At the Service of Human Rights

The Contribution of the Human Rights Bodies of the OAS to the Protection of Indigenous Peoples' Communal Property

Maja Kirilova Eriksson
Abstract

This article provides an exploration and a comprehensive account of current legal developments as regards the application of underlying principles (e.g. the *pro bono* principle) of the Inter-American human rights system and standards with reference to indigenous peoples’ collective rights to ancestral lands and territories. The study covers various aspects of the concept of property as interpreted and elaborated by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights in their respective case law.

In addition, the author examines the issue of effectiveness of the OAS system with reference to the supervision of the execution of the IACtHR judgments by the respondent states. The essay also reveals the difficulties and some problems encountered by the state parties to the American Convention on Human Rights in the area of their compliance with and implementation of international judgments on the domestic level.

The author’s aim is, furthermore, to raise the readers’ awareness about the need and significance of greater interaction and cross-fertilization between the jurisprudence and other activities of international supervisory human rights bodies for the evolution of human rights law as well as for the progressive development of international law in general.

Working paper 2014:5

At the Service of Human Rights: The Contribution of the Human Rights Bodies of the OAS to the Protection of Indigenous Peoples' Communal Property

Professor in International Law Maja Kirilova Eriksson
 Faculty of Law
 Box 512
 SE 751 20 Uppsala

Maja.Eriksson@jur.uu.se
Available at http://uu.diva-portal.org
## Contents

1. **Extending the regulatory realm and the application of international law**  
2. **Outlining the legal landscape with respect to land rights and creating a tool for change**  
   2.1 The case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua  
   2.2 The case of Yakye Axa Indigenous Community v. Paraguay  
   2.3 The case of Sawhoyamaxa Indigenous Community v. Paraguay  
   2.4 The case of Saramaka People v. Suriname  
   2.5 The case of Chitay Nech Et Al. v. Guatemala  
   2.6 The case of Xákmok Kásek Indigenous Community v. Paraguay  
   2.7 The case of The Kichwa Indigenous People of Sarayaku v. Ecuador  
3. **A Few Remarks on the Contributions of the Inter-American Commission on Human Rights**  
4. **Some implications for the development of international human rights law as a result of the landmark case-law of the IACtHR**  
   4.1 Striving for ever-greater harmonisation and coherency  
   4.2 The American Court of Human Rights - a forerunner and innovator of international law  
5. **Concluding observations – legal advances and remaining obstacles**  
   5.1 Witnessing the constant gradual normative evolution  
   5.2 Ensuring compliance with the judgments of the Inter-American Court of Human Rights  
   5.2.1 Commitment to international human rights standards and acceptance of international scrutiny  
   5.2.2 Domestic implementation of the American Convention and the judgments of the Inter-American Court of Human Rights  
   5.3 Supervision of states’ compliance with the judgments of the IACtHR  
   5.4 Looking forward
We cannot be removed from our lands. We, the indigenous peoples, are connected by the circle of life to our land and environments.1

1 Extending the regulatory realm and the application of international law

Indigenous peoples’ human rights as distinct peoples and collective units, which are indispensable for their physical and cultural survival, as well as for the group’s continued coherence have been largely neglected in the traditional public international law framework including international law jurisprudence. Much of this state of affairs is the result of the focus being placed on the classic individualistic approach to international law, rooted in liberal political theories and philosophy. In other words, most of the human rights enshrined in international treaties were founded on a construction reflecting a binary opposition or the so called vertical relationship between the individual and the state. By protecting the individual against abusive and/or arbitrary exercise of state power the emphasis has been put on the relation between a government and its citizens, and thereby excluding experiences of “those having communitarian traditions”.2

Nevertheless, international law like other legal systems is not static but it continuously undergoes transformation and evolves as everything else in life. The introduction of collective dimensions of


At the Service of Human Rights: The Contribution of the Human Rights Bodies of the OAS to the Protection of Indigenous Peoples’ Communal Property

pre-existing human rights has enabled progress in the legal sphere to the benefit of indigenous peoples. A clearly discernible trend during the last decade is that contemporary international law has become more responsive to the claims of indigenous peoples including the global recognition of indigenous peoples as direct, collective actors on the international level, i.e. they are holders of distinct collective human rights. In other words, existing human rights provisions have been applied in a present-day context, i.e. beyond the individual realm as to also cover collective dimensions of pre-existing rights, such as the right to property and the right to enjoy one’s own culture. Aspects of these rights, which are of particular significance for indigenous peoples, are outcomes from universally endorsed principles of non-discrimination, equality and self-determination.

One breakthrough example within the expanded universe of international law and with universal reach is Article 1 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which was adopted with strong global consensus by the UNGA on 13

3 Resolution No. 5/2012 adopted at the 75th Conference of the International Law Association (hereafter ILA) held in Sofia in August 2012 stipulates the following in para.1 of the Conclusions: “Indigenous peoples are holders of collective human rights aimed at ensuring the preservation and transmission to future generations of their cultural identity and distinctiveness”. Professor James Anaya emphasised in his statement of the endorsement of the Committee on the Rights of Indigenous Peoples Final Report and Resolution at the same conference the significance of “the novel phenomenon of communal and collective rights being introduced into international law”, ILA, 75th Biennial Meeting, Open Session in Sofia (28 August 2012) p. 2. The same ILA Committee took the position already in its Report from 2008 that: “Indigenous peoples are now clearly established as important non-state actors in international law”. ILA, First Report of the Committee on Rights of Indigenous Peoples (Rio de Janeiro, 2008) p. 1. This view was reconfirmed in the Committee’s report from 2010 when referring to “the constantly growing movement of indigenous peoples as direct actors in the human rights discourse of the United Nations”. ILA, Rights on Indigenous Peoples, Interim Report (The Hague, 2010) p. 3. The above mentioned reports are available at: <www.ila-hq.org> visited on 24 August 2013. On the other hand, it should be recalled that peoples as human collectives have not yet gained access to the adjudicatory procedures of several of the central treaty bodies established by the optional protocols to multilateral human rights treaties.

4 Within the legal doctrine Dr. Gaetano Pentassuglia has observed this process and has commented it as follows: “Classic individual rights, including the right to property, have been re-read to accommodate communal perspectives in ways which challenge rigid dichotomies between the individual and the group in human rights law”. G.Pentassuglia, ‘Towards a Jurisprudential Articulation of Indigenous Land Rights’, 22 European Journal of International Law 1 (2011) p. 198.
September 2007 after more than a two decade-long process of deliberations. The text of this provision regards individual rights as equivalent to collective rights by stipulating that indigenous peoples have the right to full enjoyment of all human rights recognised in international human rights law as a distinctive collective unit and as individual members of indigenous communities. In other words, the collective aspects of human rights are of special significance for indigenous communities.

This paradigmatic shift and a welcome development demonstrate that individualism and communal cooperation go hand in hand. It implies, furthermore, departure from the state-centric international law and moving towards the inclusion of human rights protection of groups rather than merely individual members of a

5 UN GA Res. 61/295 of 13 September 2007, UN Doc. A/RES/47/1 (2007). The document was endorsed by the affirmative votes of 143 states out of 158 participating states in the GA session. Among the member states of the OAS, Canada and the US voted against and Colombia abstained from voting. However, the Government of Canada has on 3 March 2010 expressed its intention to take steps to endorse the UNDRIP in a manner consistent with the country’s Constitution and domestic laws. On 12 November 2010 the Canadian Government released a statement supporting the UNDRIP. Colombia has also, thereafter, approved the Declaration. Finally, the U.S. has expressed its support for the UNDIPR by the Department of State’s Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, 16 December 2010. See <www.state.gov/documents/organization/153223.pdf> visited on 8 April 2013.


6 The intrinsic relationship between individual and collective rights, meaning among others that collective rights do not annul individual ones since they are referred to in many instances in parallel fashion, has been described aptly in the legal doctrine as follows: “It would thus be extremely difficult for an indigenous person to use or enjoy lands and natural resources if there were no prior recognition of the collective ownership of said lands and territories by the indigenous community or people in question”. A.R.Montes & G.T.Cisneros, The United Nations Declaration on the Rights of Indigenous Peoples: the Foundation of a New Relationship between Indigenous Peoples, States and Societies, in C.Charters and R.Stavenhagen (eds.), Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples (IWGIA Publisher, Copenhagen, 2009) p. 159. See also S.Joseph & J.Kyriakis, ‘The United Nations and Human Rights’, in S.Joseph and A.McBeth (eds.) supra note 5. Both authors consider the UNDRIP as paradigmatic and as an expression of, among other things, “new generations of rights”. Ibid. p. 4.

7 Of significance in this regard is para. 120 of the judgment of the IACtHR in the Saw-hoyamin case, which reads as follows: “(t)he indigenous communities might have collective understanding of the concepts of property and possession, in the sense that ownership
At the Service of Human Rights: The Contribution of the Human Rights Bodies of the OAS to the Protection of Indigenous Peoples’ Communal Property

group (the so called “atomised individuals”). This in its turn has been facilitated by the apparent move away from the concern of states echoing assimilation oriented philosophy and attitudes towards the prevalent guiding principle in current international law comprising respect for the preserved identity of indigenous peoples in spite of adverse conditions. As Mrs. Erica-Irene Daes has correctly pointed out: “The indigenous struggle is not merely a struggle for allocation of land, but for a new era of human relationship”.

These profound changes in conceptions of human rights which more properly accommodate and correspond to indigenous peoples’ actual concerns and which go beyond the prevailing international human rights law paradigm have promoted extensive understanding of human rights norms.


8 T.Ahmed and A.Vakulenko, ‘Minority Rights 60 Years after the UDHR: Limits on the Preservation of Identity?’, in M.A.Baderin and M.Ssenyonjo (eds.), supra note 2, pp. 155 and 171. Of particular interest with regard to references to the need to protect and preserve the identity of the indigenous community in question is the Lovelace v. Canada case. See UN HRC, Communication No. 6/24, UN Doc. A/36/40 (1981). Much of the ILO Convention No 169 is based on the idea of the necessity to “overcome the assimilation drive of previous international instruments” and to endorse a human rights approach. I.Muleshkova, ‘The Right to Self-determination of Nations/Peoples, Minorities and Indigenous Peoples’, in 7 Studies on International Law (Bulgarian Association of International Law, Sofia, 2012) p. 56. The international indigenous movement emerging in the 1970s rejected, for example, the ILO Convention on Tribal and Indigenous Populations No. 107 from 1957 as embodying an assimilationist and integrationist philosophy. To the contrary, the 2007 UNDRIP aspires to strengthen the aim of preserving the identity of indigenous peoples. The CERD emphasised likewise in its GR No. 23 from 18 August 1997 the significance of preservation of the indigenous peoples’ culture and expressed concern about the fact that “their historical identity has been and still is jeopardised” (para. 3).


10 As observed in the international law doctrine with regard to general trends as to the recognition of group rights reference is often made to para. 2 of the Declaration on the Right to Development, which says: “assigns a measure of international responsibility for the development of human beings, both individually and collectively, which unequivocally establishes the connection between individual and collective rights as a new symbiosis of rights arising directly from international law”. I.Muleshkova, supra note 8, p. 42. Mentioned should also be made of para. 24 and 25 in the concurring opinion of Judge Eduardo Vio Grossi in the case of Xákmok Kásek Indigenous Community v. Paraguay,
It is well known that the indigenous peoples have been subjected to colonization\textsuperscript{11}, oppressive policies and, not least, exposed to genocide\textsuperscript{12}, in addition to their world-wide marginalization for centuries. As a result, among others, little and at times no attention has, in the context of human rights law, been paid to important and unique aspects of their collective entitlement to hold rights to land, territories and natural resources (including surface and sub-surface natural resources), which they have traditionally inhabited, occupied and used. Despite the fact that most of the indigenous peoples consider themselves still today as the keepers or stewards\textsuperscript{13} rather


\textsuperscript{13} For example, the Lakota peoples perceive themselves as the caretakers, guardians and keepers of the \textit{Paha Sapa}, i.e. the Black Hills, in South Dakota, which for them constitute the sacred center of the Lakota world (\textit{The Heart of Everything That Is}). The same is true for a group of Diné (Navajo) peoples, who consider themselves as the stewards of the sacred female mountain - Big Mountain - in Arizona. For a relevant discussion on what is considered as being sacred for indigenous peoples see W.LaDuke, \textit{supra} note 12, pp. 11-19 and S.R.Butzier and S.M.Stevenson, \textit{Indigenous peoples' rights to sacred sites and traditional cultural properties and the role of consultation and free, prior, and informed con-
than owners of the land in the sense of Western culture, it is not contested nowadays that the collective entitlement, even in the legal sense, over indigenous ancestral land constitutes the very foundation for the existence and well-being of indigenous peoples as peoples.\textsuperscript{14} It is, furthermore, a crucial pre-condition for the enjoyment of other internationally recognised human rights. However, the non-indigenous dominant society has been neglectful to acknowledge and it has failed to recognise\textsuperscript{15}, in particular, the centrality of the indigenous peoples’ identities and their way of life being linked to and having a special and intimate relationship (often an intrinsic spiritual bond\textsuperscript{16}) with their traditional/ancestral

\textsuperscript{14} In the words of a much respected Oglala Holy Man - Pete Catches, Sr. (\textit{Petaga Yuba Mani}): “We are the aboriginal people of this vast Turtle Island. We are the original people, the landlords. The loss of our land undermines all that we hold dear. The sacred Black Hills is not for sale.” P.S.Catches, Sr. and P.V.Catches, \textit{Oceti Wakan, Sacred Fireplace} (Published by Oceti Wakan, Pine Ridge, 1997) p. 10. The special relationship with their traditional lands constitutes the main argument, as we shall see, from the jurisprudence of the IACtHR that follows below and sustaining the claims for distinguishable cultural specificity allowing for particular legal solutions, \textit{i.e.} culturally friendly interpretations of the protected rights under the American Convention on Human Rights.

\textsuperscript{15} This issue belonged to the controversial ones during the drafting of the UNDRIP. The representatives of Australia claimed, for example, that provisions on lands, territories and resources were impossible to implement and are even undesirable since they relate to “the recognition of indigenous rights to lands now lawfully owned by other citizens”. A.Eide, \textit{The Indigenous Peoples}, in C.Charters and R.Stavenhagen (eds.), \textit{supra} note 6, p. 40.

\textsuperscript{16} By being removed from their traditional territories the indigenous peoples cannot perform their spiritual and caretaking functions with regard to their sacred lands. Indigenous peoples’ viable connection to the past is the land itself, since it is considered to be alive. Nevertheless, Article 13 of the ILO Convention No. 169 and more recent provisions such as Articles 25 of the UNDIPR draw attention to indigenous peoples’ spiritual relationship with their ancestral lands and the collective aspects of this relationship. The UN Durban Declaration recognizes “the special relationship that indigenous peoples have with the land as the basis for their spiritual, physical and cultural existence”. \textit{See} The Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Doc. A/CONF/189/12 (2001), para. 43. \textit{See also} M.Åhrén, \textit{The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction}, in C.Charters and R.Stavenhagen (eds.), \textit{supra} note 6, p. 203. The case of the \textit{Community of San Mateo de Huanchor and its Members v. Peru}, which was brought before the IACommHR, turned out to be an excellent opportunity for discussion around the issue of the spiritual values of indigenous communities associated with their environment. IACHR, Report No. 69/04, Petition 504/03, Admissibility, 15 October 2004, para. 16. See finally para. 7 of Resolution 5/2012 on the Rights of Indigenous Peoples adopted at the IIA Conference in Sofia 2012, which affirms that: “Indigenous peoples’ land rights must be secured in order to preserve the spiritual relationship of the community
lands\textsuperscript{17}, which they regard as a relative and a living entity (“Mother/Grandmother Earth”) with cycles of renewal and not as a merely a commodity/property\textsuperscript{18}, and including their interaction with the natural environment.\textsuperscript{19} In other words, place and identity are syn-


\textsuperscript{18} However, it has been pointed out that even though the ancient cultural relationship to and with the land (“it was we who belonged to the land” and that she could not be owned but truly appreciated and respected) has not been totally eradicated: “the sense of connection to the land became weaker and weaker with each passing generation, and the new perspective - that land is property - became more and more acceptable”. In Western cultures the concept of “ownership” is based on the premise that use and control of land and the resources on it serves primarily to the benefit of its owner in contrast to the indigenous peoples’ beliefs of coexistence with the land. Thus, the common perspective of the indigenous peoples regarding the land is adaptation and not dominance. Traditionally, indigenous peoples perceived themselves as the custodians of the environment. See J. M.Marshall III, To You We Shall Return (Sterling Publishing Co., New York, 2010) pp. 43, 34, 44 and 66. Mr. Martínez Cobo, a previous UN Special Rapporteur has also emphasised that it is “essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely”.


\textsuperscript{19} Of significance in this regard are a few treaties, among others the ILO Convention No. 169 on Indigenous and Tribal Peoples adopted in 1989, which is specifically devoted to indigenous peoples, and it reflects more modern approach to the issues at stake. This treaty recognises the collective control of indigenous peoples over their traditional land and natural resources.
anonymous for indigenous peoples. Inevitably, one of the main claims of the indigenous peoples nearly all over the world is therefore related to their aspirations to regain the respect and restoration of their traditional lands “as a means to their physical, cultural, and spiritual survival”. In other words, this is of particular significance for “their continual right to determine their relationship with everything in their world, including landforms, water, animals and plants”.

Notable is the fact that the recent case-law developed by the human rights bodies within the Inter-American system for human rights protection has provided greater conceptual clarity with respect to content and meaning of the substantive rights in question as well as in determining the legal obligations of states. Moreover, it has brought about significant advance in legal thinking by capturing the changed attitude towards indigenous peoples and recognising them as direct participants at the international level as well as reflecting realities of the contemporary context related to the indigenous peoples’ specific collective aspects of existing human rights. In consequence, a holistic, inclusive approach would favour interpretations of legal texts in a manner that is culturally friendly and which supports a synthesis among the various values and common standards enshrined in contemporary international

---

20 Alejandro Fuentes has argued that the special relationship with traditional land as an essential factor when determining indigenous peoples’ cultural distinctiveness, i.e. cultural identity, is problematic since it “deprives of indigenous identity those large majorities of self-identified indigenous people living in urban areas for generations”. In his view cultural identities have to be considered as “dialogical, dynamic and changeable”. See A. Fuentes, Cultural diversity and indigenous peoples’ land claims: argumentative dynamics and jurisprudential approach in the Americas, Doctoral thesis approved on 16 May 2012 at the Università Degli Studi di Trento, pp. 374, 379 and 380.

21 ILA, 2010 Interim Report, supra note 17, p. 2.


23 The UN Special Rapporteur, Professor Anaya, has emphasised that the UNDRIP “does not affirm or create special rights separate from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples”. S. J. Anaya, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/HRC/9/9, HRC (2008) para. 40.
Maja Kirilova Eriksson

law. At the same time it would be reflective of the complexity of the issue at hand.

The aim of this article is to identify and briefly elucidate the relevant jurisprudence and decisions of the OAS human rights bodies as well as to assess their possible spill over effect and legal impact on international human rights law generally. Thus, regional developments may influence a more dynamic, expansive and inclusive approach of interpretation of other existing human rights instruments leading to the further advancement and qualitative evolution of universal standards and vice versa.

24 It has been observed within the legal doctrine that: "International law increasingly draws on values of human solidarity and justice". B.Conforti and A.Labella, An Introduction to International Law (Martinus Nijhoff Publishers, Leiden, 2012) p. 1. We should also remember that moral values have been foundational for the establishment of the UN as well as regional organizations such as the OAS and the CoE. The common desire within the international community to protect human dignity and to uphold, among others, the principle of self-determination for all peoples continues to influence legal and policy developments within these organizations. See O.Spijkers, The United Nations, The Evolution of Global Values and International Law; School of Human Rights Research Series Vol. 47 (Interseintia, Cambridge, 2011), pp. 13-57 and A.A.C.Trindade, International Law for Humankind Towards a New Jus Gentium (Martinus Nijhoff Publishers, Leiden, 2013) p. 279.

25 There is no doubt as to the influence of the regional Inter-American Charter of Social Guaranties from 1948 (especially Article 39), which requires states to protect the property of indigenous peoples’ on the subsequent development within international law globally, e.g the later adopted treaties within the ILO. The important legal precedent – the Awas Tingni case - which was decided by the IACtHR triggered off a reaction by a global institution namely the World Bank to condition an aid package set for Nicaragua. IACtHR, Judgment of 31 August 2001, Ser. C No. 79. See S.J.Anaya and R.A.Williams, supra note 17, p. 38.

26 For some examples of cross-fertilisation of the interpretations of substantive provisions between regional human rights bodies and global ones see M.Pinto, 'Fragmentation or Unification among International Institutions: Human Rights Tribunals', 31 International Law and Politics (1999) pp. 833-842; G.Pentassuglia, supra note 4, pp. 167,182-185. An illustrative example of current developments is the case of A.A. Diallo case (Republic of Guinea v. Democratic Republic of Congo), Judgment of 30 November 2010, I.C.J. Reports 2010, p. 639 (para. 65 and 68) where the Court, while analysing the alleged violations of human rights obligations at stake, relied on a multiplicity of sources including the case-law produced by other global and regional human rights bodies. See also M.Killander, ‘African human rights law in theory and practice’, in S.Joseph and A.MeBeth (eds.), supra note 5, p. 388. There is a long-standing cooperation between the UN human rights bodies in identifying areas of inter-linkages between treaties and mutual reinforcement, while maintaining the autonomy and specificity of each treaty body's mandate. See the recent presentation of a coherent vision for the future of the UN treaty body system in N.Pillay, Strengthening the United Nations human rights treaty body system (UN Geneva, 2012) pp.10 and 12. An example where the IACtHR used the case law of the ECtHR in its argumentation is the Acevedo Buendia et al. v. Peru case, Preliminary Objection, Merits, Reparations and
My supposition is that the mutual interaction, which frequently occurs between different treaty regimes, can contribute to the improvement of the international human rights protection system as a whole. The UN High Commissioner for Human Rights, Ms. Pillay, recently expressed her view in a speech that: “Strong regional mechanisms play a key role in reinforcing the international human rights system. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have not only had an extraordinarily positive impact on human rights in the region, but also served as pioneering examples which showed the rest of the world how vital and effective regional human rights bodies can be”.27 (emphasis added) The Universal Periodic Review (UPR) within the UN offers, e.g., occasions with great potential to further develop and strengthen cooperation between existing regional and universal systems for human rights protection. Mr. Antonio Cisneros de Alencar has given several examples of relevance when in the framework of the UPR review of American States judgments and findings by the Inter-American monitoring human rights bodies has been referred to as having significance for the deliberations of common issues.28

It is worth noting here that the American Declaration of the Rights and Duties of Man, which is the very first international document entirely dedicated to human rights protection in the comprehensive sense, was adopted by the GA of the OAS in April 1948, i.e. some seven months prior to the adoption of the United


27 UN News, (New York, 11 September 2012) at <news5@secint00.un.org>. Several authors have stressed that with the steady growth of the human rights monitoring system, harmonisation and coordination between the various bodies has become but a compelling issue. See M.C.Bassioni and W.A.Schabas (eds.), New Challenges for the UN Human Rights Machinery (Intersentia, Cambridge, 2011).

Nations Declaration of Human Rights (UDHR) by the UNGA in December 1948. It is uncontested that all the successive global and some of the regional human treaties assert their connection to the UDHR. This kind of historical mutuality is but a foundation for interrelatedness of the judgments and decisions delivered by global and regional courts and quasi-judicial supervisory bodies.

It is for space reasons that this essay will focus solely on few issues related to land rights, while having in mind that many of the, for indigenous peoples, fundamental rights are interlinked, interrelated and reinforcing each other. Thus, in the light of the holistic vision of life of indigenous peoples, the interrelatedness of human rights with each other “as building blocks of the unique Circle of Life representing the heart of indigenous peoples’ identity” implies among others that “the change of one of its elements affects the whole”. Therefore, as earlier pointed out, control over traditional lands “is the key feature of indigenous peoples’ autonomy, conceived as an element of self-determination”.

2 Outlining the legal landscape with respect to land rights and creating a tool for change

In recent time the number of referral of cases to regional human rights bodies has increased tremendously as has also the number of judgments that have been handed down by regional courts, especially by the Inter-American Court of Human Rights (IACtHR). This state of affairs demonstrates the growing commitment of the international community to solve delicate matters and thereby enhancing human rights protection. Therefore, I fully agree with the conclusions of Professors Anaya and Williams that the jurisprudence within the Inter-American system for human rights protection holds “the potential to further the transformation of interna-

29 Professor Dinah Shelton has pointed out that the Inter-American regional meetings conducted in 1943 have played a key role in the design of the text of the UDHR. See D.L. Shelton, Regional Protection of Human Rights (Oxford University Press, Oxford, 2010) p. 110.

30 ILA, 2010 Interim Report, supra note 17, p. 43.

31 Ibid., p. 13.
At the Service of Human Rights: The Contribution of the Human Rights Bodies of the OAS to the Protection of Indigenous Peoples’ Communal Property

tional law itself into an ever more meaningful and effective instrument for addressing the human rights concerns of indigenous peoples in the Americas and around the world as well”.

Even though the said human rights bodies operate within the unique circumstances of the Americas, much of the outcome of their case-law is of relevance universally and it thus qualifies to be considered as a progressive development for international human rights law in general terms.

Of immense importance for the recent enhancement is also the creative use of sources in the argumentation of the monitoring human rights bodies considering legal advances outside the framework of the international organizations within which they are functioning. Both OAS supervisory bodies, which have been created with the aim to monitor the observance of human rights obligations, have been drawing inspiration from and interpreting the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man in the light of a variety of other general and specialised international instruments, including the 2007 UNDRIP.

In this way, as will be shown below, both the IACtHR and the IACommHR have in their exercise of adjudicatory powers to a large extent responded adequately to the demands of the indigenous peoples in the region and have since the beginning of year 2000 continuously and relatively rapidly, despite a complex and lengthy application procedure, produced an ever growing and evolving jurisprudence, which is in conformity with the values and significantly consistent with the interests of the applicants.

The specific issue dealing with land rights has inevitable bearing for a huge population. Thus, approximately 43 million individuals of the world’s indigenous peoples live in the Western Hemisphere comprising 400 different ethnic groups. In addition, it has

---

32 S.J.Anaya and R.A.Williams, supra note 17, p. 86.
been estimated that there are some 370 million indigenous people worldwide living in some 90 countries.34

The following chronological case review is not intended to present a comprehensive analysis of the issues at hand. It rather provides some illustrative examples of the evolution of the relevant body of jurisprudence of the IACtHR and decisions of the IACommHR on the most important claims made by indigenous peoples concerning land ownership.

2.1 The case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua

This is historically the very first case35 on the topical issues, of relevance for this essay, dealt with by an international court. It must, therefore, be viewed as constituting a remarkable and landmark precedent with regard to the deliberations about what is included in the concept “property” as guaranteed by the American Convention and the ruling on the indigenous peoples’ right to communal property to their traditional lands.

The case was brought to the IACtHR by the IACommHR, which previously had concluded in favour of the Awas Tingni Community’s complaint for reasons, among others, that the Government of Nicaragua had not adopted the necessary measures to protect the rights of the Community, which lives on the Atlantic coast, to its ancestral lands as well as to compensate it for the loss of resources. Thus, the Government had granted concession of 62,000 hectares of tropical forest to a Korean company (Sol del Caribe (SOLCARSA)) to undertake logging on communal lands traditionally used and occupied by the Awas Tingni community and without consulting the community.

In this case, the IACtHR first of all paid great attention to the Mayangna community (142 families) as holder of a group right to property including traditionally used natural resources, i.e. the indi-

---


individual enjoys the right in communal association (communal property) with the other members of the same group. As a consequence of the acknowledgement of the indigenous peoples’ entitlement to property in the collective sense it is required from treaty parties to introduce guarantees for the preservation of their group integrity, i.e. that they as subjects of a group right are protected from its infringement by the state or other actors, including transnational corporations.

Furthermore, the Inter-American Court recognised not only the existence of a collective aspect of the said right, which clearly forms the basis for indigenous life, but it also recognised the special relationship of indigenous peoples to their traditional lands as central and critical for their survival and their cultural sustainability. The Court exhibited, in other words, a very wide understanding of the community’s relation with its traditional lands as including in addition to the material elements also a spiritual aspect (the duality of the special relationship), which echoes the indigenous peoples’ world view and cultural tradition. In the Court’s view: “(t)he 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. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations”. (para. 149) The last words in the sentence above reflect indigenous peoples’ intergenerational approach to land rights.

The innovation in this argumentative reasoning of the Court consists in the interpretation of the phrase “the use and enjoyment

36 In its deliberations the Court pointed out that: “Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community”. Ibid., para. 149.

37 On the universal level, the UN HRC has in several cases established that the special relationship and interaction of indigenous peoples with their lands forms the basis for their culture and is therefore protected by Article 27 of the ICCPR. See e.g. the case of Sandra Lovelace v. Canada, HRC, views from 30 July 1981, UN Doc. CCPR/C/13/D/24/1977, para. 15-16.
of his property” 38 in Article 21(1) of the ACHR 39 as to include a specific attachment to or “special relationship” of indigenous peoples with their traditionally owned or otherwise occupied and used lands and in underlining the interconnectedness between three elements: land, culture and identity as indispensable for their survival. Taking into account the indigenous peoples’ holistic understanding and their own definition of the notion “property” resulted in a construction, which extends the traditionally perceived concept in question and allowed for its broad interpretation. Nevertheless, according to the circumstances of the specific case the Community’s property rights over lands and resources therein were established within geographic limits related to territories currently used.

Another statement of the Court, which is of significance for the purpose of its analysis, is the fact that, due to the special nature of property, it took into account indigenous peoples’ customary land law and natural resources tenure patterns as a source of law, when ruling that: “customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration” (para. 151). Thus, the Court’s preparedness to contextualise human rights by taking into consideration the indigenous peoples’ specific and delicate circumstances and needs

38 The travaux préparatoires of the ACHR show that this phrase replaced the previously proposed expression “private property” and one may suggest that the legislators thereby deliberately disposed a limited interpretation of the concept. The Court could, therefore, on this basis identify that the indigenous peoples’ right to possession, use, inhabitation and occupation of ancestral territory belongs at the core of property protection under Article 21 despite the fact that the right is formulated as an individual right. OAS, IACCommHR, Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources, OEA/Ser. L/V/II, Doc. 56/09, (30 December 2009) p. 46. While the Western concept of private property is generally based on “the divisibility of land, individual ownership, alienability, commercial circulation and productivity” a broader interpretation of it adds collective, cultural and social dimensions. Thus, a territory may be also perceived as a “spatial representation of the collective identity” of indigenous peoples. A.Schettini, supra note 12, p. 66 and 67.

39 The ECtHR continues, on the contrary, to focus on the literal reading of the phrase “Every natural or legal person is entitled to the peaceful enjoyment of his possessions” and to consider the subjects/titular’s of the right to property under the European Convention on Human Rights as being the individual rather than a collective unite of indigenous peoples. Nevertheless, the collective nature of property in lands for indigenous groups has been recognised in a number of global international law instruments and case-law, such as the ILO Convention 169, the jurisprudence of the UN HRC, GC of CERD as well as on the regional level within the AU.
and thereby being able to derive from the right to property as established in a human rights document respect and protection of “the varied and particular forms of land tenure defined and regarded as property by indigenous peoples themselves”\(^{40}\) is but a step forward and an evolution under international law. At the same time we may observe that the Court did not hesitate to apply the method of autonomous\(^{41}\) interpretation of the notion property, i.e. its content is considered as being independent of the meaning given to it in domestic legislations of the signatory states. The use of this interpretative method may lead to harmonisation of the relevant standard of human rights protection in the various states.

However, the IACtHR does not thereby invent a new set of human rights but it rather applies in a culturally friendly way a right already enshrined in a number of universal and regional human rights instruments. By adding the collective and cultural dimension to the right to property the current case-law widens the regulatory realm of international human rights law.

Since the lands in question had never been delimited or titled by the Government in Nicaragua, the Court finally arrived at the conclusion that the on-going failure of the Government to order “the specific procedure to materialize that recognition” of communal property (para. 152) and thereby safeguard the traditional lands of Awas Tingni Community they currently inhabit in accordance with Article 21 of the American Convention, constitutes a violation of this provision “to the detriment of the Mayagna (Sumo) Awas Tingni Community, in connection with articles 1(1) and 2 of the Convention” (para. 155). This is the central part of the judgment and there can be little doubt that the IACtHR has contributed in clarifying the normative content of the right to property (Article 21). Thus, recognition of the right to property comprises an obligation for the signatories of the American Convention to clearly demarcate\(^{42}\), delimit and title the lands in question (para. 153).

\(^{40}\) S.J. Anaya and R.A. Williams, supra note 17, p. 58.

\(^{41}\) In the Awas Tingni case the IACtHR underlined that: “(t)he terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law”. Supra note 7, para. 146.

\(^{42}\) Demarcation, including survey, mapping and marking of a particular area, constitutes a crucial prerequisite for the legal recognition of land rights.
of a state’s legal recognition in the sense of acknowledgment of a de facto situation and protection of the indigenous peoples’ traditional lands including demarcation thereof, often leads to, among others, exploitation of the natural resources by the state and/or a third private party as in the case under review. The Court also reiterated that obligations of member states therefore stretch beyond the adoption of legislative measures at the domestic level to include also administrative and other measures to make these rights effective (para. 164). The official recognition of inherent indigenous land rights will enable them to regain ownership and control over land and resources.

The European counterpart to the Inter-American Court of Human Rights - the European Court on Human Rights - has, on the other hand, delivered mainly quite narrow interpretations of the scope of the right to property under the European Convention on Human Rights (Article 1 of the first additional protocol). One

43 As Professors James Anaya and Robert Williams have observed in this regard that since “the source of indigenous peoples’ property and other rights in relation to land is traditional or customary tenure” the governmental obligation to demarcate a land “does not depend on prior specific legal recognition by the state of rights in those lands”. S.J.Anaya and R.A.Williams, supra note 17, p. 76.
44 This article guarantees, e.g., freedom from arbitrary deprivation of possessions, freedom from unjustified control on the use of property and peaceful enjoyment of possessions. Because of the at that time existing tremendous differences between states on the issue of property the drafting of a specific provision was left to an additional protocol to the European Convention. This may explain why the European Court to a great extent has granted member states a wide margin of appreciation when determining the content of the right to property. On the other hand, current case-law such as, e.g., the case of Herrmann v. Germany, Appl. No 9300/07 (ECtHR Judgment of 26 June 2012) shows that with time this margin is becoming a narrowing power for states to interfere with property, and that there is a discernible tendency to strengthen the protection of the right to property. See generally J.Nergelius, De europeiska domstolarna och det svenska äganderättskyddet (Norstedts juridik, Stockholm, 2012). On the relevance of Article 1 in Protocol No. 1 for the reindeer husbandry by Saami people see O.Ravna, ‘I hvilken utstrekning er sameness rett til reindrift vernet av EMK P1-1?’, 2 Refsørd (2009) pp. 24-45.

The right to property has been formulated in Article 17 (1) of the EU Charter on Fundamental Rights in terms to include “the right to own, use, and dispose of lawfully acquired possessions”. Nevertheless, neither the 2010 nor the 2011 Annual Reports of the European Commission on the Application of the EU Charter of Fundamental Rights (EU, Directorate-General for Justice, published in 2011 and 2012) contain references to issues of importance for the indigenous peoples’ who are living on the territories of EU member states. An issue which has frequently dealt with by the Commission has been the restitution of property nationalised or confiscated in member States during the period of communist regimes. This author was the Swedish expert on fundamental rights in the EU Network of independent experts on fundamental rights (the
case, exposing some similarities with the *Awas* case, dealt with the application of indigenous peoples, *i.e.* four Swedish Saami villages (*samebyar*) made the complaint that their right to use land for winter reindeer grazing was violated, as the “grazing areas remain undefined”.\(^{45}\) The applicants pointed out that the national legislator had acknowledged the Saami people’s right to winter grazing for their reindeer but without having defined in what districts that essential right may be exercised. This state of affairs had raised complex legal and technical issues and caused them problems with a large number of private landowners (571 landowners) in the area under dispute. That governmental failure constituted, therefore, in their view a violation of their possessions, *i.e.* it is a violation of their right of property. The European Court rejected, however, the complaint as being incompatible *ratione materiae* with the provision on the right to property on grounds that the right to winter grazing on the disputed property was not sufficiently established to qualify as an “asset”, *i.e.* being a possession and thereby falling within the realm of protection under the European Convention. Of relevance to mention here is that Judge Ineta Ziemele in her partly dissenting opinion, which is attached to the final judgment of the ECtHR, expressed criticism with regard to the dismissal based according to

\(^{45}\) ECtHR, *Handölsdalen Sami Village and Others v. Sweden*, Appl. No 39013/04, Decision on Admissibility, 17 February 2009, para. 40 and 47. Nevertheless, the majority of the judges in this section of the Court concluded that other parts of the complaint dealing with the application of Article 6 (among others the length of the proceedings) were admissible. Mention should be made of that the Saami people in Sweden enjoy usufruct rights.

...
her on reasoning on false premises by the Chamber of main issues for indigenous peoples.\(^{46}\) She developed her line of argumentation by referring to the latest developments and the obvious advances which have taken place in international law including the expanding jurisprudence and the adoption of the 2007 UN DRIP, which concern successful accommodation of indigenous peoples’ specific land rights.\(^{47}\)

The above referred separate opinion may in some aspects also be supported on the basis of the argument of the IACoHR in the *Awas Tingni* case, that the property rights of indigenous peoples to their traditional lands have attained the status of customary international law.\(^{48}\) In addition, the UN DIPR has been considered as embodying general principles of international law relating to, among others, the indigenous peoples’ rights to their lands and resources.\(^{49}\) This stance seems now to have gained momentum and significant acceptance globally.\(^{50}\)

In sum, as the following sections will show the *Awas Tingni* judgment has clearly influenced the subsequent judgments of the Inter-American Court of Human Rights as well as it has had significant bearing on the decisions of the IACoHR on the same

---


\(^{47}\) The normative evolution in international law was especially acknowledged in the separate opinion of Judge Sergio García Ramírez in the *Awas Tingni* case. He considered the latter as being coherent with the text of the then Draft UN DIPR which “sets the standards that the international judicial community is to observe in matters bearing upon indigenous peoples and the members of their communities”. *Supra* note 7, p. 136, para. 8.

\(^{48}\) IACoHR, *Awas Tingni* case, *ibid.* § 140(d).


\(^{50}\) See ILA, 2010 *Interim Report*, *supra* note 3, pp. 23 and 51; ILA, *Final Report* (2012), *supra* note 3, p. 23. Professor James Anaya and Professor Robert Williams have earlier argued that indigenous peoples’ rights over lands and natural resources constitute part of emerging customary international law. See S.J>Anaya and R.A.Williams, *supra* note 17, pp. 36-37 and pp. 55 et seq. See also UN Doc. A/68/317 of 14 August 2013, § 64. However, some countries, among them Canada and Australia, have emphasised that the UN DIPR does not represent customary international law. UN GA Official Records, 61st session, UN Doc. A/61/PV.107, pp. 13 and 12.
At the Service of Human Rights: The Contribution of the Human Rights Bodies of the OAS to the Protection of Indigenous Peoples’ Communal Property

issue, e.g. in the Dann v the US case. In the words of Luis Rodríguez-Pinero this case has “paved the way for the elaboration of a specific, distinct body of jurisprudence regarding indigenous peoples”51, which means that it has great potential to impact legal developments beyond the regional system for human rights protection.

2.2 The case of Yakye Axa Indigenous Community v. Paraguay

The IACtHR affirmed its findings of general interest in the Awas Tingni case and further advanced its jurisprudence with regard to indigenous peoples’ land rights by ruling in the Yakye Axa 52 case and the closely related to it case of Sawhoyamaxa v. Paraguay. Both cases involved a conflict of property interests between the applicants, who were involuntary deprived of their traditional lands and the new private owners53 of the same lands.

First of all the Court came to the conclusion that the Paraguayan Government had failed to assure the Yakye Axa indigenous Community (“Isla de Palmas”), which is part of the Southern Lengua Enxet Sur people, the effective use and enjoyment of their traditional lands in accordance with domestic law guarantees. 54 This clearly implies a right to live freely on one’s own lands. The Government mentioned in its explanatory notes as a reason for its inef-
fectiveness of administrative procedures for land rights claims that it considered it impossible to expropriate land (in this case the farms of Estancia Loma Verde) disregarding its current owners’ right to property. While the Court agreed that Article 21 of the American Convention protects both the private property of individuals (i.e. the classic form contained in civil law) and the communal property of the members of the indigenous communities, it pointed out that the Convention and its own jurisprudence offer guidance for how to resolve situations, when there is apparent contradiction between different protected interests. Thus, in view of the Court, in case of conflict between individual private property and indigenous ancestral property, the state must follow the principles governing limitations of human rights and to: ”take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations” (para. 146). In consequence, restrictions of the right of private individuals to private property might not only be justified but also “necessary in order to obtain the collective objective of preserving cultural identities in a democratic and pluralist society” provided that fair compensation is paid to the affected party in a conflict. Of great importance is the Court’s ruling that Article 1(1) of the American Convention includes states obligation not only to introduce adequate legal and material protection for the communal property of indigenous peoples but also to undertake measures to accommodate cultural differences between the members of the indigenous peoples and the general population (para. 51). Therefore, the inclusion of protec-

55 The Court concretised its judgment with regard to state’s obligations in its subsequent judgment of 6 February 2006, Case of the Indigenous Community Yakye Axa v. Paraguay, Interpretation of the Judgment of Merits, Reparations and Costs. The sequential steps to be taken by the state include: identification of the territory and the borders of thereof; initiating of an acquisition process if the territory belongs to a private owner and in case of decision on non-return of ancestral lands making a proposal to the community of alternative territories (para. 34). If a legal procedure involving claims over ancestral lands had been initiated, a decision with final solution should be delivered timely and without unjustified delay. The protracted procedure in the Yakye case, with a duration close to 12 years, constitutes in itself a violation of the right to fair trial. IACtHR, ibid., Judgment of 2005, para. 85, 86 and 103.
tion of indigenous people’s cultural identity within the context of Article 21 has been considered in the literature as a welcome development, since “all aspects of cultural identity can be protected under all rights of the Pact of San José”.

Having in mind the circumstances in the case under review the Court established that there had been a violation of the Yakye Axa community’s property rights over ancestral lands. It requested the state in addition to identify the traditional territory of the community and to grant it to them free of cost within a specific period of time (a maximum of 3 years from the date of notification of the judgment) (para. 242(6)). In other words, a right to traditional lands is not limited to the prohibition of removal but comprises restitution of the ancestral lands and resources from which the indigenous community has been deprived in the past provided that the cultural link to those lands still exists. This case is clearly illustrative of the existing causal link between deprivation and the right to remedy and restitution.

Disregarding ancestral land rights may affect other fundamental human rights. Thus, the Court found that Paraguay had violated Article 4(1) of the American Convention (right to life) on the grounds that the community was prevented from access to its traditional means of livelihood. Since the members of the community were denied access to the contested lands, they settled down in front of the fence surrounding it, i.e. next to a road. In this way they could not use the land for hunting purposes, gathering activities or harvesting/production of food. The IACtHR conducted an extensive interpretation of the states’ positive obligations under the American Convention with regard to the right to life, i.e. it placed emphasis on the duty of states to guarantee the survival of indigenous peoples. The recognition of communal property constitutes, therefore, a necessary prerequisite for a decent life or, in other

57 The Court highlighted the scope of the protection of the community’s right to property as including not only traditional territories but also “the resources therein” (para. 135 of the Judgment).
58 See para. 7 in Res. No. 5/2012 adopted on 28 August 2012 at the ILA 75th Conference in Sofia, Bulgaria, supra note 3.
words, for a life in dignity. Indigenous peoples must have possibility to enjoy a way of life, which is conducted in accordance with their own cultural traditions, own spiritual world-view, value systems, etc. as guaranteed by Article 4(1) ACHR (para. 176). Thus, in the case of indigenous peoples’ land rights, the component “cultural identity” according to the Court’s interpretation of Article 21 should be read jointly with Article 4(1) (right to life lato sensu) i.e. right to life in a broad sense.

Importantly, in the view of the Court the displacement of the Yakye Axa community had created situations of extreme poverty and vulnerability, and thereby risks for their lives were created. The special vulnerability of many groups belonging to indigenous peoples as well as the specific circumstances in the case in question relate, among others, to malnutrition because the members of the community could not practice their traditional subsistence activities, neither did they have access to clear water and enjoyment of natural resources. (para. 164 and 168)

It becomes apparent from the above that control over land and the natural resources are essential to the indigenous communities,

59 It should be quite easy to argue that the members of the Yakye Axa community did not enjoy a decent life given the concrete circumstances, such as lack of adequate housing, sanitation, education for the children etc. Even though the assertion of the right to life with dignity by the IACtHR can be considered as a positive legal development, it has been subject to criticism because in practice it “has been reduced to a Western notion of “well-being”, which stands in contrast to the currently debated concept of “Living Well”, which emphasises community living, balance with nature, indigenous identity etc. See e.g. concepts such as Sumak Kawsay, Suma Qamana enshrined in the Bolivian and Ecuadorian constitutions. A. Schettini, supra note 12, p. 65.

60 The UN Special Rapporteur José Martínez Cobo emphasised as early as the 1980s that: “Land is synonymous with the very life of indigenous populations”. See Study of the Problems of Discrimination Against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1983/21/Add.4, para. 73.

61 In a separate dissenting opinion Judge Trindade and Judge Robles emphasised that: “the fundamental right to life takes on higher dimension when the right to personal and cultural identity is taken into consideration; the latter cannot be disassociated from the legal personality of the individual as an international subject”. IACtHR, Yakye Axa Indigenous Community v. Paraguay, Separate opinion of Judges A.A.Cancado Trindade and M. E.Ventura Robles, para. 4.

62 The IACtHR used in its argumentation, with regard to the clarification of the concept of vulnerability, the interpretation of Article 12 (the right to highest attainable standard of health) in the UN CESCR given by its supervising body of independent experts in year 2000 (para. 167). It considered the extreme vulnerability of the children as particularly serious (para. 172).
their survival as indigenous peoples and for the preservation of their distinct culture.

Distinctive of the IACtHR is that already at an early stage of its existence it has applied in its interpretative methodology international instruments other than the ACHR and the American Declaration on the Rights and Duties of Man, when assessing situations of alleged, human rights violations. The legal basis for that may be found in Article 29 (b) of the American Convention which states that “No provision of this Convention shall be interpreted as (re)stricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by the virtue of another convention to which one of the said states is a party”.

The principle of non-restrictive interpretation is “essential for the efficacy of the mechanism of international protection” and it has its justification in the special nature of human rights treaties. In other words, in its interpretation of the content of a specific right protected in the American Convention the Court may take into account the entirety of the contemporary legal system of which it is but an integrated part of regional as well as universal human rights instruments (corpus iuris of international human rights law) of relevance to the case at stake.

63 IACtHR, Advisory Opinion OC-1/82, “Other Treaties” subject to the Advisory Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), (Ser. A) no. 1, para. 43.


66 The Court has concluded that “the corpus juris of international human rights law comprises a set of international instruments of varied content and judicial effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter’s faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider the question in the context of the evolution of the fundamental rights of the human person in contemporary international law”. IACtHR, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, para. 115. See also the Yakye Axa Indigenous Community case, para. 67.
In an advisory opinion the Court found that, because of the regional or non-regional character of an international obligation of states, upholding distinctions will imply a denial of the existence of “the common core of basic human rights standards”.\textsuperscript{67} The Court’s own perspective asserts in other words the universal nature of human rights, which is based on the idea of the oneness of Human-kind.\textsuperscript{68} Universality requires a unified view on the core elements of legal concepts as well as some level of homogenous application of legal notions. Reality shows us, however, that conflicting international jurisprudence occurs from time to time in relation to identical substantial issues especially with respect to access to justice.\textsuperscript{69}

As sources the Court invoked in the \textit{Yakye Axa} case interestingly not only the American Convention and the American Declaration but it resorted to other additional sources of international law such as the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries\textsuperscript{70} while analysing the scope of the right to property since in its view the ILO Convention “can shed light on the content and scope of Article 21 of the American Convention” (para. 130).

\textsuperscript{67} IACtHR, Advisory Opinion OC-1/82, supra note 63, para. 40.


\textsuperscript{70} The Convention entered into force on 5 September 1991. It has received very little ratification. As of 1 June 2013, 22 out of 185 member states in ILO have become treaty parties. \textit{See} for information at \texttt{<www.ilo.org/iol/islex/egilex/ratifce.pl?/C169>} visited on 14 May 2013. The greatest number of ratifications of the Convention has been submitted by fifteen OAS member states. The Convention has clearly influenced the constitutional protection of indigenous peoples in these countries. \textit{See} C. Cortsis, ‘Notes on the implementation by Latin American countries of the ILO Convention 169 on indigenous peoples’, \textit{10 sur, international journal on human rights} (2009) p. 10.
Undoubtedly, the IACtHR ruling in the Yakye Axa case is a significant precedent facilitating the advancement of indigenous peoples’ land rights. It gives us an important clue for the scope of states obligations as well as supportive arguments in cases of deprivation of indigenous peoples of their ancestral lands.

2.3 The case of Sawhoyamaxa Indigenous Community v. Paraguay

The Sawhoyamaxa case\(^71\) discloses similarities with the previously discussed Yakye Axa case in that both cases concern the displacement of separate indigenous communities within the Enxet ethnic group from their ancestral lands and that the legal title to the property has been conveyed to third-party owners. In the Sawhoyamaxa case the territorial area under dispute known as Santa Elisa and Michi was taken over by a local cattle rancher.

In both cases the IACtHR ordered the Paraguayan authorities to return ancestral lands and taking measures to provide the respective community with basic goods, including water, food, school and health services. The members of the Sawhoyamaxa community were living, and continue to do so today\(^72\), in temporary homes on the side of the Rafael Franco road connecting the district of Pozo Colorado and Concepcion separated by a wire fence from the claimed lands. Undoubtedly, under such circumstances they cannot sustain their traditional means of livelihood such as hunting, gathering honey and fishing. The IACtHR held that these precarious conditions constitute a threat to their lives and/or physical integrity, and when a high risk for a vulnerable group is in question the state should give priority to the adoption of positive measures.\(^73\)

\(^{71}\) IACtHR, Merits, Reparations and Costs, Judgment of 29 March 2006, Ser. C No. 146.

\(^{72}\) The Sawhoyamaxa families were compensated with land enabling them to relocate in September 2011. Nevertheless, Carlos Marecos, a Community leader, published on 21 March 2013 a declaration that the Sawhoyamaxa community has decided to return and occupy the traditional Sawhoyamaxa lands. Despite the judgment of the IACtHR in favour of the community’s demands the state has, at the time of writing, failed to implement the judgment and to return the claimed ancestral lands. See Enxet: After years of expulsion from our ancestral lands, we return to recover them, in Intercontinental cry, at <http://intercontinentalcry.org/enxet> visited on 18 April 2013.

\(^{73}\) Supra note 71, para. 150 - 178.
The significance of the Sawhoyamaxa case remains also because it includes and confirms an indigenous form of ownership, i.e. the broader definition of the term “property” beyond the typical civil law conception. The Court aptly stated in its judgment that the protection of the right to property in the American Convention comprises: “material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all movable and immovable, corporeal and incorporeal elements and any other intangible objects capable of having value”74 and that “traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title” (para. 128).75 In the literature, Gaetano Pentassuglia has very appositely pointed out that the idea of indigenous property “lies at the intersection of a critical understanding of possession and title, on the one hand, and material and spiritual basis of identity, on the other”.76 Additionally, the Court ruled that the Sawhoyamaxa community’s land rights persist despite the fact that the land has been productively exploited by the owners at the time of the dispute because justification privileging automatically the agrarian system “fails to address the distinctive characteristics of (indigenous) peoples”. (para.139) In the view of the Inter-American Commission on Human Rights this standpoint may be interpreted as to include a state duty “to prioritize, in general terms, indigenous peoples’ rights in cases of conflict with third party property rights,

74 Ibid., para. 121. The Court took the position that with regard to the indigenous lands tenure systems “The notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention” (para. 120). In emphasising that there might be a great variety of forms to use and enjoy property the Court ruled that the unique relationship to traditional territory may “include the traditional use or presence, be it through spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of natural resources associated with their customs any other elements characterizing their culture” (para. 131).
75 In several countries in Latin America, such as in Guatemala, possession rights are still considered secondary to full legal title, since recognition of possession rights alone may not suffice in cases involving property disputes. See C.M. Bailliet, Between Conflict and Consensus, Conciliating Land Disputes in Guatemala (Institute of Public and International Law, University of Oslo, Oslo, 2004) p. 565.
insofar as the former are linked to indigenous and tribal peoples’ cultural and material survival”.

It is apparent from the Court’s considerations, when ordering a variety of remedies, that the pre-eminent reparation measure to be taken by the responding state according to the concrete circumstances at hand in the case under review comprises the restitution of the traditional lands. Nonetheless, this does not exclude optional corresponding obligation of the state as a last measure to render alternative lands of equal extension and quality in situations when it is “unable, on objective and reasoned grounds” to return traditional lands and communal resources to indigenous peoples. On the choice of alternative lands as a form of compensation the Court clearly stated that it must be decided upon after securing the active participation by the indigenous peoples in the process and after achieving agreement with them in accordance with “their own consultations and decision procedures”. (para. 135)

Having in mind the collective nature of the damage in the instant case the Court highlighted, in addition, the collective dimension of reparations in that it revealed its presumption of the awarded reparations to be beneficial to the community at large rather than to be to the benefit of individual claimants. Thus, ac-

---


78 Amnesty International has expressed its concern that the Paraguayan Government has given priority to a solution with respect to the established violation of land rights in the IACtHR’s judgments, implying that the authorities encouraged both communities, the Yakye Axa and Sowhowamaya, to accept alternative land options instead of making efforts to resolve the problem with the ongoing violation by the way of the first alternative solution, namely restitution of traditional lands. Amnesty International, Paraguay, Briefing to the UN Committee on the Elimination of Racial Discrimination (2011) pp.14-17 and Amnesty International, Paraguay, Submission to the UN Human Rights Committee for its 107th session (2013) p. 11.

79 The term “reparation” includes restitution (restitutio in integrum), i.e. re-establishment of the situation quo ante, both in law and in fact, which existed before the violation of the provision in question. Reparation may comprise monetary compensation to the victim or his/her relatives for pecuniary and non-pecuniary damages. It includes furthermore, the return of traditional territory. See B.Conforti and A.Labella, supra note 24, p. 132.

80 The substantial difference in approach with respect to the aim of reparations between the IACtHR and the ECtHR has been recently discussed by Diana Contreras-Garduño and Sebastian Rombouts in their essay ‘Collective Reparations for Indigenous Communities Before the Inter-American Court of Human Rights’, 27 Merkourios, Utrecht Journal of International and European Law 72 (2010) pp. 4-17.
cording to the Court state funding of indigenous community development funds and programs also embodies a means of remedy. The Court acknowledged as well that reparations require that intangible damages caused by violations of ancestral land rights were covered since “non-pecuniary damage may include distress and suffering caused directly to the victims or their relatives, tampering with individual core values, and changes of a non-pecuniary nature in the living conditions of the victims or their families”. (para. 219)

Moreover, this judgment is important because the Court elaborated upon the issue of the supremacy of human rights obligations in the legal order when reviewing the Government’s arguments for not being able to give effect to the Sawhoyamaxa community’s right to restitution of their traditional lands based on, among others, the reason that it had assumed obligations under a bilateral international investment treaty between Paraguay and Germany. The Court took the position, asserting that the American Convention has a law-making character, i.e. that it “stands in a class of its own and that generates rights for individual human beings” and, therefore, it does not depend entirely on reciprocity among states for its functioning (para. 140). In other words, the Court ruled that the Government in question is not released from international responsibility.

Last but not least, it is valuable to recall the circumstance that the Sawhoyamaxa case has been seen as the first international and landmark case on the protection of children of indigenous peoples. During the prolonged forced displacement of the community many children had passed away due to the miserable living conditions. The Court reaffirmed in this regard its earlier

---


comprehensive understanding of the parameters of the protection of the right to life and the right to education as guaranteed in the additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (the “Protocol of San Salvador”). In finding various violations of the American Convention on Human Rights the Court revealed its understanding of the intimate relationship between the relevant economic, social and cultural rights and access to land, which is consistent with the principle of indivisibility, interrelatedness and interdependence of human rights as expressed in contemporary international law, among others, in Section 1, para. 5 of the 1993 Vienna Declaration on Human Rights.83

2.4 The case of Saramaka People v. Suriname
To begin with this judgment confirms the Court’s previous rulings on land rights in the context of the right to property in e.g. the Sumo Awas Tingni case from 2001. Nevertheless, in the case of Saramaka People v. Suriname84 the Court elaborates its argumentation further in detail in connection with the analysis of the content of Article 21

84 IACtHR, Judgment of 28 November 2007, Ser. C, No. 172. A similar case, Maimuna Village v. Suriname, dealing with the forced expulsion from ancestral lands and the applicability of relevant tribal land rights, i.e. to use and enjoy traditional lands, of the N’djuka tribe was decided in 2005. IACtHR, Preliminary Objections, Merits, Reparations and Costs, Judgment of 15 June 2005, Ser. C, No. 124. Here the Court requested the Government of Suriname to take various measures including ensuring delimitation, demarcation and collective titling of the ancestral lands of the N’djuka community. In the view of the Court “indigenous communities who have occupied their ancestral lands in accordance with customary practices - yet who lack real title to the property - mere possession of the land should suffice to obtain official recognition of their communal ownership”. IACtHR, Judgment of 8 February 2006, Ser. C, No. 145, para. 131. This is the first case when the Inter-American Court dealt with the issue of the survivors’ of the massacre in 1986, which was perpetrated by personnel of the National Army, right to return to their traditional territory after being displaced in, among others, refugee camps because of the violent internal armed conflict. For an in-depth analysis of important aspects of this case (mainly of temporal jurisdictional and procedural nature) and which were not of direct relevance to this essay, see S.C.Grover, The European Court of Human Rights as a Pathway to Impunity for International Crimes (Springer, Dordrecht, 2010) pp. 275-286. Other commentators have stressed the original way of IACtHR’s interpretation of Article 5(1) (the right to humane treatment) in combination with Article 1(1) of the ACHR as being “extremely pioneering” when ruling that the community had suffered serious emotional, psychological and spiritual hardship due to the states’ ignorance of their religious convictions and beliefs concerning the relationship between the living and the dead. V.Saranti, supra note 33, p. 452.
of the American Convention on Human Rights, more specifically the scope of effective protection of the ancestral property rights of the Saramaka tribal community including aspects of ownership related to the natural resources within the territory in question. Similar to the *Sumo Awas Tingni* case the Suriname Government had provided various logging and mining concessions between 1997 and 2004 within the traditional lands of the Saramaka people without consulting them.

Firstly, the Court deliberated on the question of whether the Saramaka people constituted a tribal community.\(^8\) If this was the case they would be, as a collective subject, entitled to the same protection of their property rights (communal property) under the American Convention on Human Rights as the indigenous peoples in accordance with the Court’s recent jurisprudence. The outcome of the IACtHR’s assessment was in the affirmative, *i.e.* that the Maa-rooms of Suriname are tribal people, and the Court denoted in consequence that the application of Article 21 to be pertinent to tribal people. The IACtHR justified this standpoint for reasons that both types of communities bear particular characteristics that distinguish them from the general population in a country, and that this should be taken into account when interpreting the American Convention. Thus, what they have in common is their dependence on traditional land and their deep spiritual connection to their ancestral territories, which warrants special protection and special measures to ensure implementation of Article 1(1) of the American Convention. On this background the IACtHR arrived at the conclusion that the absence of a possibility for the Saramaka people to present a collective claim under domestic law, which at that time ensured only the individual right to property, constituted a violation of Article 3 (the

---

\(^8\) Mention should be made in this respect that Article 1 of the ILO Convention No. 169 differentiates between on the one hand tribal people as people “whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations” and on the other hand indigenous peoples whereby the definition also embraces their descent from the inhabitants of their territory “at the time of conquest or colonization or the establishment of present State boundaries”. The Saramaka people belong to the Maroon tribal people and their ancestors were African slaves forcibly taken to Suriname during the European colonisation in the 17\(^{th}\) century. They succeeded, however, to establish autonomous communities in the forest regions of the country.
right to juridical personality) of the American Convention\textsuperscript{86} in connection with Article 21. In other words, granting collective juridical capacity to tribal groups and indigenous peoples constitutes a central element and a precondition for the effective exercise of the collective right to property.\textsuperscript{87}

As has been pointed out earlier in this essay, while the Inter-American Court of Human Rights as well as its counterpart, the ECtHR, often relies on its own jurisprudence (\textit{res iudicata}) it also looks frequently for guidance in other relevant international documents.\textsuperscript{88} In the \textit{Saramaka} case the Court explicitly invoked and referred to, among others, the at that time draft UN Declaration on Indigenous Peoples’ Rights in its normative reasoning when analysing Article 21 of the American Convention. This is significant in several ways for the progressive legal developments to follow. The interdependency between one subsequent or we may call it “young” declaration, \textit{e.g.} the 1995 Beijing Declaration and Platform of Action, and an “older” convention within the relevant legal area, in this case CEDAW, may contribute essentially and beneficially to their mutual reinforcement as well as to enable positive developments. This was acknowledged in 2010 in connection with the review of the implementation of the “Beijing + 15” documents.\textsuperscript{89}

The use of the recent UNDIPR as a tool of interpretation of older instruments is similarly important because the Declaration does not have a reviewing mechanism on its own to monitor states’ compliance. In this way the Court may strengthen the legitimacy of the UNDIPR which in its turn can lead to its effective implementation.

\textsuperscript{86} IACtHR, Judgment of 28 November 2007, Ser. C, No. 172, para. 166. The legal problem related to a lack of recognition in the domestic legislation of Suriname of the judicial personality and the right to collective property of indigenous peoples continues to exist to this date. See IACtHR, \textit{Case of Saramaka People v. Suriname}, Monitoring Compliance with the Judgment of the IACtHR of 4 September 2013 and the Case No. 12.639 Kalina and Lokono Peoples v. Suriname, which was submitted to the IACtHR by the IACCommHR on 26 January 2014.

\textsuperscript{87} D.Contreras-Garduno and S.Rombouts, \textit{supra} note 80, p. 16.

\textsuperscript{88} Both the IACtHR and the ECtHR have adopted the approach that: “it is not necessary that the relevant state has ratified the international treaty which is used as an aid of interpretation”. M.Killander, ‘Interpreting Regional Human Rights Treaties’, \textit{7 sur, international journal on human rights} 13 (2010) p. 147. On the issue of convergence and consolidation of human rights jurisprudence in the American and European continents see A.A.C.Trindade, \textit{supra} note 24, pp. 588-591.

\textsuperscript{89} UN Doc. A/66/215 (10 August 2011) para. 17.
and thereby facilitating the work of the various actors who strive to ensure effective human rights protection. We should also mention that the use of later adopted documents in the interpretation of previously endorsed documents may not only modernise but also may create unity in the international law system as a whole. In addition, the Court recurred to the OAS Draft American Declaration on the Rights of Indigenous Peoples\(^{90}\) as guiding interpretative parameter.\(^{91}\)

Notably, the Court interpreted innovatively the text of Article 21 as part of the applicants’ right to self-determination (the internal dimension) in the light of the common Article 1 (the right to self-determination) as embraced in both UN Covenants: the ICCPR\(^{92}\) and the ICESCR. After referring to common Article 1 it clearly made the point that: “Pursuant to Article 29(b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree that what is recognized in said covenants”. (para. 93)

This case is likewise illustrative of the IACtHR’s reliance on and cross-referencing to stand-points taken by other international human rights bodies, e.g. the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples\(^{93}\) and CERD (General Recommendation No. XXIII (para. 98)). This interpretative technique contributes to the consistent development of international human rights law as a “coherent

\(^{90}\)At the time of writing negotiations are on-going with respect to “the quest for points of consensus” on the Draft American Declaration on the Rights of Indigenous Peoples. \(\text{See e.g. OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev.6 (20 January 2011); OEA/Ser.K/XVI, GT/DADIN/doc.423/12 (15 November 2012). It is hoped that a consensus will be reached prior to the 43\textsuperscript{rd} session of the OAS’s GA in 2013.}

\(^{91}\)This precedent shows how the adopted UNDIPR can be mainstreamed in the case-law of the UN human rights treaty bodies and how they can use it as “an inescapable framework of reference for the application and development of new interpretations of state obligations under those treaties”. L.Rodríguez-Pinero Royo, ‘Where Appropriate’: Monitoring/Implementing of Indigenous Peoples’ Rights under the Declaration’, in C.Charters and R.Stavenhagen (eds), \textit{supra} note 6, p. 319.

\(^{92}\)The UN HRC has in the case of \textit{Apirana Mahuika et al v. New Zealand} directly linked Article 27 which comprises a right to enjoy one’s own culture with the right to self-determination and thereby indicating that indigenous peoples as a distinct group constitute ‘people’ under Article 1. \textit{See} Communication No. 547/1993, UN Doc. CCPR/C/70/D/1993, Decision of 27 October 2000, para. 9.2.

branch of international law.” Significantly, unified human rights protection and consistency provide credibility for the system.

On the above mentioned basis the Court reached the conclusion that Article 21 implies a recognition of the right of the Saramaka people to own, use, develop and manage their lands, territories and natural resources which they have traditionally used and by means of their own laws and land tenure systems. Nevertheless, the IACtHR found (para. 127 of its judgment) that Article 21 does not encompass an unrestricted right to communal property, including rights to natural resources, but it entails some permissible limitations which allow states under certain conditions to grant logging and mining concessions for the exploration and extraction of natural resources found on tribal territory. A number of specific requirements must be, however, met in this regard in order for a state to fulfil the expected measures under Article 21 of the American Convention. According to the Constitution of Suriname all natural resources belong to the state.

Besides the general condition that concessions must not lead to a denial of conditions necessary for the survival of the Saramaka people as a tribal group, the state must agree to observe the following 3 substantive and procedural safeguards of their existing property rights: 1) to ensure effective participation of the members of the tribe, “in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan” within their territory 2) to guarantee that the Saramaka people will receive a reasonable benefit stemming from any such activity that takes place within their property and finally 3) the state has to consult independent and technically capable entities to assess the social and environmental impact of the requested project for land use (ESIAs). (para. 129) The Court attached importance on the impact factor, and ruled, therefore, that if the probable level of impact of

94 M.M.Forowicz, supra note 69, p. 355.
potential development projects on the group’s territory, identity and way of life of the Saramaka people is expected to be profound, their free, prior and informed consent should be obtained (para. 134).97 The duty of states to obtain consent may perform a significant precautionary function. In occurrences where concessions were already granted the IACtHR specified that the Government of Suriname must review them “in order to evaluate whether modification of the rights of the concessionaires is necessary in order to preserve the survival of the Saramaka people”. (para. 194) This is a major accomplishment for the Saramaka people.

This author agrees moreover with statements meaning that the Court has expanded its previous jurisprudence in that it “consolidates the benchmarks for a meaningful, ‘effective’ process of consultation - including the basic objective of reaching an agreement with the community - and embraces a sliding scale approach to the circumstances under which (tribal) indigenous consent to development projects must be obtained, not simply sought”.98

Since the Government of Suriname did not apply the above mentioned requirements when gold and timber concessions on ancestral lands were issued it was found to be in breach of Articles 21 and 1(1) of the American Convention.

The Saramaka case is indeed an important precedent on the issue of tribal and indigenous peoples’ rights over natural resources.99 In fact it is the first international case asserting the rights of tribal people to the natural resources on their ancestral lands. The significance of this case is to be found in, among others, the new and detailed articulation of state measures to be utilised in sit-

98 G.Pentassuglia, supra note 4, p. 178.
99 Of interest to mention is that the IACtHR referred to the jurisprudence of the African Commission (ACommHPR), the Canadian Supreme Court as well as the South African Constitutional Court when stating that indigenous community’s land rights comprises the natural resources therein. See para. 120.
utions when extraction of natural resources is under question. Because this model of involving tribal and indigenous peoples in decision-making is sufficiently flexible, it may be applied “throughout and outside of the Americas, in diverse cultural and economic contexts”. It is therefore not surprising that the case already has had significant direct and indirect influence on the jurisprudence and authoritative statements of other regional and global human rights mechanisms such as the African Commission on Human and Peoples Rights and the UN CESCR.

In sum, despite the fact that the Saramaka people are not indigenous to Suriname their case contributes to a deeper understanding of the serious problems facing the indigenous peoples in general and especially the issue of removal, relocation and the duty for governments to consult with the members of the tribal and indigenous communities with the aim to achieve agreement and under certain circumstances also to obtain their consent when the issue of exploitation of natural resources on their lands is at stake. The reassessment of the relationship between consultation and consent has been elevated in the literature as being a great contribution of the IACtHR’s case-law to the development of international law, since the ILO Convention No 169 is silent on this matter and other international documents of relevance have not yet been interpreted in this way.

100 A.Keenan, supra note 96, p. 20.
101 The ACommHPR has verbally referred to the Saramaka case as dealt with by the IACommHR as well as grounding its argumentation on land rights jurisprudence of the Inter-American system when reviewing the Endonis People v. Kenya case, supra note 17, para. 155 and 187. See further M.Ahrén, The Saami Traditional Dress and Beauty Pageants: Indigenous Peoples’ Rights of Ownership and Self-determination over Their Cultures (UIT, Tromsø, 2010) p. 131 and G.Pentassuglia, supra note 4, pp. 185-188.
103 Article 27 of the UNDIPR provides for an obligation of the states to “establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process”.
104 G.Pentassuglia, supra note 4, p. 181.
2.5 The case of Chitay Nech Et Al. v. Guatemala

In the case of *Chitay Nech and others v. Guatemala*\(^{105}\) the IACtHR maintained its previous holding that forced disappearances constitute a multiple violation of human rights.\(^{106}\) Nonetheless, it also ruled for the first time that a forced disappearance of a selective nature may interfere with the right to political participation. (para. 64) Importantly, the Court brought to light the fact that selective and targeted forced disappearances against indigenous leaders (in this case it concerns the Kaqchikel Maya leader - Florencio Chitay Nech) with the aim to impede political representation of indigenous groups occurred in Guatemala during the internal armed conflict in 1981. Because of the attacks to the house of the victim and his disappearance, the next of kin had to live their indigenous communities with the consequence of breaking their cultural identity. The abandonment of the Mayan community and the impossibility to return to the place of origin has had negative impact on the victims, including loss of the link with their spiritual and cultural ancestral past, *i.e.* their Mayan heritage. (para. 146) In taking into account the cultural uproot suffered by the family the Court stated: “(t)he disintegration of their land affected the members of the Chitay Rodriguez family in a particularly grave manner due to their conditions as Mayan indigenous persons”. (para. 162) Moreover, the Court accentuated the cruelty of the forced displacement since it has had harmful and “dramatic” effects on the access to cultural life of the minor indigenous children. The children’s cultural life is protected under Article 19 of the ACHR and it arises from “the deep material and spiritual relationship of the indigenous peoples with their traditional lands”. (para. 145 and 168)

In addition, the Court interpreted Article 22 of the ACHR in a more extensive way in comparison to its previous case-law by acknowledging that the freedom of residence is violated when a fami-

---

ly, especially when indigenous children are involved, is relocated when “attempting to escape threatened violence”.107

Of significance is also the Court’s standpoint that the understanding of indigenous family is not limited to the concept of the nuclear family. This notion is more extensive in the indigenous people’s context and it comprises different generations as well as the community of which it forms a part (para. 159). For that reason, the Court concluded that through the forced displacement the rights of the Nech family, i.e. Article 17 of the ACHR, were violated.

The Court did not find it necessary to rule on the alleged violation of the right to property under the ACHR on *ratione temporis* grounds, i.e. because the acts in question occurred prior to the recognition of the jurisdiction of the Court by the government of Guatemala.

2.6 The case of Xákmok Kásek Indigenous Community v. Paraguay

The *Xákmok Kásek* case108 is the third case against Paraguay in which the Inter-American Court in building its argumentation on its previous case-law arrived at the conclusion on the key point dealing with the indigenous multi-ethnic Xákmok Kásek community who reclaimed about 10,700 hectares of land located in Paraguayan Chaco and from which it had been displaced, that the Government had violated its international law obligations under the American Convention. It had not guaranteed the right to ownership of the traditional territory in its domestic legal order for some 60 families comprising the Xákmok community from Enxet, Sanapaná. The Paraguayan Government contested the applicants’ right to land and natural resources therein on grounds that the property in question had been granted to other private persons who built, among others, a farm on President Hayes’ land. In addition, the respondent state maintained that a portion of the claimed land was recognised as a protected wildlife zone.


The IACtHR reaffirmed first and foremost its previous position on the right to communal property and reminded that: “the close link that indigenous peoples have to their traditional lands, to the natural resources found that are part of their culture, and to the lands’ other intangible elements” should be safeguarded and protected in accordance with Article 21 of the American Convention. (para. 85)

The domestic authorities exposed in the view of the Court prevalence of understanding of land rights in a way which provides better protection to the private owners over the indigenous collective territorial claims. This constituted a threat to the physical subsistence of the community (para. 271). The Court ordered, therefore, restitution of the claimed hectares by the Xákmok Kásek community by August 2013 or that the Paraguayan Government identifies another suitable and available land area within the community’s ancestral lands.109 It also required that until the traditional territory has been returned to the community, the State must ensure that “the land is not harmed by the actions of the State itself or of private third parties. As such, the State shall insure that the area is not deforested, that sites that are culturally important to the Community are not destroyed, that the land is not transferred, and that the land is not exploited in such a way as to cause irreparable damage to the area or to the natural resources found there”. (para. 291)

Particularly interesting are the Court’s deliberations dealing with the relationship between possession of land and the protection of other human rights. The Court held in para. 263 of its judgment by incorporating a trans-generational dimension of human rights protection that separation of indigenous children from their traditional lands may result in loss of traditional practices, such as male and female initiation ceremonies. The lack of the preconditions, which will enable indigenous children to develop a special relationship with their traditional territory, will in this sense have serious negative impact on their cultural identity and thereby jeopardising their overall development. The Court came to the conclusion that the

109 The Community’s land claims have at the time of writing not yet been solved. See Amnesty International, Paraguay, Submission to the UN Human Rights Committee, AMR 45/001/2013, p. 13. The IACtHR held a public hearing on 21 November 2011 in order to obtain information on the compliance with the reparation measure regarding the return of ancestral lands.
denial of the children’s right to their unique way of life, i.e. cultural life, gave rise to a violation of Article 19 of the American Convention.

The Court’s ruling in this case has been considered in the literature as being an achievement, a “judicial milestone”,\(^{110}\) and having particular significance in that it addressed the issue of maternal death of an indigenous woman as evidence of, “among other wrongs, the injuries the community suffered in addition to exclusion from its traditional lands”.\(^{111}\) In the Court’s view the Government had failed to take special measures to protect pregnant indigenous women, which caused pregnancy-related deaths. The IACtHR, thus, for the first time held a Government liable for inadequate health-services including an avoidable maternal death and established a violation of the right to life, i.e. Article 4(1) of the American Convention. (para. 232-234) In consequence, the Court mandated the Paraguayan Government to adopt immediate and concrete measures to provide health-care for pregnant women belonging to a marginalized group in accordance with the needs of the Xákmok Kásek community.

Furthermore, the Court elaborated in concrete terms in e.g. para. 309 on the issue of the international obligations of the respondent state to adapt domestic laws in a way which would guarantee indigenous communities’ property rights to their traditional lands. In the Court’s opinion, “the social interest of the property, in what regards the indigenous community, should be understood as lands that hold an ancestral quality for the indigenous, which should be reflected in both substantive and procedural forums”. The idea behind this statement, which has been reflected also in the Court’s previous jurisprudence, gives the Inter-American system for the protection of human rights a front position vis-à-vis its European counterpart, where the jurisprudence of the ECtHR as well as the

---


ECJ has solely focused on the economic dimensions of property rights.\textsuperscript{112}

2.7 The case of The Kichwa Indigenous People of Sarayaku v. Ecuador

The \textit{Kichwa} case\textsuperscript{113} deals with a claim of an alleged violation of several human rights of the Kichwa people in Sarayaku, located in the Amazonian region of Ecuador. A private Argentinian oil company (CGC), after concluding a contract with the State Petroleum Company of Ecuador in 1996, started a large-scale development project in 2002 on land areas, to which the Sarayaku peoples have legal title or ancestral claim. By allowing the company to operate on their territory, which led to, among others, the placement of high-grade, \textit{i.e.} 1400 kg, explosives in over 450 pits, along their traditional hunting trails, the community members were put at severe risks. This conduct, which caused the destruction of caves and underground rivers used as sources for drinking water by the people in Sarayaku, constituted according to the Court a threat to the Kichwa peoples’ right to life and physical integrity, for which the State of Ecuador is liable under the American Convention. This case exposes a significant shift in conception of “victim” since the Court explicitly considered the injured party, \textit{i.e.} the Kichwa people, as the collective beneficiaries of the acknowledged reparations. (para. 284)

The IACtHR ruled in its decision that the activities of the company in question had damaged the environment (\textit{e.g.} the living rainforest) and had had devastating consequences for the indigenous peoples. They did not only restrict the Kichwa people’s freedom of movement but violated also the indigenous community’s right to communal property and cultural identity since people were unable to practice their traditional means of subsistence. Moreover, the state’s failure to fulfil its international obligation to consult with them was an element of the violation of the community’s land


\textsuperscript{113} IACtHR, Judgment of 27 June 2012, Ser. C, No. 245.
rights. In other words, the right to property has to be effectively protected through proper consultation processes.

The significance of this case as a legal precedent resides mainly in that the Court placed much focus on the issue related to the community’s right to prior, special and differentiated consultation processes about legal and administrative measures with regard to development projects when certain of the indigenous groups’ interests are to be affected. (para. 165) By concluding that the Ecuadorian Government is indeed internationally responsible for its failure to engage in such consultations with the Kichwa people before granting oil concessions to an international corporation for exploration and exploitation of hydrocarbons on the Sarayaku ancestral lands, the Court restated some of its earlier findings in the Saramaka case. Especially important is the Court’s standpoint that states’ obligation to consult under the relevant circumstances is now considered to be a general principle of international law. The Court argued that this is a principle reflected in other international instruments, e.g. the ILO 169 Convention, as well as recognised as such in the domestic jurisdictions of states among them the U.S.,114 Canada and New Zealand, which are not party to the relevant instruments. (para. 164) Previously, the UN Special Rapporteur on the rights of indigenous peoples has underlined that the duty of states to consult with indigenous peoples on decisions affecting them is “firmly rooted in international human rights law” and it is affirmed in core human rights treaties as well as in the UN DIPR.115

The Court highlighted and spelled out in detail several elements of this duty to consult as well as relating it to the indigenous people’s right to effective participation in decision-making concerning

---

114 Recently, in August 2012, the UN Special Rapporteur on the rights of indigenous peoples, Professor James Anaya, urged the U.S. Government and the authorities in the state of South Dakota to engage in consultations with the concerned indigenous peoples on the sale of land situated in the Black Hills. The sale will undoubtedly affect a site of spiritual and cultural significance to the Lakota, Dakota and Nakota peoples. His statement was distributed through <UNNews@un.org> (22 August 2012).

their land rights as stemming from Article 21 ACHR. First and foremost the Court ruled that the obligation to consult rests upon the State and it cannot be passed on to a private company or to third parties. (para. 187) With respect to how the consultations should be undertaken the Court confirmed that they should be carried out in good faith, through culturally appropriate procedures, in accordance with the indigenous peoples’ own traditions. (para. 177) Furthermore, the process should be based on principles of mutual trust and respect and must be aimed at reaching a consensus between the parties. (para. 186) The Court thus considered the consultation process as being a “process of dialogue and consensus building”. (para. 167) On this background the IACtHR could reach the conclusion that the CGC’s search to achieve understanding with the Sarayaku people could not be characterised as part of a consultation process.

Regrettably, the Court concentrated its analysis on terms of consultation and did not rule on the issue of whether the Kichwa community’s consent should have been obtained before the State of Ecuador took the decision to grant the concession in question as it did explicitly in para. 134 of the Saramaka judgment in its discussion on when the threshold for an obligation to seek consent is imminent. On the other hand, the Court expressed the general view in the Kichwa case that: “the State must ensure that members of the community are aware of the potential benefits and risks so they can decide whether or not to accept the proposed development or investment plan”. (para. 177)

Finally, the Court ordered the State of Ecuador to adopt adequate legislation for the implementation of free, prior and informed con-

116 As has been pointed out, the “specific characteristics of the consultation procedure that is required by the duty to consult will necessarily vary depending on the nature of the proposed measure and the scope of its impact on indigenous peoples”. UN Doc. A/66/288, ibid, para. 82.
117 Amnesty International argued in this direction in its Amicus Curiae, Case of the Kichwa People of Sarayaku v. Ecuador, submitted before the IACtHR, AI, AMR 28/001/2011, p. 6, Chapters II and III. In addition, The UN Special rapporteur on the rights of indigenous peoples has proposed that “in situations involving the establishment of natural resource extraction projects within indigenous peoples’ lands and other situations in which projects stand to have a significant social and cultural impact on the lives of the indigenous peoples concerned”, it should be made necessary to obtain the consent of the group in question. UN Doc. A/66/288 (10 August 2011) para. 84.
sultation of indigenous peoples in Ecuador. It is encouraging that the State of Ecuador after the announcement of the decision has accepted its responsibility and that the Government has declared its preparedness to comply with the judgment of the IACtHR.118

The Kichwa case will undoubtedly have implications not only for the states parties to the American Convention but it will influence international human rights law commitments beyond that region, i.e. including other global and regional human rights instruments. It may also serve as a catalyst for the further development of international standards in particular those comprising the duty to consult.119

In sum, the case-law of the IACtHR gives us an idea, despite the fact that it does not provide the complete picture of the reality, about the extent to which indigenous peoples’ rights have been or continue to be denied and violated. It can be argued that the case-law of the IACtHR provides an authoritative elucidation and determination of the content of the relevant provisions in the American Convention and the American Declaration in spite of the fact that it reflects an in casu (case by case) approach, i.e. the Court will make assessments of the factual situation in the light of the particularities and specific circumstances surrounding the case at stake. The jurisprudence constitutes a solid legal basis providing impetus for the progressive development of indigenous standards in international law in general and contributes thereby to the strengthening of the legal position of the indigenous peoples. Successful outcome of cases will thus lead to more effective implementation of the existing human rights standards. Also, as has been observed, “each case has an impact that goes beyond the sphere of the case itself, affecting structurally the area of human rights that the petition

---

118 F.Doiz Costa, ‘Ecuador: The Inter-American Court Ruling Mark Key Victory for Indigenous Peoples’, (27 July 2012) at <www.amnesty.org>
119 L.Brunner and K.Quintana, ‘The Duty to Consult in the Inter-American System: Legal Standards after Sarayaku’, ASIL, insights (28 November 2012) p. 5, available at <www.asil.org/insights> visited on 7 January 2013. Some legal writers who have criticised the Court’s position over the right of indigenous peoples to consultation argue that the Court has “largely considered a desired outcome and not an essential condition for the exercise of their self-determination”. A.Schettini, supra note 12, p. 76.
deals with”. The Inter-American Court has acknowledged that its “jurisprudence can serve as guidance to establish principles” in certain matters.

3 A Few Remarks on the Contributions of the Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights (IACommHR) has revealed substantial protection gaps when redressing the land rights of indigenous peoples in several of its activities, such as submission of cases to the IACtHR, conducting on site visits, production of country and thematic reports, as well as in its publication of a compilation and commentary pertaining property rights, which has contributed to the advancement of legal argumentation domestically and initiated legal and administrative changes in many of the countries in the region.

Notwithstanding that the Commission is a quasi-judicial body, it is authorised to oversee the implementation of the American Declaration of the Rights and Duties of Man, i.e. to adjudicate upon, among others, whether OAS’s member states, which are not parties to the American Convention, has violated any of the rights and


121 IACtHR, Trujillo-Orozco v Bolivia, Judgment of 27 February 2002, Ser. C, No. 92, para. 82.

122 The IACommHR has conducted approximately 100 on-site visits by the end of 2012.


124 As of 8 May 2013, twenty three of the thirty-five OAS member states are state parties to the American Convention. The U.S., Canada and some Caribbean states have not yet ratified the treaty. Trinidad and Tobago announced on 26 May 1998 its withdrawal from the American Convention in accordance with Article 78 of the treaty. Venezuela took the same step on 10 September 2012. As a result, the government is no longer subject to the IACtHR’s jurisdiction as of September 2013. The Brazilian Government threatened in 2012 to cut its funding to the IACommHR and to leave the OAS in response to the Commission’s request for precautionary measures in the case of Indigenous Communities of Xingu River Basin v Brazil. See V.Jaichand and A.A.Sampaio, ‘Dam and Be Damned: The Adverse Impacts of Belo Monte on Indigenous Peoples in Brazil’, 35 Human Rights Quarterly 2 (2013), p. 414.
freedoms enshrined in the Declaration. The mandate of the Commission to deal with communications constitutes therefore a significant remedy, opening possibilities for the indigenous peoples, who reside on territories of non-treaty parties, such as Belize, Canada and the U.S. and whose land rights are disputed to submit complains. The legal status of the American Declaration has evolved over time and it is nowadays considered as embodying an authoritative interpretation of the fundamental human rights proclaimed in Article 3(1) in the OAS Charter. The Inter-American Court has e.g. on several occasions expressed the view that the Declaration is indeed a source of legal obligations and that the rights contained in its corpus are but “at a minimum, the human rights which OAS member states” have to observe.

The Yanomani Community v. Brazil case deserves to be mentioned initially since it is the first decision where the Inter-American Commission took the position that indigenous peoples must receive special protection in order to enable them to preserve their cultural identity and to prevent cultural erosion. The significance of the case is to be found in the acknowledgement made by the Commission that the lack of title over ancestral lands is one of the main reasons behind the situation of vulnerability of the Yanomani community. The Commission asserted in its report that protection of indigenous peoples’ culture covers the preservation of communal and ancestral lands (para. 24). The decision sends, furthermore, a clear message that despite the existence of domestic legal regulations (in e.g. the Brazilian Constitution) on demarcation and recognition of indigenous peoples’ lands and the right to exclusive use of the natural resources therein, the Brazilian Government has often in fact failed to protect indigenous communities from the invasion of, among others, gold miners into their ances-

125 See Article 20 in the Commission’s Statute and Articles 51-54 in its Regulations (Rules of Procedure).

126 Article XXIII of the Declaration stipulates the right of every person to “own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and the home”.


tral lands and thereby creating a threat to their traditions, physical well-being and culture. In response to the Commission’s conclusions and recommendations, the Brazilian Government took various measures in December 1998 including, among others, the adoption of a Statute comprising the authorization of demarcation of indigenous’ lands in the northern state of Roraima.

The Yanomani case has on its turn influenced subsequent decisions of international human rights bodies such as the UN HRC in the Hopu and Bessert v. France case concerning a group of Polynesian indigenous people, who claimed to have been wrongfully dispossessed of their communal property.

Another point of great interest is the precedent-setting case of Mary and Carrie Dann v. United States. This is the very first decision of an international body finding that the Government of the U.S. has violated the land rights of indigenous peoples.

The applicants are two sisters and indigenous traditional ranchers Carrie and Mary Dann, members of the Western Shoshone Nation, who for several decades have refused to submit to a governmentally imposed system, which requires the attainment of a permit after payment of federal grazing fees for grazing livestock on Shoshone territory, their ranch-land is situated in Crescent Valley, the state of Nevada. Carrie and Mary Dann were faced with substantial fines for their resistance to comply with the permit sys-

---

129 A governmental development plan to exploit natural resources in parts of the Amazon region resulted in the construction of a highway passing through the Yanomani community’s territory and causing loss of lands, forced displacement to lands not being adequate for upholding their way of life, etc. The Commission found that the Government of Brazil is responsible for violation of a number of human rights, including the right to life, to residence and movement and the right to health. The Commission avoided, however, tackling the issue of land rights in detail.


131 HRC Communication No. 549/1993, UN Doc. CCPR/C/60/D/549/1993/Rev.1 (29 December 1997). See also HRC, GC No. 31, Nature of the General Legal Obligations Imposed on State Parties to the Covenant, UN Doc. CCPR/C/Rev.1/Add.13 (29 March 2004) para. 8. Currently all of the nine central human rights treaties within the UN provide for petition procedures albeit not all of them are in force yet.

132 IACRCommHR, Case No 11.140, Report No. 75/02, Doc. 5, Rev.1 (27 December 2002).


134 Western Shoshone territory extends through much of Nevada, parts of California, Idaho and Utah.
tem. They justified their action based on circumstances relating to their current possession and actual use of their ancestral lands, which were guaranteed to the Western Shoshone peoples on the basis of the Treaty of Peace signed at Ruby Valley (Nevada) in 1863. Notable is that the U.S. Government did not acquire any legal title of the lands by signing that treaty. In contrast to the sisters’ assertion the Government maintained that the land in question constituted federal property and that the land rights had extinguished as a result of proceedings before the Court of Claims and involving the Indian Claims Commission (ICC). In the view of the U.S. Government those residual rights have been terminated due to the gradual encroachment of non-indigenous persons in these territories as well as for the reason that it has paid compensation for loss of territory some years earlier through the Indian Claims Commission. The Dann sisters emphasised on their part that they had never agreed to relinquish their ancestral lands, which their family had occupied “since time immemorial” and that like most of the other members of the Western Shoshone Nation they did not take any action in this direction during the ICC process. Therefore, seizure of their ancestral land was illegal in that the authorities were using illegitimate means to gain control of the lands under dispute. On this basis the petitioners alleged violation of, among others, the right to property. The IACCommHR was supportive of the applicants’ argumentation and established a violation of the applicants’ property rights, since the conditions as required by the right to equality before the law and the right to a fair trial (Articles XXIII, II and XVIII of the American Declaration) were disregarded.

The Dann case is also of significance because it illustrates the IACCommHR’s adherence to a rather flexible method of interpretation of human rights provisions and that it similarly as the IACtHR shows enthusiasm for taking into account developments in the cor-

136 In the words of the Commission: “(t)he US has failed to ensure that the Indigenous people’s property rights had been extinguished prior to granting the permit in accordance with rights of equality and to property…” (para. 86).
pus iuris of international human rights law “over time and in present-day conditions”. The Commission thereby clearly rejects the use of a rigid textual interpretation and mechanical application of the relevant provisions. In arriving at some of its conclusion that there has been an infringement, i.e., prima facie violation of the Western Shoshone ancestral land rights the IACommHR invoked in its argumentation provisions contained in other prevailing global as well as regional international law instruments and international jurisprudence. Most importantly, while reviewing the petition, the Commission applied in its argumentation with respect to situations when determination of indigenous peoples’ interest in land is at hand, a principle which requires that there must be a just process based on informed and mutual consent by the indigenous community as a whole. The Commission confirmed the idea that such a request is embodied in general international law principles and it is reflected in the draft American Declaration on the Rights of Indigenous Peoples, the then draft UN DIPR as well as in other relevant standards established in, e.g., the ILO Convention No 169, even though the U.S. has not ratified it. Based on the above-mentioned analysis the Commission espoused the view that: “Where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of Indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective Indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property” and that members of indigenous groups must have “an effective opportunity to participate as individuals and as collec-

137 IACommHR, Report No. 75/02, at 96. The Commission clarified further in the same paragraph that: “in interpreting and applying the Declaration, it is necessary to consider its provisions in the context of the international and inter-American human rights system more broadly, in the light of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of violation of the Declaration are properly lodged”.

138 Interestingly, the HRC came to the conclusion in the Poma v. Peru case that: “participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community”. UN Doc. CCPR/C/95/D/1457/2006, Decision of 27 March 2009, para. 7.6. Despite the fact that the HRC does not verbally refer to developments within the OAS or the UN DRIP their impact on the reasoning of the Committee in this case is apparent.
tives” when there is a question of altering title to lands.\textsuperscript{139} Having this in mind the Commission concluded that in the Dann case these prerequisites were not met, and therefore it recommended the respondent Government to provide a fair legal process to determine the land rights of the two sisters as well as of other members of the Western Shoshone Nation. In other words, the Commission mandated the state to take special measures to ensure recognition of the collective interest of indigenous people in occupation and use of their traditional lands and resources. Thus, they should not be deprived of it except when they have given their fully informed consent and under conditions of equality and with possibilities for fair compensation.

Finally, the Commission demanded the U.S. Government to suspend measures to displace the Dann sisters until the closure of the case. The U.S. Government objected to the Commission’s findings and rejected its final report in its entirety. As a member state in the OAS the U.S. is expected to comply with the Commission’s decision. Thus, the American Declaration constitutes a clarification of the legal obligation to protect human rights under the Charter of the OAS. Nevertheless, the Commission has no effective tool at its disposal besides the threat of embarrassment power and the possible “shaming” effect of the reports to force compliance with its decisions.\textsuperscript{140} It is, therefore, not surprising that the Dann case was incorporated in the IACcommHR’s Annual Report for 2011 as still pending compliance.\textsuperscript{141} It should be mentioned here that subse-

\begin{footnotesize}
\textsuperscript{139} IACcommHR, \textit{supra} note 128, at 130 and 131.

\textsuperscript{140} Mention should be made that CERD issued a Decision 1(68) on U.S. under its early warning and action procedure on 10 March 2006 dealing with the situation of the Western Shoshone peoples and it especially expressed concern about the lack of action with regard to the case of the Dann sisters. Again in 2008 the Committee expressed its strong disappointment about the U.S. unwillingness to follow up on earlier recommendations to deal with the Dann case as decided by the IACcommHR in its concluding observations related to the U.S. periodic report. See UN Doc. CERD/C/USA/CO/6 (2008) para. 19. Notably, the UN Special Rapporteur on the rights of indigenous peoples, Professor James Anaya, who has been one of the Dann sisters’ attorneys before the U.S. Supreme Court and their counsel in the IACcommHR proceedings, continues to receive a number of communications from indigenous groups in the U.S. This choice of complaint venue could be seen as a better opportunity for indigenous peoples to mobilize global support for their cause. See, e.g., UN Doc. A/HRC/21/47/Add.3 (7 September 2012) pp. 20-22 and Annex X, UN Doc. A/HRC/18/35/Add.1, pp. 43-52.

\textsuperscript{141} IACcommHR, \textit{Annual Report 2011}, p. 101. For statistics on states’ compliance with the recommendations of the IACcommHR see C. Hillebrecht, “The Domestic Mecha-
sequently, some progress is, however, taking place in general and that there is a hope that the U.S.’s endorsement of the UN DIPR on 16 December 2010 will facilitate a new era of relations between the indigenous peoples and the American State. President Obama has, among others, signed on 30 July 2012 the Helping Expedite and Advance Responsible Tribal Home Ownership Act (the so called HEARTH Act) with the aim to strengthen tribal communities by e.g. being supportive of a greater tribal control over tribal assets and thereby gradually adjusting to a better synchronicity with the progressive legal developments taking place currently in international law. Moreover, the recommendations of the Indian Trust Reform Commission on, among others, this subject matter are expected in 2013.142

We can observe that after the paradigmatic Dann case the IACommHR has framed its numerous decisions on similar cases on the same contentious issues in a harmonious way with this decision as well as with the ever evolving jurisprudence of the IACtHR.

Last but not least to mention among issues of significance is the fact that the IACommHR has, on a great number of occasions143 in urgent and serious situations, endorsed precautionary, also known as provisional, measures in favour of indigenous communities for assumed violations of their land rights in order to prevent irreparable harm.


4 Some implications for the development of international human rights law as a result of the landmark case-law of the IACtHR

4.1 Striving for ever-greater harmonisation and coherency

What is distinctive about the IACtHR and the IAComHR is that both human rights mechanisms have become renowned for having created a coherent and comprehensive approach to the broad and creative interpretation of the special regional standards under review in interaction with universal legal norms of international law. The use of a dynamic or a so called evolutionary approach to interpretation, in the context of current conditions by the IACtHR, and exposing a holistic rather than a strict formalistic approach, has led to its jurisprudence having contemporary relevance for the indigenous peoples’ rights and serving as a catalyst for progressive development and enhancing international law in general.

The invaluable work of the Inter-American Court and Commission in relying on universal and other regional instruments including the relevant case-law and the activism exposed by the judges and members of the said supervisory bodies when bringing to light human rights violations has contributed immensely to knowledge creation and the integration of the regional human rights regime into the framework of the international legal order. This has also helped to strengthen the unity of international law and to diminish the negative effects of the fragmentation dilemma in international law.

144 For the application of a wide range of international human rights treaty provisions in the case-law of the IAComHR see S.J.Anaya & R.A.Williams , supra note 17, p. 42, note 35.

145 There is an on-going intensive debate in the literature on the impact which fragmentation may have on developments of international law. See M.Koskenniemi, The finalized report of the ILC study group ‘Fragmentation of International Law: Difficulties arising from the Diversities and Expansion of International Law’, ILC, UN Doc. A/CN.4/L.682 (13 April 2006); Baldwin and Carpenter, ‘Regionalism: moving from fragmentation towards coherence’, in T.Cottier and P.Delimitis (eds.), The Prospects of International Trade Regulation, From Fragmentation towards Coherence (Cambridge University Press, Cambridge, 2011),
of international human rights law as an integrated legal system (\textit{corpus iuris}) that international instruments (treaties, conventions, resolutions and declarations) influence each other. The legitimacy of a unified human rights system is, furthermore, closely related to the UDHR as well as to the UN DIPR, which has been reflected in the pragmatic approach of the UN Human Rights Council when dealing with the process related to the Universal Periodic Review. In the words of an academic writer: “all international instruments that are part of it do not live isolated one from each other, on the contrary, they interact and influence each other in a way that generate a critical mass capable to put pressure toward the enhancement of the protection of the existing human rights in the region”.\textsuperscript{146} Another scholar has maintained that regional specificity can be balanced “with the advantages of the emergence of a common core of principles concerning different sectors of international law” including indigenous rights.\textsuperscript{147}

Universality also implies that despite the diverse legal landscape that makes up member states in various international organisations, regional human rights standards should not fall below those endorsed at the global level. They may, however, ensure better protection.

The existing jurisprudence within the OAS has not only a harmonising effect on the development of international human rights law\textsuperscript{148} but it is also narrowing the gaps, \textit{i.e.} declining the use of different yardsticks of interpretation, in contemporary international law jurisprudence on the subject matters in question. Several harmonizing initiatives have been widely discussed. The focus of a recent UN report has been placed on the significance of monitoring bodies to strive to ensure “continued consistency of treaty body

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{146} A.Fuentes, \textit{supra} note 20, p. 280.
\item \textsuperscript{147} E.Ruozzi, \textit{supra} note 112, p. 17.
\item \textsuperscript{148} M.Killander, \textit{supra} note 88, p. 148 et seq.
\end{itemize}
\end{footnotesize}
jurisprudence” and on the beneficial effects of harmonisation across human rights mechanisms. Attention has also been paid to the need of increasing coordination among these bodies on their work on communications and inquiries for the enhanced promotion and development of consistent standards of protection of human rights. Needless to say, such a supportive approach towards a better coherence takes into account the interrelatedness and interdependence of all human rights. It has, therefore, been seen as an important aspect of the operationalization of the principles of the universality and indivisibility of human rights. The reinforcement of the justiciability and the interdependence of all human rights are highly relevant for the human rights of indigenous peoples. Greater coherence across different human rights systems may also ensure possibilities for improved efficiency and greater “impact on the ground”.

One additional remark at this point would be that also complementary interaction between universal and regional legal systems, among others by systematic cross-referencing and using other bodies’ decisions as justification for a body’s own position, can lead to the best possible human rights protection, since the relevant texts to some extent cover identical and comparable issues, and several of the guaranteed rights are of a similar nature. In striving for coherence, the IACtHR has captured the idea behind its use of a multitude of sources in, for example, the Mapiripán Massacre v. Colombia case in the following way: “the Court has based its jurisprudence on the special nature of the American Convention in the frame-

149 N. Pillay, supra note 26, p. 10. See further pp. 12, 25 and 69 in the same document. Of relevance to mention here is that CERD proposed in March 2012 the creation of a joint treaty body, WG on communications, made up by the experts of the existing UN human rights treaty bodies. Such a step would not require amendments of the treaties in force. Ibid., p. 68.

150 The UN HRC has adopted resolutions, among others, Res 18/14, A/HRC/Res/18/14 (14 October 2011), which aims to enhance the cooperation between the various global and regional human rights mechanisms. See <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx> visited on 22 October 2012. Of relevance is also the report to be submitted to the HRC in 2013 relating to the International Workshop on "Enhancing cooperation between UN and regional mechanisms for the promotion of human rights", which took place in Geneva 12-14 December 2012.

work of International Human Rights Law. The American Convention, like other human rights treaties, is inspired by higher shared values (focusing on protection of the human being). This standpoint clearly reflects the IACtHR’s involvement with the identification of the moral values such as truth, justice and equality, which underline the American Convention as well as the purpose for which human rights are supposed to serve.

On the basis of the inventory survey of the IACtHR’s jurisprudence it can be safely assumed that behind the steady trend towards integrating the meaning of related human rights obligations stemming from different legal sources is the more frequent application of the pro homine principle in the argumentative process. This principle constitutes a key interpretative tool and it predisposes a choice of the option being less restrictive to a given right, i.e. in

152 IACtHR, Mapiripán Massacre v. Colombia, Merits, Reparations, and Costs, Judgment of 15 September 2005, Ser. C No. 134, para. 104. The ECtHR has followed the trend within the Inter-American human rights system and it has increasingly used in a number of cases relevant human rights treaties, even such treaties to which the respondent state is not a party, as well as non-binding materials (recommendations of the CM and the Parliamentary Assembly, reports of the European Commission against Racism etc.) for interpretative guidance. This interpretative approach applied in a holistic way has been perceived in the doctrinal writings as “inherently evaluative exercise in seeking to determine how fact-independent moral values normatively constrain the pursuit of states’ joint projects”. G.Letsas, ‘Strasbourg’s Interpretive Ethics: Lessons for the International Lawyer’, 21 European Journal of International Law 3 (2010) pp. 512 and 522. In other words, the ECtHR like the IACtHR willingly undertakes inquiries for the reason to find common values. For examples of judgments of regional courts referring to the jurisprudence of other courts or decisions of universal bodies when dealing with similar issues see D.L.Shelton, Regional Protection of Human Rights (Oxford University Press, Oxford, 2010) pp. 143-144. See also D.L.Shelton, ‘Environmental rights and Brazil’s obligations in the Inter-American Human Rights System’, 40 The George Washington International Law Review (2009) p. 745; J.Viljanen, Comparative Approach to Limitations: From European Standard to International Trend, 55 Scandinavian Studies in Law (2010) p. 298 and p. 302.

153 During his briefing before the Third Committee of the UN, the Special Rapporteur on Indigenous Peoples emphasised that without greater awareness of the human rights values encompassed in the UN DIPR, “its implementation would be difficult, if not impossible”. UN Doc. GA/SHC/40/74, 21 October 2013, p. 1. A few scholars have, notwithstanding, expressed some skepticism about the existence of objective values in international law. M.Koskenniemi, From Apology to Utopia: The Structure of International Argument, (Cambridge University Press, Cambridge, 2005) pp. 537-538.

154 S.J.Anaya & R.A.Williams, supra note 17, p. 42. See in addition, IACtHR, the Mapiripán case, supra note 152, para. 106 where the Court stated that: “when interpreting the Convention it is always necessary to choose the alternative that is most favourable to protection of the rights enshrined in said treaty, based on the principle of the rule most favourable to the human being”.

58
being value-oriented it “encourages as a main standard the most extensive protection of human beings”. The reliance on this principle suggests, moreover, that it can limit the excessive use of the doctrine on the margin of discretion by respondent states. In this way the utilization of the pro homine principle can grant individuals the most effective legal protection. In the words of the members of the IACommHR it is “a controlling guideline for interpreting the American Declaration and Convention, and in human rights law in general”. The pro homine principle links, in addition, international law with domestic legal order, since it permits the application of the most favourable (be it international or domestic) norm for the human being/s in relation to a private or a state party to a dispute. Taking this principle into account can on its turn diminish the probability of norm collision on the normative arena as well as limiting the possibility for states to opt for the application of the ‘margin of appreciation’- doctrine, which allows for a space for “manoeuvring not only with regard to the identification of the general needs that have to be pursued in a democratic society, but also in connection with means or measures to be adopted for the achievement or fulfilment of those needs”.

It is also important to note that the IACtHR, already at an early stage, indicated and emphasised the trend towards a more coherent interpretation of treaties in its statement that: “the rules of a treaty or convention should be interpreted in relation to the provisions that appear in other treaties on the same subject matter. In addition, the norms of a regional treaty should be interpreted in light of

---


156 On the requirement of effectiveness of human rights protection see among others IACtHR, the Ricardo Canese v. Paraguay case, Judgment of 31 August 2004, Merits, Reparations and Costs, para.178. This position which often has been taken by the regional human rights courts has been grounded and justified by reference to Article 31 of the VCLT. See also C.Medina, The American Convention on Human Rights, Crucial Rights and their Theory and Practice, Cambridge 2014, p. 6.

157 IACommHR, A.A.Azocar v. Chile, Report No 137/99, Case No 11.863, 27 December 1999, para. 146. See also the separate opinion of Judge Garcia Ramirez in the Sumo case, Judgment of the IACtHR No. 79, para. 2, supra note 35.

158 A.Fuentes, supra note 20, p. 142.
Moreover, the interpretative attitude of the Court is that “if in the same situation both the American Convention and another international treaty are applicable, the rule most favourable to the individual must prevail”. Also, in cases of doubt with regard to the content of a provision, i.e. when a greater precision is needed the IACtHR has ruled that: “the ambiguity should be interpreted in favour of the victim’s rights”.

4.2 The American Court of Human Rights - a forerunner and innovator of international law

Several international law scholars have consistently underscored the great contribution of the IACtHR’s jurisprudence to the global human rights discourse, and there is therefore a potential for it influencing the activities of other international human rights bodies.

In addition to being the first international court to rule favourably on the communal property rights of indigenous peoples, the IACtHR’s case-law can be characterised as being precedent-setting in many other legal areas, such as the creation of the international doctrine on the compatibility of amnesty laws with international law, the issues of disappearances, women’s and children’s rights.

---


160 IACtHR, Advisory Opinion OC-5/85, para. 52.


164 The IACommHR addressed for the first time the nature and extent of states’ obligations to protect individuals from private acts of domestic violence in the context of existing large systematic problems urging legal reforms in the U.S. in the González v. U.S. case in 2011. Besides its international impact on the jurisprudence of human rights
At the Service of Human Rights: The Contribution of the Human Rights Bodies of the OAS to the Protection of Indigenous Peoples’ Communal Property

rights\textsuperscript{165} etc., which are also highly relevant for application on the current situation of indigenous peoples. The Inter-American Court and the Commission have also been innovative with regard to issues dealing with reparation issues. The case-law of both regional human rights bodies has served as a catalyst for subsequent developments with respect to furthering the international human rights protection. It has also been earlier observed in the international law doctrine that states are in general “socialized to accept new norms, values and perceptions of interest by international organizations”.\textsuperscript{166} Nowadays states are more inclined to be receptive to jurisprudential developments and have become more used to invoke them on domestic level.\textsuperscript{167} Therefore, in the view of the ILA Committee on the rights of indigenous peoples “the conclusions drawn by the (Inter-American) Court may plainly be extended outside the Latin American continent, to cover the whole planet”.\textsuperscript{168}

Suffice it to mention here a few examples which provide a testimony to the creativity of the IACtHR and to its expansive attitude towards the interpretation of existing provisions having a wide-ranging effect and visible influence on the perceptions of other regional and global judicial and quasi-judicial human rights bodies. The referred cases have subsequently been often cited and used to support the argumentation and reasoning of other human rights mechanisms.

\textsuperscript{165} IACtHR, Villagrán - Morales et al. v. Guatemala (also known as the Street Children case) Judgment of 19 November 1999. This is not only the very first international case dealing with children’s rights but it also establishes a very extensive interpretation of the right to life as to include living “conditions that guarantee a dignified existence”, para. 144.


\textsuperscript{167} See e.g. ILO, Application of Convention No 169 by domestic and international courts in Latin America, A casebook (ILO, Geneva, 2009).

\textsuperscript{168} ILA, Final Report (2012), supra note 3, p. 27.
The first case to be mentioned in this regard is the Vélasquez Rodríguez v. Honduras case from 1989, which clearly has widened the scope of the American Convention’s obligations upon states. The Court took a clear stance by clarifying and extending the boundaries for the legal obligations of states to encompass actions by non-state actors within the territory of the state in question.\(^{169}\) The impact of this particular case has been obvious in that more and more international courts and supervisory bodies devote significance to relations among private parties as well as to relations between private parties and states when safeguarding human rights is at stake.\(^{170}\)

The IACtHR was the first international court to recognise the severity of rape crimes and to rule in the Raquel Mejía v. Peru case\(^ {171}\) that rape can amount to torture. The ECHR followed this line of reasoning in the Aydin v. Turkey case\(^ {172}\), as it arrived at the conclusion that the rape of the applicant constituted a violation of Article 3 (prohibition of torture) of the ECHR.\(^ {173}\) Very recently it has been suggested that the ECHR should examine the practice of the IACtHR and the IACommHR, e.g. the ruling in the case of Aleman-Lacayo,\(^ {174}\) which included a request for interim measures to be taken by the respondent state.\(^ {175}\) Sometimes severe situations require

\(^{169}\) In this particular case the Inter-American Court of Human Rights came to the conclusion that Honduras has failed to protect civilians from non-state armed opposition groups and paramilitaries during internal armed conflict (the so called horizontal application of international human rights law).

\(^{170}\) One such example is the Ogoni land case from the year 2001, i.e. Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria, AHRLR 60.


\(^{173}\) On the other hand, there are some legal areas in which the ECHR has internationally taken the lead by decisively and progressively interpreting the relevant human rights provisions and broadening the field of protection as to include e.g. the prohibition of discrimination on the basis of sexual orientation. See P. Johnson, Homosexuality and the European Court of Human Rights (Routledge, Abingdon, 2013). The IACtHR found that sexual orientation and gender identity were protected grounds in the framework of the ACHR in its first case to be decided on this substantial issue in 2012. IACtHR, Atala Riffo and daughters v. Chile. IACtHR, Judgment of 22 February 2012, Ser. C, No. 239. Yet another example of the IACtHR using some arguments and findings of the ECHR is the recently decided case of Gretel Artavia Marillo et al (In vitro fertilization) v. Costa Rica. IACtHR, Judgment of 28 November 2012, Ser. C, No. 257.

\(^{174}\) IACtHR, Order of 2 February 1996.

\(^{175}\) E. Becue et al, ‘The administrative, tax, financial and cost hindrance against NGOs and lawyers’, in E. Lambert-Abdelgawad (ed.) supra note 166, pp. 150-159. The ECHR has continued to be influenced by the case law of the IACtHR, CAT, HRC and ICJ in
suspension of state action in between the receipt of a communication and the final determination of the case in order to avoid irreparable harm to the applicants. This may, e.g., include a high risk of environmental harm to indigenous groups as well as other kinds of imminent danger of violation of their human rights. These kinds of grave situations have occurred as a relatively recent phenomenon within the European human rights law system. Therefore, the experience of the Inter-American bodies is sought in this regard, and it has been considered as very valuable. We have earlier mentioned the impact of specific IACtHR cases on other international human rights bodies’ decisions such as the case-law on indigenous peoples of the African Commission on Human Rights, the incorporation of the protection of indigenous peoples in Article 27 of the ICCPR as well as CERD. CERD recognises the collectively held rights to land by indigenous peoples.

The foregoing leads to the conclusion that there are good prospects for international and domestic jurisprudential development in the future, based on the inter-American case-law. It can, e.g., inspire other human rights courts such as the ECtHR to bring in line their jurisprudence with current standards in the area of indigenous peoples and thereby to advance better protection under the ECHR for the Saami peoples. Within the ECHR system the possibility

its argumentation with regard to interim measures, which are occasionally issued in urgent situations, when there is a danger for irreparable harm to an applicant. The following examples are illustrative: Mamutkalov and Askarov v. Turkey, Judgment of 4 February 2005, para. 124. Judge Bonello at the ECtHR has even in his separate opinion in the Angelova v. Bulgaria case (Judgment of 13 June 2002), (para. 11) expressed the view that the European Court is “lagging behind other leading human rights tribunals”, and later on referring to the IACtHR, which has achieved a more progressive standard with regard to the protection against racial discrimination. The ECtHR referred to the case-law of the IACtHR in the Al-Adsani v. UK case (Judgment of 21 November 2001) in connection with its argumentation that the prohibition of torture constitutes an ius cogens norm. See pp. 108-112 of the Judgment.

The IACtHR has on few occasions referred to the African Commission’s case law in e.g. the Maya indigenous communities of the Toledo district v. Belize, para. 149 (2004) and Ecuador v. Colombia, para. 117 (2010).


Since November 2012 a summary of the ECtHR judgments illustrating its use of other human rights instruments as well as decisions made by other human rights bodies
to invoke collective aspects of indigenous peoples’ land rights is still contested, and no contextual adjustment in the case-law has occurred, which could be based on greater sensitivity for the indigenous peoples’ cultural particularities and the vulnerable position of indigenous peoples. The ILC’s study group on fragmentation of international law has emphasised in its finalised report that there is a principle of harmonization and a principle of systemic integration in the context of treaty interpretation.\textsuperscript{180} Some scholars have already argued that by expanding the jurisdiction of the ECtHR, the European human rights system has become “Latin Americanized”.\textsuperscript{181}

In order to consolidate international jurisprudence, it is important to ensure coherence and unity of the modern international human rights law regime, which constitutes a significant part of the international legal system, thereby preserving its integrity. The earlier referred to ILC report on fragmentation of international law has frequently emphasised that uniform application of law provides legal certainty and legal security; that sufficiently precise texts are not only reasonably foreseeable but also easier to implement. This is momentous, since it has been observed that the multiplicity of human rights treaties and monitoring bodies has made the system “increasingly complex, opaque and cumbersome”.\textsuperscript{182} Among the negative consequences presented in international adjudication of inconsistent interpretations of existing vague and lacking in detail norms in several treaties is that they create confusion as well as undermine the efficiency and legitimacy of the system.\textsuperscript{183}

\textsuperscript{180} See the Analytical Report of the Study Group of the International Law Commission, supra note 145, para. 37-43.


\textsuperscript{182} Outcome Document of Dublin II Meeting, supra note 151, p. 2.

\textsuperscript{183} Of some interest are the deliberations of the ILC, supra note 180. See also V.Tzevelekos, ‘The Use of Article 31(3)c of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement
There are different tools to achieve a uniform application of international law norms. Of mutual significance is, for example, the fact that arrangements for cooperation between regional courts already exist. Regular meetings of judges sitting on the ECtHR and the ACtHR take place on a biannual basis, and as a result of such meetings, a convergence of their jurisprudence has occurred in several respects. In addition, the good relationship between the OHCHR and the IACtHR has resulted in the establishment of fruitful collaboration practices between IACtHR judges and experts of the UN HRC on issues of significance for the indigenous peoples. Despite the fact that regional courts as well as global human rights monitoring bodies have been established with mandates to operate within different organizational frameworks they are increasingly using each other’s jurisprudence and decisions as reference point, soft law and other international law instruments of relevance in an essentially consistent manner in order to advance the interpreta-

---

184 Familiarity with current international law standards is an important prerequisite for the progressive legal development within international law jurisprudence. It has been estimated that only about 43 per cent of the judges of the ECtHR (there are currently 47 judges affiliated with the Court) have had experience and have had formal education in international law. M. Forowicz, supra note 69, p. 369.

185 The HRC’s GC No. 23 from 4 April 1994 is of significance for the issues discussed in this essay since in para. 3.2 it is stated that: “(t)o enjoy a particular culture – may consist in a way of life which is closely associated with territory and use of its resources”.

186 The protection and fulfilment of human rights is, however, at the core of the common goal and aims of global and regional organisations such as the UN, OAS and CoE. All these organisations have provisions on cooperation e.g. between the UN and OAS.

187 It has been argued that creating a system of binding precedents promotes consistency. L. Grover, ‘A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Court’, 21 European Journal of International Law 3 (2010) p. 558. In a draft concept note of the UNHCHR the importance and utility of strengthening the cooperation between global, regional and sub-regional human rights mechanisms with a view to avoid divergence in the interpretation of human rights standards has been stressed. As a consequence the Office of the UNHCHR presented a few proposals, including the establishment of a joint information sharing procedure, on how to facilitate the future dialogues between the Chairpersons of the UN treaty bodies and representatives of the treaty bodies of the African human rights system. Addis Ababa Workshop on Strengthening the cooperation between African Union human rights mechanisms and stakeholders and the UN Human Rights Treaty Bodies (25 June 2012) para. 9. The HCHR will submit a report on this workshop to the Human Rights Council at its 23rd session in 2013. Of relevance is also the fact that the
tion of the human rights treaties within their mandate through crystallisation and clarification of the meaning of the protected freedoms and rights. The reports of the UN special rapporteur on indigenous peoples reflect an integral and holistic perspective, which impedes the corrosive effect of discrepancy and disparity.

5 Concluding observations – legal advances and remaining obstacles

5.1 Witnessing the constant gradual normative evolution

“My lands are where my dead lie buried”
Tashunke Witko (Crazy Horse)

The inquiry above discloses that indigenous peoples have articulated and formulated their needs, aspirations and legal perspectives on land rights generally in terms of international law and have advocated them as matters of human rights protection particularly. Reliance on international human rights law appears to have in several instances led to clearly beneficial results for indigenous peoples in that it has been established that sacred places and their ancestral lands are to be protected not at discretion but as a matter of human rights.

Turning attention to the specific needs of indigenous peoples through the use of the particular lens of human rights protection

UN Secretary-General has been requested to report annually to the HR Council on remaining obstacles to the improvement of the harmonisation and standardisation of the work of the UN human rights treaty bodies in order to create greater foreseeability and efficiency. See UN Doc. A/HRC/22/21 (8 December 2012). On cross-referencing of e.g. recommendations of special procedures and treaty bodies within the UN see UN Doc. A/65/190 (6 August 2010) para. 49.

has provided valuable recourse to a crucial legal remedy especially through the dynamic jurisprudence of international human rights courts and treaty bodies189 in the course of an expansive interpretation and re-interpretation of the existing normative framework, including the use of newly elaborated documents such as the UN-DIPR.

For several reasons indigenous peoples have chosen to use the legal label of human rights for grounding their concerns and as justification for their claims rather than decolonization language190 despite the fact that their situation in the Americas, Australia and New Zealand has been categorised by some academic commentators as “internal colonization”. This choice does not, however, per se solve the existing problems.191 The apparent justification for safeguarding indigenous peoples’ rights in international jurisprudence is preservation of their autonomy and cultural integrity192 and cultural diversity in general. Irrespective of their diversity, i.e. belonging to various indigenous communities with different cultures, different historical circumstances and present conditions193, indigenous peoples around the world share common needs based on holistic and spiritual perspectives and they confront similar

189 As Mr Eide has recalled the indigenous peoples’ “past experiences have, in most cases, given them little confidence in the governments that rule over them”, ‘The Indigenous Peoples, The Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples’, in C.Charters & R.Stavenhagen (eds.) supra note 6, p. 41.
191 There is an obvious legal link between decolonisation and the right to self-determination. The problem is, however, that the principle of self-determination of peoples with very few exceptions is understood in its classical scope in contemporary international law, i.e. excluding its application in its entirety with respect to the situation of indigenous peoples.
192 See e.g para. 281 in the Xákmok Community v. Paraguay case from 2010 where the IACtHR emphasised that the ownership of the traditional land is for the indigenous community in question “indissoluble and fundamental for its cultural subsistence”.
193 The case-law which has been reviewed earlier in this essay has demonstrated that current problems in regard to indigenous peoples’ land rights may include a wide range of legal issues such as failure to acknowledge indigenous occupancy, failure to attach full rights to such an occupancy or absence of legal status with respect to indigenous peoples’ territorial rights, refusal to honour past treaties, failure to demarcate indigenous territories, etc.
types of difficulties as a result of colonization and historic injustices that they have suffered. These circumstances do not exclude the circumstance that dissimilar measures might be required domestically in order to resolve land conflicts in various countries.194

The IACtHR’s jurisprudence dealing with different aspects of indigenous peoples’ claims is certainly influential and constitutes a great contribution to the process of rapid contextual evolution of contemporary international law.195 It paves the way for “the construction of a new *jus gentium* at the beginning of the XXIst century, no longer State-centric, but turned rather to the fulfilment of the needs of protection and aspirations of human beings and human-kind as a whole”.196 The IACtHR has provided ground-breaking precedents of relevance for indigenous peoples’ land rights, *i.e.* reflecting their own definition of property and thereby contributing to the understanding of the special nature of property rights in this context. As already pointed out, the IACtHR’s jurisprudence holds relevance beyond the regional context. The Inter-American system is to the advantage of indigenous communities in that its jurisprudence has served to fill existing gaps globally caused by, *e.g.*, the fact that both UN Covenants omit the right to property in their human rights catalogues.197 Furthermore, the ILO complaint mechanism is only available to governments, syndicates and employer organisations.198

In sum, through evolutionary and integrative interpretation and comprehension of the right to property as part of the *corpus iuris* of international human rights law the IACtHR has clarified the con-

---

195 The Inter-American system has, therefore, been considered as “an effective vehicle for the land’s claims” of indigenous peoples and the jurisprudence of the IACtHR as being a powerful tool for change. A. Fuentes, *supra* note 20, pp. 252 and 253.
197 On the other hand, the case-law of the HRC suggests that complainants dealing with the right to use land or other natural resources have been reviewed by the Committee, albeit on the basis of linking the issue with livelihoods of indigenous peoples. In addition, para. 3.2 of the HRC’s GC No. 23 clearly states that “(t)he enjoyment of a particular culture may consist in a way of life which is closely associated with territory and use of resources.” HRC GC No. 23 on article 27 of the ICCPR (1994), UN HRI/GEN/Rev.3, p. 40.
198 C.M.Bailliet, *supra* note 75, p. 97. Nevertheless, indigenous groups may send relevant information to the members of the Commission of Experts who can use it in their country reports.
cept “land rights” within a new paradigm, i.e. in the context of indigenous peoples’ situation and thereby identified a number of legally relevant aspects and components as included within the scope of its protection under the American Convention on Human Rights.

The Court has, to begin with, linked different decisive elements with regard to indigenous peoples’ communal property such as the still existing i.e. “keeping alive” spiritual and material connection to the traditional lands in question, which may be expressed in various ways by different indigenous groups, as being vital for their cultural identity and a “life in dignity”, which has to be safeguarded. As long as this special relation to ancestral lands exists there is, albeit limited, conventional obligation for member states, not only in an abstract manner, to recognise but specifically to identify, delimit, demarcate and grant legal title of the land as well as to formally transfer the specific traditional lands belonging to indigenous communities. In other words, providing there is maintenance of cultural attachment199 and “unless the lands have been lawfully transferred to third parties in good faith”200, there is a right for indigenous peoples to restitution when they have been recently, forcibly deprived of their lands.201 The discussed jurisprudence in this essay bears witness of the legal evolution which has been achieved in relation to legal recognition of land rights, including demarcation of occupied land territories, but that difficulties are encountered, especially with respect to the restoration of lands, from which indigenous peoples have been removed in the past.202 In other words, the right to communal property is not absolute, since it has been conditioned.203 It has been maintained in the liter-

199 Dr. Fuentes has referred to several views on this subject matter, which have been presented in the international law doctrine, supra note 20, p. 329, footnote 88.
200 IACtHR, Sawhoyamaxa Indigenous Community v. Paraguay, para. 128.
201 The time aspect has been interpreted that the right to return cannot cover claims which are solely “grounded on historical or ancestral lands whose possession had been lost in the colonisation process or in the formation of the modern States”. A.Fuentes, supra note 20, p. 338.
202 The highest percentage of indigenous descendants remaining on ancestral land is to be found in the Arctic. J.M. Marshall III, supra note 18, p. 143. Thus, the great portion of indigenous peoples has been displaced otherwise to infertile lands or reservations.
203 See E.A. Daes, Principal Problems Regarding Indigenous Land Rights, supra note 9, p. 483.
204 The IACtHR’s jurisprudence has exemplified that limitations of the right must: 1) be previously established by law; 2) have legitimate objective and be in the interest of the
Maja Kirilova Eriksson

ature that unless agreement can be achieved that the principle of self-determination in general international law, which belongs to the normative category of *ius cogens* and which imposes obligations *erga omnes*, should also be applied in its classical meaning to indigenous peoples, the issue of land rights will continue to be addressed by the courts and quasi-judicial bodies in a manner requiring balance between the different - often opposed - interests that are involved in a dispute.205

The IACtHR has, nevertheless, established a number of important safeguards in cases when restrictions and limitations on the right to communal property are necessary. In summarizing the outcome of the case-law, the essential guarantees include: 1) a right to previous consultation for indigenous peoples, *i.e.* the effective participation in decision-making processes regarding their lands or natural resources206; 2) that no concession will be issued within indigenous lands unless and until an independent and technically capable institution with the state’s supervision has carried out a prior environmental impact assessment, and finally; 3) members of the community should be assured some benefit in a reasonable way

---


206 The Court has specified that the state must ensure that the process has to be carried out in “previous, effective and fully informed consultation”. See IACtHR, *Saramaka People v. Suriname*, Judgment on Preliminary Objections, Merits, Reparations and Costs, para. 194. With respect to the right to free, prior and informed consent to a development project academic writers have taken the position that it is evolving customary international law and such a right is gaining wide support globally and regionally. C.Lewis, ‘Corporate responsibility to respect the rights of minorities and indigenous peoples’, in Minority Rights Group International, *Briefing* (October 2012) p. 8. In the view of the ILA there is a right to veto with respect to measures of relocation of indigenous peoples from their lands and territories. ILA, Committee on the Rights of Indigenous Peoples, Final Report presented at the ILA Conference in Sofia 2012, p. 7. In addition, the Committee has expressed the view that such a right exists also with regard to measures resulting in taking lands, territories and resources but also storage or disposal of hazardous materials in the lands of indigenous peoples. See also UN Doc. A/69/L.1, (15 September 2014) para. 3, 20 and 21.
from *e.g.* development projects. Lastly, even though the restitution\textsuperscript{207} of land generally is the preferred solution of legal disputes for indigenous peoples, there is a right to compensation if restitution is impossible and loss of ancestral lands has occurred.\textsuperscript{208}

In conclusion, the jurisprudence of the IACtHR gives evidence to existing, great potentials for those who cannot get justice at a national level to be able to seek redress at the international level for being exposed to human rights violations. The Inter-American Court has, clearly, addressed violations of the communal land rights holistically, which is a rarely available alternative within the frames of traditional domestic litigation systems. The same is also true for the Court’s collective approach in connection to awarding of reparations as well as to the protection of fundamental human rights.\textsuperscript{209}

It is beyond dispute that the normative work is indispensable for advancing the international law protection of indigenous peoples’ rights. However, this article shows also that the classical human rights supervisory mechanisms as institutional safeguards have an important role to play in the promotion and protection of human rights. The consideration of petitions constitutes a framework of direct protection of individual members as well as indigenous communities as such. In this way justice may be achieved for wrongful seizing of their lands and resources. Indigenous peoples have therefore more often begun to use international courts and other international mechanisms as channels through which to secure their claims to traditional lands. By taking a look at the list of the delivered judgments by the IACtHR and reports of the IACommHR, it becomes apparent that there is a recognisable trend of a steady rise in the number of cases dealing with various aspects of indigenous peoples’ land rights. In addition, the IACtHR’s jurisprudence plays a positive role in making it easier for states to comply with human rights norms, by which they are bound, since diffuse legal concepts and uncertain parameters of

\textsuperscript{207} Compensation is clearly a lower standard of reparations than restitution (restoring something to the rightful owner).

\textsuperscript{208} For many indigenous peoples “No amount of money could pay for destroying a whole way of life”, which may be the result of *e.g.* uprooting communities. See L.Two Ravens Irwin & R.Liebert, *supra* note 12, p. 43.

\textsuperscript{209} V.Saranti, *supra* note 33, p. 427.
state obligations tend to open up for the use of discretionary powers and constitute an impediment to full compliance.

5.2 Ensuring compliance with the judgments of the Inter-American Court of Human Rights

5.2.1 Commitment to international human rights standards and acceptance of international scrutiny

Despite the fact that the groundwork has been laid, there are a number of factors, which continue to hamper the progressive legal development. The first and foremost challenge on closer examination is the circumstance that the doctrine of state sovereignty, which places limitations on international scrutiny, still forms the very basis of public international law.\textsuperscript{210} Despite several propositions that the international law system should be reorganised on the basis of a new anthropological basis\textsuperscript{211}, the sovereign states continue to be the main components in the international architecture established by the Westphalia peace treaties.\textsuperscript{212} States remain the primary actors on the arena of contemporary international law. States are thus the primary bearers of international responsibility for the implementation of the provisions of human rights treaties, to which they themselves decide whether or not to adhere to. Despite that ratification of a treaty does not \textit{per se} guarantee compliance with its norms, it signals that the treaty party is willing to commit to the aims and ideas behind that treaty. States with large populations of indigenous peoples (\textit{e.g.} the U.S. and Canada)\textsuperscript{213} have regrettably abstained from becoming a party to the ACHR,


\textsuperscript{211} F.F.Carvalho Vecoso and A. de Amaral Júnior, \textit{supra} note 159, p. 8.

\textsuperscript{212} Nevertheless, supranational entities such as the EU and international organisations with their own legal personality as well as networks of NGOs have increasingly become important actors in international relations.

\textsuperscript{213} It has been estimated that 1.8 million people have been registered as members in indigenous tribes in the U.S. while some 6 million have determined themselves as being indigenous persons. The numbers for Canada show some 1.2 million people as indigenous. V.Saranti, \textit{supra} note 33, p. 433, footnote 23. Nevertheless, as already mentioned before, the IACmHR has applied the standards enshrined in the American Declaration on the Rights and Duties of Man when reviewing the human rights situation in the U.S. and Canada.
which sets hurdles for the effective performance of the system and impacts negatively on the human rights protection of these communities.

Furthermore, courts and quasi-judicial bodies’ complaint procedures are crucial for the realisation of human rights. A problematic aspect and an apparent weakness of the Inter-American human rights system is the consensual basis for the binding jurisdiction of the Inter-American Court, which limits its capacity. In other words, not all states that are parties to the American Convention on Human Rights have recognised the jurisdiction of the IACtHR, which, needless to say, decreases the impact and the effectiveness of that treaty. On the other hand, as a matter of the good faith principle, states parties to a treaty but who have not accepted the contentious jurisdiction of the relevant monitoring body are still expected to consider the interpretation by this respective body when applying the human rights provisions in the domestic context.

In addition, the Inter-American Court has been empowered with only subsidiary jurisdiction in relation to the national judicial systems. Thus, the principle of subsidiarity lies also beneath the Inter-American human rights system. It has been expressed through the requirement that the available effective domestic remedies must be exhausted before an individual or groups may submit a petition alleging violation by a member state to the IACCommHR. The principle of subsidiarity means that states parties to a treaty have the primary duty and responsibility to protect and guarantee the human rights, to prevent their violation and to ensure effective remedies in the domestic order. This has been captured by the words of Petter Wille as follows: “the national implementation should always be regarded as the alpha and omega of the protec-

tion of human rights”. The suggestion that national implement-
ination, i.e. “bring the rights home”, is still a key to international law
enforcement has been a slogan in Strasbourg for a while.

A logical invention following from the principle of subsidiary is
the doctrine of ‘margin of appreciation’. Born within the Stra-
bourg system for human rights protection, this technique is part
of the state-centred vision of international law, since it gives
states some leeway for action by assigning certain subject matters
to certain decision-making authorities.

The doctrine has in recent times attracted criticism by academic
writers and judges alike on the grounds that it leaves room to
states to handle sensitive issues short of predictability. It has even
been claimed in the scholarly writing that: “Properly analysed, the
doctrine of margin of appreciation is at best redundant and at
worst a danger to the liberal-egalitarian values which underline
human rights” as well as that it constitutes “a general inhibitor to
reception across the general and special regimes”. Having in
mind that application of the ‘margin of appreciation’ can be con-

216 P.F.Wille, The Council of Europe: A Champion in Monitoring Implementation of
Human Rights Standards?, in A.Eide et al (eds.), supra note 9, p. 231. See also M.Serrano,
‘The human rights regime in the Americas: Theory and Reality’, in M.Serrano and
V.Popovski (eds.), Human Rights Regimes in the Americas (UN University Press, Tokyo,
217 O.Zetterquist, ‘Strasbourg, Luxembourg - we have a problem - Reflektioner om ett
litet HD-uppror’, in M.Derlén & J.Lindholm (eds.), Festskrift till Pär Hallström (Iustus
förlag, Uppsala 2012) p. 357.
218 The 2012 Brighton high level meeting on the reform of the ECtHR decided on the
contrary to invite the Minister Committee of the CoE to adopt necessary amendments
to the ECtHR by the end of 2013 and to include the principle of ‘margin of apprecia-
tion’ verbally. See CoE, The Brighton Declaration of 20 April 2012. A great number of
NGOs as well as human rights institutions have opposed the proposed draft Protocol
No. 15 to the ECHR. See, AI, EHRAC, Redress et al, Open letter to all member states
of the Council of Europe, Draft Protocol 15 to the European Convention on Human
Rights: a reference to the doctrine of the margin of appreciation in the Preamble of the
Convention (15 April 2013).
219 Also the preamble of the UN DRIP does not change this state of affairs. As has
been maintained, the Declaration preserves “the right of the states that have established
dominance over them (indigenous peoples) and exerted power over their historical
territories and natural resources in these particular territories”. I.Muleshkova, supra note
8, p. 59. The limited scope of the right to self-determination provides an evidence for
that.
220 L.Crema, ‘Desappearance and New Sightings of Restrictive Interpretation(s)’, 21
221 G.Letsas, supra note 152, p. 531.
222 M.Forowicz, supra note 69, p. 373.
considered as “a potential pathway to impunity”\textsuperscript{223}, the IACtHR has often demonstrated a “reluctant attitude with regard to properly name and to openly verbalize the use of the `margin of appreciation doctrine’”.\textsuperscript{224} On the other hand, it has been observed within the literature on international law that with regard to the preferences of the IACtHR to use other international instruments and relevant municipal law in politically “delicate contexts, such as indigenous rights”, domestic law “seems to play a larger role in interpreting the American Convention”.\textsuperscript{225}

5.2.2 Domestic implementation of the American Convention and the judgments of the Inter-American Court of Human Rights

Article 2 of the American Convention clearly requires states parties to give domestic effect of its provisions and to ensure that their domestic laws are compatible. The IACtHR has in its Advisory Opinion No. 14 clarified states’ responsibility to bring domestic legislation into compliance with international human rights obligations by way of amendments, repeal or adoption.\textsuperscript{226} To review the compatibility of domestic laws with the American Convention may lead to a greater degree of harmonisation of domestic laws on the regional as well as global level. International law determines in this way the validity of national legal systems. Nevertheless, each state has the discretion to decide in which manner its domestic law shall

\begin{itemize}
  \item \textsuperscript{223} S.C.Grover, \textit{supra} note 84, p. 62.
  \item \textsuperscript{224} A. Fuentes, \textit{supra} note 20, p. 316.
  \item \textsuperscript{225} L. Lixinski, \textit{supra} note 56, p. 603. It seems, thus, that the Court is cautious in sensitive subject matters not to push too far and too quickly the legal development forward, which could result in some states’ withdrawal from the Convention regime. This happened in the case of Trinidad and Tobago and the recent withdrawal made by the Government of Venezuela. UN News Centre at \textless www.un.org/news \textgreater visited on 4 May 2012, UN concerned over Venezuela’s possible withdrawal from human rights body; \textless www.un.org/news \textgreater visited on 12 September 2012, Top UN Official urges Venezuela to reconsider withdrawal from Human Rights Convention. UNHCHR expressed on 11 September 2012 her deepest concern about Venezuela’s decision to denounce the American Convention of Human Rights. See UN \textless news5@scinf00.un.org\textgreater; \textless www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx\textgreater visited on 12 September 2012.
  \item \textsuperscript{226} IACtHR, International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94.
\end{itemize}
provide for execution of international obligations. There are various solutions.\textsuperscript{227} In a monistic legal system norms of international law, including jurisprudence, are frequently applied automatically in the domestic legal system. The monistic approach places domestic courts in easier position to implement treaty obligations, and this technique probably creates greater willingness for the concerned authorities to consider the outcomes of international jurisprudence. In contrast, in dualistic systems, if the American Convention has not become part of the domestic law, international decisions are usually not considered as being of self-executing character and will, therefore, not be directly enforceable domestically. This may explain the primary concern, which has been raised, and the main remaining problem facing the function of the human rights systems as being linked to the enforcement of judgments and decisions of international supervisory bodies. At the same time it has been acknowledged that human rights treaties “are meaningful only insofar as they are applied by domestic courts and executive organs”.\textsuperscript{228} To invoke international human rights standards on the national level continues to be of utmost importance and adequate interpretation of the current international standards must be followed by their practical application and effective implementation on the domestic level at all strata of governance in order to guarantee their enjoyment in the day-to-day lives of indigenous peoples.

Furthermore, Article 68 of the American Convention obliges states parties to comply with the IACtHR’s judgments, \textit{i.e.} to reach some result through appropriate legal measures, administrative practices etc., when a breach of it has been established. The IACtHR orders frequently far-reaching remedial measures to be enacted by the respondent state in cases of breach of the American Convention. The concerned government is requested to take indi-

\textsuperscript{227} The majority of the OAS member states have predominantly a monist tradition, while countries with a common law tradition are mostly associated with a dualistic view on the relationship between international and domestic law. As Daphne Barak-Erez has pointed out “any evaluation of the impact of international law on national jurisprudence must start from the question whether norms of international law have direct effect in local law”. D. Barak-Erez, ‘The international law of human rights and constitutional law: a case study of an expanding dialogue’, 2 \textit{New York University School of Law} 4 (2004) p. 613.

\textsuperscript{228} B. Conforti and A. Labella, \textit{supra} note 24, p. 6.
individual as well as general measures to remedy the situation in order to prevent similar abuses in the future. Thus, the state’s actions may comprise involvement of the legislature, executive and judiciary (national courts).

The IACtHR has, in recent years made it more difficult for states and their authorities to ignore its verdicts. Some academic commentators have interpreted the Court’s rulings in the *Barrios Alto* case as presuming that the Inter-American Court’s judgments have a self-executing character and that the American Convention as such assumes the self-execution of the Court’s judgments. The IACtHR orders are characterised by a high degree of specificity in contrast to the ECHR, which allows states in breach of their conventional obligations to choose the tools for remedy. Thus, compliance with the American Convention and the Court’s judgments is no longer entirely left to the concerned states to do as they see fit with the help of various domestic measures.

Achievements on the international level may be curtailed by unwilling governments as well as domestic authorities and courts. Decisions of international monitoring mechanisms at times and on different occasions have been seen by some governments as an intrusion in their domestic affairs. It seems that domestic judges tend to resist international jurisprudence, which they may perceive as “intrusion from abroad” and “infringements upon national sovereignty”. One possible explanation for this

---

229 This obligation implies that the state must erase the consequences suffered by the applicant/s in order to achieve *restitutio in integrum* including payment of just satisfaction.

230 Appropriate general measures encompass an obligation to prevent repetitive violation/s of the Convention as well as establishing adequate remedies to deal with violations already committed. This kind of measures may also include a review of legislation and/or judicial practice causing systematic problems. See G.Nicolaou, *The New Perspective on the European Court of Human Rights on the Effectiveness of its Judgments, 31 Human Rights Law Journal* (2011), p.273.


232 Successful implementation of international standards on indigenous peoples’ rights remains in the words of Vital Bambanze “an elusive goal”.


negative attitude, which evidently constitutes an impediment to the implementation of international jurisprudence on national level, can be found in the fact that the majority of domestic judges in the region still lack skills, substantial knowledge about and experience of how to apply international human rights law in practice. Therefore, in order to achieve greater compliance with judgments of the IACtHR, the Inter-American Court needs to “directly engage with national justice systems”. Education and training of judges as well as legislators and civil society about the IACtHR’s role and its jurisprudence will most probably lead to better and effective implementation. In addition, domestic highest courts (Constitutional or Supreme Courts) should play an active role in the implementation of the ACHR by adapting their jurisprudence to the case-law of the IACtHR, i.e. effectively integrating it in domestic adjudication, and thereby providing guidance to courts on the lower levels.

The above mentioned shortcomings and suggestions to overcome them should be valid for other human rights systems as well. We may find some examples of expressed little readiness by domestic judges to act in accordance with findings in international judgments also within the Strasbourg system. Lord Irvine’s speech of 16 December 2011 is illustrative in this regard when he stated that: “the fact that the ECtHR has repeatedly endorsed a particular proposition does not through some process of alchemy transform the nature of the domestic Court’s duty. If the European Court has overlooked or misunderstood some important fact, argument or point of principle then the domestic Court should not regard itself as bound to follow it”.

example the Brazilian Government’s resistance to the IACtHR’s order on precautionary measures comprising suspension of construction of a hydroelectric plant on indigenous peoples’ lands. The ground for the Court’s decision was evidential deficiencies in the licensing process. Ibid. p. 137.

Conducted research at the Brazilian State Court in Rio de Janeiro has revealed that as much as 84 per cent of the judges participating in the survey were missing formal education in international human rights. M.N. Bernardes, ibid., p. 139.

A.Huneeus, supra note 163, p. 504. The term compliance is usually understood in this context as the implementation of the Court’s order. The need of cooperation and dialogue between ECtHR and domestic courts was realised at the CM’s Conferences in Interlaken in 2010, in Izmir in 2011 and in Brighton in 2012.

Lord Irvine, "A British Interpretation of Convention Rights", The Bingham Centre for the Rule of Law at: <www.ucl.ac.uk/laws/judicial-institute/docs/Lord_irvine_Convention
It is notable, however, on the positive side and in addition to the above said, that there are a number of encouraging examples of domestic cases within the realm of operation of the American Convention, where deserved attention has been paid to indigenous peoples’ rights by referring to current international law including the then draft UNDIPR and the IACtHR’s jurisprudence in their claims to ownership and jurisdiction of their traditional territories.\(^\text{238}\) Thus, the IACtHR has had a strong normative influence on states parties and it is continuing constantly to help them to reform their legal systems. Strong domestic institutions, which have capability and willingness to implement international human rights law, are a critical factor to improve states’ conformity with the IACtHR’s judgments.

5.3 Supervision of states’ compliance with the judgments of the IACtHR
The IACtHR has inherent power to monitor states’ compliance with its own judgments\(^\text{239}\) by ordering states to report within a
specified time period on the actions, which they have carried out in order to meet the Court’s demands. The victims and the IACommHR may comment upon self-reports of the states.\textsuperscript{240} Since the beginning of the 1990s the Court has begun to adopt resolutions and to issue compliance reports, which evaluate the concerned states’ compliance. These reports are nowadays accessible at the Court’s website, which is a welcome positive development. Widely disseminated jurisprudence is thus a significant tool for achieving better compliance with human rights norms, since it contributes and assists states to develop compatible national standards on the issues in question. Increased compliance with the Court’s jurisprudence inevitably strengthens also the Court’s legitimacy and standing.

Notwithstanding that the Court will keep its jurisdiction in the matter until adequate and full compliance with its rulings has been achieved, a majority of the concerned states continue to encounter difficulties in securing prompt compliance and fall short of performance. In respect with Court verdicts related to land rights, it is only the judgment in the \textit{Awas Tingui} case, up to the present, which has been fully implemented by the Government of Nicaragua. This is regrettable, since that kind of cases and the related judgments affect a great number of people and they affect the effectiveness of the whole human rights system.

The destructive inaction of, \textit{e.g.}, the Government of Paraguay and the failure to comply with the IACtHR’s judgments to uphold the communities’ land rights as identified in the IACtHR’s judgments in the \textit{Yakye Axa} and \textit{Sawboyamaza} cases, illustrates that the system is far from being fully effective. The Court ordered the respondent state to ensure effective use and enjoyment of the communities’ traditional lands. The Court’s three-year deadline for the implementation of its ruling in the \textit{Yakye Axa} case, which should be considered as a long time\textsuperscript{241}, passed on 13 July 2008 and for the

\textsuperscript{240} A.Huneeus, \textit{supra} note 163, p. 501.

\textsuperscript{241} Long lasting execution period is common also within the CoE. According to the latest available statistics there were 514 cases pending less than two years, 545 for two to five years and 278 for more than five years, CoE, Committee of Ministers, \textit{Annual Report} (CoE, Strasbourg, 2012) p. 11. It has been suggested that the average compliance
Sawhoyamaxa case on 19 May 2009. The UN Permanent Forum of Indigenous peoples established in its report on the Mission to Paraguay in 2009 that the living conditions of the concerned communities have basically not changed since the adoption of the two judgments.242 It seems from the above said that the Inter-American Court has not been enough persuasive to convince the respondent state of the importance of compliance with its judgments, since the Paraguayan Congress voted against the return of the ancestral lands to the Yakye Axa community in 2009.243 Despite the Court’s repeated warnings that the case will only be closed when the judgments are fully implemented the domestic authorities have not yet implemented them.244 Needless to say, substantial delays and unsolved cases may create a high number of repetitive cases and thereby jeopardise the Court’s effectiveness in the long run. Negotiations between the concerned indigenous community and the Paraguayan Government began, however, in January 2013.

The low level of compliance with the Court’s judgments in general is unsatisfactory and the above examples show that governments, even though generally avoiding to be exposed in negative light, which undermines their credibility internationally, still do not fully fulfil their international obligations. Depending on the requested measures, compliance can take many various forms different degrees.245 Therefore, more and more scholars have begun to

244 Amnesty International has expressed concern about the fact that some national authorities still question the claims of the communities. Amnesty International, Paraguay, Briefing to the Committee on the Elimination of Racial Discrimination (August 2011) p. 15.
challenge compliance rates as “a useful measure of the effects of legal regimes”. That notwithstanding, it is alarming and worrisome to know that currently only about 12 per cent of the total cases decided by the IACtHR have been fully complied with by the concerned states. One explanation for this situation may be that in case of failure to comply with the IACtHR’s judgments in contentious cases of breach of the ACHR or the Court’s order of provisional measures, there are no effective tools to enforce sanctions for this kind of disobedience. There is mainly a political dimension within the OAS, manifested, among others, in the ability to exercise political pressure on defaulting states to improve their human rights records with the help of the rather weak measure of political condemnation/reputational sanctions, i.e. the so called tactics of “name and shame”, exerted onto the state in violation with the aim to bring forth embarrassment for the respondent government. In other words, mentioning explicitly of the failure of a particular government in the Court’s annual report to the OAS’s GA, the GA can on its turn through resolutions encourage the state in question to comply with the Court’s decision (Article 65 of the American Convention). Nevertheless, the ACHR does not confer a duty to a political body within the organisation to ensure execution of the Court’s judgments as is the case within the CoE. After that the ECtHR has issued its rulings on requested reparations it leaves the case to the Committee of Ministers of Foreign Affairs, which will keep it on its agenda until satisfied with the response of the respondent government. In other words, it is the highest political

246 A.Huneeus, supra note 163, p. 505.
247 D.Rodríguez-Pinzón and C.Martin, supra note 120, p. 379; G.L.Neuman, supra note 159, p. 104. Detailed information on the compliant rate with regard to different remedies, i.e. depending on type of measure, can be found in F.Basch et al, ‘The Effectiveness of the Inter-American System of Human Rights protection: A Quantative Approach to its Functioning and Compliance with its Decisions’, 7 sur- international journal on human rights 12 (2010) pp. 9-35. For information on the compliance rate within the UN system see N.Pillay, Strengthening the United Nations human rights treaty body system, a report by the United Nations High Commissioner for Human Rights (UN Geneva, 2012) p. 9 et seq. See also Follow-up to decisions, UN Doc. HRI/ICM/2009/7 (11 November 2009), 10th inter-committee meeting of human rights treaty bodies.
248 The IACommHR has regularly carried out a follow-up of cases included in its report during the last 12 years.
body of the organisation, the CM\textsuperscript{249}, which monitors compliance and has an enforcement role in that it supervises the execution of the ECtHR judgments.\textsuperscript{250} The CM may decide in cases of serious shortcomings and refusal by member states to comply with a final judgment to bring proceedings before the Grand Chamber of the ECtHR, on suspending of voting rights in the CM as well as the state’s expulsion from the organisation (Article 8 of the CoE’s Statute). The available ultimate sanction, i.e. “ultima remedia” relating to expulsion has, however, never been used, probably for political reasons. It has remained as an empty threat. There are a number of examples of member states refusing to comply with the ECtHR’s orders even in urgent situations\textsuperscript{251} and despite resolutions establishing a duty for treaty parties to co-operate with the Court.\textsuperscript{252} When the respondent state has implemented the ECtHR’s judgment in a satisfactory manner the CM will issue a final resolution as an indication that the execution of the judgment is completed.

Summing up, it seems that states’ reluctance to effectively enforce international decisions to a certain degree depends on circumstances related to whether the issue at hand is considered as politically sensitive and controversial as well as its complexity. The reluctance of the highest organs within the OAS and the CoE is likewise based on their political nature.

\textsuperscript{249} The obligation of states to abide by the judgments of the ECtHR to which they are party can be found in the Committee’s Rules of Procedure (Rule 6(2)).

\textsuperscript{250} The Inter-American system for the protection of human rights is currently lacking a similar formal procedure for monitoring states’ compliance with the ACtHR’s judgments. The annual reports of the IACtHR contain relevant factual figures such as the percentage of compliance with regard to reparation orders by the Court.

\textsuperscript{251} This is most frequently the case when states refuse to suspend extradition and expulsion orders. See generally, E.Lambert - Abdelgawad (ed.), supra note 166. See also C.Hillebrecht, ‘Implementing International Human Rights Law at Home: Domestic Politics and the European Court on Human Rights’, 13 \textit{Human Rights Review} 3 (2012) pp. 279-301. Cecilia Naddeo has characterised the CM’s monitoring procedure \textit{vis-à-vis} the ECtHR’s judgments as “a politically-charged process in which appraisal of compliance might function as a bargaining chip for other completely unrelated concerns of the states”. C.C.Naddeo, ‘Praising the Region: What Might a Complementary Criminal Justice System Learn from the Inter-American Court of Human Rights?’, in L.van den Hervik and C.Stahn (eds), \textit{supra} note 145, p. 200.

\textsuperscript{252} CoE, PACE, Res. 1571 (2007), \textit{Council of Europe Member States’ duty to co-operate with the European Court of Human Rights} available at: <www.assembly.coe.int/> visited on 14 April 2013.
5.4 Looking forward

The earlier identified progressive developments with regard to indigenous peoples’ rights through international litigations leading to greater sensitisation of international law, especially human rights law, and creating a more conductive environment for their realisation are not sufficient, since they have their limitations. The legal achievements must be complemented by a variety of other initiatives of a different kind, policies and actions by several actors, as has been made evident in the excellent reports of the UN Special Rapporteur on Indigenous Peoples and the work carried out within the framework of the UN Permanent Forum on Indigenous Issues, which was established in 2000.

In this regard mention should be made of the fact that the IAC-tHR distinguishes itself as being a forerunner in international human rights law also because it has ordered in many of its judgments, e.g. the rulings in the Yakye Axa and Sawhoyamaxa cases, as a measure of satisfaction the respondent government to publish its judgments in official gazettes and other national daily newspapers as well as financing broadcasting of parts of the judgments in the language indicated by the indigenous communities and in a radio station accessible to them. The Court has ordered on several other occasions the respondent state to force national mass media to disseminate its judgments. We witness therefore today a parallel to major achievements in the international legal sphere a trend of growing and broader public awareness around the globe of the indigenous peoples’ main concerns, thereby promoting a culture of respect for their rights and building up a new relationship between indigenous peoples, states and societies at large. The growing support for the indigenous peoples’ claims in general and the renewed commitment to address violations suffered by indigenous peoples is promising and it can be illustrated by some efforts made in public media to impact on public opinion. For example, the complexity of the issues related to indigenous peoples’ communal

---

253 Notable in this regard is the remark of the UN Deputy Secretary-General delivered at the closing session of the world summit on 23 September 2014 saying that: “The future we want is one where all indigenous peoples realize their human rights”. UN Doc. GA/11559 at http://www.un.org/News/Press/docs/2014/dsgsm801.doc.htm

254 A.R.Montes and G.T.Cisneros, supra note 6, p. 164. See also R.Kuokkanen, supra note 205, p. 244.
land rights has been captured in an easily comprehensible way in several recent documentary DVD productions such as *Children of the Jaguar*, *Birdwatchers*, *In the Light of Reverence; Protecting America’s sacred lands*.255

The results of this survey are encouraging and there is a ray of hope for indigenous peoples. As a Saami proverb articulates it: “The night is not so long that the day never comes”.256 The consistent jurisprudence of the IACtHR has contributed to the increasing importance of international human rights law, which inspires this author to make a final optimistic observation. The UN GA adopted resolution No. 65/198 on 21 December 2010 and resolution No. 66/296 on 17 September 2012 on a High-level Plenary Meeting of the General Assembly also known as the World Conference on Indigenous Peoples to be held on 22 and 23 September 2014. According to the planning, the gathering will deal among other issues with the doctrine of “discovery”257, which has

---

255 The recent offer made by the artist Johny Depp to buy land at the site of Wounded Knee massacre and give it back to the Oglala Tribe was among the first page news in the *Rapid City Journal*. See D.Simmons-Ritchie, *Lakota consider Depp’s offer*, RCJ (12 July 2013) p. 1. Mentioned should be made of the Department of the Interior’s announcement in December 2013 on the first cooperative agreement between the By-Back Program for Tribal Nations and the Oglala Sioux Tribe of the Pine Ridge Reservation. U.S. Department of the Interior, 9 December 2013 at interior_news@ios.doi.gov.


257 At the center for discussions during the 11th session of the UN Permanent Forum on Indigenous Issues in 2012 was the special theme “The Doctrine of Discovery: its enduring impact on indigenous peoples and the right to redress for past conquests (Articles 28 and 37 of the UN Declaration on the Rights of Indigenous Peoples”). It was strongly emphasized that this doctrine constituted the root of the egregious violations of indigenous peoples’, collective as well as individual rights. Discovery has, in other words, been used as a means to obtain legal title to land (property) since colonization was considered as an irreversible fact by many governments. The doctrine of discovery has been articulated by the American Supreme Court in a number of cases when arguing that the European explorers gained a superior title to the lands and thereby leaving just a right to temporary occupancy for the indigenous owners. V.Deloria Jr. and D.E.Wilkins, *The Legal Universe, Observations on the Foundations of American Law* (Fulcrum Publishing, Golden, 2011) p. 8. Closely connected with this doctrine is the concept of “Manifest Destiny” as “the apparent God-given right of Euro-Americans to conquer and assume control over the continent”. J.M.Marshall III, supra note 18, p. 49. See also E.McGaa, *Nature’s Way* (Harper Publishing, San Francisco, 2004) p. 187. See, in addition, on this topic P.Keal, European Conquest and the Rights of Indigenous Peoples: the Moral Backwardness of International Society, in *Cambridge Studies in International Relations* (2003) p.15 and The Preamble of *The Alta Outcome Document*, UN Doc. A/67/994 (12 June 2013) pp. 3 - 4.
been used as a justification for obtaining legal title to property and for the annexation of indigenous lands by numerous domestic courts in various countries. It has been observed in the literature that the international community only recently has begun to understand that such doctrines (i.e. *terra nullius* and discovery) “are illegitimate and racist”.\(^{258}\) An enhanced visibility of that particular issue will hopefully lead to that governments finally pay attention to and take into consideration the UN Secretary-General’s recent message that: “International law is clear: No matter who you are, or where you live, your voice counts”.\(^{259}\) It is thus time for the indigenous voices that have been silenced to be heard again. In light of the foregoing, let us wish that the following statement expressed by indigenous peoples’ “we’re only asking for what is ours”\(^{260}\) will be heard.


\(^{259}\) UN Secretary-General’s message on the international human rights day, received through UN [News@un.org](http://news@un.org) (10 December 2012). On current developments of public international law and the role of indigenous peoples in humanizing it see E.Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration*, (Cambridge University Press, Cambridge, 2012).
