TRANSCONTINENTAL INDIGENOUS RIGHTS: CONTRIBUTIONS OF THE INTER AMERICAN COURT OF HUMAN RIGHTS

Carina Calabria[1]

Introductory words

Whereas violations to the rights of indigenous and tribal peoples are widespread and date to as far back as colonial times, resolute responses given by international law are recent and as yet insufficient. In recent times, the Inter-American Court of Human Rights (hereinafter the Court) has become one of the protagonists in the development of a progressive and innovative jurisprudence addressing rights specific to indigenous people. Although the contributions of the Human Rights Committee of the United Nations, as well as other international and domestic bodies should not be disregarded, the Court has been playing a paramount role, being the first international tribunal to have decided a contentious case involving Indigenous Peoples[2].

Over the last few decades, the Court has been recognizing a distinctive set of indigenous rights, identifying positive and negative obligations of States and proposing innovative forms of redressal[3]. Its singular case law has thus been advancing both procedural and substantive aspects of international law related to indigenous rights. According to James Anaya, former Special Rapporteur on

[1] PhD Candidate at the University of Manchester. Member of the Manchester International Law Centre. Researcher of the project "The Sociology of the Transnational Constitution" led by Professor Chris Thornhill and funded by the European Research Council (Advanced Grant 323656-STC). This paper is an updated and extended version of a presentation given at the 4th Annual Conference of the African Society of International Law that took place in Yaoundé (Cameroon) on the 30th and 31st of October, 2015. I am especially grateful to Rodrigo Céspedes Proto for the valuable jurisprudence on indigenous rights that he has kindly shared with me. At first we were to present this paper together, so many of the ideas here presented came from our discussions. I am also very grateful to Elizabeth O'Loughlin, Dr. Maria Smirnova, Dr. Dominic Dagbanja and Professor Chris Thornhill. We have been debating numerous questions related to the use of a legal concept of indigeneity in Latin America and Africa during the meetings of "The Sociology of the Transnational Constitution," project and this paper would have taken a different and less relevant direction without their contributions. That being said, I take full responsibility for the final form of all ideas presented in this paper. I am also indebted to David Rance for proofreading former versions of this article. Finally, I would also like to express my gratitude to Professors Makane Mbengue, Metou Brusil Miranda, and Yenkong Hodu Ngangjoh, who were responsible for the organization of this Conference and who have been fundamental for the development and expansion of the African Society of International Law.

[2] The very first case in which the Court somehow affirmed indigenous rights was actually Aloeboetoe et al. v. Suriname (1991/1993). However, the first case in which the Court applied those rights to defend an indigenous community was Mayagna (Sumo) Awas Tingni Community v. Nicaragua (2001). For more comments on these cases see Laurence Burgogue-Larsen and Amaya Ubeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford: Oxford University Press, 2013 [2011]) at p. 501.

[3] See Burgogue-Larsen and Torres, *supra* note 2, at p. 512.

the situation of human rights and fundamental freedoms of indigenous people to the United Nations (UN):

> "*At the regional level, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have played a path-breaking role in developing a distinct body of jurisprudence concerning the rights of indigenous peoples in the Americas, with an important normative effect in other regions. These bodies have interpreted the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights in a way that takes account of the specific circumstances of indigenous peoples and tribal communities, affirming for them the right to life, including a dignified collective existence; the right of property over lands, territories and natural resources, including the rights to consultation and consent; and the right to political participation in accordance with their cultural patterns*"[4].

The efforts of the Court, although remarkable, still represent only an incipient step toward the strict fulfilment of indigenous rights worldwide. Domestic legal orders continue to violate conventional and constitutional norms, domestic efficacy remains lacking in some of the Court's rulings, and the Inter-American System has been facing a critical financial crisis, one which threatens the region as a whole. Try as the Court may, issuing decisions and monitoring human rights norms is alone not sufficient to ensure rights. Therefore, coordination with States and other strategic actors continues to be a fundamental factor in the protection of rights. At the global level, it seems necessary to intensify the dialogue between regional systems of human rights protection, global mechanisms of protection, specialized agencies, and

[4] James Anaya, Report of the Special Rapporteur on the Situation of human rights and fundamental freedoms of indigenous people: Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Human Rights Council. UN doc. A/HRC/9/9, 11 August 2008, at p. 28.

indigenous and tribal peoples themselves in order to constitute more substantive and effective rights[5].

Focusing on the performance of the Inter-American Court, this paper aims to present the main changes occurring within the field of indigenous rights over the last decades. The central idea is to underline how the jurisprudence of this tribunal has underpinned the consolidation of some of those rights. Ultimately, this paper intends to shed some light on the major contributions of the Inter-American Court to the development of indigenous rights, aiming to foster conversations between regional courts of human rights, and, more specifically, to serve as a source for future comparative analysis on the African continent. Evidence suggests that there is room for intercontinental exchange, such as the fact that no other regional human rights instrument has given to "peoples" a treatment as extensive as that given by the African Charter on Human and Peoples' Rights, the emergence of cases related to indigenous rights in the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, and the selection of indigenous rights as the overarching theme of the last Annual Conference of the African Society of International Law (2015).

In order to address these points, the present study is structured in four sections. The first section analyses the development of indigenous rights norms and institutions in recent years. The second section provides a general overview of the entire case law of the Court on the subject. The third lists the main contributions of the Court to the development of indigenous rights. Lastly, the final section will tentatively trace prospects and limits for transcontinental dialogues.

I. Setting the scene: the conquest of international subjectivity and the recognition of authoritative rights

[5] For a panorama of the situation of indigenous rights worldwide see Rodolfo Stavenhagen, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Indigenous Issues, Human Rights and indigenous issues, Economic and Social Council, Commission on Human Rights. UN doc. E/CN/2006/78, 16 February 2006, at p. 90, 105. Although this report was launched a decade ago, many of the issues described remain almost unchanged.

The continued development of a steady jurisprudence on indigenous rights by the Court, albeit remarkable, should not be perceived as an isolated phenomenon. The last decades of the twentieth century have witnessed a progressive consolidation of a multilevel normative and institutional framework of protection of the rights of traditional native people, indigenous and tribal peoples included. In his Melland Schill Studies in International Law about Indigenous Peoples, Thornberry carries out a detailed description of this process. He starts with a historical analysis of the modern era by reporting that during the early twentieth century, the very existence of indigenous and tribal people as subjects of international law was denied, as well as their independent treaty making capacity. In 1923, when Canadian Indians and New Zealand Maoris tried to reach the League of Nations with the Deskakeh case, the British Empire promptly took the subject out of the agenda of the League, relegating the matter to a domestic discussion[6]. At least other three cases would appear in the early twentieth century to reinforce the invisibility of indigenous and tribal groups to international law, with tribunals such as the US-Great Britain Arbitral Tribunal in the Cayuga Indians case stating, for example, that: "*[the Cayuga] tribe have never constituted a unity under international law… From the time of discovery of America the Indian tribes have been treated as under the exclusive possession of the power which by discovery or conquest or cession held the land which they occupied*"[7] or the Permanent Court of Arbitration in the Island of Palmas Case affirming that "*contracts between a State […] and native princes or chiefs of peoples not recognised as members of the community of nations […] are not, in the international sense, treaties or conventions capable of creating rights or obligations such as may, in international law, arise out of treaties*[8]. These arbitral awards pretty much reflect the spirit of the first decades of the century.

In this first period, indigenous peoples were deemed incapable before law, an argument that justified abuses. According to Thornberry,

[6] See Patrick Thornberry, *Indigenous Peoples and Human Rights (Melland Schill Studies in International Law)* (Manchester: Manchester University Press, 2002), at p. 82.
[7] Idem, at p. 83.
[8] Ibidem. The decision is available at: http://legal.un.org/riaa/cases/vol_VI/173-190_Cayuga.pdf.

> "*The motif of natural slavery is also profoundly disabling, without the softening features of guardianship. To suggest that the indigenous inhabitants of the New World were somewhat less than human is to institute a language of dehumanisation, a perfect instrument of genocide (...) The indigenous were also deemed to lack the virtues of labour – hence the colonisers' justification of appropriation of empty lands, or the acquisition of lands superfluous to the needs of the Indians*"[9].

In terms of a normative framework, change had begun to occur only during the mid-century. Historically, the International Labour Organization (hereinafter ILO) was one of the pioneers in promoting international standards to address indigenous and tribal people claims. Following failed earlier attempts, the ILO adopted in 1957 Convention 107, which concerned the protection and integration of indigenous and other tribal or semi-tribal populations in independent countries. The Convention reached 27 ratifications and stands as the first successful endeavour to codify indigenous rights at the level of international law. Despite the severe criticisms condemning its paternalist and integrationist tone, ILO 107 remained for years the sole hard law international document to specifically regulate the rights of indigenous and tribal peoples, contributing *"to signalling the need for international attention and cooperation with regard to indigenous peoples"*[10].

In terms of jurisprudence, the Advisory Opinion of the International Court of Justice in the Western Sahara case, delivered in 1975, is perceived as a milestone for the recognition of the international personality of indigenous and tribal people, for it declares the concept of *res nullius* inapplicable in cases of "*territories inhabited by tribes or peoples having a social and political organization*"[11]. Discussions stemming out of this more inclusive background escalated throughout the 1970s, giving rise to a new normative instrument. Adopted in 1989, the Convention concerning indigenous and tribal peoples in

[9] Ibidem. The decision is available at: http://legal.un.org/riaa/cases/vol_II/829-871.pdf .
[10] See James Anaya, *supra* note 4, at p. 31.
[11] Advisory Opinion on the Western Sahara, [1975], I.C.J. 12, at p. 75-83.

independent countries (ILO 169) reflected a change in the attitude of international law, finally reversed from one of assimilationism to one of solidarity[12]. ILO 169 came into force in 1991 and represented "*a momentous step in the consolidation of the contemporary international regime on indigenous peoples*" [13]. The Convention provided formal international recognition of indigenous people's collective rights in essential areas, including cultural integrity; consultation and participation; self-government and autonomy; land, territory and resource rights; and non-discrimination in the social and economic spheres. Despite the fact that only 22 states, most of them in Latin America, have actually ratified ILO 169, "*the norms embodied in the Convention have been subsequently developed through the interpretive practice of the ILO and UN supervisory bodies, international courts and domestic courts*"[14], which suggests that ILO 169 has in fact achieved a wide-ranging impact. From these 22 states, 15 are Latin American; four are European (Denmark, Netherlands, Norway and Spain); and Africa (Central African Republic), Asia (Nepal), and Oceania (Fiji) have one ratifying State each. Additionally, 18 States remain part of ILO 107.

Another outcome of the revisionist discussions that started back in the 1970s was the United Nations Declaration on the Rights of Indigenous Peoples, formally adopted by an overwhelming majority of 143 Member States in 2007[15]. The Declaration is a relevant piece of soft law that embodies a common body of opinion on the rights of indigenous peoples and reflects "*the evolving normative understanding concerning the rights of indigenous peoples*" [16]. Other contemporaneous international standard-setting instruments also provide for the protection of indigenous peoples, albeit in a contingent way, such as the Convention on the Rights of the Child, the Convention on Biological Diversity, and some UNESCO instruments.

[12] See Federico Lenzerini, "Reparations for Indigenous People in International and Comparative Law: An Introduction" in Federico Lenzerini (ed.), Reparations for Indigenous People: International and Comparative Perspectives (Oxford: Oxford University Press, 2008) at p. 19.
[13] See James Anaya, *supra* note 4, at p.32.
[14] Ibidem.
[15] The General Assembly Resolution 61/295 was adopted after a year of the submission of its draft by the UN Human Rights Council. The Resolution has also received 4 votes against (Australia, Canada, New Zealand and the United States), and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).
[16] See James Anaya, *supra* note 4, at p. 32.

At the Inter-American level, since 1989, a Special Working Group operating in cooperation with the Rapporteur on the Rights of Indigenous Peoples within the Inter-American Commission on Human Rights has been preparing a legal instrument on the rights of indigenous populations. On February 26, 1997, the Inter-American Commission approved a draft of a Proposed American Declaration on the Rights of Indigenous Peoples, and on June 15, 2016, the final document was finally adopted by the General Assembly of the Organization of American States. This Declaration is the first instrument in the history of the Organization to specifically promote and protect the rights of indigenous peoples of the region[17].

At the domestic level, the influence of these movements can be ascertained via "*processes of constitutional, legal and institutional reform at the domestic level –including in States that are not formally part of the Convention–as well as in the development of other international instruments, programmes and policies*"[18]. These reforms, in general initiated in the 1980's, have recognized particularities of indigenous peoples and granted them specific rights, sometimes allowing the coexistence of diversified sets of norms within a society[19]. Such movements of constitutionalization have been facing limits, however. According to the first Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to the United Nations,

> "*Despite some countries have undertaken constitutional reforms and adopted laws recognizing distinct indigenous identities and the multicultural character of the State, in most cases, those reforms have not been able to eliminate the legacy of historical discrimination against indigenous peoples. In other extreme cases the very existence of indigenous peoples is not recognized in constitutions and laws and they are even denied citizenship*"[20].

[17] See more details of the adoption of the American Declaration on the Rights of Indigenous Peoples in: http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-075/16.
[18] See James Anaya, *supra* note 4, at p. 33.
[19] See Burgogue-Larsen and Torres, *supra* note 2, at p. 501.
[20] See Rodolfo Stavenhagen, *supra* note 5.

In tandem with this normative development, protective bodies were created at the international, regional, and domestic levels with mandates to enforce and protect these newly created rights. Despite the existence of some limitations on the ground, legal advances in the consolidation of indigenous rights on these different levels, especially in Latin America, are undeniable. Within a century, the international status of indigenous peoples switched from being "formally not considered members of the community of nations" to being legitimate subjects of international and domestic law, entitled to specific rights backed by a forward-looking normative and institutional framework. The jurisprudence of the Court has been taking advantage of this thriving environment and advancing it even further, as it will be explored in the next section.

II. An overview of the jurisprudence of the Inter-American Court of Human Rights concerning indigenous rights

The previous section described how indigenous and tribal peoples have been recognized as legitimate subjects of international law in the last century, as well as the subsequent creation of a normative and institutional framework to ensure the rights of these emergent actors. This section aims to give an overview of the substantial body of case law built up by the Inter-American Court of Human Rights for the protection of indigenous rights over recent decades.

1. Historical overview

The first case involving indigenous rights reached the Court only in the 1990s. It would take still another decade for a second case to be decided. Although the Inter-American Commission (hereinafter the Commission)–the other body that together with the Court composes the Inter-American System of Human Rights (hereinafter the System)–had been receiving and delivering recommendations on indigenous issues since the 1970s[21], it took longer for the

[21] For a detailed report of produced documents and actions carried out by the Commission since the 1970s, see Ariel Dulitzky, "Los pueblos indígenas: jurisprudencia del Sistema Interamericano de Protección de los

Court to become a centre of resolution for these disputes[22]. The 1980s is characterized by certain apathy of the Court, with advisory opinions occupying most of the agenda of the tribunal. In the following decade, the activities of the Court increased slightly, but cases were still marked by monothematicism. During the 1990s, the greater part of the 15 decisions delivered by the Court involved forced disappearances and other typical violations of dictatorial regimes and periods of transition[23]. During the 2000s, in contrast, the Court saw the number of cases soar. With the increase in litigation the topics addressed by the Court have also faced an unprecedented diversification, moving from the agenda of transitional justice, which characterized former years, to the discussion of structural problems stemming from inequality and social exclusion[24].

The emergence of indigenous and tribal cases has arisen as a consequence of this general tendency towards the diversification of the Court's portfolio. So far, between 1991 and 2016, the Court has delivered 23 decisions against 10 different States involving this issue. This figure represents half of the number of polities that have recognized the contentious jurisdiction of the Court, even if for a brief period[25]. Most victims are indigenous peoples, but some cases also refer

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Derechos Humanos" (1998) 26 Revista IIDH, pp. 137-188. Not surprisingly, less than two pages of that article, published in 1998, are dedicated to describing the activities of the Court related to indigenous rights.

[22] The inexistence of contentious decisions and the predominance of advisory opinions in the first years of the existence of the Court could suggest certain lethargy. However, there is evidence that as soon as the System started operating, a great number of petitions started to be lodged, attesting the existence of an incipient regional advocacy. Notwithstanding, by 1990, the Commission had submitted only 3 cases to the Court. Several reasons have been offered to explain the concentration of activities within the Commission during this period, such as the politicization and deliberated centralization of the Commission, and an alleged technical inability of the tribunal in the early years. For a further discussion, see Lynda Frost, "The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges" (1992) 14 Human Rights Quarterly, pp. 171-205, at p. 179.

[23] The cases delivered during the 1990s are: Aloeboetoe et al. v. Suriname (1991/1993), Cayara v. Peru (1993), Gangaram Panday v. Suriname (1994), Maqueda v. Argentina (1995), Neira Alegría et al. v. Peru (1991-1996), El Amparo v. Venezuela (1995-1996), Caballero Delgado and Santana v. Colombia (1994-1997), Genie Lacayo v. Nicaragua (1995-1997), Garrido and Baigorria v. Argentina (1996-1998), Benavides Cevallos v. Ecuador (1998), "White Van" (Paniagua Morales et al.) v. Guatemala (1998-2001), Castillo Páez v. Peru (1996-1998), Loayza Tamayo v. Peru (1996-1998), Suárez Rosero v. Ecuador (1997-1999), Castillo Petruzzi et al v. Peru (1998-1999), and Blake v. Guatemala (1999).

[24] See Víctor Abramovich, "Das violações em massa aos padrões estruturais: novos enfoques e clássicas tensões no Sistema Interamericano de Direitos Humanos" (2009) 6 Sur: Revista Internacional de Direitos Humanos, pp. 7-39, at p. 16.

[25] The following States have accepted the jurisdiction of the Inter-American Court of Human Rights: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Perú, Dominican Republic, Suriname and Uruguay. The main exceptions are some Caribbean Islands, United States and Canada, which makes the Inter-American System pretty much a Latin American instrument. Trinidad and Tobago and Venezuela denounced the Convention in 1998 and 2012, respectively. Peru withdrew its recognition of the contentious jurisdiction of the Court in 1999, during the Fujimori government, but returned to the System in 2001,

to Afro-descendant tribes such as the Maroons (*bushnegroes*), a tribal group composed of Afro-descendants who were taken to the region of Suriname in the 17th century to work as slaves on plantations, and the Garífunas, a tribal group composed by Afro-descendants mixed with indigenous people who lives in the North Coast of the Honduran Atlantic and whose origin goes back to the 18th century. Whereas only one of these cases was delivered in the 1990s and 10 were decided during the 2000s, in the present decade, the Court has already delivered 12 decisions. All together, these cases involving indigenous and tribal groups represent roughly 10% of the total case law of the Court.

The case of Aloeboetoe v. Suriname (1991-1993)[26] was the Court's first decision concerning indigenous rights. In 1991, during the hearings, the State of Suriname accepted responsibility for the acts of moral harassment and abuse of force perpetrated by State agents against a group of approximately 20 unarmed Maroons during a military intervention that culminated in the disappearance and death of at least seven individuals. Aloeboetoe v. Suriname is considered a leading case for different reasons. First, it introduced a discussion on the content of specific rights of indigenous and tribal people within the jurisprudence of the Court. In this decision, the Court considered that the matrilineal and polygamist structure of the tribe to which the victims belonged should prevail over the Surinamese norms. Proceeding from this assumption, the Court recognized that insofar as the Maroons were concerned, Surinamese family law was not effective in this case. Additionally, although in Suriname marriages must be registered in order to be recognized by the State and to guarantee the enforcement of Surinamese law, this requirement is generally not met by indigenous groups due to their social structure, but also due to the dearth of registry offices in the interior of the country. Thus, compensation measures took into consideration the traditional custom and social structure of the tribe instead of Surinamese civil law[27]. Second, it suggested, from the outset of the Court's deliberations on

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stressing "*the declaration of recognition should be understood to have been in effect without interruption since its deposit [...] on January, 1981*". For more details: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm#Peru.

[26] I/A Court H.R., Case of Aloeboetoe et al. v. Suriname. Merits. Judgment of December 4, 1991. Series C No. 11 and I/A Court H.R., Case of Aloeboetoe et al. v. Suriname. Reparations and Costs. Judgment of September 10, 1993. Series C No. 15.

[27] Idem, at prs. 17, 55, 58, and 62: "(...) *here local law is not Surinamese law, for the latter is not effective in the region insofar as family law is concerned. It is necessary, then, to take Saramaka custom into account*".

this matter, that indigenous rights shall also be used to protect distinctive rural black communities, like the Maroons. In proposing the application of specific indigenous rights regardless of the existence of an indigenous ethnical component, the Court has widened the coverage of these rights, setting an important precedent. Indeed, this set of rights has been used by the Court to protect not only indigenous peoples but also other historically marginalized groups with similar characteristics, such as Afro-descendant communities and tribes[28]. Finally, it was the first case in which a reparation other than compensation was required[29]. Aloeboetoe v. Suriname is also included in the first of three categories of cases, proposed by this article, relating to different groups of violations to indigenous rights. Using these categories, the following sections will examine the 23 cases regarding indigenous rights in the jurisprudence of the Court.

2. First group: excessive use of force by state agents resulting in forced disappearance of indigenous leaders, massacres and gender-based violence

This first category comprises an array of decisions involving the violation of indigenous rights resulting from the excessive use of force by law enforcement officers, normally police and military agents.

In some of these decisions, abuses committed by official agents have escalated into massacres. The cases of Plan de Sánchez Massacre v. Guatemala (2004) and Río Negro Massacres v. Guatemala (2012) portray the persecution and elimination of members of indigenous communities during the 1980s "*within the framework of a genocidal policy of the Guatemalan State carried out with the intention of totally or partially destroying the Mayan indigenous people*"[30] as a response to their resistance against the military regime. In Plan de Sánchez

[28] See Ariel Dulitzky, "When Afro-descendants became "Tribal Peoples": the Inter-American Human Rights System and Rural Black Communities" (2010), 15 UCLA Journal of International Law and Foreign Affairs, pp. 31-79.

[29] See Gabriela Citroni and Karla Quintana Osuna, "Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights" in Federico Lenzerini (ed.), *Reparations for Indigenous People: International and Comparative Perspectives* (Oxford: Oxford University Press, 2008) at p. 321.

[30] I/A Court H.R., Case of the Plan de Sánchez Massacre v. Guatemala. Merits. Judgment of April 29, 2004. Series C No. 105, at pr. 2.

Massacre v. Guatemala, the Court denounced the massacre of 268 persons perpetrated by the Guatemalan Army and civil collaborators and subsequent acts of intimidation and discrimination against survivors and the next of kin of victims. In Río Negro Massacres v. Guatemala, the Court condemned the "*destruction of the Mayan community of Río Negro by means of a series of massacres perpetrated by the Guatemalan Army and members of the Civil Self-defense Patrols in 1980 and 1982; the persecution and elimination of its members and the subsequent violations directed against the survivors*"[31]. Likewise, in Moiwana Community v. Suriname, Maroons were again the victims of attacks, forced displacement, and intimidation after a massacre perpetrated by state agents against over than 40 men, women and children in a Moiwana village.

In other cases, acts of brutality have resulted in the forced disappearance of members and leaders of indigenous communities. In Tiu Tojín v. Guatemala (2008)**,** María Tiu Tojín and her daughter Josefa, both members of a Mayan indigenous community, disappeared while under custody of Guatemalan army and the Civil Self-Defence Patrols; in Escué Zapata v. Colombia (2008), "*a Cabildo Governor of the Indigenous Protection of Jambaló [...] who devoted himself to farming as well as the other members of his [c]ommunity and to the defence of the indigenous [...] territory*"[32] was also declared disappeared; in Chitay Nech et al v. Guatemala (2010), the Court declared the State internationally responsible for the forced disappearance of the Mayan indigenous political leader Florencio Chitay Nech.

Perhaps the most outrageous cases within this category, after the aforementioned massacres, relate to gender-based violence. Two cases in particular draw special attention to systematic violations committed against indigenous women. Both took place in Guerrero, a state located in southwestern Mexico characterized by a strong military presence due to activities of organized crime in the region. In the first case, Rosendo-Cantú et al. v. Mexico (2010), Rosendo Cantú, who at the time of the events was 17 years old, was sexually assaulted near her home by members of the Armed Forces while she was

[31] I/A Court H.R., Case of the Río Negro Massacres v. Guatemala. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 4, 2012. Series C No. 250, at pr. 2.
[32] I/A Court H.R., Case of Escué Zapata v. Colombia. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 165, at pr. 3.

washing clothes and bathing in a small river. In the second case, Fernández Ortega et al. v. Mexico (2010), three soldiers, in uniform and carrying weapons, entered in the home of Mrs. Fernández Ortega, a 25 year-old indigenous women, to ask about her husband while she was with her four children. One of the officials raped the victim while her children ran to their grandparents' house in the moments immediately prior to the crime. These cases exposed not only the repeated abuses committed by military forces in Guerrero, but also the inadequacy of the health staff of clinics and hospitals, as well as the failure of judicial and police officers to deal with cases of violence against women. It has been reported that "*between 1997 and 2004, six indigenous women filed complaints of rape attributed to members of the Army in the state of Guerrero*"[33] and that the patriarchal structure in the State "*is blind to gender equity*"[34]. These complaints were heard in the military jurisdiction, without any indication of punishment of those responsible for any of the alleged crimes. According to the victims and the Commission, the rapes "*had gender-specific causes and consequences [given that they were used] as a form of submission and humiliation and a method of destroying the women's autonomy*"[35]. Both petitions stressed "*the difficulties encountered by indigenous people, particularly indigenous women, to obtain access to justice*"[36]. The State made a partial acknowledgment of its international responsibility during the public hearing, admitting that "*there have been delays and a lack of due diligence in the investigation and punishment of the perpetrators*"[37]. In these cases the Court took into consideration the "project of life"[38] of the victims and their next of kin, ordering extensive measures of individual redressal and giving emphasis to measures of non-repetition[39].

[33] I/A Court H.R., Case of Rosendo-Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2010. Series C No. 216, at pr.71.

[34] I/A Court H.R., Case of Rosendo-Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2010. Series C No. 216, at pr. 71; I/A Court H.R., Case of Fernández Ortega et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 30, 2010. Series C No. 215, at pr. 78.

[35] I/A Court H.R., Case of Rosendo-Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2010. Series C No. 216, at pr. 81.

[36] Idem, at pr.2.

[37] Idem, at pr.16.

[38] The Court first used the concept of "project of life" in the judgment of Loayza-Tamayo v. Peru to describe reasonable expectations for the future of the victim. According to Dinah Shelton "*Unlike pecuniary damage for probable past losses and lucro cessante for quantifiable lost future earnings, proyecto de vida alludes to the 'personal fulfilment' of the affected person, taking into account the vocation, skills, circumstances, potentialities, and aspirations that reasonably could be determined and expected. The concept is thus linked to the self-actualization of the person, grounded in individuality. If the proyecto de vida are cancelled or subject to*

2. Second group of cases: land and derived rights

This second category does not represent the majority of the cases related to indigenous rights within the Court's jurisprudence, but it certainly addresses the most relevant issue faced by indigenous and tribal peoples worldwide: land rights. Due to the profiteering activities of State and private actors, large numbers of indigenous and tribal peoples have been removed from their traditional lands, an action which exposes them to situations of vulnerability characterized by lack of housing, food, and medical services. Occasionally, their separation from traditional lands threatens their very survival. These decisions all present a similar structure, albeit specificities may appear from case to case. Normally, defendant States do not recognize the juridical personality of indigenous peoples or their right to land, and, therefore, do not assure property rights over ancestral lands and natural resources. Sometimes, States even grant plots of traditional territory to third–parties who engage in invasive projects, allowing economic interests to prevail over the right of indigenous and tribal peoples to their ancestral lands.

The first case in which an international court dealt with land rights of an indigenous community was Mayagna (Sumo) Awas Tingni Community v. Nicaragua (2001). In this case, not only did the State of Nicaragua fail to demarcate an ancestral territory, but it also granted a private company a concession to initiate logging on communal lands without the assent of the community. Another three cases, this time against the State of Paraguay–Yakye Axa Indigenous Community v. Paraguay (2005), Sawhoyamaxa Indigenous

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interference, the loss cannot be ignored by the Court". See Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2015 [2009]), at p. 350s; Jo M. Pasqualucci, The practice and procedure of the Inter-American Court of Human Rights (Cambridge, UK: Cambridge University Press, 2003) at p. 271s.

[39] In this case, the Court ordered: "16. The State will continue with the process to standardize a protocol, applicable at the federal level and in the state of Guerrero, regarding the handling and investigation of rape cases, 17. The State must continue to implement permanent training programs and courses on diligent investigation in cases of sexual violence against women, which include an ethnic and gender-based perspective. […] 21. The State must continue to offer services for women victims of sexual violence through the health centre, 22. The State must ensure that assistance services for women victims of sexual violence are offered by the institutions indicated by the State, 23. The Court must continue to implement the campaign to raise awareness and to sensitize the population regarding the prohibition and effects of violence and discrimination against indigenous women". I/A Court H.R., Case of Rosendo-Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2010. Series C No. 216.

Community v. Paraguay (2006), and Xákmok Kásek Indigenous Community. v. Paraguay (2010)–attest to an on-going delay in the demarcation procedures occurring domestically. Two cases against Suriname, Saramaka People v. Suriname (2007) and the recent Kaliña and Lokono Peoples v. Suriname (2015), reveal that even after a span of 8 years between the first and the second decision the State of Suriname remained incapable of recognizing the collective juridical capacity of indigenous communities. According to the Court, the recognition of such capacity is a very important measure, which has the "*purpose of ensuring the full exercise and enjoyment of their right to communal property, as well as collective access to justice, in accordance with their communal system, customary laws, and traditions*"[40]. The sole case against Ecuador, Kichwa Indigenous People of Sarayaku v. Ecuador (2012), condemns the State for having granted a permit to a private company to carry out oil exploration and exploitation activities in the territory of the Kichwa Indigenous People of Sarayaku in the 1990s without previously consulting them and without obtaining their consent. The private company had not only begun exploratory activities but had also "*introduced high-powered explosives in several places on indigenous territory, thereby creating a situation of risk for the population*"[41]. In more recent cases such as Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia (2013), Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v. Panama (2014) and Garífuna Punta Piedra Community and its Members v. Honduras (2015), the right to traditional lands is extended to other groups like Afro-descendant communities, reaffirming the understanding of the Court in previous cases, such as the aforementioned Aloeboetoe v. Suriname, that indigenous rights must be used to guarantee the protection of not only indigenous peoples, but also of other historically marginalized groups with similar characteristics. These decisions supported the establishment of an innovative set of reparations by the Court, as well as the development of arguments to justify the special rights of indigenous communities over their traditional lands.

[40] I/A Court H.R., Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172, pr. 6.
[41] I/A Court H.R., Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, pr.2.

4. Third group of cases: discriminatory practices

The third group of rulings comprises three sui generis cases related to the principle of equality. The first decision, López Álvarez v. Honduras (2006), deals with a prohibition imposed upon the garífuna Alfredo Lopez Alvarez—who at the time of his arrest was Vice-president of the Honduras Black Fraternal Organization and leader of the Confederation of Indigenous People of Honduras—which disallowed him from using his mother tongue while imprisoned. The second ruling in this category, Yatama v. Nicaragua (2005), is related to a decision issued by the Supreme Electoral Council of Nicaragua that impeded members of an indigenous regional political party from participating in municipal elections held in 2000. The Court condemned the State for not having provided "*norms in the electoral law that would facilitate the political participation of the indigenous organizations in the electoral processes of the Atlantic Coast Autonomous Region of Nicaragua, in accordance with the customary law, values, practices and customs of the indigenous people who reside there*"[42]. The third decision, Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile (2014)**,** brings up the question of racial discrimination, which in that case came disguised as an application of the Chilean Antiterrorist Law to ancestral leaders and authorities of Mapuche communities.

III. Tentative intercontinental contributions

The previous section provided an overview of the Court's jurisprudence concerning indigenous rights. This section will analyse some advances arising from this jurisprudence with the aim of supporting the co-development of regional regimes of human rights protection and to establish an intercontinental dialogue on these rights. In doing so, it gives emphasis to 5 major legal contributions of the Court.

[42] I/A Court H.R., Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, pr. 2.

1. Establishment of a distinctive set of reparations for indigenous and tribal peoples

Obligation to repair is one of the foundations of international human rights law and state responsibility. Not by coincidence, one of the most remarkable contributions of the Court lies exactly in the development of a new semantic of reparation. The comprehensive and progressive character of the reparations regularly ordered by the Court differentiates the Court's practice from the practice of other tribunals, which rely mainly on compensatory measures to redress breaches of international law. According to the Court, which groups its wide range of reparatory measures in six different categories, "*Numerous measures of reparation are ordered in each judgment, and the Court monitors every reparation ordered promptly and in detail*" [43]. This comprehensive

[43] The Court defines measures of restitution, rehabilitation, satisfaction, as well as guarantees of non-repetition and obligation to investigate, prosecute and punish, as appropriate, as follows: [Restitution]"These measures entail the re-establishment, insofar as possible, of the situation that existed before the violation occurred. As a form of reparation, restitution includes measures such as: (a) re-establishment of the liberty of persons illegally detained; (b) return of property illegally seized; (c) return to the place of residence from which the victim was displaced; (d) reinstatement in employment; (e) annulment of judicial, administrative, criminal or police record and cancellation of the corresponding records, and (f) the return, demarcation and granting of title to the traditional territory of the indigenous communities to protect their communal property"; [Rehabilitation] "These are the measures aimed at the provision of the required medical and psychological care to attend to the physical and mental health of the victims, which must be supplied free of charge and immediately, including the provision of medicines and, as appropriate, the supply of goods and services"; [Satisfaction] "These measures are aimed at repairing the non-pecuniary damage (suffering and anguish caused by the violation, harm to values that are very significant to the individual, and any change of a non-pecuniary nature in the living conditions of the victims). They also include, inter alia, acts or objects of public scope or impact, such as acts to acknowledge responsibility, public apologies to the victims, and acts to commemorate the victims, with the aim of recovering the memory of the victims, recognizing their dignity and consoling their next of kin. In this regard, the following are some example of measures of satisfaction: (a) a public act to acknowledge international responsibility and amend the memory of the victims; (b) publication or dissemination of the Court's judgment; (c) measures to commemorate the victims or the facts; (d) scholarships or commemorative grants, and (e) implementation of social programs"; [Guarantees of non-repetition] "These are measures intended to ensure the non-recurrence of human rights violations such as those that occurred in the case examined by the Court. These guarantees are of public scope or impact and, in many cases, resolve structural problems, so that not only the victim in the case benefits but also other groups or members of society. The guarantees of non-repetition can be divided into three groups, according to their nature and purpose, namely: (a) measures to adapt [and implement, complement] domestic law to the parameters of the Convention; (b) human rights training for public officials, and (c) adoption of other measures to guarantee the non-repetition of violations"; [Obligation to investigate, prosecute and punish, as appropriate] "This refers to an obligation that States have to guarantee the effective investigation of the acts that violated human rights and, as appropriate, to determine the masterminds and perpetrators of those acts, as well as to apply the corresponding punishments. This obligation also entails conducting administrative investigations in order to sanction those who may have obstructed the domestic proceedings. This obligation also means that, if applicable, the States must determine the whereabouts of the victims when these are unknown. In addition, the State must remove all the obstacles, de facto and de jure, that prevent the due investigation of the facts, and use all available means to expedite the said investigation and the respective proceedings, in order to avoid the repetition of those acts". See OEA. Inter-American Court of Human Rights. Annual Report 2012. OEA/Ser.L/V./II.147. Doc.1, adopted in 05 March 2013, p 18-19.

reparatory regime could be sometimes characterized as a form of "reparatory activism", in analogy to the idea of judicial activism[44]. For indigenous and tribal peoples in particular the Court has been ordering a variety of such measures, including the publication and broadcasting of rulings in native languages[45], the realization of public acts in which the State apologizes to victims and recognizes international responsibility, and the construction of monuments to honour the memory of victims. These measures dignify "*the role of the victim, who is thus turned into a social actor who reacts and thinks about how to construct a space for justice*"[46].

Public acts normally take place in a public ceremony, organized in close consultation with the representatives of the victims and their families and with the presence of senior State officials, survivors, victims, families and any other people affected by violations. The determination of the venue and the characteristics of the act itself must be decided through consultation and agreement with members of the community. In Plan de Sánchez Massacre v. Guatemala, "*the State of Guatemala, represented by the vice-president went to the indigenous community of Plan de Sánchez formally to apologize in accordance with the implementation of the sentence issued by the Court. The community obliged him to attend a theatre performance by young members of the community that illustrated the events of the massacre that took place twenty-three years*

[44] Expressions such as "innovative", "pioneer" and "progressive" are commonly used to describe the regime of reparation established by the Court. For more details on this comprehensive reparatory regime see David C. Baluarte, "Strategizing for Compliance: the Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative for Victims' Representatives (2012) 26 American University International Law Review pp. 263-321; Douglas Cassel, "The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights" in Koen Feyer, Stephan Parmentier, Mart Bossuyt, Paul Lemmens (eds.), Out of the Ashes: Reparations for Gross and Systematic Human Rights Violations (Antwerp: Intersentia, 2005); Thomas M. Antkowiak, "A Dark Side of Virtue: the Inter-American Court and Reparations for Indigenous Peoples" (2014) 25 Duke Journal of Comparative and International Law, pp.1-80; Thomas M. Antkowiak, "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond" (2008) 46 Columbia Journal of Transnational Law, pp. 351-419; and Judith Schonsteiner, "Dissuasive Measures and the 'Society as a Whole' A Working Theory of Reparations in the Inter-American Court of Human Rights" (2011) 23 American University International Law Review, pp. 127-164.

[45] So far, the Court has ordered the translation and publication of rulings in the following native languages: Maya Achí (Plan de Sánchez Massacre v. Guatemala**,** Río Negro Massacres v. Guatemala), Miskito, Sumo, Rama (Yatama v. Nicaragua), Nasa Yuwe (Escué Zapata v. Colombia), Saramaka (Saramaka People. v. Suriname), K´iche´ (Tiu Tojín v. Guatemala), Mayan kaqchike (Chitay Nech et al. v. Guatemala), Me'paa (Fernández Ortega et al. v. Mexico, Rosendo Cantú et al. v. Mexico), Sanapaná, Enxet, Guaraní languages (Xákmok Kásek Indigenous Community. v. Paraguay), Kichwa (Kichwa Indigenous People of Sarayaku v. Ecuador). On others occasions, the Court has also ordered the translation of the whole Convention to a native language and the subsequent distribution between members of affected communities.

[46] Nieves Gómez, "Psychosocial Reparation: Latin American Indigenous Communities", in Federico Lenzerini (ed.), *Reparations for Indigenous People: International and Comparative Perspectives* (Oxford: Oxford University Press, 2008) at p. 153.

earlier"[47]. In Moiwana Community v. Suriname, the State built a memorial in a suitable public location to honour the victims of the massacre. In Chitay Nech et al. v. Guatemala, the State named a school and a recognized street in San Martín Jilotepeque after Florencio Chitay Nech, and placed there a commemorative plaque with his name and a description of his activities.

The Court has been also instituting "socioeconomic measures of collective reparation", bringing forward the concept of social rehabilitation[48]. The first case in which this appeared was Aloeboetoe et al. v. Suriname. Following the orders of the Court, the State reopened a school located in the affected community and staffed it with teaching and administrative personnel, as well as with a medical dispensary. In subsequent cases, the Court ordered, among other similar measures[49], the maintenance and improvement of the road system between the communities affected by violations and nearby cities; the arrangement of sewage and potable water supply together with housing projects; the establishment of health centres; and the obligation of providing medicine, food supplies, medical and psychosocial care, and effective hygienic management of biological waste. Other measures of reparation tailored for indigenous and tribal peoples will be detailed in the following sections.

2. Recognition of collective rights and strengthening of the social dimension of reparations

The Court has been progressively recognizing the collective rights of indigenous people, even in spite of the fact that the American Convention does not explicitly set forth collective rights. At the same time, the Court has also gradually expanded the social dimension of its reparations, ordering measures of

[47] Ibidem.

[48] The concept of social rehabilitation expands the traditional definition of the Court that restricts rehabilitation to "the measures aimed at the provision of the required *medical and psychological care*" (see *supra* note 44). For an interesting development of the concept of social rehabilitation, see Clara Sandoval, "Rehabilitation as a Form of Reparation under International Law" (London, REDRESS, 2009), available at: http://www.redress.org/reports/The%20right%20to%20rehabilitation.pdf

[49] I/A Court H.R., Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124; I/A Court H.R., Case of the Indigenous Community Yakye Axa v. Paraguay. Interpretation of the Judgment of Merits, Reparations and Costs. Judgment of February 6, 2006. Series C No. 142; I/A Court H.R., Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214.

individual redress but also measures directed to society as a whole that aim to guarantee the non-repetition of violations[50].

In their inaugural decisions, Justices tended to be very careful and to individualize the process of redressal, creating enormous lists of each and every victim, especially in cases of collective massacres. However, even in these cases, the Court reaffirmed collective rights, mentioning the special collective significance of individual reparations, which could bring benefits to the community as a whole. Likewise, subsequent decisions have consistently held that on the conceptual level, the "*indigenous community has ceased to be a factual reality to become an entity with full rights, not restricted to the rights of the members as individuals, but rather encompassing those of the Community itself, with its own singularity*"[51].

The reaffirmation of collective rights does not preclude the existence of individual rights, as attested by the Justice Sergio García Ramírez:

> "*The collective rights of the community are not blended with those of its members, and the individual rights of the members are not absorbed or subsumed in the former. Each "category" retains its own entity and autonomy. Both of them, deeply and closely interrelated, retain their own character, are subject to protection and require specific measures of protection. In this context, recognition of each of these aspects becomes relevant and even essential for the other. There is no conflict between them, only harmony and mutual dependence. Finally, the collective life becomes part of the individual life, and the latter acquires meaning and worth in the framework of the collective existence. While it is true that this phenomenon can be seen in many societies, perhaps in all, it is also true that in some – such as the*

[50] See Sofía Galván Puente, "Legislative measures as guarantees of non-repetition: a reality in the Inter-American Court, and a possible solution for the European Court" (2009) 49 Revista IIDH, pp. 69-106 at p. 74s.
[51] See Burgogue-Larsen; Torres, *supra* note 2, at p. 504-512.

indigenous groups of the Americas – it has special, more intense and decisive characteristics"[52].

The Court has repeatedly reaffirmed collective rights using different strategies of redress. In former decisions, the Court ordered the State of Suriname to "*grant the members of the Saramaka people legal recognition of the collective juridical capacity, pertaining to the community to which they belong, with the purpose of ensuring the full exercise and enjoyment of their right to communal property, as well as collective access to justice, in accordance with their communal system, customary laws, and traditions*"[53]. On other occasions, the Court has ordered the implementation of a special registration program to guarantee the provision of identification documents and implied benefits to indigenous groups in affected areas of Paraguay[54]. After these orders, the number of registered adults and children in these areas reached levels of 94% and 80%, respectively. Another common strategy of the Court is the creation of collective funds or the requirement that compensation be used for an agreed upon purpose which will benefit the community as a whole. In Plan de Sánchez Massacre v. Guatemala, the compensation was used to improve the infrastructure of the chapel in which members of the community pay homage to those executed in the massacre. In Escué Zapata v. Colombia, there was established a fund named after the disappeared indigenous leader "Germán Escué Zapata", which was to be invested, according to the Court's decision, in "*works or services of collective interest for the benefit of the community which he belonged*,"[55]. The fund was used to acquire a *chiva*, a special bus commonly used for rural transport in Colombia.

The collective funds designed by the Court as reparatory measures are normally used to subsidize projects related to education, housing, agriculture

[52] I/A Court H.R., Case of the Plan de Sánchez Massacre v. Guatemala. Merits. Judgment of April 29, 2004. Series C No. 105. Separate Opinion of Judge Sergio García Ramírez.
[53] I/A Court H.R., Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172.
[54] I/A Court H.R., Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146 and I/A Court H.R., Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214.
[55] I/A Court H.R., Case of Escué Zapata v. Colombia. Interpretation of the Judgment on Merits, Reparations and Costs. Judgment of May 5, 2008 Series C No. 178.

and health. In its first decisions, the Court tended to call for the institution of an implementation committee, composed of a "*representative appointed by the victims, a representative appointed by the State, and another representative jointly appointed by the victims and the State*" that would "*be responsible, in consultation with the community for designating how the projects will be implemented*"[56]. This kind of ruling was severely criticized because, according to some specialists[57], it reflected a paternalist approach towards indigenous and tribal peoples. As perhaps a response to this criticism, in more recent cases such as Xákmok Kásek Indigenous Community. v. Paraguay and Kichwa Indigenous People of Sarayaku v. Ecuador, the Court decided that the communities in question would "*use the money as they decide*", and "*in accordance with its own decision making mechanisms and institutions, among other aspects, for the implementation of educational, cultural, food security, health care and ecotourism development projects or other community infrastructure projects or projects of collective interest that the People considers a priority*"[58]. The devolution of autonomy to the communities reflects a new mind-set of the Court, which takes the right to self-determination even more seriously.

3. Restoration of the right of self-determination and other derived rights

As explained by Rodolfo Stavenhagen, the first Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to the United Nations,

> "*With respect to indigenous peoples, self-determination, conceived in these terms, incorporates the following prerogatives, which are 'consequential' with each other; non-discrimination and cultural integrity; right to conserve the*

[56] I/A Court H.R., Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124; I/A Court H.R., Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146.

[57] See Jo M. Pasqualucci "International indigenous land rights: a critique of the jurisprudence of the Inter-American Court of Human Rights in light of the United Nations declaration on the rights of indigenous peoples" (2009) 27 Wisconsin International Law Journal, pp. 51-98 and Thomas M. Antkowiak *supra* note 45.

[58] I/A Court H.R., Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245.

> *possession of their traditional lands and natural resources; right to social welfare and development; right to self-government, in the twofold characterization of autonomy and participation in the decisions affecting them [...] The principle of self-determination entails the formal recognition of indigenous peoples' traditional institutions, internal justice and conflict-resolution systems, and ways of socio-political organization as well as the recognition of the right of indigenous peoples to freely define and pursue their economic, social and cultural development*"[59].

The Court has contributed to the strengthening of most of these prerogatives, balancing the "paradoxical combination" produced by the conflict between the principle of non-discrimination, which states that indigenous and tribal peoples shall be treated as other members of society, and the protection of cultural and social integrity, according to which indigenous and tribal peoples should receive a differentiated treatment in respect to their own customs and beliefs [60]. On the one hand, the Court has been carrying out diverse actions to guarantee the cultural and social integrity of indigenous and tribal peoples. In Aloeboetoe et al. v. Suriname, the customs of Saramaka people were taken into account in order to identify their heirs and successors[61]. In some cases against Guatemala, the Court ordered the State to design and implement a special project to rescue the Maya Achí culture. In response, the State has implemented programs in several communities, including the study and dissemination of Maya-Achí culture and the provision of teaching personnel trained in intercultural and bilingual teaching[62]. Furthermore, in Bámaca Velásquez v. Guatemala, before ordering reparations, the Court considered the profound repercussions caused by the forced disappearance, torture and extrajudicial execution of Efrain Bámaca Velásquez vis-à-vis the sacred relationship that

[59] See Rodolfo Stavenhagen, *supra* note 5.
[60] See Burgogue-Larsen and Torres, *supra* note 2, at p. 513.
[61] Idem at p. 522.
[62] I/A Court H.R., Case of the Plan de Sánchez Massacre v. Guatemala. Reparations. Judgment of November 19, 2004. Series C No. 116, pr.; I/A Court H.R., Case of the Río Negro Massacres v. Guatemala. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 4, 2012. Series C No. 250.

unites the living and the dead in Mayan culture. In order to enable the organization of a proper burial according to the customs of the Mayan culture, the Court ordered the State to "*locate the mortal remains of Efraín Bámaca Velásquez, disinter them in the presence of his widow and next of kin, and deliver them*"[63].

On the other hand, the Court has recognized the principle of non-discrimination as a norm of *jus cogens*, issuing decisions accordingly. The threefold discrimination that indigenous women continue to suffer–for being women, indigenous and poor–has been addressed with extensive reparatory measures by the Court, including the granting of scholarships for victims and their next of kin[64], the creation of an action protocol to investigate and deal with victims of rape cases, and the re-structuring of health and legal services designed for women victims of abuses[65]. In López Álvarez v. Honduras, garífunas imprisoned in a detention centre were prohibited of speaking their native language. The Court established that "*the prohibition acquires a special seriousness, since the mother tongue represents an element of identity of Mr. Alfredo López Álvarez as a Garífuna. In this way, the prohibition affected his personal dignity as a member of that community […] Language is one of the most important elements of identity of any people, precisely because it guarantees the expression, diffusion, and transmission of their culture*". In Yatama v. Nicaragua, insidious discrimination impeded indigenous candidates to run for regional elections[66]. As a response, the Court ordered the State to reform the domestic electoral system so indigenous political parties could participate in subsequent elections. Although this case hasn't yet been met with formal compliance, there are attempts to increase indigenous participation in legislative, judicial and executive bodies in Nicaragua**.**

[63] I/A Court H.R., Case of Bámaca Velásquez v. Guatemala. Reparations and Costs. Judgment of February 22, 2002. Series C No. 91.

[64] I/A Court H.R., Case of Escué Zapata v. Colombia. Interpretation of the Judgment on Merits, Reparations and Costs. Judgment of May 5, 2008 Series C No. 178; I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico. Interpretation of Judgment of Preliminary Objection, Merits, Reparations and Costs. Judgment of May 15, 2011. Series C No. 225; I/A Court H.R., Case of Fernández Ortega et al. v. Mexico. Interpretation of Judgment of Preliminary Objection, Merits, Reparations and Costs. Judgment of May 15, 2011. Series C No. 224.

[65] I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico. Interpretation of Judgment of Preliminary Objection, Merits, Reparations and Costs. Judgment of May 15, 2011. Series C No. 225; I/A Court H.R., Case of Fernández Ortega et al. v. Mexico. Interpretation of Judgment of Preliminary Objection, Merits, Reparations and Costs. Judgment of May 15, 2011. Series C No. 224.

[66] See Burgogue-Larsen and Torres, *supra* note 2, at p. 513.

4. Introduction of new perspectives regarding the right of indigenous and tribal peoples to land

Today, just as in the past, global capital and private interests continue to inflict widespread despoliation of indigenous and tribal lands and of natural resources contained therein. Regularly, land alienation and forced displacement come as result of concessions granted to private companies, federal agencies and financial institutions invested in agricultural schemes, deforestation programmes, mining of natural resources, construction of national parks, expansion of roads, and, especially, large multipurpose dams. These activities are often the source of human rights violations taking place in traditional lands.

The Court was the first international juridical body that interpreted the right to property bearing in mind the right of indigenous and tribal peoples to traditional lands. With the decision issued in Mayagna (Sumo) Awas Tingni Community v. Nicaragua[67], the Court became the first international tribunal to recognize the right of an indigenous community to its communal property, regardless of a holding of legal title. The Court has placed the distinctive relationship of indigenous and tribal peoples with ancestral lands at the centre of land disputes, treating land as a multidimensional and foundational element of indigenous life rather than a mere economic good.

Taking into consideration that ancestral lands constitute a fundamental basis for essential aspects of the cultural and spiritual existence of some groups, the Court has settled the point that "*ancestral property shall have priority over private property and considerations of more rational and productive use of land. All states shall introduce in their domestic systems appropriate and effective remedies for indigenous peoples to claim restitution of their ancestral lands*"[68].

In its 11 rulings related to land rights, the Court has obliged States to carry out the identification, demarcation and titling of traditional territories. Moreover, it has instituted that the entire process should occur in accordance with the values, usage, and customs of affected communities, through previous, effective,

[67] I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79.
[68] See Gabriela Citroni and Karla Quintana Osuna, *supra* note 29, p. 341.

and fully informed consultations. Besides that, the Court has settled that, until the final delimitation and titling is effectuated, the State should cease any act which could affect the well being of communities or interfere with the existence, value, use or enjoyment of the property located in the geographic area where the members reside. Likewise, during periods in which communities remain landless, the State must provide adequate infrastructure, basic services and necessary supplies for the well being of members[69]. The State has also the duty to always consult with indigenous and tribal peoples about the use of their traditional lands. The principle of free, prior and informed consent entails the right to be consulted with reasonable notice about questions affecting directly or indirectly the life and the territory of a community, including information on the likely social and environmental impact and any possible coercion, intimidation or manipulation during the process[70].

Unfortunately, despite the advancement of these important rules at the normative level, violations keep occurring at an alarming rate. As attests a report of the first Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to the United Nations,

[69] In Xákmok Kásek Indigenous Community. v. Paraguay, for example, the Court ordered: "the State must take the following measures immediately, periodically, or permanently: (a) provision of sufficient potable water for the consumption and personal hygiene of the members of the Community; (b) medical and psycho-social attention to all the members of the Community, especially the children and the elderly, together with periodic vaccination and deparasitization campaigns that respect their ways and customs; (c) specialized medical care for pregnant women, both pre- and post-natal and during the first months of the baby's life; (d) delivery of food of sufficient quality and quantity to ensure an adequate diet; (e) installation of latrines or any other adequate type of sanitation system in the Community's settlement, and (f) provision of the necessary materials and human resources for the school to guarantee the Community's children access to basic education, paying special attention to ensuring that the education provided respects their cultural traditions and guarantees the protection of their own language (check the spacing in the preceding quote, I have made some changes where spaces were missing). See more in: I/A Court H.R., Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214.

[70] As a result, in the case of Saramaka the Court has stated "Paragraph 8: The State shall adopt legislative, administrative and other measures necessary to recognize and ensure the right of the Saramaka people to be effectively consulted, in accordance with their traditions and customs, or when necessary, the right to give or withhold their free, informed and prior consent, with regards to development or investment projects that may affect their territory, and to reasonably share the benefits of such projects with the members of the Saramaka people, should these be ultimately carried out [...]The State shall ensure that environmental and social impact assessments are conducted by independent and technically competent entities, prior to awarding a concession for any development or investment project within traditional Saramaka territory, and implement adequate safeguards and mechanisms in order to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Saramaka people [...]The State must consult the Sarayaku People in a prior, adequate and effective manner, and in full compliance with the relevant international standards applicable, in the event that it seeks to carry out any activity or project for the extraction of natural resources on its territory. I/A Court H.R., Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172.

> "*Although in recent years many countries have adopted laws recognizing the indigenous collective right to ownership of their lands, land-titling procedures have been slow and complex and, in many cases, the titles awarded to the communities are not respected in practice. […] While legal protective measures have been enacted with greater frequency, the loss and dispossession of indigenous lands has proceeded relentlessly, in some countries more rapidly than in others, and the consequences of this process have in general been quite deplorable on the human rights situation of indigenous peoples. […] Even when laws are in principle available to the indigenous, these are not always implemented for their benefit. Numerous States report on recent legislative activity by which indigenous rights are seemingly protected, but indigenous organizations also report that their implementation leaves much to be desired*"[71].

5. Introduction of the concept of "vida digna" (life with dignity)

The Court has established the distinctive relationship of indigenous peoples with their ancestral lands as the main argument justifying their priority over the ownership of traditional territories. However, some commentators suggest the concept of the "distinctive relationship" might constitute a fragile legal basis to defend indigenous and tribal land rights[72]. They argue that by establishing a static idea of how indigenous groups relate to territory, the Court overlooks natural dynamics such as migration, cultural shifts and nomadism. Accordingly, the use of ethnic grounds as the foundation for the right to access territory could be devastating in regions marked by a complex social composition or disputes between distinct indigenous groups. Some scholars advocate, then, the use of a more substantive foundation for the defence of

[71] See Rodolfo Stavenhagen, *supra* note 5, p. 41s.
[72] See Jo M. Pasqualucci and Thomas M. Antkowiak *supra* note 58.

indigenous rights to land, embedded in the notion of "*vida digna*"[73], one of the most important concepts developed by the Court in former cases. The concept of "*vida digna*", which means literally life with dignity, represents a comprehensive understanding of the right to life, enshrined in article 2 of the American Convention on Human Rights, and governs not only access to land, but a wide array of fundamental rights. It can be defined as follows: "*In essence, the fundamental right to life includes not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence*"[74]. The concept first appeared in decisions such as Street Children (Villagrán-Morales et al) v. Guatemala (1999) and Instituto de Reeducación del Menor v. Paraguay (2004) and is normally used in cases involving indigenous people, children and rights of persons deprived of liberty. In proposing the replacement of the concept of "distinctive relationship" by the concept of "*vida digna*" as the foundation for the defence of the indigenous right to land, it is advocated that a more solid and comprehensive legal basis for the protection of indigenous groups would be created.

IV. Final remarks: a tentative transcontinental conversation

In its almost 40 years of existence, the Court has reaffirmed existing rights and progressively identified new sets of rights. Especially after the decade of 2000s, indigenous rights have been a privileged topic in the normative development carried out by this tribunal, occupying a significant parcel of its jurisprudence. Besides that, it was already acknowledged that the Court "*have played a path-breaking role in developing a distinct body of jurisprudence concerning the rights of indigenous peoples in the Americas, with an important normative effect in other regions*"[75]. However, legal institutions do not act independently to advance legal standards. Changes occurring within different

[73] See also Jo M. Pasqualucci, "The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System" (2008) 31 Hastings Intl & Comp. L. Rev., pp.1-31.

[74] See I/A Court H.R., Case of the Street Children (Villagrán-Morales et al) v. Guatemala. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 19, 1999 Series C No. 63, at pr. 144.

[75] See *supra* note 4.

levels have contributed to spur, to give efficacy, and to accommodate normative shifts proposed by the Court.

The first section of this paper presented an overview of how transformations faced by international law enabled the creation of a normative and institutional architecture specialized in indigenous rights. These transformations were essential to granting the recognition of the international legal personality of indigenous and tribal peoples and for the attribution of specific rights to these groups. The second section described how the Court's jurisprudence has been progressively widened over the years to embrace different factors affecting the rights of indigenous and tribal peoples. The third section represents an attempt to create a non-exhaustive list of some of the major contributions of the Court in this field, with the purpose of fostering conversations with regional courts of human rights facing similar cases, and, more specifically, to serve as a source for future comparative analysis on the African continent. But there are some caveats. In imagining correlations, it is important to flag the risks of carrying out automatic legal transplants. The recognition of the particularities of indigenous and tribal communities located in different parts of Africa and Latin America, as well as the socio-legal meaning of indigeneity in each region, is an important part of promoting a dialogue between the two regional courts of human rights.

On the one hand, similar constitutional problems involving indigenous peoples, such as land alienation, discriminatory practices, genocidal policies, violence against women and vulnerable groups, and poor provision of goods and basic services, have been occurring in both Africa and Latin America. Likewise, former decisions of the African Commission on Human and People's Rights in the Ogoni and Endorois case, which declared that Nigeria and Kenya, respectively, violated the right to property of traditional peoples due to concessions given to oil corporations and to tourism agencies to exploit their traditional territories, apply a legal reasoning somehow similar to the one developed by the Inter-American Court. On the other hand, whereas the use of an ethnical component has proved successful in the Inter-American Court in addressing most of the problems facing indigenous and tribal peoples, this may not be always hold true for the African counterpart. For instance, the constitutional use of indigeneity as

a concept is stronger in Latin American than in Africa. African constitutions lean towards the concept of tribal instead of indigenous when manifesting rights based on ethnicity, and yet are far stricter than the American counterparts in guaranteeing rights under this concept. Accordingly, the African Charter on Human and Peoples' Rights does not have direct provision on indigenous rights, and some African states have articulated constitutional and political concerns regarding the adoption of the United Nations Declaration on the Rights of Indigenous Peoples. These observations suggest that there might be some uncertainty in the use of a legal concept of indigeneity, especially in Africa. Therefore, it is essential to perform a tentative intercontinental dialogue concerning indigenous rights with great care, considering each individual case. At the same time, such uncertainty indicates that there is space for further developments, and that an intercontinental dialogue may lead to a deeper integrated reflection on the subject in both regions.