Jurisprudential Developments and Adjudication of Indigenous Peoples’ Rights

Culturally Sensitive Systemic Integration of International Human Rights Law in the Americas

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Abstract

In recent years, the Inter-American Court of Human Rights (“IACrtHR”) has developed an innovative jurisprudence that has reaffirmed and further developed the right of indigenous peoples as an integrative part of the corpus juris of the international human rights law (“ihrl”). In fact, through a dynamic, systemic, evolutive and effective interpretation of the American Convention on Human Rights (“ACHR”), the regional tribunal has expanded the scope of protection of Article 21 ACHR (Right to Property) in a manner that includes the protection of the special relationship that indigenous peoples have with their traditional lands, territories and natural resources. Based on this interpretative development, the IACrtHR has further expanded the protection of indigenous peoples’ communal property to guarantee their right to cultural identity and to a dignified life, that is, to live in accordance with their own cultural traditions and understanding of dignity. In this sense, specific safeguards against unjustified restrictions on the right to property, that could amount to a denial of the cultural survival of indigenous peoples, were jurisprudentially identified by the regional tribunal.

This paper critically analyses the legal regime applicable for the protection of the right to traditional communal property of indigenous and tribal peoples in the Americas, as developed by the IACrtHR. In particular, it pays special attention to the methods of interpretation applied by the regional tribunal and the manner that has referred to the corpus juris of international human rights law that specifically protects and guarantees the rights of indigenous peoples.
Key words

Inter-American Court of Human Rights, Systemic Integration of International Human Rights Law; Indigenous Peoples; Right to Communal Property, Cultural Identity; Right to Dignified Life

1 Introduction

The Inter-American Court of Human Rights (“IACtHR,” or the Court) has developed, in recent years, a landmark jurisprudence on indigenous peoples’ rights. The court has recognised their right to communal property over traditional lands and natural resources under the right to property of Article 21 of the American Convention on Human Rights (“ACHR,” the Convention).

The IACtHR has expanded the scope of protection of Article 21 by applying a contextual, effective, non-restrictive, evolutive and systemic interpretation of the Convention’s norms. Interpretative methods derived from The Vienna Convention on the Law of Treaties (“VCLT”) and the ACHR rules on treaty interpretation.

A contextual, evolutive (Article 29 ACHR) interpretation of the Convention has led the court to recognise that human rights treaties are living instruments. Such methods, combined with the systemic interpretation (Article 31(3)) of the VCLT have led the court to conclude that the meanings and scope of the Convention’s normative content must take into account the legal system to which they belong, the corpus juris of international human rights law.

See The right to information on consular assistance in the framework of the guarantees of the due process of law, 1 October 1999, IACtHR, Advisory Opinion OC-16/99, series A No.16, para. 68, 114. See also Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, 14 July 1989, IACtHR, Advisory Opinion OC-10/89, series A No.1; Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, 17 June 2005, series C No. 125, IACtHR, para. 67.

See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970), 21 June 1971, ICJ, Advisory Opinion, I.C.J. Reports 1971, pp. 16 and 31; See The right to information on consular assistance in the framework of the guarantees of the due process of law, supra note 1, para. 144.
Deriving from such interpretative methods, in particular in light of the convention’s *travaux preparatoire* and the principle of non-restrictive interpretation of Article 29(b) of the ACHR, the court has established that Article 21 of the ACHR does not exclude the protection of the indigenous communities’ right to communal property. In addition to these principles, the IACtHR has also restored a systemic integration of Article 21 by means of scrutinise human rights instruments that are part of the corpus juris of international human rights law. For instance, the IACtHR has constantly referred to the Indigenous and Tribal Peoples Convention (“ILO Convention No. 169”), which establishes the importance of the special relationship that indigenous communities have with their land as well as the essential need of natural resources for the physical and cultural survival of these communities.

Thus, a systemic interpretation of Article 21 of the ACHR has led the IACtHR to not only acknowledge the protection of indigenous peoples’ right to communal property under the ACHR but also the right to land ownership and the right over natural resources that belong to those territories.

The IACtHR has gone even further in the protection of indigenous peoples’ rights by identifying concrete safeguards that the State must put in place in order to prevent that development projects, including the exploration and exploitation of resources in the territory of indigenous communities, will disproportionately affect these communities. This way, the court has afforded a

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4 Article 32 VCLT recognises the possibility to recourse to supplementary means of interpretation, such as “the preparatory work of the treaty and the circumstances of its conclusion.”

5 Article 29 reads as the following: “[n]o provision of this Convention shall be interpreted as: b. restricting the enjoyment or exercise of any right or freedom recognised by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.”


8 See *Yakye Axa v. Paraguay*, supra note 1, para. 127.


protection under Article 21 ACHR that does not only include the duty of States to respect the right of indigenous communities over their traditional lands but also includes *specific* positive obligations to protect this right.

Special attention must be paid to the fact that under the court’s analysis, the *special relationship* that indigenous peoples have with their lands is an essential and determinative factor of their *distinguishable* cultural identity as well as essential for their “possibility to enjoy a life in dignity, or a dignified life.”11 This way, through an effective and non-restrictive interpretation, the protection granted by the IACrtHR of indigenous peoples’ right to communal property goes as far as guaranteeing indigenous peoples’ rights to have a dignified life.

2 **Interpretative Methods Applied by the Inter-American Court**

When interpreting the American Convention, the IACrtHR applies the general principles of interpretation contained – in particular – in The Vienna Convention on the Law of Treaties of 1969 (“VCLT”) and the interpretation criteria set forth in Article 29 of the ACHR,12 under the light of the evolution of the *corpus juris* of international human rights law.13 In other words, the interpretative methods used by the Court could be seen as in line with the traditional rules of interpretation of international law.14

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12 See Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 6, paras. 2–3.


According to Article 31 of the VCLT, treaties need to be interpreted in accordance with their own object and purpose, which in the case of human rights treaties – such as the ACHR – is “the effective protection of human rights.” In other words, in case of uncertainty regarding the meaning of a provision enshrined in the ACHR, the interpreter should read its terms not only in accordance with their “ordinary meaning” but also – and most importantly – in a manner that will generate the most effective protection of the rights involved. In this sense, the Court has emphasised throughout its constant jurisprudence that “the efficacy of the mechanism of international protection, must be interpreted and applied in such a way that the guarantee that it establishes is truly practical and effective, given the special nature of human rights treaties.”

Therefore, the first guiding rule when interpreting the American Convention is, under Article 31 of the VCLT, to recognise the primacy of the text of the Convention, in light of its object and purpose. In cases where the wording of the text will still lead to ambiguous possibilities, the interpreter could resort to supplementary means of interpretation, as established by Article 32 of the VCLT, such as preparatory work and the circumstances of its conclusions. However, the use of the latter interpretative tool has faced concrete limitations in the jurisprudence of the Court.

In fact, before resorting to – for instance – the travail préparatoire of the Convention, the Court has given priority to the elaboration of autonomous regional meanings attached to the conventional terms. For the Court, “[t]he terms of an international human rights treaty have an autonomous meaning”, and therefore, their interpretation is not only detached from domestic or national meanings, but also “adapt to the evolution of the times and, specifically, to current living conditions.” This also means that the supplementary means of interpretation are used in a subsidiary manner, in order “to confirm

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15 Article 31 VCLT states – in its first paragraph – that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

16 Cf. The right to information on consular assistance, supra note 1, para. 68.

17 Cf. Case of the Constitutional Court v. Peru. 24 September 1999, IACtHR, Competence, Judgment, series C No. 55, para. 36; See also Yatama v. Nicaragua, 23 June 2005, IACtHR, Preliminary Objections, Merits, Reparations and Costs, series C No 127, para. 204.

18 Article 32 VCLT recognises the possibility to recourse to supplementary means of interpretation, such as “the preparatory work of the treaty and the circumstances of its conclusion.”

19 Cf. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 6, para. 146. See also Right to Information on Consular Assistance, supra note 1, para. 114; Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, 28 November 2012, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 257, para. 173.
the meaning resulting from that interpretation or when it leaves an ambiguous or obscure meaning, or leads to a result which is manifestly absurd or unreasonable.”

As argued above, the paramount interpretative principle consists of interpreting the Convention “in such a way that the system for the protection of human rights has all its appropriate effects (effet utile).” Then, ordinary or supplementary means of interpretation cannot pave the way for an interpretation that would eventually deprive individuals from the effective protection of their rights, under the light of the pro homine principle. As mentioned elsewhere, the principle pro homine could be seen – together with the principle of effectiveness – as a central hermeneutical element in the IACtHR’s jurisprudence. Indeed, the Court has developed an interpretation of the Convention based “on the principle of the rule most favourable to the human being.” Consequently, the interpretation cannot lead to a result where the exercise of the rights are “illusory or deprived of their essential content.”

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21 Cf. The right to information on Consular Assistance, supra note 1, para. 58.
22 According to Judge García Ramírez, “the principle pro homine of the international law of human rights – frequently cited in this Court’s case-law – which requires the interpretation that is conducive to the fullest protection of persons, all for the ultimate purpose of preserving human dignity, ensuring fundamental rights and encouraging their advancement.” Cf. Awas Tingni v. Nicaragua, Concurring Opinion of Judges Sergio García Ramírez, supra note 6, para. 2.
The interpretative tools provided by the VCLT are coupled – in the jurisprudence of the Court – with the principle of non-restrictive interpretation, recognised in Article 29 of the ACHR. According to this provision, no interpretation of the rights recognised in the Convention could lead to the suppression of the enjoyment of rights or to reduce their scope of protection as recognised by national laws or other treaties ratified by States parties of the Convention. In other words, “[a]ny interpretation of the Convention that [...] would imply suppression of the exercise of the rights and freedoms recognised in the Convention, would be contrary to its object and purpose as a human rights treaty.”

The non-restrictive and effective interpretation illuminates also the manner that conventional rights need to be balanced against each other, in case of potential conflicts. In this sense, the interpreter needs to seek the most favourable interpretation that would allow the higher degree of protection of all rights involved in a given case. To put it differently, “the restrictions that would result from recognizing one right over the other” needs to be carefully balanced in order to avoid unjustifiable interpretations contrary to their effective and non-restrictive realisation.

Furthermore, in its constant jurisprudence the Court has emphasised that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions. Human rights treaties and declarations are living instruments that require an evolutive interpretation. Thus, the interpretation of human rights provisions must consider

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26 Article 29 ACHR (Restrictions Regarding Interpretation) reads as follows: “No provision of this Convention shall be interpreted as: a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; d) ....”


28 See, Yakye Axa v. Paraguay, supra note 2, para. 146.

29 See The right to information on consular assistance, supra note 1, para. 114. See also Interpretation of the American Declaration, supra note 2; Street Children” (Villagrán-Morales et al.) v. Guatemala, supra note 7, para. 192; Case of the Gómez Paquíyauri Brothers v. Peru, 8 July 2004, IACtHR, Merits, Reparations and Costs, Series C No. 110, para. 165.

30 See The right to information on consular assistance, supra note 1, para. 144. See also Interpretation of the American Declaration, supra note 2; Tyrer v. United Kingdom, 25 April,
the “evolution of the fundamental rights of the human person in contemporary international law.”

Conditions in society are subjected to a permanent change, according to cultural influences and developments, that take diverse forms across time and space. In order to relate to the ‘present day conditions’ in a given society, the interpretation of human rights instruments need to be not only evolutive but also contextual. As clearly framed by Judge Sergio Garcia-Ramirez,

“[i]t would be useless and lead to erroneous conclusions to extract the individual cases from the context in which they occur. Examining them in their own circumstances – in the broadest meaning of the expression: actual and historical – not only contributes factual information to understand the events, but also legal information through the cultural references – to establish their juridical nature and the corresponding implications.”

Moreover, an evolutive interpretation not only takes into account the factual developments of the society but also its normative evolution. This means that the contextual and evolutive interpretation of Article 29 of the ACHR, under the light of the provisions contained in the VCLT – in particular, Article 31(3) – determines that treaty interpretation must take into account not only the agreements and instruments related to the treaty but also the system of jurisprudential developments and adjudication.
which it is part.\textsuperscript{36} In the wording of the IACtHR, “according to the systematic argument, norms should be interpreted as part of a whole, [and] the meaning and scope of which must be defined based on the legal system to which they belong [... ] in other words, international human rights law.”\textsuperscript{37}

Therefore, taking into account Article 31(3) of the vclt, the provisions contained in the American Convention need to be “interpreted as part of a whole and its meaning and scope must be defined based on the legal system to which they belong,” namely, the\textit{ corpus juris} of international human rights law.\textsuperscript{38}

\textbf{2.1 Systemic Interpretation: The Importance of the Corpus Juris of International Human Rights Law}

In the views of the regional tribunal, the\textit{ corpus juris} of international human rights law is composed by a set of “international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations),”\textsuperscript{39} which means that different sources of international law, such as binding or non-binding, regional and international instruments, as well as domestic law, integrate this\textit{ corpus juris} of international Human Rights Law.\textsuperscript{40}

It is important to bear in mind that the\textit{ evolutive and systemic interpretation} implies that the court will refer to the dynamic evolution of the\textit{ corpus juris} of international human rights law. As the International Court of Justice (ICJ) has stated in the \textit{South West Africa} case:\textsuperscript{41}

“The Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law [... ] Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, [... ] the \textit{corpus iuris gentium} has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.”\textsuperscript{41}

Therefore, when interpreting the convention the Court can scrutinise other regional or international human rights instruments that would assist in the

\begin{itemize}
\item \textsuperscript{36} See \textit{The right to information on consular assistance}, supra note 1, paras. 113–114.
\item \textsuperscript{37} Cf. \textit{South West Africa} case, supra note 3, pp. 16 and 31.
\item \textsuperscript{38} Cf. \textit{Artavia Murillo v. Costa Rica}, supra note 19, para. 192.
\item \textsuperscript{39} Cf. \textit{The right to information on consular assistance}, supra note 1, paras. 115.
\item \textsuperscript{40} See \textit{Yakye Axa v. Paraguay}, supra note 1, para. 120.
\item \textsuperscript{41} Cf. \textit{South West Africa} case, supra note 3, pp. 16. See also \textit{The right to information on consular assistance}, supra note 1, paras. 113–114.
\end{itemize}
interpretation of the Convention in a given case. Such instruments need to be seen as “elements of interpretation, assessment or judgment for a better understanding of the provisions enshrined in the Convention.” In other words, the Court would not directly and exclusively apply in a given case a different instrument than the American Convention. Rather, it will read its provisions under the light of the instruments that integrate the same legal system – independently if they have been adopted within or outside of the OAS – aiming at the effective protection of human rights, that is, the corpus iuris of international human rights law.

In short, the scope of the systemic integration is to develop a better understanding – in order to deliver a more effective protection – of the rights recognised within the American Convention “interpreted by reference to their normative environment” in which the Convention is integrated.

Finally, it would be relevant to highlight that the integration of the provisions of the Convention under the light of the principles and norms enshrined

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43 Cf. Case of the Plan de Sánchez Massacre v. Guatemala, 29 April 2004, IACrtHR, Merits, Series C No. 105, Separate Concurring Opinion of Judge Sergio Garcia-Ramirez, para. 19. In addition, Article 23 of the Rule of Procedure of the Inter-American Commission on Human Rights, which contains an enumerative list of the treaties that – within the Inter-American System – have recognised the competence of the Commission, and the Court, for the reception of the individual complaints.
44 In this sense, the Court has declared that it could “address the interpretation of a treaty provided it is directly related to the protection of human rights in a Member State of the Inter-American System,” even if that instrument does not belong to the same regional system of protection. See Kichwa Indigenous People of Sarayaku v. Ecuador, supra note 9, para. 161.
46 In the views of this regional tribunal, States are “bound by the corpus juris of the international protection of human rights, which protects every human person erga omnes, independently of her statute of citizenship, or of migration, or any other condition or circumstance.” Cf. Juridical Condition and Rights of the Undocumented Migrants, supra note 13, para. 85.
in the *corpus iuris* of international human rights law, has paved the way to the expansion of the scope of protection of conventionally protected rights.\(^{48}\) In this sense, it would be possible to say that the *pro homine* principle has guided the systemic integration made by the Court, aiming at generating a more effective and robust protection of human rights and, therefore, prioritising the centrality of individual fate in the hermeneutical process.\(^{49}\)

### 2.2 Systemic Integration of Article 21 ACHR

The IACrtHR was the first regional tribunal to recognise the right to communal property over indigenous peoples’ traditional lands, as protected under Article 21 of the ACHR. As mentioned elsewhere, since the adoption of the landmark judgment in the case of *Awas Tingni Community v. Nicaragua*,\(^{50}\) the IACrtHR has shown “a sensitive inclination towards the protection of indigenous peoples’ rights and cultural understandings.”\(^{51}\)

This innovative interpretation of the American Convention, based on the current evolution of the *corpus juris* of international human rights law, has expanded the scope of protection of Article 21 of the ACHR, by means of extending its protection to the “close relationship between indigenous peoples and their lands, and with the natural resources of their ancestral territories and intangible elements stemming from these.”\(^{52}\) In other words, the content of Article 21 of the ACHR has been integrated (or re-interpreted) under the guiding light of the normative system in which the Convention is part of, namely, the international human rights law system.

One of the main reasons for this *praetorian* jurisprudential development has been identified in the pressing need of the effective realisation, without discrimination of any kind, of the rights recognised in the Convention, such as the right to property. This is nothing but the concrete (and contextual) application of the above-mentioned principle of effectiveness (*effet utile*), that takes

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\(^{50}\) See *Awas Tingni Community v. Nicaragua*, *supra* note 6.

\(^{51}\) See, Fuentes A., Judicial Interpretation and Indigenous Peoples Right, *supra* note 27, p. 41 *et seq*.

\(^{52}\) See Kichwa Indigenous People of Sarayaku v. Ecuador, *supra* note 9, para. 145.
into account the factual reality in which conventional rights are applied. In the case of indigenous communities, this reality includes the communitarian tradition related to a form of collective land tenure, which “not necessarily conform[s] to the classic concept of property.” In the words of the Court,

“Disregard for specific forms of use and enjoyment of property, based on the culture, uses, customs and beliefs of each community, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of people.”

The interpretative steps made by the Court that pave the way for the expansion of the conventional standard enshrined in Article 21 of the ACHR could be summarised in the following hermeneutical steps. First, the Court discharged the possibility of being potentially trapped in a literal reading – as indicated by Article 31(1) of the VCLT – of Article 21 of the ACHR. Since the wording of the latter provision does not explicitly include or exclude any potential reference to communal property, the Court–bearing in mind the object and purpose of the American Convention– has recurred to the preparatory work of the ACHR, as a supplementary means of interpretation (Article 32 VCLT).

The Court found that at the time of the drafting of this Convention, it was decided only to use the term enjoyment of his property instead of private property. The phrase “everyone has the right to the use and enjoyment of private property, but the law may subordinate its use and enjoyment to public interest” was replaced by “everyone has the right to the use and enjoyment of his property.”

Therefore, under the light of the travaux preparatoire and taking into consideration the preclusion of any potential restrictive interpretation of rights

53 When interpreting human rights instruments, the interpreter “must take into consideration society as a whole, paying due account to the complex plurality of cultural understandings that are present (contextual interpretation) and in accordance with the current present conditions existing at a given time (evolutive interpretation).” Cf. Fuentes A., Judicial Interpretation and Indigenous Peoples’ Rights, supra note 27, p. 54.
54 Cf. Kichwa Indigenous People of Sarayaku v. Ecuador, supra note 9, para. 145.
56 Article 21(1) ACHR states that “[e]veryone has the right to the use and enjoyment of this property. The law may subordinate such use and enjoyment to the interest of society.”
57 See Fuentes A., Judicial Interpretation and Indigenous Peoples’ Rights, supra note 27, p. 58.
58 Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 6, para 145.
recognised in other international instruments or domestic legislations (Article 29(b) ACHR), the Court concluded that the wording of Article 21 of the ACHR does not exclude the protection of the right to property in a sense which includes the rights of members of the indigenous communities within the framework of communal property.

The principle of non-restrictive interpretation of the rights recognised in the Convention leads toward the second interpretative step made by the Court, namely, the integration of the substantive content of Article 21 of the ACHR under the light of other conventions that are part of the same human rights international law system applicable to a specific case. In other words, in order to avoid a potentially restrictive interpretation of Article 21 of the ACHR in the framework of indigenous peoples’ lands’ claims, the interpreter needs to analyse other international and regional instruments that are part of the same human rights system applicable to the case.

Among international human rights instruments, the regional tribunal found that in most cases in which indigenous peoples’ property rights were at stake, the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries was – among others – the most suitable international instrument for the interpretation of Article 21 of the ACHR. Under the light of the ILO Convention 169, the Court has drawn an interconnected line between identity, culture, traditional land and natural resources, as part of the elements that integrate the scope of protection of Article 21 of the ACHR. Specifically, the Court took into account articles 13(1), 14(1), 15(1) & 15(2) of the ILO Convention to interpret Article 21 of the ACHR.

Based on Article 13(1) of the ILO Convention, the Court stated that Article 21 of the American Convention must safeguard the close ties of indigenous peoples with their traditional territories and the natural resources therein.

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59 Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 6, para. 148.
60 Id.
63 See Yakye Axa Indigenous Community v. Paraguay, supra note 1, para. 127.
64 See Saramaka People v. Suriname, supra note 9, para. 121.
65 Article 13(1) of the ILO Convention expressly states that governments “(...) shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.”
associated with their culture, as well as the components derived from them.\textsuperscript{66} Moreover, taking into account Article 14(1) of the ILO Convention, the rights of ownership and possession of indigenous peoples shall include the use of lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. This would include the protection of the natural resources, which these peoples have traditionally used, and the introduction of specific safeguards to protect the right to property over traditional lands and natural resources (Article 15 ILO Convention).

Consequently, through a\textsuperscript{67} systemic interpretation of Article 21 of the ACHR, under the light of the provisions enshrined in the ILO Convention No. 169, the Court has established not only the special relationship that indigenous communities have with their land but also the essential importance of natural resources for the physical and cultural survival of these communities.\textsuperscript{67} Moreover, it is important to highlight that this interpretation of Article 21 of the ACHR has not been developed exclusively through references to the ILO Convention No. 169. In fact, in two cases brought against the State of Surinam,\textsuperscript{68} whose domestic legislation does not recognise the right to communal property of members of tribal peoples, and has not ratified the ILO Convention No. 169, the Court has made references to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

In other words, in the case of Surinam, the Court avoided referring to the ILO Convention because it was not ratified by the country. Instead, the regional tribunal decided to make references to both covenants, which have been ratified by Surinam. In particular, the Court referred to their common Article 1 and the right of self-determination, which recognises the right that “all peoples” have to “... freely pursue their economic, social and cultural development (Article 1(1)) to freely dispose of their natural wealth and resources ...” and to “...not be deprived of its own means of subsistence (Article 1(2)).”\textsuperscript{69}

Thus, by considering indigenous peoples as ‘peoples’, in the sense of enjoying the right to self-determination recognised under common Article 1, and therefore being able to “freely dispose of their natural wealth and resources”, it would be possible to conclude that they should not be deprived of their “own

\textsuperscript{66} See Yakye Axa Indigenous Community v. Paraguay, supra note 1 at 137.

\textsuperscript{67} See Saramaka People v. Suriname, supra note 9. 121–122.

\textsuperscript{68} See Case of Moiwana Community v. Suriname, 8 February 2006, IACtHR, Interpretation of the Judgment of Merits, Reparations and Costs, Series C No. 145, paras. 127 – 135; and Saramaka People v. Suriname, supra note 9, paras. 92–95.

\textsuperscript{69} See Saramaka People v. Suriname, supra note 9, para. 93.
means of subsistence.”70 This interpretation was reinforced by considering indigenous peoples as minorities, in relation to Article 27 of the ICCPR, which entails that they are protected in their right to enjoy their own culture including “in a way of life which is closely associated with territory and use of its resources.”71

This means that the right to property, as guaranteed by Article 21 of the ACHR and interpreted in light of the rights recognised under common Article 1 of the ICCPR and ICESCR and Article 27 of the ICCPR, extends its scope of protection to the right to communal property of indigenous peoples.72

Furthermore, the Court has also referred to the UN Declaration on the Rights of Indigenous Peoples (UNDPRP) in order to reinforce its interpretation of Article 21 of the ACHR. In fact, in several cases the Inter-American Court took into account the fact that the States had voted in favour of the Declaration before the UN General Assembly in order to reinforce its interpretation of the scope of protection of Article 21 of the ACHR.73 Thus, even if this Declaration has a non-binding character, the Court has used it in connection to the American Convention to highlight and define the extent of the obligations of the States in relation to the right to property of indigenous peoples.

3 Communal Property Rights Over Their Ancestral Lands and Natural Resources

As a consequence of the systemic interpretation of Article 21 of the ACHR, it is recognised that the protection of the right to communal property of indigenous peoples under the ACHR includes the ownership of their land and some of the natural resources that belong to those territories.

The Court has highlighted the special relation that indigenous peoples have with their land in the sense that ownership is not centred on an individual but rather on the group and its community. Hence, the Court has stated the need to

70 Id.
71 See id. at para. 94.
72 See Saramaka People v. Suriname, supra note 9, para. 95.
73 See Kichwa Indigenous People of Sarayaku v. Ecuador, supra note 9, paras. 215 and 217; Case of the Kuna Indigenous People of Madungandi and the Emberá Indigenous People of Bayano and their members v. Panama, 14 October 2014, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 284, para. 118; Case of the Garífuna Punta Piedra Community and its members v. Honduras, 8 October 2015, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 304, para 168; Case of the Kalina and Lokono Peoples v. Suriname, 25 November 2015, IACrtHR, Merits, Reparations and Costs, Series C No. 309, para. 122; and Saramaka People v. Suriname, supra note 9, para. 131.
recognise the close ties of indigenous peoples with their land as a fundamental basis for their cultures, their spiritual life, integrity and economic survival.\textsuperscript{74}

In this sense, the Court has established that even if this collective understanding of concepts of property and possession does not conform to the classic understanding of property, it must be protected under the \textit{ACHR}.\textsuperscript{75} In fact, according to the Inter-American Court, the protection of indigenous traditional lands under the \textit{ACHR} is not linked to the existence of a formal legal title. Its recognition is given on the basis of the existence of an ancestral and spiritual relationship with their traditional territories and it is not necessarily extinguished by the loss of possession, unless the lands have been lawfully transferred to third parties in good faith.\textsuperscript{76}

Moreover, the Court has also understood that the right to use and enjoy their territory includes the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land: without them, the very physical and cultural survival of such peoples is at stake.\textsuperscript{77} In other words, protecting the lands and resources that indigenous peoples have traditionally used is a safeguard against their potential extinction as a group; as distinctive peoples.\textsuperscript{78}

### 3.1 \textit{Indigenous Peoples’ Right to Communal Property Over Traditionally Used Natural Resources}

After recognising the right of indigenous peoples to communal property, the Court addressed the question of the extension of the right of the indigenous peoples to use and enjoy the natural resources that lie on and within their traditionally owned lands. In this sense, the regional tribunal has recognised that the same reasons that justify the protection of the property rights over those lands that have been traditionally used and occupied for centuries,\textsuperscript{79} ground

\textsuperscript{74} See Mayagna (Sumo) Awas Tingni Community \textit{v}. Nicaragua, \textit{supra} note 6, para. 149.

\textsuperscript{75} See Sawhoyamaxa Indigenous Community \textit{v}. Paraguay, \textit{supra} note 9, para. 120.

\textsuperscript{76} \textit{Id.} at para 128.

\textsuperscript{77} See Saramaka People \textit{v}. Suriname, \textit{supra} note 9, 121; Yakye Axa \textit{v}. Paraguay, \textit{supra} note 1, para. 137; Sawhoyamaxa Indigenous Community \textit{v}. Paraguay, \textit{supra} note 9, para. 118; Kichwa Indigenous People of Sarayaku \textit{v}. Ecuador, \textit{supra} note 9, para. 146.

\textsuperscript{78} See Saramaka People \textit{v}. Suriname, \textit{supra} note 9, para. 121.

\textsuperscript{79} It is important to bear in mind that the Inter-American jurisprudence “has characterized indigenous territorial property as a form of property whose foundation lies not in official state recognition, but in the traditional use and possession of land and resources; indigenous and tribal peoples’ territories “are theirs by right of their ancestral use or occupancy.” See Inter-American Commission on Human Rights (I-ACHR), Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System, oea/Ser.L/V/ii. Doc.56/09, December 30, 2009, p. 26, para. 68.
the right to ownership over those natural resources that these communities “have traditionally used.”

Natural resources that lie on and within their traditional lands are essential – in the case of indigenous and tribal peoples – for the maintenance and enjoyment of their traditional way of life, social structure, economic system, etc.. Access to these resources is essential for the conservation and development of their cultural identity and to have the possibility to enjoy a dignified life. Based on the intrinsic connection between the traditional lands and territories, the resources that lie on and within them, and the cultural identity and way of life of the indigenous communities, the Court has extended the protection provided by Article 21 of the ACHR to “those natural resources traditionally used and necessary for the very survival, development and continuation of such people’s way of life.”

Accordingly, those natural resources that can be considered protected by the right to communal property recognised in Article 21 of the ACHR are those that fulfil the two above-mentioned conditions. First, these are resources that have been traditionally used since immemorial times and second, they are necessary for the very survival, development and continuation of the indigenous peoples’ cultural identity and way of life. In the contrary sense, the allocation of the ownership rights over all other natural resources that ‘do not satisfy’ these two requirements will – of course – depend on the domestic national legislation and, hence, will fall into “the inalienable right of each State to the full exercise of national sovereignty over its natural resources.”

Therefore, in line with the acknowledgement of the States’ property over those natural resources not traditionally used by these communities, the Court has expressly recognised that “Article 21 of the Convention should not

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80 See Saramaka People v. Suriname, supra note 9, para. 121.
81 Id. at para. 122.
82 As it has been stressed, indigenous lands and territories traditionally used “includes not only physically occupied spaces but also those used for their cultural or subsistence activities, such as routes of access, [which is] compatible with the cultural reality of indigenous peoples and their special relationship with the land and territory”. Cf. Fuentes A., ‘Protection Indigenous Peoples’ Traditional Lands, supra note 10, p. 239 et seq.
83 The UN General Assembly, in its 2203rd plenary meeting, has “[s]trongly reaffirms the inalienable rights of States to permanent sovereignty over all their natural resources, on land within their international boundaries as well as those in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters.” Cf. UN GA Res. 3171 (XXVI), ‘Permanent sovereignty over natural resources’, 2203rd plenary meeting (1973), <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/282/43/IMG/NR028243.pdf?OpenElement>, (last visited on 13 April 2017).
be interpreted in a way that prevents the State from granting any type of concession for the exploration and extraction of natural resources” within those traditional lands and territories.\textsuperscript{84} The legal principle remains that States have the right to explore and exploit the natural resources that lay in and within their territories.

However, the exploitation and extraction of natural resources within indigenous peoples’ lands “is most likely to affect the use and enjoyment of other natural resources that are necessary for the survival” of these peoples.\textsuperscript{85} Consequently, the Court has called Member States to assess each situation under a proper ‘necessity test’ before granting concessions over state-owned natural resources.\textsuperscript{86} The scope of the test is to determine whether the restriction of the right to communal property of indigenous peoples upon natural resources (traditionally used) is needed for the achievement of a legitimate aim in a pluralist and democratic society;\textsuperscript{87} and whether or not a ‘reasonable relation of proportionality’ exists between the exploitation and the restriction of the indigenous rights.\textsuperscript{88}

At this point, it is important to bear in mind that the right to property of these peoples over their traditional lands and used natural resources is not an absolute right. In this sense, the Court has emphasised that property rights, like many other rights recognised in the Convention, are subject to certain limitations and restrictions.\textsuperscript{89} Article 21 of the ACHR expressly states that the “law may subordinate [the] use and enjoyment [of property] to the interest

\begin{itemize}
\item \textsuperscript{84} See Saramaka People v. Suriname, supra note 9, para. 126.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} See Saramaka People v. Suriname, supra note 9, para. 127.
\item \textsuperscript{87} The Inter-American Commission has stressed in this sense that “recognition and protection as culturally different peoples requires wide political and institutional structures that allow them to participate in public life, and protect their cultural, social, economic and political institutions in the decision-making process. This requires, among other aspects, the promotion of an intercultural citizenship based on dialogue, the generation of culturally appropriate services, and differentiated attention for indigenous and tribal peoples.” Cf. Inter-American Commission on Human Rights (I-achr), “Indigenous peoples, Afro-descendent communities, and natural resources: Human rights protection in the context of extraction, exploitation, and development activities”, OEA/Ser.L/V/11.Docs.47/150EA/Ser.L/V/11.Docs.47/15, December 31, 2015, p. 75, para. 150.
\item \textsuperscript{88} See Saramaka People v. Suriname, supra note 9, para. 127.
\item \textsuperscript{89} Id. at 127. Cf. Case of the Indigenous Community Yakye Axa, supra note 1, paras. 144–145 (cited mutatis mutandis); Case of Ricardo Canese v. Paraguay, supra note 24, para. 96; Case of Herrera Ulloa v. Costa Rica, 2 July 2004, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 107, para. 127; and Ivcher Bronstein v. Peru, supra note 27, para. 155. Cf., also, Case of the Indigenous Community Sawhoyamaxa, supra note 9, para. 137.
\end{itemize}
of society." Thus, States could potentially justify a restriction to the use and enjoyment of the right to communal property in those cases where the restrictions are: "a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society." In short, "[t]he necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest."92

Finally, when that exploitation generates a direct or indirect limitation on the enjoyment of the indigenous peoples’ land rights, it will nevertheless be justified if it pursues the fulfilment of imperative or ‘pressing social needs’; as long as it does not “amount to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members.”93 This is because an interference on the enjoyment of the right to communal property could eventually generate a restriction in their possibility to have access to a ‘life in dignity’, and therefore, an infringement of their right to life *lato sensu* (Article 4 reading together with Article 1(1) of the American Convention).94

In short, what is protected under Article 21 in relation to the right to property of indigenous peoples’ is the close link that these communities have with their lands and the resources found on and within their territories that are necessary for their survival. This protection afforded by the *ACHR* is not absolute, and therefore States can limit this right only when the general requirements for the restriction of a right are met and when the survival of the group is not at stake.

3.2 Safeguards Against Unjustified Interferences in the Enjoyment of Indigenous Peoples’ Rights

In order to avoid, protect and guarantee the unique relationship that indigenous communities have with their lands and territories, which in turn ensures their material and cultural survival as distinguished peoples, the Inter-American Court has identified three specific and concrete safeguards.

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90 *Cf.* Article 21(1) of the *ACHR*.
91 See *Saramaka People v. Suriname*, *supra* note 9, para. 128.
92 See *Case of the Indigenous Community Yakye Axa*, *supra* note 1, para. 145.
93 *See Saramaka People v. Suriname*, *supra* note 9, para. 128.
94 It is important to note that "Article 21 of the Convention states that the ‘law may subordinate [the] use and enjoyment [of property] to the interest of society.’ Thus, the Court has previously held that, in accordance with Article 21 of the Convention, a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society.” See *I-ACHR*, Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources, *supra* note 79, p. 90, para. 230.
For instance, it has subjected the issuance of logging and mining concessions within indigenous peoples’ lands by the States, to: (a) effective participation of the involved communities, according to their own traditions, in any investment or development project within their lands; (b) the shearing of reasonable benefits with these communities in each project; and (c) the elaboration of prior and independent environmental and social impact assessment.95

The first safeguard required by the Court, participation, implies that in any development plan the State must conduct prior and informed consultations with the communities involved in accordance with their own traditions, and taking into account their own methods of decision-making.96 This consultation process consists of effectively sharing all relevant information regarding the nature of the development project and its consequences vis-à-vis potentially affected indigenous communities. In fact, the information shared must be sufficient, accessible, and timely.97

The obligation to consult is an overarching duty that must be implemented in any situation in which a project could potentially interfere with the rights of indigenous communities over their traditional lands and territories.98 The aim of the consultation is to seek an agreement with the affected communities. Consultation is an obligation of means,99 which requires a proactive role of the States to accept and disseminate information in good faith in an understandable and publicly accessible format,100 and in conformity with indigenous peoples’ customs and traditions, including paying due respect to their traditional decision making institutions.101

Finally, in case of ‘large-scale development or investment projects’ that could have major impacts within the territory of the indigenous communities, the Court has imposed to the States not only the duty to consult but also “to obtain their free, prior and informed consent, according to their customs and traditions.”102 As concluded elsewhere,103 this additional requirement does not
provide indigenous peoples with a ‘veto power,’ but rather establishes the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned.”

The second safeguard, benefit sharing, is based upon “the restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival.” This right to obtain just compensation (Article 21(2) ACHR) applies not only to the total deprivation of the communal property title by way of expropriation by the State, but also to the restriction or deprivation of the regular use and enjoyment of such property.

Hence, the reasonableness in the sharing of the project’s benefits has to be interpreted as the existence of a ‘relation of proportionality’ between the restriction suffered by the affected communities in the enjoyment of their rights, and the possible benefits from the investment or development projects. Consequently, large and more invasive interferences will require more participation in the benefit sharing.

Finally, the third safeguard identified by the Court is the obligation to conduct prior environmental and social impact assessments (hereinafter ESIA). The justification lies on the prevention of potential negative impacts that development projects could have on traditional lands, territories, and natural resources. The purpose of ESIA is to ensure that members of the community “are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily.” Moreover, the ESIA “must conform to the relevant international standards and best practices”, “must be undertaken by independent and technically capable entities, with the State’s supervision”, and must respect the communities’ traditions and culture.


See Saramaka People v. Suriname, supra note 9, para 139.

Id.


Id.

See Saramaka People v. Suriname, Interpretation of the Judgment, supra note 10, para. 40.

Id. at 41.

Id.

As concertedly pointed out by the Court, “the guided principle with which to analyse the result of ESIA’s should be that the level of impact does not deny the ability of the members of the affected communities to survive” as a distinctive group. In addition, ESIA’s must be implemented before granting any concession for the exploration and exploitation of natural resources, or the establishment of any development or investment projects within the traditional indigenous peoples’ territories and lands in order to produce the least possible impact on the enjoyment and exercise of these rights.

To conclude, these safeguards developed by the Inter-American Court are essential for the survival of indigenous peoples’ traditional way of living. They are instrumental in creating a legal framework able to take into consideration indigenous peoples’ cultural distinctiveness, and making sure that any concession or development project will not take place if its socio-environmental impacts amount to a denial of their material and cultural survival.

4 Right to Cultural Identity and Dignified Life: When Diversity Matters

As it has been argued in this paper, the innovative interpretation of Article 21 of the American Convention on Human Rights has expanded the scope of conventional protection beyond the material relation that indigenous peoples have with their land. In the wording of the traditional tribunal,

“the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations”.

This means that the protection afforded by the Convention to the right to property of indigenous peoples includes a spiritual element, which is based on the fact that it is through the special relation with their land that indigenous peoples find their own cultural identity. In the same line, the UNDRIP has also recognised the axiological centrality that land plays in indigenous peoples’

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113 See Saramaka People v. Suriname, Interpretation of the Judgment, supra note 10, para. 42.
115 Id.
116 See Saramaka People v. Suriname, supra note 9, para. 129.
117 See Case of the Indigenous Community Yakye Axa, supra note 1, 131.
culture, recognising the importance of the right of these people to “maintain and strengthen their distinctive spiritual relationship with their traditional owned or otherwise occupied and used lands”.\textsuperscript{118}

In fact, what is truly at stake when indigenous peoples are deprived of the enjoyment of their traditional lands and territories is the possibility to maintain and further develop their own way of living, their own right to life in accordance with their own traditions and worldviews.\textsuperscript{119} In short, what is under threat is not only their physical survival but also the persistence of their cultural identity, their \textit{indigenouness} as distinguishable peoples.\textsuperscript{120}

According to the consolidated jurisprudence of the regional tribunal, cultural identity has to be considered as part or as an integrative component of the right to life \textit{lato sensu}.\textsuperscript{121} Under Article 4 of the \textit{ACHR}, the protection of life includes “not only the right of every human being not to be deprived of his life arbitrarily” (right to life \textit{strictu sensu}) “but also the right that he will not be prevented from having access to the conditions that guarantee a decent existence” (right to life \textit{lato sensu}).\textsuperscript{122}

This dual understanding of the right to life needs to be read in connection with the general ‘obligation to respect and ensure’ the enjoyment of fundamental rights incorporated in Article 1(1) of the \textit{ACHR}. Thus, it generates upon the States not only the \textit{negative} obligation to prevent and restrain arbitrary deprivations of this right, but also the \textit{positive} obligation to guarantee the necessary conditions that would permit indigenous peoples to have a decent life. Consequently, States have the positive obligation to adopt all appropriate

\textsuperscript{118} Cf. \textit{Undrip Art. 25}.

\textsuperscript{119} See Case of the Indigenous Community Yakye Axa, \textit{supra} note 1, Separate Dissenting Opinion of Judges A.A. Cançado Trindade and M.E. Ventura Robles, para. 4. Moreover, according to the Commission, “the term ‘survival’ should be understood in a coherent manner with the indigenous and tribal peoples set of rights, with the aim of not giving rise to a static conception of their ways of life.” In addition, the Commission has emphasised that “since the requirement to ensure their “survival” has the purpose of guaranteeing the especial relationship between these peoples with their ancestral territories, reasonable deference should be given to the understanding that the indigenous and tribal peoples themselves have in regards to the scope of this relationship, as authorised interpreters of their cultures.” Cf. \textit{I-ACHR}, Indigenous peoples, Afro-descendent communities, and natural resources, \textit{supra} note 87, p. 47, para. 83.

\textsuperscript{120} See Fuentes A., ‘Judicial Interpretation and Indigenous Peoples’ Rights to Lands, \textit{supra} note 27, page 69.

\textsuperscript{121} See Sawhoyamaxa Indigenous Community \textit{v. Paraguay}, \textit{supra} note 9, para. 151.

\textsuperscript{122} See “Street Children” (Villagrán-Morales et al.) \textit{v. Guatemala}, \textit{supra} note 7, para. 144.
measures, in the light of their obligation to secure the full and free enjoyment of human rights, in order to ‘protect and preserve’ the right to life.\textsuperscript{123}

Therefore, in order to guarantee a full enjoyment and access to decent condition of life for all members of the society, an in particular for those in a vulnerable position,\textsuperscript{124} the Court has stressed the States’ positive obligation to recognise within the national legal systems the right of indigenous peoples to communal property over their traditional lands and resources.\textsuperscript{125} This positive obligation is grounded on the intrinsic and constitutive nature that traditional lands have vis-à-vis indigenous peoples’ identity and, therefore, in the enjoyment of a decent conditions of life (dignify life), which are intrinsically connected with their own way of living, their own culture, understandings, traditions and world’s views.\textsuperscript{126}

The interrelation between the enjoyment of the right to communal property and the protection of indigenous peoples’ right to cultural identity and dignified life, is based on the inherent interconnection between these rights. The interpretative path of the Court starts with the expansion of the scope of protection of the right to life. Protection of life includes not only the prohibition of its arbitrary deprivation (negative obligation) but as well the generation of all of those conditions that will permit and facilitate its full enjoyment, that

\textsuperscript{123} See, Case of the Pueblo Bello Massacre v. Colombia, 31 January 2006, IACrtHR, Merits, Reparations and Costs, Series C No. 140, para. 120. See also “Mapiripán Massacre” v. Colombia, supra note 24, para. 232.

\textsuperscript{124} Under the ‘jurisprudence constant’ of the IACrtHR, the obligation to take positive measures vis-à-vis the protection of the right to life increases its imperativeness according to “the particular needs of protection of the legal persons, whether due to their personal conditions or because of the specific situation they have to face, such as extreme poverty, exclusion or childhood.” Cf. Pueblo Bello Massacre case, supra note 122, para. 111–112.

\textsuperscript{125} In connection with extractive industries, “[t]his obligation includes the adoption of the appropriate domestic legislation to protect the most relevant human rights in the field of extractive and development activities, the repeal of legislation which is incompatible with the rights enshrined in the Inter-American instruments, and to refrain from adopting legislation contrary to these rights.” Cf. I-achr, Indigenous peoples, Afro-descendent communities, and natural resources, supra note 87, p. 40, para. 67.

\textsuperscript{126} In this sense, in the Yakye Axa case Judges Cançado Trindade and Ventura Robles have emphasised the fact that even if the right to life “is a non-derogable right under the American Convention, while the right to property is not [...] the latter is especially significant because it is directly related to full enjoyment of the right to life including conditions for a decent life.” Cf. Yakye Axa v. Paraguay, supra note 1, Separate Dissenting Opinion of Judges AA Cançado Trindade and ME Ventura Robles, para. 20.
is, the creation of conditions that will facilitate or create opportunities for a
decent life (positive obligations).\textsuperscript{127}

In addition, these positive obligations include the generation of conditions
able to facilitate equal enjoyment of decent living conditions for each mem-
ber of the society, in accordance with their own understandings and cultural
identity.\textsuperscript{128} In this sense, Judge A. A. Cancado Trindade highlighted that indige-
nous peoples’ cultural identity “is closely linked to their ancestral lands” and if
members of indigenous communities “are deprived of them, it seriously affects
their cultural identity, and finally their very right to life lato sensu”.\textsuperscript{129}

Furthermore, because in the case of indigenous peoples their cultural iden-
tity is intimately connected with their traditional lands, positive measures
must include adequate legal and material protection for this special relation-
ish.\textsuperscript{130} Without the recognition of the communal property over their tradi-
tional lands, in accordance with its regulation in their customary laws, the life
of indigenous peoples will be under threat.\textsuperscript{131} In fact, without the intimate and
close union with their land in which indigenous peoples found the possibility
to build and develop their life, according to their own worldviews and tradi-
tions, their own project of life will become meaningless due to the impossibil-
ity to reach a dignified life, according to their own understanding of dignity.\textsuperscript{132}

\begin{footnotes}
\textsuperscript{127} See, \textit{Case of Juan Humberto Sánchez v. Honduras}, 7 June 2003, IACrtHR, Preliminary
\textsuperscript{128} See In reference to this “cultural identity has to be considered as part or as an integrative
component of the right to life lato sensu.” See also Fuentes A., ‘Protection Indigenous
Peoples’ Traditional Lands, supra note 10, p. 235.
\textsuperscript{129} See Sawhoyamaxa Indigenous Community v. Paraguay, supra note 9, Separate Opinion
by Judge A.A. Cançado Trindade, para. 28.
\textsuperscript{130} As stated by the Inter-American Commission, “[t]he obligation to adopt special
and specific protective measures is inherent in ILO Convention No. 169; the IACHR
has highlighted the need for its States parties to ‘take special measures to guarantee
indigenous peoples the effective enjoyment of human rights and fundamental freedoms,
without restrictions, and to include measures that promote the full effectiveness of their
social, economic, and cultural rights, respecting their social and cultural identity, and
their customs, traditions, and institutions.’” Cf. \textit{I-ACHR, Indigenous and Tribal Peoples’
Rights over their Ancestral Lands and Natural Resources}, supra note 79, p. 18, para. 51.
See also Fuentes A., ‘The Inter-American System Judicial Interpretation and Indigenous
Peoples’ Land Claims’, supra note 11, p. 305 et seq.
\textsuperscript{131} See I-ACHR, Indigenous peoples, Afro-descendent communities, and natural resources,
supra note 87, p. 115, paras. 231 et seq.
\textsuperscript{132} In connection with the understanding of the Court toward the concept of ‘project
of life’, see “Street Children” v. Guatemala, supra note 7, para. 144; and \textit{Case of Loayza-
Tamayo v. Peru}, 27 November 1998, IACrtHR, Reparations and Costs, Series C No. 42,
para. 147–148.
\end{footnotes}
In conclusion, in the specific case of indigenous communities, the negation of the right to property to their traditional lands, will amount –according to the specific circumstances of each case- not only to a violation of Article 21 of the American Convention, but as well to an infringement of the right to life as protected by Article 4(1), reads in accordance with the dispositions contained within Article 1(1) of the same instrument (Obligation to Respect and Protect).133

5 Concluding Remarks

The Inter-American Court of Human Rights has developed an expansive interpretation of the scope of protection of Article 21 ACHR, including the right of indigenous communities to communal property upon their traditional lands, territories and traditionally used natural resources. This jurisprudence raises awareness and sensibility on the importance of taking into consideration the protection of the richness, plurality of identities and diversity that exist in our modern societies.134

In the case of indigenous peoples, their cultural distinctiveness is directly connected with the unique relationship that they have with their traditional lands and territories. This all-encompassing relationship is at the base of their identity as distinctive people. Without having access to their traditional lands and territories, the enjoyment of their right to enjoy a life in dignity would suffer because indigenous people would not have the possibility to fully develop their life, in accordance with their traditions, understanding and worldviews. Hence, in order to avoid an infringement of their right to life lato sensu (Article 4(1) ACHR), the recognition and protection of the access of the members of these groups to their traditional lands should be guaranteed.135

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133 In the case of the members of the Yakye Axa Community, the Court established that the lack of recognition of the right to communal property “has had a negative effect on the right of the members of the community to a decent life, because it has deprived them of the possibility of access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clear water and to practice traditional medicine to prevent and cure illnesses.” Cf. Yakye Axa v. Paraguay, supra note 1, para. 168.


135 In this sense, it has been said: “limitations on the right to indigenous property can also affect the right to the exercise of one’s own religion, spirituality or beliefs, a right
Consequently, States have the obligation under Article 1(1) of the ACHR to guarantee the creation of the conditions in society that may be necessary in order to protect and preserve these rights. Authorities have to facilitate the full enjoyment of these rights through taking the necessary legislative, administrative and judicial steps at national levels. For instance, States will have to elaborate the necessary legislation for the incorporation of the indigenous peoples’ right to communal property into their domestic legal order, in compliance with the disposition enshrined within Article 2 of the ACHR. In addition, when determining these policies, States have to pay due attention to the indigenous traditional norms and regulations in connection with their land-tenure systems and –more broadly– the structure of their society, as long as those norms and practices “are not incompatible with fundamental rights defined by the national legal systems and with international recognised human rights.”136

Most importantly, by guaranteeing their right to their traditional lands and territories authorities will facilitate and create the conditions for indigenous peoples to enjoy their cultural identity and dignify life in accordance with their own cultural understandings and worldviews.

In this sense, the Inter-American Court has identified specific safeguards that state authorities should put in place in order to avoid material and spiritual suffering to indigenous communities. Broad and effective participation and consultation of indigenous communities before the design and implementation of development projects or exploration and exploitation of natural resources is a paramount guarantee that could prevent disruptive effects in their traditional way of living. Prior environmental and social impact assessments (ESIAs) are also essential for the prevention of potential negative effects on indigenous peoples’ traditional lands and territories and, therefore, prevent the deterioration of societal conditions that would affect or even deny their right to live in dignity (dignify life).

Finally, in case that development projects will take place within indigenous peoples’ traditional lands and territories, it is essential that benefits be shared

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136 See ILO Convention No. 169, Article 8(2).
with the affected communities, in accordance with their own demands, cultural understandings and interest. Again, consultation with the affected communities is paramount in order to consensually define the nature, quantity and quality of the benefits that need to be shared with indigenous communities.

In short, indigenous peoples’ culture is threatened without guaranteeing access to their traditional lands, territories and traditionally used natural resources. For these reasons, the jurisprudential development led by the Inter-American Court is key for enhancing the protection and preservation of cultural diversity in pluralistic societies where all members, including those in more vulnerable positions, would be able to pursue the realisation of their ‘project of life’ in dignity, that is, in accordance with their own customs and tradition and worldviews.137

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137 For further readings regarding the manner that the indigenous peoples’ rights to communal property safeguards and perpetuates their cultural identity. See Fuentes A., ‘The Inter-American System Judicial Interpretation and Indigenous Peoples’ Land Claims’, supra note 11, p. 303 et seq.