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RESEARCH BRIEF

Exploitation of Natural Resources and Protection of Indigenous Peoples' Communal Property over Traditional Lands and Territories

A summary of the Inter-American Court of Human Rights' safeguards

Alejandro Fuentes
Doctor of Law, Senior Researcher
Raoul Wallenberg Institute of Human Rights and Humanitarian Law

ABSTRACT

This summary critically analyses the legal regime that protects the ancestral lands and natural resources traditionally used, the so-called traditional communal property, of indigenous and tribal peoples in the Americas. It also analyses the legal regime's connection with indigenous and tribal people's right to cultural identity and the right to a *dignified* life.
The Inter-American Court of Human Rights (I-ACtHR, or the Court) has developed safeguards to establish a fair balance between potentially conflicting interests over these lands. Three specific safeguards are highlighted in this summary:

- the effective participation and consultation of the affected communities
- the obligation to share reasonable benefits with them
- the elaboration of a prior environmental and social impact assessment of any development investment, exploration or extraction plans that could directly affect their lands

The author goes beyond this innovative jurisprudence on indigenous peoples' lands and argues that what is really at stake in these cases is the protection and preservation of *cultural diversity* as an essential value in pluralistic societies.

KEY WORDS

human rights - indigenous peoples - right to land - natural resources - judicial interpretation - safeguards

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Alejandro Fuentes
Doctor of Law, Senior Researcher
Raoul Wallenberg Institute of Human Rights and Humanitarian Law
alejandro.fuentes@rwi.lu.se

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INTRODUCTION

The I-ACtHR has developed a landmark jurisprudence on indigenous peoples' rights as a result of these peoples' struggles to have their human rights recognized and protected. This is especially the case in connection with the right to communal property over their traditional lands and natural resources, where the Court additionally recognized their right to enjoy their own culture and traditions as different peoples.

In 2001, the I-ACtHR issued a landmark judgement in the *"Awas Tingni Case"*[1] that for the first time recognized indigenous peoples' right to communal property over their traditional land and natural resource as protected by the American Convention on Human Rights (the Convention, or ACHR).

This jurisprudence has provided recognition and visibility to the rights of indigenous peoples across the Americas. But it has also generated some political resistance in the region regarding its potential restrictive effect over strategic development projects, especially in connection with the exploitation of natural resources present within the claimed indigenous traditional lands.

The solution to potential conflicts by balancing legitimate interests over the same territory needs to be based - in all cases - on the human rights standards applicable in the region. Therefore, a systematization of the relevant jurisprudence of the Court is needed.

THE RIGHT TO COMMUNAL PROPERTY AS PART OF INDIGENOUS PEOPLES' CULTURAL IDENTITY

Article 21 of the ACHR recognizes and protects indigenous peoples' right to communal property over traditional lands and territories. Relying on the autonomous meaning of terms used in international human rights treaties, the Court has interpreted this provision to include the protection of the *collective* dimension of the right to property in accordance with the indigenous peoples' own customary use and occupancy patterns. It thus delivered a legal and special protection to the "*distinctive*" spiritual relationship between these populations and their ancestral lands and territories. Moreover, the Court has incorporated an *"intertemporal dimension"* into the conventional understanding of property,[2] by considering these ties as an essential part of indigenous cultural identity - *"...just as the land they occupy belongs to them, they in turn belong to their land."*[3]

Thus, in order to guarantee equal exercise and full enjoyment of the right to property over traditional land and resources, Article 21 ACHR has to be interpreted by taking into account indigenous peoples' traditions and customary law, which are sources and manifestations of their cultural identity. Failing to protect the *special* connection that indigenous peoples

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1 See *Case of The Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, 31 August 2001, I-ACtHR, Merits, Reparations and Costs, Series C No. 79. The right to communal property over their traditional land and natural resources was already recognized in international law in the 1989 ILO Convention No. 169 on Indigenous and Tribal Peoples (Articles 13 to 19), and the most recent 2007 UN Declaration on the Rights of Indigenous Peoples (Article 26).

2 As the Court highlighted, without the enjoyment of their traditional lands, indigenous peoples *"...would be deprived of practicing, conserving and revitalizing their cultural habits, which give a meaning to their own existence, both individual and communitarian*." *Ibid*, para 9.

3 See *Awas Tingni*, Joint Separate Opinion of Judges AA Cançado Trindade, M. Pacheco Gómez and A. Abreu Burelli, para. 8.

have with their lands will affect their living conditions and the possibility to have access to a *dignified life*. For the Court, the latter is connected with the centrality that traditional lands have in their cultural understandings and way of living.[4]

Indigenous peoples and the right to have a dignified life vis-à-vis their traditional lands

The right of indigenous and tribal peoples to communal property needs to be protected in order to safeguard their physical and cultural survival. This is indispensable not only for the preservation of their cultural identity and survival as different peoples, but also for the enjoyment of "*dignified*" conditions of life. In this sense, cultural identity has to be considered as a part or an integrative component of the right to life *lato sensu*.[5] The very broad scope of Article 4 ACHR[6] includes protection of *"… 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 decent existence"* – the right to life *lato sensu.*[7]

Therefore, the Court reasoned on indigenous peoples' connection with their traditional territories as follows: *(a)* the protection of the right to 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, merely, that will generate conditions for a *decent life* (positive obligations)[8]; *(b)* positive obligations include the creation of conditions that will permit an equal enjoyment for each member of the society of their own right to cultural identity; and *(c)* in the case of indigenous peoples, as long as their cultural identity is intimately connected with their traditional lands, positive measures must include adequate legal and material protection for this special relationship. Since indigenous peoples build and develop their *project of life* in close connection with their land, its absence would severely impede them to have access to a *dignified life*, according to their own worldviews and traditions.[9]

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 ACHR, but also to an infringement of the right to life *lato sensu* as protected by Article 4(1) ACHR.

THE RIGHT TO COMMUNAL PROPERTY OVER NATURAL RESOURCES. EXTENSIONS AND LIMITATIONS

The indigenous peoples' right to communal property upon the traditional lands they possess includes the right over traditional territories and natural resources pertaining to their land. The latter is interpreted as including *"the right of these peoples to participate in the*

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4 See *Case of the Saramaka People* v. *Suriname,* 12 August 2008, I-ACtHR, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs, Series C No. 185, para. 122 ("*Saramaka*").

5 See *Case of the Sawhoyamaxa Indigenous Community* v. *Paraguay*, 29 March 2006, I-ACtHR, Merits, Reparations and Costs, Series C No. 146, para. 151 ("*Sawhoyamaxa*").

6 Article 4(1) ACHR reads as follows: "*Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life*.".

7 See *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala,* 19 November 1999, I-ACtHR, Merits, Series C No. 63, para. 144 (emphasis added).

8 See *Case of Juan Humberto Sánchez* v. *Honduras,* 7 June 2003, I-ACtHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 99, para. 110.

9 For the Court's understanding of the concept of "*project of life"*, see *Street Children*, para. 144.

use, management and conservation of these resources" (ILO Convention No. 169 Article 15). In order to reinforce this right and to address possible clashes of interest with third parties and governments, the right to be consulted before "*undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands*" is also recognised by the above provision, even where States retain public ownership of those resources.

Using the ILO Convention as an interpretative guideline, and taking into consideration the intrinsic connection between indigenous peoples and their traditional lands and territories, the Court has extended the protection under Article 21 ACHR to recognize their right of ownership over *"...those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life"* (*Saramaka,* para. 122).[10]

However, where the above two requirements are not fully met, the allocation of the ownership rights over all other natural resources depends on the domestic national legislation and will fall into *"the inalienable right of each State to the full exercise of national sovereignty over its natural resources"*.[11] In this sense, the Court expressly recognised that *"Article 21 of the Convention should not 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 (*Saramaka*, para. 126). However, where that exploitation generates a direct or indirect limitation on the enjoyment of the indigenous peoples' land rights, a prior "necessity test" is needed. This test assesses whether that interference pursues the fulfilment of imperative or pressing social needs in a pluralistic and democratic society and whether it could - or could 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."* (*Saramaka,* para. 128).

Finally, it is important for States to bear in mind that any such restriction could eventually generate a restriction on the indigenous peoples' possibility to access a life of dignity, and therefore, an infringement of their right to life *lato sensu* (Article 4 read together with Article 1(1) ACHR).[12]

SAFEGUARDS AGAINST RESTRICTIONS ON THE RIGHT TO COMMUNAL PROPERTY

In order to guarantee the *unique* relationship that indigenous communities have with their land and territories, and the fact that the legitimate exercise by the State of its rights on state-owned resources would not amount to a total restriction or deprivation of these peoples' rights over *their* traditional lands and resources, and – therefore – would not affect their survival as distinctive people, the Court established three additional important safeguards.

The first safeguard stipulates that logging and mining concessions issued by States within indigenous peoples' lands should be subjected to informed consultation and effective participation of the involved communities,[13] according to their own traditions. In fact, the

10 These two cumulative requirements (to be traditionally used and necessary for their survival) have to be objectively proven in each case and the burden of proof lies on the community making such ownership claims.

11 See UNGA Res 3171 (XXVIII) "Permanent sovereignty over natural resources" 2203rd Plenary meeting (1973).

12 See IACHR "Indigenous and tribal people's rights over their ancestral lands and natural resources" (OEA/Ser.L/V/II.Doc.56/09) [2009] 90.

13 IACHR "Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the

overarching duty to consult exists in any situation in which States actions (or omissions) could directly affect the community's rights. The consultation process must be conducted in good faith, with due respect to their decision-making institutions and procedures – as long as these practises "are not incompatible with fundamental rights defined by the national legal systems and with internationally recognised human rights" (ILO Convention Article 8(2)).

Additionally, in those cases where large-scale development or investment projects could have major impacts on indigenous peoples' lands and natural resources, the Court has strengthened the duty to consult by requesting States *"to obtain their free, prior and informed consent* [FPIC]*, according with their customs and traditions"* (*Saramaka,* para. 138). This obligation, laid down in Article 19 of the UN Declaration on the Rights of Indigenous Peoples, is not a recognition of a "veto power" in their hands. Such interpretation would be contrary, for example, to the general interest of the whole society (indigenous communities included), the territorial integrity or political unity of sovereign and independent States, and the very principle of *representative democracy*.[14] Rather, obtaining a FPIC is not an obligation of *ends*, but of *means*. That is, States have to make every reasonable effort in order to achieve an agreement with the affected communities. Accordingly, the obligation to obtain a FPIC will be more or less relevant depending upon the level of impact of the proposed activity on indigenous lands. This means the highest level of restriction on the enjoyment of the indigenous' rights will require major levels of diligence and responsibility from states' authorities in building agreements with the affected communities.

The second safeguard refers to the sharing of reasonable benefits with the affected communities in connection with each project that could directly affect them. In this way, the right to obtain "*just compensation"* under Article 21(2) ACHR has been extended to situations of restriction or deprivation of the regular use and enjoyment of indigenous traditional lands and resources necessary for their survival (*Saramaka,* para. 139). Moreover, participation in the benefits generated by the investment project has to be understood as a form of "*reasonable"* equitable compensation for the restriction generated; it cannot be interpreted as a partnership in the enterprise, or *equal* participation in its economical profits. Hence, the *rationale* of the benefit sharing implies the existence of a reasonable relation of proportionality between the restriction suffered and the possible benefits generated by the investment or development project.

The third safeguard says the elaboration of prior and independent environmental and social impact assessments (ESIAs) is needed for the prevention of negative impacts over traditional lands and territories, and therefore, for the protection of the full enjoyment of indigenous communities' distinctive way of life, intimately connected with their lands.[15] Among other requirements, ESIAs "must conform to the relevant international standards and best practices" and ensure that the communities are "aware of possible risks", and that "the proposed development plan is accepted knowingly and voluntarily" by them (*Saramaka,* paras 40-41).

By virtue of State Parties' obligations to respect and to ensure the full enjoyment of the recognised conventional rights (Article 1(1) ACHR), they have to fulfil the safeguards mentioned above in order to generate the lesser possible impact over the enjoyment and exercise

Context of Extraction, Exploitation, and Development Activities" (OEA/Ser.L/V/II.Doc.47/15) [2015] 100.

14 See Article 7 of the Inter-American Democratic Charter, adopted by the OAS General Assembly at its special session held in Lima, Peru, on 11 September 2001.

15 *Ibid.*, 106.

of these rights. Where restrictions are unavoidable, States must prevent endangering the survival of indigenous peoples as *distinctive* people. Interferences overpassing this legal threshold and amounting to a deprivation of their lands and natural resources will entitle the affected communities to a full and integral compensation, which should have - when possible - the form of surrendering alternative lands capable to enable their survival as *distinctive* peoples.

The right to be fully compensated and the surrender of alternative lands

States have a duty to full compensation by means of surrendering "alternative lands of equal extension and quality" (*Sawhoyamaxa,* para. 135) when concrete, objective and fully-justified reasons would lead to the deprivation of the enjoyment of the right to communal property (impossibility to enjoy resources or deprivation of their lands traditionally possessed). In order to overcome the impact on indigenous' right of access to a *dignified life*, the extension of the lands must be "*large enough to support and develop the community's way of life"*, thus "*suitable to provide for their present needs and future developments"*[16] (ILO Convention No. 169 Article 16(4)). Moreover, the relevant and interdependent relationship between traditional lands, cultural identity and life-in-dignity calls for an identification of these alternative lands in accordance with the "own manner of consultation and decision-making, practices and customs" of the affected communities.[17]

However, States are not absolved from the "conventional" responsibility of providing a proper legal answer to every conflicting situation arising within their territories (*Saramaka*, para. 102) in cases of disagreement or when it is impossible to reach consensus on the location, quality and quantity of the alternative lands to be surrendered. States need to carefully balance the possible conflicting interests at stake, such as between property rights of private owners and communal property rights upon traditional lands, in order to assess *"the legitimacy, necessity and proportionality of the condemnation of the territories with the aim of achieving a legitimate goal in a democratic society."*[18] Accordingly, States must fully redress or compensate the affected communities (e.g. pecuniary compensations, creation of development funds, etc.), meanwhile protecting their cultural identities and access to dignified conditions of life. In this sense, the restitution of traditional lands remains as the most adequate form of non-pecuniary reparation, as well as a guarantee of non-repetition.[19]

CONCLUSION

The I-ACtHR's broad and expansive interpretation of Article 21 ACHR recognizing the right of indigenous communities to communal property over their traditional lands and territories is a clear sign of the increased protection of diversity and awareness of the existence of a plurality of identities in our modern societies.

The identity of indigenous communities as *distinctive* peoples is molded and shaped by the *unique* and *all-encompassing* relationship with their traditional lands and territories granting them the possibility to develop and - ultimately - enjoy a *dignified* life. Therefore, protection

16 See *Case of the Indigenous Community Yakye Axa* v. *Paraguay*, 6 February 2006, I-ACtHR, Interpretation of the Judgment of Merits, Reparations and Costs, Series C No. 142, para. 26 ("*Yakye Axa Interpretation*").

17 See *Case of the Yakye Axa Indigenous Community* v. *Paraguay*, 17 June 2005, I-ACtHR, Merits, Reparations and Costs, Series C No. 125, para. 217 ("*Yakye Axa*").

18 *Ibid.*

19 See *Yakye Axa,* Concurring Opinion of Judge AA Cançado Trindade, para. 7.

of their right to life *lato sensu* (Article 4(1) ACHR) requires the recognition and protection of the lands and territories that they traditionally possess. Consequently, States are also obligated under Articles 2(1) and 2 ACHR, when incorporating the right to communal property into their domestic systems, to consider indigenous norms and regulations related to their land-tenure systems as long as they "are not incompatible with fundamental rights defined by the national legal systems and with internationally recognised human rights" (ILO Convention Article 8(2)).

Furthermore, the resolution of potential conflicts between claims by indigenous communities and private individuals or governments over traditional lands calls for balancing the interests at stake by taking into account indigenous' special relationship with the lands. State Parties to the ACHR should assess, on a case-by-case basis, the proportionality and reasonability of the restriction *vis-à-vis* imperative interests of the entire society. Although States have a certain *margin of appreciation* in identifying those pressing social interests, it is for the Court to assert whether or not an interference with indigenous peoples' rights is justified and compatible with the American Convention (*Sawhoyamaxa*, para. 136).

In addition, the Court has introduced restrictive safeguards in order to avoid endangering indigenous people's material and spiritual survival. Measures to best accommodate conflictive interests should generate the smallest possible restriction on indigenous peoples' *all-encompassing* connection with their traditional lands. Thus, protection of their identity as *distinctive* peoples is granted by the guarantee of their permanence within those lands and territories. Relocation of the communities to alternative lands could be considered only as an exceptional measure. In the latter case, *alternative lands* should be quantitatively and qualitatively capable to enable the perpetuation and development of indigenous peoples' cultural *distinctiveness*. In short, there is no other *alternative* culture to compensate the deprivation of their *specific* and *unique* traditional culture.

Consequently, behind the jurisprudence on indigenous peoples' lands lies the essential value of protection and preservation of cultural diversity in pluralistic societies. Hence, the protection of indigenous peoples' right to communal property could be interpreted as a vehicle, a legal tool contributing to the safeguarding of the maintenance and perpetuation of their cultural identity.

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