LL.M. Final Thesis

in Natural Resources and International Environmental Law

The integration of International Environmental Law principles within Indigenous Peoples’ rights

In the jurisprudence of the Inter-American Court of Human Rights

Coralie Sing-Mei Tsirony

Supervisor: Aðalheiður Jóhannsdóttir

Co-supervisor: Snjólaug Árnadóttir

Faculty of Law

School of Social Sciences

February 2019
Contents

Contents................................................................................................................................. 2
Abstract ..................................................................................................................................... 4
Acknowledgments ..................................................................................................................... 5
Abbreviations ........................................................................................................................... 6
1. Introduction .......................................................................................................................... 7
   1.1 General Introduction ......................................................................................................... 7
   1.2 Objectives ......................................................................................................................... 7
      1.2.1 Research Questions ..................................................................................................... 8
      1.2.2 Delimitations .............................................................................................................. 8
   1.3 Materials .......................................................................................................................... 9
   1.4 Structure ............................................................................................................................ 10
2. General Background ............................................................................................................. 12
   2.1 Environmental Law and Protection of Natural Resources .............................................. 12
      2.1.1 Basics of International Environmental Law ............................................................... 12
      2.1.2 Subjects of International Environmental Law ............................................................. 17
   2.2 Principles of Environmental Law Relating to Individuals and Groups ........................... 18
      2.2.1 The Link Between Environmental Law and Human Rights ...................................... 18
      2.2.2 The Link Between Environmental Law and Groups .................................................. 20
   2.3 Indigenous People .......................................................................................................... 21
      2.3.1 Definition .................................................................................................................... 21
      2.3.2 International Labour Organization ............................................................................. 22
      2.3.3 Economic and Social Council’s Working Group ......................................................... 23
      2.3.4 Organisation of American States .............................................................................. 24
      2.3.5 Lack of a Unified Definition ....................................................................................... 24
      2.3.6 Indigenous Peoples in Numbers ............................................................................... 25
   2.4 Indigenous Peoples’ Specific Rights ............................................................................... 26
      2.4.1 Self-determination ...................................................................................................... 27
      2.4.2 Collective property ..................................................................................................... 29
      2.4.3 Prior Informed Consent (PIC) .................................................................................... 31
      2.4.4 Cultural Rights ........................................................................................................... 33
   2.5 Relationship between Indigenous People and the(ir) Environment ................................ 34
      2.5.1 Aspects of the Relationship ....................................................................................... 34
      2.5.2 Difficulties of Enforcement of IP Rights at National Level ......................................... 36
      2.5.3 Indigenous Peoples’ Rights Mechanisms from an Environmental Perspective .......... 36
   2.6 Conclusions ....................................................................................................................... 38
3.1 Organs of the Organization and Jurisdiction of the IACtHR .................................................. 39
  3.1.1 The Organization of American States .................................................................................. 39
  3.1.2 The Inter-American Commission on Human Rights ......................................................... 40
  3.1.3 The Inter-American Court of Human Rights .................................................................... 41
  3.1.4 Environmental Protection within the Inter-American System ......................................... 43
3.2 IP Rights in Inter-American Human Rights Instruments .................................................... 45
  3.2.1 Regional Treaties and Declarations .................................................................................. 45
  3.2.2 International Treaties and Declarations .......................................................................... 47
  3.2.3 Interpretations of the Court and the Commission ............................................................... 48
3.3 Conclusions ........................................................................................................................... 50
4. The IACtHR’s recent jurisprudence .......................................................................................... 52
  4.1 De la Cruz case ...................................................................................................................... 52
    4.1.1 Facts ................................................................................................................................. 52
    4.1.2 Merits ............................................................................................................................... 54
    4.1.3 Arguments of the parties ............................................................................................... 54
    4.1.4 Considerations of the Court .......................................................................................... 57
  4.2 Punta Piedra case ................................................................................................................. 65
    4.2.1 Facts ................................................................................................................................. 65
    4.2.2 Merits ............................................................................................................................... 66
    4.2.3 Arguments of the parties ............................................................................................... 66
    4.2.4 Considerations of the Court .......................................................................................... 67
  4.3 Environmental Principles Identified in the IACtHR’s jurisprudence ....................................... 70
5. Conclusions ............................................................................................................................. 73
Bibliography .................................................................................................................................. 76
Abstract
The principal objective of the thesis is to shed some light on how international environmental law principles have been elaborated and integrated into cases relating to the rights of indigenous peoples, inter alia, in relation to their property and land rights, with an emphasis on a few recent cases stemming from the Inter-American Court of Human Rights (IACtHR or the Court). As the analysis of the recent IACtHR decisions shows, the Court has, in several instances, integrated and further developed some of the most important principles of environmental law with property rights, which are guaranteed by the American Convention on Human Rights (American Convention) and the International Labour Organization (ILO) Convention no. 169. The analysis shows the strong interplay between international environmental law and human rights, in general, and indigenous peoples rights, more specifically. The jurisprudence of the IACtHR, which recognizes legal standing to indigenous peoples, appears as an important contributor to the extension of the scope of indigenous property rights and the safeguards that they entail such as participation, prior informed consent (as a general principle of international law) and environmental impact assessment (even in the absence of transboundary harm). Indigenous peoples’ property rights, unlike other rights, prove to be a strongly judiciable ground for addressing environmental aspects of human rights and enforcing environmental principles. Incidentally, it contributes to the enforcement of the sustainable development principle.
Acknowledgments

The initial idea of this thesis was inspired by my exchange program in the Public University of Chile, in 2012, which was my first acquaintance with the law of indigenous peoples through an introductory course. I am grateful for the opportunity given by international programs, including this LL.M. program in Iceland, for the multicultural and transdisciplinary opportunity that they give to students around the globe to discover different ways of thinking.

I would like to thank my supervisor Dr. Aðalheiður Jóhannsdóttir for patiently guiding me in my research process and Dr. Snjólaug Árnadóttir for giving me precise and extremely helpful feedback.

I also want to address special thanks to Agnès Bonnot, Jennifer Leonard and Delphine Apostolska for their passionate proofreading and constructive feedback, to my family for their support and my friends for their commitment.

For all those who feel at home in nature.
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>CBD</td>
<td>Convention on Biological Diversity</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>EIA</td>
<td>Environmental Impact Assessment</td>
</tr>
<tr>
<td>EU</td>
<td>The European Union</td>
</tr>
<tr>
<td>HRC</td>
<td>Human Rights Committee</td>
</tr>
<tr>
<td>IAComHR</td>
<td>Inter-American Commission of Human Rights</td>
</tr>
<tr>
<td>IACtHR</td>
<td>Inter-American Court of Human Rights</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>IGC</td>
<td>Intergovernmental Committee</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organization</td>
</tr>
<tr>
<td>IP</td>
<td>Indigenous people</td>
</tr>
<tr>
<td>IWGIA</td>
<td>International Work Group for Indigenous Affairs</td>
</tr>
<tr>
<td>OAS</td>
<td>Organization of American States</td>
</tr>
<tr>
<td>PIC</td>
<td>Prior Informed Consent</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNDRIP</td>
<td>United Nations Declaration on the Rights of Indigenous Peoples</td>
</tr>
<tr>
<td>UNESCO</td>
<td>United Nations Education Science and Culture Organization</td>
</tr>
<tr>
<td>UNFCCC</td>
<td>United Nations Framework Convention on Climate Change</td>
</tr>
<tr>
<td>UNTS</td>
<td>United Nations Treaty Series</td>
</tr>
<tr>
<td>WIPO</td>
<td>World International Property Organization</td>
</tr>
</tbody>
</table>
1. Introduction

1.1 General Introduction

Two recent cases of the Inter-American Court of Human Rights (IACtHR or the Court), confirm and reinforce the connections that the jurisprudence of the Court had drawn between international environmental law principles such as sustainable development, participation and prior informed consultation and environmental impact assessment with indigenous peoples’ collective property rights. The two decisions of the Court put on the States a strong procedural obligation of safeguards control for large scale development plans or exploitation of natural resources on indigenous peoples’ lands that includes a participative process ensuring a right to consultation, an environmental impact assessment and a reasonable share of benefits. In the two cases the Court recognized communities of afro-descendants as indigenous peoples by referring to a self-identification criterion and the Court extended the safeguards obligations to nature conservation projects. The aim of this thesis is to analyse how the Court found an interconnectedness between international environmental law principles and indigenous peoples rights, what legal basis the Court found for such interpretation and how the Court articulates these principles and rights.

1.2 Objectives

In the line of the above the principal objective of the thesis is to shed some light on how international environmental law principles have been elaborated and integrated into reasoning of cases relating to the rights of indigenous peoples, inter alia, in relation to their property and land rights, with an emphasis on a few recent cases stemming from the IACtHR. As the analysis of the recent IACtHR decisions shows, the Court has in several instances integrated and developed further some of the most important principles of environmental law with property rights, which are guaranteed by the American Convention on Human Rights (American Convention), the Convention 169 of the International Labour Organisation (ILO), and several soft law instruments such as the United Nations Declaration on the rights of indigenous people.

This thesis should enable the reader to have an overview of the mechanisms used by the Court and an appreciation of the extent to which this interpretation of environmental law principles within human rights disputes may contribute to both the development of the environmental and human rights fields. The analysis and background provided should also
give an indication as to whether the reasoning of the Court can be extended to other groups or individuals, in a similar Court or other international and regional Tribunals.

1.2.1 Research Questions

To achieve the objective of the thesis the following issues will be particularly analysed and discussed:

- How do international Human Rights law and international environmental law connect?
- In international law, who has standing in environmental and human rights disputes?
- What are the environmental principles that the IACtHR cited in its jurisprudence and how did it refer to it, as a balancing instrument? Interpretation instrument?
- What is the status of indigenous people in international law and before the IACtHR more particularly? How does it relate to or differ from other human rights? Could this specific status reflect on the rights of other communities or groups?
- What is the link between indigenous people and the(ir) environment?
- Is the reasoning of the IACtHR transposable to other international or regional jurisdiction? To other types of human rights disputes?

1.2.2 Delimitations

Although some of the most important environmental law principles will be explained in the relevant chapters bellow, the aim of the thesis is not to cover environmental law as such. The idea is to focus on the environmental principles that share a common ground and mechanisms of enforcement with the Human Rights field within the jurisprudence of the IACtHR. The aim is to observe the enforcement of the principle of sustainable development through consultation, information, participation, prior informed consent principle environmental impact assessment within the context of indigenous peoples’ rights disputes before the IACtHR. It is also to evaluate which are the consequences of the transposition of environmental principles into the interpretation of Human Rights treaties and the jurisprudence of other Human Rights Courts. The specificities of indigenous rights, and the collective nature of their rights will be analysed in order to highlight the connections with environmental law mechanisms, and the limitations as to a transposition of the IACtHR’s reasoning in other Human Rights regimes. The thesis will refer to, but will not elaborate on, all substantive and procedural human rights that are held by individuals but will limit its analysis to the specific group rights held by indigenous peoples (self-determination, collective property, prior informed consent, cultural rights).
1.3 Materials

The sources that are analysed in the thesis include, but are not limited to, the following:

1. Indigenous and Tribal Peoples Convention of the International Labour Organization (ILO) (1989) (No. 169) (C169),¹
2. United Nations Declaration on the Rights of Indigenous People (2007) (UNDRIP);²
3. American Declaration of the Rights and Duties of Man (1948);³
6. American Declaration on the Rights of Indigenous peoples (2016);⁶
7. International Covenant on Civil and Political Rights (1966) (ICCPR);⁷
8. International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR);⁸
10. United Nations Framework Convention on Climate Change (1992) (UNFCCC);¹⁰
11. Rio Declaration on Environment and development (1992) (Rio Declaration);¹¹

³ Adopted in 1948 at the Conference of Bogota.
⁴ Approved in Santo Domingo 15 June 2016, 46th, OAS AG/RES.2888 (XLVI-O/16).
15. Nagoya protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (2010) (Nagoya Protocol);\textsuperscript{15} 
17. Pulp Mills on the River Uruguay (Argentina v. Uruguay), 2010, ICJ, (Pulp Mills case);\textsuperscript{17} 
18. Mayangna (Sumo) Awas Tingni Community v. Nicaragua, 2001, IACtH.R., (Mayanga (Sumo) Awas Tingni case);\textsuperscript{18} 
19. Yakye Axa Indigenous Community v. Paraguay, 2005 IACtHR, (Yakye Axa v. Paraguay Case);\textsuperscript{19} 
20. Kichwa people of Sarayaku v. Ecuador, Merits, Reparations and Costs, 2012, IACtHR (Kichwa people of Sarayaku case);\textsuperscript{20} 
21. Garífuna Triunfo de la Cruz Community and its Members v. Honduras, 2015 IACtHR (De la Cruz case);\textsuperscript{21} 
22. Garífuna Punta Piedra Community and its Members v. Honduras, 2015, IACtHR, (Punta Piedra case);\textsuperscript{22} 

Various articles from international law researchers and reports from international organizations will also be used as secondary sources. 

\textbf{1.4 Structure} 

The analysis will start with a chapter setting the general background (Chapter 2) that will summarize the basics of international environmental law (2.1) and the environmental principles relevant to the topic (2.2). This chapter will also present the difficult question of finding a definition to indigenous peoples (2.3), explain the origins and the sources of their specific group rights (2.4) and make a selective overview of the multiple aspects of 

\textsuperscript{15} Adopted in Nagoya, 29 October 2010, entered into force 12 October 2014, UNTS 1760 No. A-30619. 
\textsuperscript{16} Adopted in Paris 12 December 2015, entry into force 4 November 2016, UN Doc FCCC/CP/2015/10/Add.1, 21. 
\textsuperscript{17} \textit{Pulp Mills (Argentina v Uruguay)} [2010] ICJ Rep 2010. 
\textsuperscript{18} \textit{Mayangna (Sumo) Awas Tingni Community v. Nicaragua}, Merits, Reparations and Costs, Judgment IACtHR (Ser. C) No.79 (Aug 31, 2001). 
\textsuperscript{19} \textit{Yakye Axa Indigenous Community v. Paraguay} Merits, Reparations, and Costs, Judgment, IACtHR (Ser. C) No. 125 (17 June 2005). 
\textsuperscript{20} \textit{Kichwa people of Sarayaku v. Ecuador}, Merits, Reparations and Costs, Judgment, IACtHR (ser. C) No. 245 (27 June 2012). 
indigenous peoples’ relationship with their lands and natural resources and the environment more generally (2.5) which show the need of a specific legal regime.

The following chapter will present the Inter-American system of Human rights and the substantive and procedural rights that were developed within this system with regard to indigenous peoples (Chapter 3). This presentation will cover the relevant human rights organs of the Inter-American System with their approach towards environmental protection (3.1) and the legal instruments and sources applicable to indigenous peoples within this system (3.2).

Having set the necessary background, the last chapter will review and analyse the two recent cases of the IACtHR (Chapter 4). The exercise will be, first, to summarize the relevant elements of the two cases (4.1 and 4.2) and, second, identify the reasoning of the Court while integrating environmental law principles within indigenous peoples rights disputes (4.3).

An overall conclusion (Chapter 5) will assess how the questions of the introduction are addressed by the IACtHR. It will also synthesize the strengths and the remaining weaknesses of the human rights jurisprudence in the attempt to integrate environmental perspective into human rights issues and more specifically, indigenous peoples’ groups rights.
2. General Background

This chapter will provide a particular background to the thesis, explain and discuss some fundamental issues, including a few principles, relating to the nature and specificities of international environmental law. It will highlight some of the common grounds and discrepancies with international human rights law. It will also explain some fundamentals, including the status and definition of indigenous peoples in international law and the specific rights that they enjoy in international and regional human rights law due to their specific status.

2.1 Environmental Law and Protection of Natural Resources

2.1.1 Basics of International Environmental Law

This thesis builds on the assumption that environmental law is in fact regulating “both the features and products of the natural world and those of human civilisation” and affecting both nature and its inhabitants, including human beings. From the interrelationship between humans and their environment some general principles and implementation techniques are worth mentioning, because they are referred to in human rights instruments and the jurisprudence that will be analysed in the following chapter. They include the principle of sustainable development, the principle of public participation, the principle of prior informed consent and the environmental impact assessment principle.

Sustainable development

As a preliminary remark, it should be noted that some authors make a distinction between principles and concepts. The former would be hierarchically above rules and practice and be recognized as having customary or jus cogens value. The latter would be even higher and include the concept of common concern of mankind. Within this classification these authors consider that sustainable development is a concept “whose function is not to operate as primary norm but, rather, to guide the formulation of such norms and, more generally, the

---

overall structure of certain environmental regimes”.

28 Principles (no-harm, prevention, precautionary, cooperation, prior informed consent, environmental impact assessment, polluter-pays, common but differentiated responsibilities, participation, inter-generational equity) would come as means of implementation to the overall objectives set by those concepts (among which are sustainable development, common areas, common heritage and common concern). 29 This is based on the interpretation of the International Court of Justice (ICJ) in its jurisprudence such as in the Pulp Mills case. 30 Other authors differentiate between general principles and rules (sovereignty over natural resources, preventive action, cooperation, sustainable development, precautionary principle, polluter pays and common but differentiated responsibilities) 31 and the implementation techniques (environmental impact assessment, environmental information and technology transfer, liability for environmental damage) for reaching the objective set by the principles and rules. 32

These approaches are close, therefore, for the sake of fluency and because this thesis focuses on the interrelation between human rights and environmental law, it will not elaborate on the classification and potential hierarchy of these notions but will refer to all (concepts, principles, rules and implementation techniques of international environmental law) as principles. Sustainable development will be analysed as a principle that sets an objective that requires implementation through other rules and principles which, as it will be presented here, may be integrated into environmental law and other mechanisms.

Sustainable development first found its source in the 1980ies in political instruments on nature conservation. 33 With the Brundtland Report 34 and the following political and legal international instruments adopted during United Nations international summits, 35 it was quickly associated with human centred concerns such as intergenerational equity (meeting the needs of present and future generation) and intragenerational equity (meeting the needs of all

---

30 *Supra*, note 17, *Pulp Mills* case, paras. 75-77 and 177.
31 *Supra*, note 24, Philippe Sands and Jacqueline Peel, 197.
States or, eventually, all people) combined with the pursuit of a development that would ensure a sustainable use of natural resources.\textsuperscript{36}

This logic can be found, for instance, in the recent Paris Agreement of 2015\textsuperscript{37} which refers, in its preamble, to the “intrinsic” link between climate change actions, access to sustainable development and poverty. The States, in this agreement, reiterate their commitment to addressing environmental related challenges together with development and fight against poverty challenges in Article 2(1).\textsuperscript{38}

Following the logic of the policies and instruments cited above, the prerequisite for achieving sustainable development goals lies on the integration of environmental considerations into development policies and decisions\textsuperscript{39} but it may as well find an efficient tool in the integration into human rights mechanisms. This last statement will be analysed in the following chapters.

\textit{Public participation}

The public participation principle includes a right to access information, to participate in decision-making processes and access to justice for individuals and citizens in decisions that may affect their environment. The principle is formulated in, \textit{inter alia}, Principle 10 of the Rio Declaration\textsuperscript{40} and the Aarhus Convention\textsuperscript{41} which incorporate the above-mentioned three pillars and closely link this principle to the environmental impact assessment process. The aim of the principle is to consider the interests of groups and individuals potentially affected by projects, activities or environmental policies through a democratic process.\textsuperscript{42} However, the principle does not set the details of the minimum internal measures that should be adopted by States to fulfill the access to information, participation and judicial access obligations. Another difficulty that limits the enforcement of this principle is its uncertain status before international law courts. Although widely supported, it has still not been recognized as a

\textsuperscript{36} Supra, note 24, Philippe Sands and Jacqueline Peel, 219.

\textsuperscript{37} Supra, note 16, Paris Agreement.

\textsuperscript{38} Ibid, Article 2(1).

\textsuperscript{39} Supra, note 24, Philippe Sands and Jacqueline Peel, 227-229.

\textsuperscript{40} Supra, note 11, Rio Declaration, Principle 10: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”.

\textsuperscript{41} Supra, note 13, Aarhus Convention.

\textsuperscript{42} Supra, note 26, Pierre-Marie Dupuy and Jorge E. Viñuales, 86.
customary rule by the ICJ.\textsuperscript{43} This principle of good governance\textsuperscript{44} remains limited, its application is not quite homogenous in practice\textsuperscript{45} and States keep a prominent role in the decision-making process.\textsuperscript{46}

\textit{Prior informed consent}

The prior informed consent principle can be declined into two rights, one that is going to be addressed later in relation to indigenous peoples and another one that relates to the exportation of certain wastes, substances or products and regulates the relations between States.\textsuperscript{47} Indigenous peoples’ prior informed consent rights are developed in indigenous peoples specific legal instruments but also in environmental law instruments.\textsuperscript{48} As to the principle that regulates the relations between States, its objective is to ensure that the said wastes, substances or products are only sent to States that “are willing to accept them and have the technical capacity to manage them”.\textsuperscript{49} In any event, it is a procedural principle that may not have reached customary status but tends to be recognized as an expression of the prevention principle, together with the obligation to conduct an environmental assessment.\textsuperscript{50}

\textit{Environmental impact assessment}

The environmental impact assessment is a process that aims to influence decision-making and mitigate risks by processing information and involving the participation of affected persons while authorizing development activities.\textsuperscript{51}

The requirement is considered to be of general international law and to be compulsory in all transboundary risk of adverse effect on the environment.\textsuperscript{52} Principle 17 of Rio Declaration’s evolving interpretation and the emergence of other instruments such as Agenda 21 are leading

\textsuperscript{43} Supra, note 17, Pulp Mills case, Dissenting opinion of Judge ad hoc Vinuesa, para 60.
\textsuperscript{46} Jeroen van Bekhoven, “Public participation as a general principle in international environmental law: its current status and real impact” (2016) Vol. 11.2 National Taiwan University Law Review, 219, 258.
\textsuperscript{47} Supra, note 26, Pierre-Marie Dupuy and Jorge E. Viñuales, 76.
\textsuperscript{48} See, e.g., Supra note 14, CBD, Article 8(j).
\textsuperscript{49} Supra, note 26, Pierre-Marie Dupuy and Jorge E. Viñuales, 76.
\textsuperscript{50} Ibid, 77-78.
\textsuperscript{51} Supra, note 24, Philippe Sands and Jacqueline Peel, 657; Supra, note 17, Pulp Mills case, para 204.
\textsuperscript{52} Ibid., Philippe Sands and Jacqueline Peel, 658; Stuart Bell, Donald McGillivray, Ole W. Pedersen, Environmental law (8th Edition, Oxford University Press 2013), 453-459.
to an extension of the requirement for national activities authorized by the State within its borders.\textsuperscript{53}

As to the procedural requirements that lie upon the States, the ICJ holds that States must conduct an assessment as to whether the activity, that they are requesting an authorization for, could potentially adversely affect the environment of another State. If yes, they shall then conduct an environmental impact assessment which, if it confirms the existence of an adverse harm to the environment of another State, must lead to a notification and consultation of the potentially affected State.\textsuperscript{54}

It results from the conclusions of the ICJ that the opportunity of choosing to conduct an environmental impact assessment would most generally stay in the States’ hands. In addition, it should be noted that the content of the environmental impact assessment is not regulated under international law. The international instruments provide no indication as to the scope, the type of project to be covered or the type of information that should be made available to the potentially affected parties.\textsuperscript{55} These elements vary from one State’s implementation to another. In national laws there are three different levels on which the policies in force may provide an environmental impact assessment. There is, first, the one that precedes any punctual activity or construction work, the one that precedes the adoption of plans and programs and the one that precedes the adoption of national regulations and policies that regulate the environment.\textsuperscript{56}

The protection provided by the environmental impact assessment therefore remains limited in public international law whereas the European and Inter-American human rights systems have developed an increasing case law\textsuperscript{57} recognizing the relationship between human rights protection and the performance of environmental impact assessments which may lower the trigger of the “significant transboundary harm”.\textsuperscript{58}

Having reviewed the most relevant environmental law principles for the purpose of this research and the limits of their enforceability, the following sections will analyse how international human rights law, the law of indigenous peoples and the legal mechanisms that regulate these fields may contribute to the environmental field.

\textsuperscript{53} \textit{Supra}, note 24, Philippe Sands and Jacqueline Peel, 680.
\textsuperscript{54} \textit{Certain activities and construction of a Road} (Costa Rica v Nicaragua) and (Nicaragua v Costa Rica) [2015], ICJ Rep 2015, para 104.
\textsuperscript{55} \textit{Supra}, note 24, Philippe Sands and Jacqueline Peel, 680.
\textsuperscript{56} Michel Prieur, \textit{Droit de l’environnement durable} (Bruylant 2014), 326.
\textsuperscript{58} \textit{Supra}, note 24, Philippe Sands and Jacqueline Peel, 680.
2.1.2 Subjects of International Environmental Law

According to the principles of public international law, States are the main actors of environmental protection under the international legal system as they are in public international law. States rule upon their own lands and natural resources, the territory being an attribute of the Nation-State in its post-Westphalian conception. However, the consequences of the use of lands and natural resources are not limited to one Nation but may affect several different groups within the State and even some that extend much beyond the State’s mere borders.

Human rights mechanisms are supported by many authors as being “virtually unique in offering avenues of redress for individuals or groups wishing to appeal beyond their own state in cases of harm that constitute a violation of their rights”. So far, no agreement was found to create an instance that would be dedicated to address both human rights and environmental issues and some criticisms remain about the relevance of linking environmental interests with the ones of humankind. There is actually more and more support for a system that would include both aspects equally.

The principles of international law mentioned above also find limited application because some of them have their legal ground enclosed in conventions for which the Courts that have jurisdiction do not allow standing to individuals.

The purpose of the general introduction will be to explore the possible inputs and relevance of a mechanism that would be giving legal standing to groups such as indigenous people in environmental matters and the following chapters will explore whether it offers an effective mechanism which includes environmental interests.

59 Supra, note 24, Philippe Sands and Jacqueline Peel, 11.
60 The intrinsic link between sovereignty over natural resources and self-determination is explained in Supra, note 26, Pierre-Marie Dupuy and Jorge E. Viñuales, 6.
63 Ibid. Karrie Wolfe, 58.
64 Supra, note 45, Jona Razzaque, 148.
2.2 Principles of Environmental Law Relating to Individuals and Groups

2.2.1 The Link Between Environmental Law and Human Rights

As Alan Boyle observes “a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans rather than on other states or the environment in general.”

Amongst the benefits of such a connection between Human Rights and the environment, the author mentions the promotion of the rule of law that enables raising the States’ accountability for their failure to regulate and sanction the activities that private actors undertake within their borders, by facilitating “access to remedies and other procedures”.

Incidently, some human rights require that at least some environmental, health and living standards be upheld such as right to life, right to private and family life, right to an adequate standard of living and right to health.

As Malcolm J. Rogge writes “environmental degradation erodes freedom because it limits the range of choices for people today and for future generations”. The reasoning summarizes the idea behind the efforts towards including sustainable development into environmental instruments with the Stockholm Declaration in 1972 and the Rio Declaration in 1992. In fact, the previous section on sustainable development holds a strong basis on the interconnectedness between the environment and human rights as pillars of sustainable development.

On one hand, the Stockholm Declaration considers that a satisfactory environment is necessary for the enjoyment of human rights. On the other hand, the degradation of the environment needs to have a direct link with a clearly identified protected human right in order to be brought to court in human rights cases.

If many environmental law instruments refer to human rights and include provisions relating to participation rights for instance, it is less common to find a direct connection within general human rights instruments. Those that expressly refer to environmental rights

---

66 Ibid, 210, 230 and 238.
67 Supra, note 26, Pierre-Marie Dupuy, Jorge E. Viñuales, 357.
69 Supra, note 9, Stockholm Declaration.
70 Supra, note 26, Pierre-Marie Dupuy, Jorge E. Viñuales, 360.
71 Supra, note 9, Stockholm Declaration, Preamble, para 2.
72 Supra, Aarhus Convention.
are the 1981 African Charter on Human and Peoples Rights (Article 24), the 2004 Arab Charter on Human Rights and the 1988 San Salvador Protocol to the American Convention on Human Rights (Article 11). The European Convention on Human Rights does not have such a provision and no instrument of the European Council provides anything similar. The jurisprudence of the corresponding Court does not limit its interpretation to express provisions but have derived the rights from the prism of existing human rights such as the right to life, prohibition of inhuman or degrading treatment, right to security, property rights, private and family life, freedom of expression, freedom of assembly and association, right to a fair trial or right to an effective remedy.

The interconnectedness between environment and human rights does not preclude the two fields from conflicting in the context of environmental protection measures such as a national restriction on reindeer husbandry for nature conservation purposes. Limitations may also be set on property rights, given that fair compensation is provided, for considerations of environmental protection. The control that the Human Rights courts are willing to make on the States’ ability to strike a fair balance between the enjoyment of human rights and the interest of the society as a whole is however limited, especially in the ECHR. Generally, the content of substantive environmental human rights is not well defined and the courts’ control rely more on procedural rights.

---

75 Supra, note 5, San Salvador Protocol.
76 Supra, note 56, Michel Prieur, 307.
78 Oneryildiz v. Turkey App no. 48939/99 (ECHR 30 November 2004), para 89-90.
79 Elefteriadis v. Romania App no. 38427/05 (ECHR 25 January 2011), para 47-49.
80 Mangouras v Spain App no. 12050/04 (ECHR 28 September 2010), para 92.
81 Brosset Triboulet and others v France App no. 34078/02 (ECHR 29 March 2010), para 92-93.
84 Thoma v. Luxembourg App no. 38432/97 (ECHR 29 March 2001) para 58.
85 Costel Popa v Romania App no. 47558/10 (ECHR 26 April 2016), para 45.
86 Steel and Morris v. United Kingdom App no. 68416/01 (ECHR 14 February 2005), para 72.; Iera Moni Profitou Ilou Thiras v. Greece App no. 32259/02 (ECHR 22 December 2005), para 38.
87 See details of cases within the jurisprudence of the ECHR: “Factsheet, Environment and the ECHR”, June 2018. Available at: https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf [Last accessed on 21 November 2018]
89 Turgut v. Turkey Application No. 1411/03 (ECHR 8 July 2008), para 90.
90 Supra, note77, Malgosia Fitzmaurice, 641.
2.2.2 The Link Between Environmental Law and Groups

First, the importance of groups within the human rights field as such must be mentioned. The society is organized around communities, collectives and families and several human rights originate in this aspect of human life. Freedom of assembly, freedom to join a union, freedom of religion or protection for groups to gather and express their thoughts are examples of this element of human nature. However, the enjoyment of these rights can only be claimed individually whereas the exercise of these rights can only be guaranteed if their group right is protected.91

Similarly, it appears that some environmental rights may require the enjoyment of several group rights. Very often, the enforcement of environmental rights is the result of a tension between local groups and large transnational corporations.92

Even if many individual human rights have the effect of protecting a group (right to freedom of assembly, right to join a trade union, freedom of religion and freedom of expression), those remain individual rights that can only be claimed individually.93

The ECHR, for instance, has a very individualistic approach to human rights with a strict interpretation of the “victim” requirement that reflects on environmental claims. The only occurrence of a group claim would come in connection with the right to freedom of expression under Article 10 of the ECHR, to protect NGOs against defamation claims.94 The African Commission and Court are more flexible and found admissible a claim brought by two NGOs on behalf of indigenous peoples for the environmental degradations and human rights violations made resulting from the oil operations in the Niger Delta.95 The approach of the IACtHR is becoming more flexible too, as will be analysed in the following chapters. The main benefit of recognizing collective rights is that it enables a more preventive approach to environmental law by human rights' courts since, with collective claims being recognized,

94 Aizsadzibas Klubs v. Lettony App no. 57829/00 (ECHR 27 May 2004) para 46.
there is no need to wait for a serious environmental disaster to occur for the affected individuals to raise the issue.\textsuperscript{96} 

It should be kept in mind that not all marginalized groups are entitled to group rights and that, yet, the enjoyment of such rights depends a lot on circumstances.\textsuperscript{97}

### 2.3 Indigenous People

For background, this chapter’s objective is to provide a short overview of how international law has referred to “indigenous people” over the years. Other terms, including “Indians”, “native people”, “aboriginal people”, have been used over the years. The choice of the more generic version or “indigenous people” is not fortuitous, this section will cover the main developments that led the international community to the election of this term and the following section will present the specific rights that came along with the recognition of their status and specific culture in international law. A comprehensive definition of indigenous people holds a fundamental role in defining the scope of environmental principles in the IACtHR jurisprudence’s analysis that will follow.

#### 2.3.1 Definition

Until the late eighties, the indigenous question mostly remained a domestic one that stayed outside the international fora.\textsuperscript{98} At that point, most attempts on regulating the status of indigenous people had taken place without their participation.

The concept appeared in the colonial times. The term “Indians” was used to define the people present on the new continent when the settlers arrived. At the time, European settlers created rather unilateral rules to conduct their activities in the territory of Indians in accordance with the theory of “Just war”.\textsuperscript{99}

A later positivist approach referred to a dependency of indigenous populations towards “advanced nations”\textsuperscript{100} in the management of their territory. Indigenous populations were not considered as politically organized groups. It is only with the emergence of the modern concept of international law that came together with the United Nations that specific rights for


\textsuperscript{98} Supra note 61, James Anaya, 57.

\textsuperscript{99} Ibid. 16-19.

\textsuperscript{100} Article 22 of the Covenant of the League of Nations, 28 April 1919. Available at: http://www.refworld.org/docid/3dd8b9854.html [Last accessed 25 October 2018]
non-nation-State entities were introduced. This was first declined in individual human-rights in a perspective of assimilation and was aimed to protect indigenous workers.  

2.3.2 International Labour Organization

In 1957 the International Labour Organization (ILO) created the first specific instrument dedicated to the protection of “indigenous populations” with the No. 107 Convention on the protection and Integration of Indigenous and Tribal and Semi-Tribal populations in independent countries. This first instrument did not include any cultural identity rights or any recognition of their status as a group but it did confer on them rights over their territories and this was the first international instrument mentioning such territories.  

The ILO introduced, in 1989, Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries which formalized the use of the term “indigenous peoples” without giving a straightforward definition. Accordingly, Article 1 of the Convention reads as follows:

1. This Convention applies to:
   (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
   (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criteria for determining the groups to which the provisions of this Convention apply.

Rather than establishing a definition, the Convention sets a number of criteria and elements of evidence that are to be considered relevant for the recognition of the status of “indigenous” or “tribal” people. One criterion is their ancestral or native nature (“on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs at the time of conquest or colonisation or the establishment of the present boundaries”), another is their traditional way of living (“retain some or all of their...

101 Supra note 61, James Anaya, 57.
103 Ibid, Article 12.
105 Supra, note 1, ILO Convention No. 169.
own social, economic, cultural and political institutions”) and another lies on the fact that they self-identify themselves as such (“self-identification as indigenous or tribal shall be regarded as a fundamental criterion”). Nothing indicates in the Treaty how to weigh those criteria, if all should be present to qualify as indigenous or if one or two of them is enough. Nor does it indicate if one may override another in the balancing process. It may be understood from the above-mentioned article that “tribal” people, referred to under (a), may require less elements to be identified as such. The sole way of living criterion seem to be a constituent element of the status as opposed to “indigenous” that seem to require the ancestral element in addition to the traditional way of living. In addition, the Convention refers, for the first time, to “peoples” which give the group or community a distinct identity that no longer needs to be integrated in the wider nation-State and that enjoys more than separate individual rights. The success of this Convention was, for a long time, limited to Latin America where several countries had quickly ratified it but its expansion to other continents is still ongoing (Norway ratified it in 1990, Denmark in 1996, Netherlands and Fiji in 1998, Spain and Nepal in 2007, Central African Republic ratified it in 2010, Luxembourg in 2018).

2.3.3 Economic and Social Council’s Working Group

On a similar note and within the same time-frame, in 1982, the Economic and Social Council (ECOSOC) mandated a Working Group on Indigenous People to work on a more exhaustive, even though non-binding, definition and set of standards in a Declaration on the Rights of Indigenous Peoples that was meant to be adopted by the United Nations General Assembly during the Decade of the World’s Indigenous People (1995-2004). This however, did not take place and the mandate was transferred to the U.N. Commission on Human Rights which was later replaced by the U.N Human Rights Council (in 2006). The Declaration on the Rights of Indigenous Peoples (UNDRIP) was finally adopted on 13 September 2007 by a majority of 144 and the 4 States which had voted against (Australia, Canada, New Zealand and the United States) have now endorsed or expressed support for it. The Declaration lists the rights that the UN General Assembly entrusts the States to guarantee towards indigenous

---

107 Ibid., Article 1 “3. The indigenous and other tribal or semi-tribal populations mentioned in paragraphs 1 and 2 of this Article are referred to hereinafter as ‘the populations concerned’.”
108 Supra, note 104, Maria Victoria Cabrera Ormaza, 271.
110 Supra note 61, James Anaya, 64.
111 Supra, note 104, Maria Victoria Cabrera Ormaza, 273-275.
112 Supra, note 2, UNDRIP.
peoples but the Declaration does not provide or refer to any definition of “indigenous peoples”. It mainly seems to be expressly affirming the application of the general principles of human rights to indigenous peoples.

The reason the word “indigenous” took so long to be accepted in international instruments is that most African and Asian countries were reluctant to recognizing that such populations existed within their borders. First, because they feared new ethnically-based conflicts and second, because they simply considered that the term could only apply to countries having experienced colonialism. Some Latin-American countries also found that the notion would not appropriately cover all populations. As to Europe the idea of “first inhabitants” raised even more difficulties.113

2.3.4 Organisation of American States

More recently, the Organisation of American States (OAS) adopted, in 2016, an American Declaration on the Rights of Indigenous Peoples that recognized self-identification as a fundamental criterion for defining “indigenous peoples”114 but it does not elude to recall that the said Declaration cannot be interpreted as “authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states”.115

The details of OAS policy regarding indigenous peoples will be further developed in the following chapters.

2.3.5 Lack of a Unified Definition

As can be seen from above, there is no internationally recognized definition of indigenous peoples but there are instruments identifying criteria that encourage the recognition and can be transposed into national law or the jurisprudence. The following chapters will show the importance of the role of the IACtHR in finding a definition.

Indigenous peoples can also be defined by comparing the notion to other existing notions. For instance, they are not a “nation” which is a term that relates to an entity that would be wider than “people” and bears political institutions.116 A “population” would better refer to a group that is not entitled to self-determination whereas indigenous peoples are.117 A “minority” holds certain common ethnic, linguistic or religious characteristics and form a

113 Supra, Maria Victoria Cabrera Ormaza, 278-279.
114 Supra note 6, American Declaration on the Rights of Indigenous Peoples, Article I.2.
115 Supra note 6, American Declaration on the Rights of Indigenous Peoples Article IV.
117 Ibid., 7-8.
non-dominant minority in a State but, unlike indigenous peoples, they do not hold groups rights but individual rights. Indigenous peoples have also shifted, in some instruments, from a restrictive “aboriginal” definition to a recognition of their status based on their traditional land use and marginalization.

The most important element for indigenous peoples’ representatives in international discussions have always been the self-identification criteria and that explains why a universal definition could not emerge.

2.3.6 Indigenous Peoples in Numbers

According to ILO, information from 2009, more than 370 million people of 5000 ethnicities in the world, living in 70 different states are indigenous people. They are dispatched on the five continents as presented in the following table. None of these numbers are exhaustive since it may not include the population of countries that do not recognize the existence of indigenous populations within their territory. For instance, France considers that Article 1 of its Constitution and the theory of indivisibility of the Republic does not allow such recognition and therefore France has not ratified the ILO Convention No. 169 despite the fact that populations of French Guyana, French Polynesia and New Caledonia have a claim of indigenous status.

118 Ibid., 9.
119 Ibid., 11.
120 Ibid., 257.
122 Supra, note 6, American Declaration on the Rights of Indigenous Peoples, Article 1.2.
125 Irène Bellier, Leslie Cloud and Laurent Lacroix, Les droits des peuples autochtones, des Nations unies aux sociétés locales (L’Harmattan, Horizons autochtones, 2017) 177-188.
Table of continents and countries with indigenous population:126.

<table>
<thead>
<tr>
<th>Continents</th>
<th>States with indigenous population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Europe</td>
<td>Norway, Finland, Sweden</td>
</tr>
<tr>
<td>Northern-America</td>
<td>Canada, United States</td>
</tr>
<tr>
<td>Mexico and Central-America</td>
<td>Mexico, Nicaragua, Guatemala, Panama</td>
</tr>
<tr>
<td>Southern-America</td>
<td>Venezuela, Colombia, Equator, Brazil, Peru, Bolivia, Paraguay, Argentina, Chile</td>
</tr>
<tr>
<td>Australia and Pacific</td>
<td>Australia, Pacific Islands, Papua New Guinea</td>
</tr>
<tr>
<td>Asia</td>
<td>Russia, Japan, Tibet, Taiwan, Philippines, Indonesia, Malaysia, Thailand, Cambodia, Vietnam, Laos, Myanmar, Nagaland, Bangladesh, Nepal, India, Iraq, Israel</td>
</tr>
</tbody>
</table>

A more detailed and up to date review of the situation of indigenous peoples in the world is submitted yearly by the human rights non-governmental organization International Work Group for Indigenous Affairs (IWGIA) founded by anthropologists in 1968. It is available online and can be consulted for further details.127

2.4 Indigenous Peoples’ Specific Rights

Around the debate on the definition of indigenous peoples crystallized the multiple specificities of indigenous peoples history, way of living, spiritual beliefs and identity as a group. This progressively resulted in the creation of specific rights based on the specific status of indigenous peoples. This section will present the main rights that were theorized for the purpose of addressing the specific status of indigenous peoples: self-determination, collective property, prior informed consent, protection of traditions and culture. This presentation will enable a better understanding of the links that were ultimately made between indigenous peoples’ rights and their environment and the environment more generally and will introduce the reasons that may have led the human rights’ Courts to link indigenous peoples’ rights and international environmental law principles. This section will give a large picture of the spirit

126 Milka Castro Lucic, “La universalización de la condición indígena”, Alteridades, 2008 18(35), 21, 25, “Cuadro 1 Continentes y países con población indígena” “Table 1 Continents and countries with indigenous population” [translation of the table by the author of the thesis]
of the rights granted to indigenous peoples by referring to global international law instruments.

2.4.1 Self-determination

One of the fundaments of indigenous peoples’ protection is the concept of self-determination. It should be noted that multiple general international law instruments starting with the UN Charter of 1945\textsuperscript{128} mentioned self-determination but the context of decolonisation led to some confusion on the scope of this right.\textsuperscript{129} The challenges of independence and state sovereignty had to be overcome to elaborate on the conception of self-determination which will be analysed in the present thesis. The notion that will be referred to here is not the concept of external self-determination\textsuperscript{130} that is a concept that directly followed WWII or the cold war that enabled colonized or dominated nations to form an independent State.\textsuperscript{131} The notion of self-determination that needs to be considered in the case of indigenous peoples, is one that enables them to politically, economically and culturally control their future without reaching for independence or separation from the State.\textsuperscript{132} In other words, it is the concept of internal self-determination.\textsuperscript{133}

The concept can be found by isolating the first paragraph of Article 1 of the ICCPR, as opposed to paragraph 2 that refers to colonized and oppressed peoples:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development\textsuperscript{134}

This provision provides a wide protection, not only to indigenous peoples as groups but also to individuals and it carries a strong political conception of self-determination. It offers all kinds of people composing a State the legitimacy to have their specific identity reflected in the institutions and the policies of the State. As Bownlie phrases it, it is “the right of a

\textsuperscript{128} Article 1 of the Charter of the United Nations and Statute of the International Court of Justice, adopted San Francisco 26 June 1945, entry into force 24 October 1945, UNTS 80. Available at: https://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf [Last accessed on 29 October 2018]
\textsuperscript{132} Ibid. 158.
\textsuperscript{133} Supra, note 130, Ilis Bantekas and Lutz Oette, 458-459.
community which has a distinct character to have this character reflected in the institutions of the government under which it lives”. However the protection remains limited since the Covenant and its Optional Protocol are not considered by the Human Rights Committee as opening its jurisdiction to group claims.

In the same spirit, Article 20 of the African Charter on Human and Peoples rights (African Charter) distinguishes between people who are colonized or under oppression (paragraph 2) and those that are not (paragraph 1) and are entitled to “maintain their existence and exercise their self-determination within existing states”.

Within these two instruments, self-determination applies to more than just indigenous peoples since the African Commission considers that it can be exercised by “people bound together by their history and traditions, as well as by their racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic, or other bonds”.

The concept is now better illustrated in the UNDRIP’s Preamble and Articles 3 and 4. The wording or Article 3 is the same as the one of the ICCPR but Article 4 details the exercise of this right:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 34 of the Declaration goes further:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Because of the normative value of the Declaration (non-binding), the concept still lacks enforceability at the international level, but the UNDRIP is the wider consensus ever found on indigenous rights, with endorsement of strategic countries such as Australia, New Zealand,

135 Bownlie, The rights of Peoples in modern international law, 1985 cited in Supra, Alexandra Xanthaki, 158
137 Supra note 73 African Charter on Human and Peoples’ rights.
138 Supra, note 129, Dinah Shelton, 64.
139 Ibid, 69.
140 Supra, note 2, UNDRIP Article 3: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.
141 Ibid., Article 4.
142 Ibid., Article 34.
Canada and the USA. It is not excluded that it indirectly reaches a binding value with the evolving state practice, and other emerging international instruments which may ultimately form, together, *opinio juris*.

It is in the ILO Convention No. 169 that an effective principle may be invoked by indigenous peoples in practice. The ILO Convention No. 169 does not namely use the term “self-determination”, but the preamble of the Convention is written in a way that suggests that self-determination is the basis for all indigenous rights protected by the Convention in the whole corpus of its articles.

Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.

This principle, as promoted in UNDRIP and the ILO Convention No. 169, leave the States with a positive duty of implementing national regulations in order to make it effective but the said instruments do not specify the means for said implementation.

2.4.2 Collective property

In the pursuit of the definition of indigenous peoples the recurring element is their right to collective property. This is a particularity of indigenous peoples that was created to adapt to their specific way of living and their culture. It does not compare to any existing legal concept of the occidental world. Originally, property was created for the protection of individual liberty (against the State or the Church). In classical international and national human rights instruments property is a right that is linked to individuals. Article 17 of the Universal Declaration of Human Rights provides:

(1) Everyone has the right to own property alone as well as in association with others.

This article does make a reference to property owned in “association” but the concept cannot compare to a collective property concept. It rather can be compared to a corporative right where each individual would be able to claim a share of the property. In short,

---

144 Ibid., 42.
145 Supra, Note 1, ILO Convention No. 169, Preamble.
international human rights’ instruments and regional human rights’ instruments aim to protect “every human”, “every natural or legal person”, “everyone”. The fact that this concept could be merged with an idea of community and collective use and enjoyment is antinomic with the strict definition of property. Nonetheless the practice of indigenous peoples and their relationship with their lands and territories required an adequate legal mechanism following the rejection of the theory of *terra nullius*.  

As the Special Rapporteur presents it to the Human Rights Council in its 2004 report, indigenous peoples have “from time immemorial (…) maintained a special relationship with the land, their source of livelihood and sustenance and the basis of their very existence as communities”. This right to “own, occupy and use lands is inherent in the self-conception of indigenous peoples and generally it is in the local community, the tribe, the indigenous nation or group that this right is vested”. Their way of living relies on hunting, pasturing, fishing, harvesting and religious gathering and even though the land may be divided into plots used “individually or on a family basis” most of the land is usually “restricted for community use only” and “social and moral ownership belongs to the community”. In practice, access and use of lands may also be shared by indigenous peoples with other communities.

These specific needs are addressed in international law in the ILO Convention No. 169 at Article 13 which provides the following:

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

In the jurisprudence of the IACtHR the interpretation of other human rights instruments referring to property rights are interpreted in the light of this provision when it deals with indigenous peoples claims because “the close ties of indigenous peoples with the land must be

---

149 *Supra*, note 4, American Convention, Article 21.
152 Ibid.
153 *Supra*, note 151, UN Special Rapporteur A/59/258.
154 *Supra* ILO Convention No. 169 Article 13.
recognized and understood as the fundamental basis for their cultures, their spiritual life and their integrity”. In other words, collective property is interpreted as being an essential element of the identity and survival of indigenous peoples and its interpretation is often made with reference to other indigenous peoples’ rights. This will be further explained in the context of the cases analysed in the chapter below.

### 2.4.3 Prior Informed Consent (PIC)

Prior informed consent (PIC) is the corollary of self-determination and collective property rights. It addresses the situation where the State or a private entity considers conducting an activity on indigenous peoples’ traditional lands. Examples are multiple, they can be dams, mines, highways, sometimes even national parks. Today’s world of economic development and increasing populations is filled with projects that have an impact on indigenous territories and that may cause the displacement of communities. In this context, procedural safeguards were created to ensure the effectivity of the substantive right to collective property. A generic definition of the prior informed consent concept would be the following:

...a consultative process whereby a potentially affected community engages in an open and informed dialogue with individuals or other persons interested in pursuing activities in the area or areas occupied or traditionally used by the affected community.

To be effective, this safeguard entails that discussions occur prior to the project and its approbation and that they continue throughout the entire time when the activity is conducted. Consent can be withheld from the community at any point of the process and/or project. Because indigenous communities may not have the financial or technical means to evaluate all the pros and cons of the project, they should be appropriately informed of all the implications of the project.

This concept can be encountered in the CBD (Article 8 (j)) and its Nagoya Protocol (Article 7) on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits

---

155 Supra, note 18, Mayagna (Sumo) Awas Tingni case, para 149.
156 Supra note 229, Sophie Thériault, 326.
160 Ibid, 421.
161 Supra, note 14, CBD, Article 8 : “(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles
Arising from their utilization. The World Bank Inspection Panel is entrusted with the mission of investigating claims from people and communities who believe that they have been, or are likely to be, adversely affected by a World Bank-funded project.

The concept finds an even wider scope within the UNDRIP in its article 19:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

This is similar to the provisions of the ILO Convention No. 169 which addresses the concept through different articles. Article 6 imposes on governments a consultation in good faith of the peoples concerned for all legislative or administrative measures that may affect them directly, with “the objective of achieving agreement or consent”, to establish means of participation for indigenous peoples and establish means for the development of the indigenous peoples’ own institutions and initiatives. Article 16 of the ILO Convention adds the obligation for “free and informed consent” in cases where relocation of peoples is necessary, Article 17 addresses alienation and transmission of rights on indigenous lands.

The question of representation of the communities remains controversial in the implementation of the prior informed consent. This is also addressed by UNDRIP in Article 18. Also, consultation may occur, but the communities may consider that the procedure lacked transparency or clarity.

On the other hand, those seeking access to the land and resources may be reluctant in engaging in a PIC procedure since it could appear to them as unnecessary, costly and time-relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”


UNDRIP, supra note 112, Article 18 “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures (…)”.

32
consuming. They may also have difficulties in identifying the communities that would potentially be impacted.

The IACtHR linked this procedural protection to the principle 22 of the Rio Declaration on Environment and Development by referring to the “profound impact on the social and spiritual relationships that members of the community may have with different elements of the natural world that surrounds them, when these are destroyed or harmed”.¹⁶⁸ The Court stated that consent must be given if a project would impact the survival of a people and considered that it was the State’s obligation to create and implement the internal legal mechanisms in order to effectively ensure the right to prior informed consultation.¹⁶⁹

When PIC is not explicitly mentioned, participation rights are often conferred in indigenous peoples related instruments.

### 2.4.4 Cultural Rights

The development of indigenous cultural rights, again, is linked to the indigenous peoples’ identity. The preservation of their culture is a means for indigenous people to pass along their knowledge to the future generations and uphold the identity and culture of the community throughout time. The best illustration of this is through the protection of cultural heritage and benefit sharing of the use of traditional knowledge in patterns and intellectual property regulation.

Without going into the details of the protection, the objective of this sub-section is to point out another specific aspect of indigenous peoples’ rights and give the big picture of the different challenges that are to be faced in considering this status.

There are multiple interactions between indigenous peoples and the rest of society nowadays which raise complex issues in numerous fields such as art, fashion, and alternative medication. An increasing phenomenon of alleged “cultural appropriation”¹⁷⁰ is being observed.¹⁷¹

Some regulating frameworks and organizations intend to address those issues. UNESCO is making some attempts to develop some policies in the field of cultural heritage and cultural

¹⁷⁰ Definition of cultural appropriation in Oxford Dictionaries: “The unacknowledged or inappropriate adoption of the customs, practices, ideas, etc. of one people or society by members of another and typically more dominant people or society.” Available at https://en.oxforddictionaries.com/definition/cultural_appropriation [last accessed 2 November 2018]
¹⁷¹ *Supra*, note 158, Shawkat Alam, 596.
diversity conservation by developing community-based cultural conservation standards.\textsuperscript{172} In the field of patents, protection of traditional knowledge, cultural expression and genetic resources it is worth mentioning WIPO’s Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (ICG).\textsuperscript{173} As to the role of indigenous peoples in biodiversity, it is recognised in the Nagoya Protocol.\textsuperscript{174}

\textbf{2.4.5 Legal Aspects of the Indigenous Status}

Enforceability of the rights presented above is limited by the jurisdiction of the courts and indigenous standing within these courts, as a group. That is the reason why the study focuses on the implementation by the IACtHR where indigenous rights appear to be the most effectively implemented in the international arena since the IACtHR enables indigenous peoples’ access to its jurisdiction through petitions submitted to the IAComHR.

\textbf{2.5 Relationship between Indigenous People and the(ir) Environment}

Elements of this relationship can already be found in the section above on indigenous peoples’ specific status and the human rights principles attached to them. The definition of indigenous peoples and their collective property rights showed the importance of their relationship with their lands and territories. Their culture, religion and survival rely on their lands and the resources attached to them. The point here is not to make a repeat of the previous section but to identify indigenous peoples’ role from an environmental perspective, through the lens of selected authors.

\textbf{2.5.1 Aspects of the Relationship}

Because the question of the protection of indigenous peoples’ rights often coincides with large scale development projects in resource and energy extraction, tourism, etc, the idea is to identify the perspective that indigenous peoples’ interests give to those environmental challenges and how their interests interplay with the ones of the environment.

Following Rebecca Tsosie’s reasoning, indigenous peoples have a complicated relationship with their environment due to their vulnerability. They are both the most likely victims to be affected by climate change and environmental depletion as it is common that they live next to a waste infested land, an extraction field, or hydroelectric dam, and the first

\textsuperscript{172} UNESCO Policy on engaging with indigenous peoples, 201 EX/6, 2018. Available at unesdoc.unesco.org/images/0026/002627/262748e.pdf [Last accessed 1 November 2018]

\textsuperscript{173} See WIPO’s website for mandate and Reports of the ICG. Available at: http://www.wipo.int/tk/en/igc/ [last accessed 1 November 2018]

\textsuperscript{174} Supra, note 15, Nagoya Protocol, Article 7 and 12.
“beneficiaries” of employment created by the said activity or tax revenue produced by it. Nevertheless, the author points out the vulnerability of communities in small island developing states who are threatened by the rising sea level causing coastline erosion, loss of land and property, dislocation of people, saltwater intrusion into freshwater but also deforestation of upper lands for crops, loss of biodiversity and coral reef. Consequences of climate change for communities in the Arctic are severe as well, given the melting of the sea ice, glaciers and permafrost that affect species such as polar bears, caribou, walrus and killer whales on which native communities of Alaska depend for their survival. For addressing these issues, the author supports a right to environmental self-determination for indigenous peoples that would impose “affirmative obligations on nation-states to engage in a mitigation strategy”.

Having mentioned the practical aspects of indigenous peoples’ relationship with their lands, the spiritual aspects should also be mentioned. The example of the San Francisco Peaks in the Colorado Plateau is presented by David Schlosberg and David Carruthers who explain that the peaks were sacred for 13 native American tribes in the region including the Navajo. They believe that they are one of four sacred mountains marking the boundaries of their home and that the medicine bundles of plants and soil from the peaks that they have in their homes are a conduit for communicating healing prayers to the mountain. The Hopi believe that the peaks are the home of the spirits bringing rain to their villages and crops, who could stop if they are not treated with respect. The Hualapi believe that the water flowing from the Peaks is sacred and they use it in purification ceremonies and healings. From this perspective, it can easily be imagined that all the communities were affected on different levels by the building of a recreational area where a ski station was implemented and started to make artificial snow with sewage water.

The specific relationship that indigenous peoples hold with their lands is the main reason why indigenous peoples are more likely to suffer from the impact of climate change and this

176 Ibid.
177 Ibid., 1640.
178 Ibid. 1674.
180 Ibid. 20.
181 Ibid.
182 Ibid.
is why, in Shawkat Alam’s view, the indigenous peoples’ rights to self-determination, land rights and cultural rights are “heavily interdependent” and that makes their promotion important within the context of climate change.184

2.5.2 Difficulties of Enforcement of IP Rights at National Level

On the specific handling of claims at the national level, States remain mainly inefficient in giving the proper level of protection to indigenous peoples and their environment.185 First, because of the absence of definition that we mentioned above, this leaves it in the hands of the relevant state to recognize the communities as indigenous or not. Secondly, because most international instruments protecting indigenous peoples are non-binding or if they are, not largely ratified by States.186 Therefore, a lot of imbalance between States recognizing indigenous rights and those who do not remain. This can be seen in the national case studies presented by Jerry Firestone, Jonathan Lily, Isable Torres de Noronha of American, African and Asian cases.187

Despite the difficulties of reaching a homogenous protection of indigenous peoples, an increasing movement is set towards recognizing their contribution to the environment’s preservation. This is illustrated by the arrangements that are made from indigenous communities to participate in management of conservation areas and wildlife resources such as in the drylands of Sub-Saharan Africa188, or management of cultural heritage sites189 and it is encouraged by international organizations focusing on nature conservation.190

2.5.3 Indigenous Peoples’ Rights Mechanisms from an Environmental Perspective

Maria Victoria Cabrera Ormaza sees a new functional approach of indigenous peoples’ rights. According to her, they are granted a special protection “based on their environmental input”

184 Supra, note 158 Shawkat Alam, 602.
185 Jerry Firestone et al., Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental law, American University International Law Review 20, no. 2 (2005), 219, 290.
186 Ibid., 291.
187 Ibid., 262.
189 Such as Uluru-Kata Tjuta in Australia and Tongariro National Park in New Zealand, under the Convention for the Protection of the World Cultural and Natural Heritage, 23 November 1972, 27 UST 37; 1037 UNTS 151, cited in supra Benjamin J. Richardson, 8.
in fields relating to development (as explained above about the World Bank policy, the Rio Declaration and Nagoya Protocol).191

In Cherie Metcalf’s view the extension of environmental rights to indigenous peoples is a corollary to the protection and preservation of indigenous culture and it brings a shift within environmental law because it does not focus on creating legal regulation against multiple but isolated sources of environmental degradation, but it is an approach based on environmental quality.192 This is the main input of human rights to the environmental law field and because of the link between indigenous culture and sustainable environmental practice, participation of indigenous peoples is welcomed, especially in the negotiation and decision-making process. This is reflected in Principle 22 of the Rio Declaration,193 Chapter 26 of the Nagoya Protocol194 and the participation of indigenous peoples in the Arctic Council195 and their observer status in the COP.196 The main difficulties, observed by Cherie Metcalf, are that, taking into account indigenous peoples brings difficulties in the negotiation process since it necessarily “multiplies the number of parties who must come to consensus to form international environmental law by treaty”,197 and that, most rights enjoyed by indigenous peoples remain procedural which makes substantial contribution still limited.198 The approach of international environmental law instruments is mainly a cultural integrity-based approach and, according to Cherie Metcalf the environment would benefit from a self-determination model.199 This model is promoted in the human rights instruments of the UN (UNDRIP) and the OAS (American Declaration) and generally leads to a symbiosis of interests between indigenous peoples’ cultural development and the environment, with the counter-example of the aboriginal subsistence whaling regime.200 In the author’s view, the IACtHR makes an adequate synthesis by connecting the cultural integrity and the self-determination concepts.201

191 Supra note 104, Maria Victoria Cabrera Ormaza, 281.
193 Supra note 11, Rio Declaration, Principle 22.
194 Supra note 15, Nagoya protocol, Chapter 26.
197 Ibid, 105-106.
198 Ibid.
199 Ibid, 136-137.
201 Ibid, 140.
2.6 Conclusions

It results from the above that even though some ambivalence persists within indigenous peoples’ regime, the connection with environmental concerns cannot be denied. Whether indigenous peoples pursue the same goals as environmental protection and sustainable development or not, the question of the interplay between environmental law principles and indigenous rights is a recurring one and the focus is here to explore the mechanisms developed in human rights disputes to reflect this situation.
3. IP Rights and their Environment in the Inter-American Human Rights System

The aim of this chapter is to present the functioning of the Inter-American Human Rights System in order to identify the substantive and procedural rights that it up-holds in the field of indigenous peoples’ rights with regard to their environment and to assess how the structure and rules of procedure of the organs of the Organization of American States (OAS) enable their implementation. This overview will provide the necessary background for a better understanding of the issues at stake in the case law that will be analysed in the following chapter.

3.1 Organs of the Organization and Jurisdiction of the IACtHR

3.1.1 The Organization of American States

The idea of a regional organization in the Americas dates back to the International Conference of Panamerican States, held in Washington D.C., from October 1889 to April 1890. The 18 States that met at that time concluded that their collaboration required a common and general knowledge of their respective economies, laws, practices, trade regulations and conditions, available natural resources etc. This observation resulted in the creation of the International Union of American Republics and its Commercial Bureau of American Republics, established in Washington. The bureau’s name was later changed to Pan American Union and was the basis for the Organization that now exists.

The Organization of American States (OAS) was formally established in 1948 with the signature of the OAS Charter in Bogota (Colombia). The purpose of this regional Organization is to achieve among member states “an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.” Today, the OAS counts 35 Member States and

---

204 Supra note 202, Cesar Sepulveda, 360.
95 observers. All States of Northern and Southern America have ratified the Charter except for Cuba which expressed some reservations.

The Organization comprises a General Assembly, an organ of consultation embodied by a Meeting of Consultation of Ministers of Foreign Affairs, the Permanent Council of the Organization, the Inter-American Council for Integral Development, an Inter-American Juridical Committee, the Inter-American Commission on Human Rights (IAComHR), the General Secretariat and specialized Conferences and Organizations.

The focus will be here on the organs of the OAS assigned with the mandate of developing and enforcing human rights which are the IAComHR and the IACtHR.

3.1.2 The Inter-American Commission on Human Rights

The IAComHR (or, in this Chapter, “the Commission”) was created in 1959 and gained the status of permanent and independent organ of the OAS in 1970. It was invested with the mission to promote the observance and protection of human rights and to serve as a consultative organ of the OAS on these matters. Its full mandate, composition and rules of procedure are established by the Inter-American Convention on Human Rights (Pact of San José or “American Convention”) of 1969. While it is a consultative organ to the OAS, it also has an investigative mandate for which its competence only extends to States which ratified the American Convention. To date, 20 States have ratified the American Convention but neither Canada or the United States have.

The Commission is entrusted by the States’ parties to the Convention to:

- Develop awareness of human rights;
- Make recommendations to the member States for the adoption of domestic law and constitutional provisions with regard to Human Rights;
- Conduct in-country assessment of Human Rights situations in member States and produce specific Reports on these situations
- Respond to member States’ inquiries about Human Rights;

206 OAS official webpage. Available at http://www.oas.org/en/about who_we_are.asp [Last accessed 10 November 2018]
208 Supra note 205, OAS Charter, Chapters VIII-XVIII.
209 Supra note 205, OAS Charter, Article 106, Chapter XV.
210 Supra note 4, American Convention.
211 Ibid, Article 45.
Submit an annual report to the General Assembly of the OAS;
Conduct investigations upon petitions submitted by individuals, groups of persons of any nongovernmental entity alleging Human Rights violations;
When admissible, request precautionary measures in the context of petitions for Human Rights violations, explore friendly settlement possibilities, prepare reports and submit the cases for litigation to the Inter-American Court of Human Rights.213

Among the limits of the IAComHR one can cite its competence, as mentioned above, the Commission may only investigate and refer a case of human rights violation to the IACtHR if the respondent State is party to the Convention and has accepted the Court’s jurisdiction. For States which have accepted the Commission’s competence, the recommendations and decisions of the Commission are non-binding. The significant backlog of cases is also an important limit to the effectiveness of Human Rights protection and enforcement by the Commission.214

3.1.3 The Inter-American Court of Human Rights
The IACtHR (or, in this chapter, “the Court”) is an independent adjudicative body established with the entry into force of the American Convention, in 1979. The Court is established in San José, Costa Rica, and is composed of 7 judges selected among nationals of the OAS member States.215

As to the jurisdiction and function of the IACtHR, the Court is entrusted with the following:

- Hear cases submitted by/against State members which have accepted its jurisdiction and cases submitted by the Commission (IAComHR) after having conducted the appropriate investigation, report and attempt of amicable settlement;
- Hear all cases concerning the interpretation and application of the American Convention;
- Deliver judgments that are binding and final;
- Order provisional measures, in cases of extreme gravity and urgency;
- Order remedies and compensation

213 Supra note 4, American Convention, Article 41.
• Be consulted and advise State members of the OAS regarding the interpretation of the American Convention “or other treaties concerning the protection of human rights in the American states”;

• Deliver advisory opinions on the compatibility of domestic law with the international instruments;

• Deliver an annual report to the OAS General Assembly.

The Court’s functioning counts some specificities. Only States and the Commission can submit cases to the Court and the Commission must declare petitions admissible, investigate the cases and explore friendly settlement. Only individuals whose rights have actually been violated can file a complaint, theoretical and hypothetical cases of violations are not admissible. The Court established certain minimum characteristics for accepting cases referred by the Commission. The Court considers that the controversial legal issue should not have been previously decided by the Court and the subject matter should have certain importance to the hemisphere. Nonetheless, the Commission has never addressed environmental issues to the Court despite the fact that environmental disasters can have significant and permanent consequences for a large number of people.

The Commission and the Court have developed principles of interpretation that are recurrent in their judgements, advisory opinions and recommendations. In this respect, Dinah Shelton finds worth citing the pro homine principle, the notion of “effet utile”, the evolutionary approach or rule of dynamic interpretation of treaties and international instruments, and the theory of the treaty’s object and purpose.

Judgements of the Court are final but as to the compliance control of the Court’s decisions, there is no specific mechanism and, in practice, the Court requests the states,

---


217 Supra note 4, American Convention, Section 2 “Jurisdiction and Functions”.

218 Supra note 214, Natalia Gove, 213.


220 Ibid.

221 Ibid, page 209.

222 Supra note 216, Dinah Shelton, 943.

223 Supra note 4, American Convention, Article 67.
through written communications, to communicate reports on the measures adopted to implement the judgments.\textsuperscript{224}

### 3.1.4 Environmental Protection within the Inter-American System

Similarly to other international and regional systems, it is difficult for environmental claims to find their way to a jurisdiction in the inter-American system. The Court is reluctant to establish a right to a healthy environment. Many cases involving environmental degradation would fall under violation of the right to life but the court would consider that the burden of proof of showing evidence of the threats to life and health was on the petitioners.\textsuperscript{225} Another obstacle lied in the fact that the Commission was limiting the petitions it forwarded to the Court to cases with “the most shocking and clear cut facts”.\textsuperscript{226} It is important to note that environmental harms and their consequences are not easy to demonstrate for the general public, they are spread out through time and mixed with other possible causes, not to mention that governments and industries may have political or financial bias in sharing the information related to environmental impacts of certain activities. As a result of the very nature of environmental harms and contamination, the mechanism to prosecute them in courts require a lifting of the - implicit - victim requirement and a shift of the standard of proof from the petitioners to the State.\textsuperscript{227}

The recognition of the right to a healthy environment came with the Protocol of San Salvador\textsuperscript{228} which opened the way to the adoption of positive measures by the States. But it remained inefficient because of its lack of enforceability. This provision can only be invoked in petitions claiming a breach of another related right.\textsuperscript{229}

Many OAS State members also included the right to a healthy environment into their constitutions and domestic law among which Ecuador, Costa Rica, Chile, Brazil, Guatemala, Honduras and Nicaragua.\textsuperscript{230} If internal implementation remains difficult for different reasons


\textsuperscript{225} Supra note 219, Inara K.Scott, 212.
\textsuperscript{226} Ibid., 213.
\textsuperscript{227} Ibid., 216.

\textsuperscript{228} Supra note 5, Protocol of San Salvador, Article 11.


\textsuperscript{230} Supra note 219, Inara K. Scott, 227.
(national debt in Brazil or political instability)\(^{231}\) it gives the Court more sources for its evolutive interpretation of treaties.

The Court found a basis for procedural environmental claims in the right to freedom of association with the Kawas-Fernandez case\(^{232}\) where the Court, referring to Principle 10 of the Rio Declaration and to the Aarhus Convention, established that there was a general right of access for any person to state-held public interest information as a fundamental element of the right to freedom of expression and that the information should be provided without the need to prove direct interest or personal involvement.\(^{233}\)

Finally, a big breakthrough on this topic recently came out with the Court’s Advisory Opinion of 15 November 2017 requested by Colombia on the question of the States’ obligations with regard to the protection of the right to life and physical integrity protected in the Pact of San José in the context of certain activities that may have serious consequences and cause severe damage to the marine environment on which the habitat of the inhabitants of the coasts and islands of the Wider Caribbean Region depends.\(^{234}\) The Court formally recognized in its opinion the existence of a link between the protection of the environment and the realization of other human rights and the indivisibility of human rights, the environment and sustainable development.\(^{235}\) The Court based its decision on the recognition of the right to a healthy environment and the fact that numerous other human rights are vulnerable to environmental degradation. As a consequence of this link, the Court concluded that the States had positive substantive and procedural obligations regarding environmental protection that were to be found within right to life, personal integrity, health or property (substantial obligations)\(^{236}\) and rights to freedom of expression and association, to information, to participation in decision-making and to an effective remedy (procedural obligations).\(^{237}\) The Court integrated the concept of trans-boundary environmental harm, the

---

\(^{231}\) *Supra* note 214, Natalia Gove, 216.

\(^{232}\) *Kawas Fernandéz v. Honduras*, Merits, Reparations and Costs, Judgment IACHHR (ser. C) No. 196 (3 April 2009), para. 146


\(^{234}\) *The Environment and Human Rights* (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights) Advisory Opinion IACHHR OC-23/ Series A No. 23 (15 November 2017) Available at : www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf [Last accessed 11 November 2018]

\(^{235}\) *Ibid.*, para 47.


principle of prevention, the precautionary principle, public participation and access to information.  

Until this interpretation of the Court finds concrete implementation at the national level and confirmation in the context of a judiciary dispute which could provide a clearer picture of the exact impact of such an interpretation, the focus will be here on the link between indigenous and environmental rights within the jurisdiction of the IACtHR, a more long-standing interpretation that may have set the basis of the elements and reasoning mentioned in the previously cited Advisory Opinion.

3.2 IP Rights in Inter-American Human Rights Instruments

This section will introduce the available legal sources providing protection to indigenous peoples within the Inter-American Human Rights system. About 40 million of the 370 million indigenous peoples in the world are located in the OAS countries. According to Dinah Shelton, it was in 1971 that the IAComHR formally found that a specific protection was needed for indigenous peoples and this was closely followed in case law with the Yanomami case in 1985. The growing number of petitions coming from indigenous peoples and the conclusions of the Commission in its reports most probably led to the inclusion of the provision of the right to a healthy environment in the San Salvador Protocol, a first step in formalizing the influence of indigenous peoples on human rights.

As mentioned above, the Commission and the Court are competent for reviewing the fulfillment of State parties to the American Convention with regard to all of their obligations, taken at the internal level and international level. Therefore, it is without surprise that the Court, in its judgments concerning indigenous peoples, refers to the several international instruments that will be presented in the present section.

3.2.1 Regional Treaties and Declarations

No express protection of IP in OAS Treaties or other general human rights instruments:

Neither of the provisions of Article 21 of the American Convention on right to property or Article XXIII of the American Declaration of the Rights and Duties of Man on private property expressly refer to indigenous or tribal peoples but the Court has found that they

---

238 Ibid, para 125. See also English abstract of the Decision, 4. Available at : http://www.corteidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf [Last accessed on 11 November 2018]
239 Supra note 216, Dinah Shelton, 937.
240 Ibid, 948; Yanomani v. Brazil, Resolution 12/85, IAComHR case 7615 (5 March 1985), para 7.
241 Supra note 216, Dinah Shelton, page 948.
242 Supra, American Convention, Article 33.
applied to the lands and territories of such peoples and their members. The States agreed on
the fact that the American Declaration on the Rights and Duties of Man are the human rights
obligations referred to in the Charter of the OAS in Article 3.

Recent adoption of a specific text on IP Rights: the American Declaration on the Rights of
Indigenous Peoples:

The recent adoption on 15 June 2016 of the American Declaration on the Rights of
Indigenous peoples which was first approved in 1997 confirms the common will of the OAS
to adopt common rules in the field of indigenous and tribal peoples rights but, as indicated by
the time-frame of the negotiation, this adoption did not come without long debates.

In fact, the American Declaration on the rights of IP (“the Declaration” in this section)
resulted from 17 years of work and debate with the participation of indigenous peoples. It still
does not provide a definition of indigenous peoples but refers to the self-identification criteria
and provides some unique provisions. As mentioned by the Bolivian delegation during the
meeting of the General Assembly voting on the adoption of the Declaration, the document
was a necessary instrument complementing the existing UNDRIP. It addresses more precisely
the needs of the American hemisphere, it mentions the theme of the indigenous family and
provides a specific reference to the uncontacted peoples. The delegation of Mexico noted in
this respect that the Declaration puts an emphasis on the pluricultural and multilingual nature
of societies and recognizes the right of indigenous peoples to remain voluntarily isolated and
without contact. The delegation of Chile recalled that the Declaration was a political
instrument largely inspired by the ILO Convention No. 169, which is binding. This
observation highlights the possible difficulties that the Declaration may encounter in the
attempts for domestic implementation, especially within States with reluctant governments.
Some other concerns were raised during the session of the OAS General Assembly by the
representative of the indigenous peoples. Hector Huertas explained that the adoption of the

---

243 Inter-American Commission on Human Rights, “Indigenous and tribal peoples’ rights over their ancestral
lands and natural resources: norms and jurisprudence of the Inter-American human rights system” American
244 Ibid., page 269.
245 OAS General Assembly, Considerations and adoption of the Resolution project “American Declaration on
the rights of indigenous peoples”, AG/doc.5537116, XLVI-0.2 Acts and Documents Vol. II, Santo Domingo,
[Last accessed 13 November 2018]
246 Ibid., 150. [Translation of the minutes by the author of the thesis]
247 Ibid., 151. [Translation of the minutes by the author of the thesis]
248 Ibid., 152. [Translation of the minutes by the author of the thesis]
249 Ibid., 155. [Translation of the minutes by the author of the thesis]
Declaration is a historic achievement but that, despite the fact that the indigenous peoples recognized the efforts of the OAS for involving them into the making of the Declaration, they regretted that their participation had been limited at the final stage of the process by a lack of political will from the States for financing their participation. The representative also pointed out that some States insisted, during the negotiation process, on subjecting IP rights to their domestic laws and conditions. This clearly indicates that difficulties remain at several levels where the representative insisted that protecting indigenous peoples was an opportunity for States to take a political stand in favour of environmental protection. The parallel between the protection of environment and natural resources and the rights of indigenous peoples was expressly mentioned by the representative who explained that indigenous peoples were “defensores de la madre tierra”, that they promoted sustainable development since millennial times and that the fact that environmental resources of the continents were located in the indigenous territories was not casual. He considered that it was therefore “inacceptable that indigenous peoples remained discriminated against and marginalized in the regional and national discussions”. Indigenous peoples called, in the context of the adoption of the Declaration for a better participation of indigenous peoples in domestic decisions and in the OAS. They requested in this respect the creation, within the OAS, of a mechanism of effective monitoring of the level of achievement of indigenous participation by States in which indigenous peoples would take part.

It results from the above that even after the adoption of the American Declaration on the Rights of indigenous peoples, the OAS faces multiple challenges with regard to IP rights.

3.2.2 International Treaties and Declarations

Since there was no express source for indigenous peoples’ rights within OAS texts and treaties before the American Declaration of 2016 presented above, the IACtHR has developed, over the years, a practice of interpreting the OAS texts in the light of other international instruments. This section will present the main international provisions that the Court found relevant for the interpretation of cases relating to indigenous peoples’ rights.

The ILO Convention No. 169 is referred to by the Court in the interpretation of Article 21 of the American Convention on the right to property with regard to indigenous peoples’ territorial rights.

\[250\] Ibid., 156. [Translation of the minutes by the author of the thesis]
\[251\] Ibid. [Translation of the minutes by the author of the thesis]
\[252\] Ibid. [Translation of the minutes by the author of the thesis]
\[253\] Ibid., 157. [Translation of the minutes by the author of the thesis]
\[254\] Ibid. [Translation of the minutes by the author of the thesis]
The Court also makes references to interpretations of general human rights within UN instruments such as the ICCPR (Articles 27 on rights of minorities and 1 on self-determination),\textsuperscript{255} the Convention for the Elimination of Racial Discrimination (Article 5 and other relevant provisions),\textsuperscript{256} the ICESCR\textsuperscript{257} and the Convention on the Rights of the Child.\textsuperscript{258}

More recently, it is the CBD and its Article 8(j) which were used as a source of interpretation before the Court. This introduction of references to the CBD may open the way to more specific references in the implementation of the Akwé Kon voluntary guidelines by Stats.\textsuperscript{259}

In the end, the Court even found that indigenous and tribal peoples’ right to territorial property could find legal basis in international customary law.\textsuperscript{260}

The UN Declaration of the Rights of Indigenous Peoples gained an equivalent value to the Convention No. 169 in the interpretation of indigenous rights by the Court. The findings of the UN Special Rapporteur on the situation of human rights and fundamental liberties of indigenous peoples may also be taken into account by the Court and the Commission.\textsuperscript{261}

It is also relevant to mention that the Court sometimes refers to other human rights courts’ jurisprudence such as the European Court of Human Rights.\textsuperscript{262}

3.2.3 Interpretations of the Court and the Commission

Indigenous peoples’ rights in connection to their environment were mainly addressed by the IACtHR and the IAComHR through their collective property rights. This will be a short introduction to the concepts and mechanisms identified in the main indigenous peoples’ rights cases before going more into the details of the reasoning of the Court with the two more recent cases analysed in the following chapter.

In \textit{Mayagna (Sumo) Awas Tingni} case,\textsuperscript{263} the Court established indigenous lands rights and rights to the natural resources they enclose.\textsuperscript{264}

In \textit{Maya Indigenous Communities of the Toledo District v. Belize (2004)}\textsuperscript{265}, the Commission recommended judicial protection\textsuperscript{266} and special measures for indigenous peoples

---

\textsuperscript{255} Supra note 7, ICCPR.
\textsuperscript{256} Adopted New York 7 March 1966, entry into force 4 January 1969, UNTS 660.
\textsuperscript{257} Supra note 8, ICESCR.
\textsuperscript{259} Ibid., 275.
\textsuperscript{260} Ibid.
\textsuperscript{261} Ibid., 276.
\textsuperscript{262} Supra note 233, Ricardo Pavoni, 74; Supra note 232, Kawas Fernandés case, para 148.
\textsuperscript{263} Supra note 18, Mayagna (Sumo) Awas Tingni case.
\textsuperscript{264} Ibid. para 149.
and effective compensation for violations of their rights.\textsuperscript{267} It also sustained that indigenous peoples’ property rights entailed an obligation of delimitation, demarcation and recognition of communal lands through title.\textsuperscript{268} For the Commission, any measure diminishing their property right required informed consent.\textsuperscript{269}

In the \textit{Yakye Axa} case,\textsuperscript{270} the Court established that ancestral lands were covered by the guarantees of indigenous property rights and that the States were bound to take legislative and administrative measures to guarantee the effective exercise of indigenous peoples with regard to their property rights.\textsuperscript{271}

In the \textit{Sawhoyamaxa} case,\textsuperscript{272} the Court established that the traditional ownership of the lands by indigenous peoples was equivalent to a full property title and that indigenous peoples were entitled to request official recognition of their property by the State.\textsuperscript{273} The Court added that indigenous property rights included a protection against third parties’ ownership which entailed that even when third parties legally acquired, in good faith, lands that were traditionally owned by indigenous peoples, the latter were entitled to restitution or the granting of lands of equal size and quality in accordance with their land property rights.\textsuperscript{274}

In the \textit{Saramaka People} case,\textsuperscript{275} the Court found that, because of their special relationship with their lands, and their cultural identity, non-native tribal people were entitled to the same rights as indigenous peoples.\textsuperscript{276} In this case the Court also drew a distinction in the natural resources regime. The Court found that there were two types of natural resources, the ones that were necessary to the subsistence of the indigenous peoples because they are necessary to their agricultural, hunting and fishing activities, and those that are not traditionally used by indigenous peoples (generally minerals, oil, etc).\textsuperscript{277} The Court found in this distinction a limit to the property rights of indigenous peoples over their lands.\textsuperscript{278} The idea being that the State owns the resources and that it holds the authority to authorize exploration and extraction

\textsuperscript{265} \textit{Maya Indigenous Communities of the Toledo district v Belize}, IAC\textit{omHR} case 12.053 (12 October 2004). Available at: \url{http://www.cidh.org/annualrep/2004eng/belize.12053eng.htm} [Last accessed: 24 November 2018]
\textsuperscript{266} \textit{Ibid.}, para 186.
\textsuperscript{267} \textit{Ibid.}, para 117.
\textsuperscript{268} \textit{Ibid.}, para 132.
\textsuperscript{269} \textit{Ibid.}, para 142.
\textsuperscript{270} Supra note 19, \textit{Yakye Axa v. Paraguay} case.
\textsuperscript{271} \textit{Ibid.}, para 225.
\textsuperscript{273} \textit{Ibid.}, para 128.
\textsuperscript{274} \textit{Ibid.}
\textsuperscript{275} \textit{Saramaka People v. Suriname}, Preliminary Objections, Merits, Reparations, and Costs, Judgment IAC\textit{omHR} (Ser C) No. 214, (24 August 2010).
\textsuperscript{276} \textit{Ibid.}, para 84.
\textsuperscript{277} \textit{Ibid.}, para 126.
\textsuperscript{278} \textit{Ibid.}, para 127.
concessions on all territories. Therefore, the case introduced the question of the balance between the States’ need for development and the resources rights of indigenous peoples. To resolve this issue, the Court introduced three safeguards: effective participation, reasonable benefit sharing and environmental and social impact assessment.\footnote{Ibid., para 129.}

In the \textit{Xákmok Kásek} case,\footnote{Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment IACtHR (ser. C) No. 214, (24 August 2010).} the Court found that the States needed to adopt positive measures to protect vulnerable populations\footnote{Ibid., para 212, 282.} and that a legitimate claim of environmental protection cannot override indigenous peoples lands claims.\footnote{Ibid., para 169.}

In the \textit{Kichwa People of Sarayaku} case,\footnote{Supra note 20, Kichwa people of Sarayaku case.} the Court used cultural identity of indigenous peoples as a basis for their right to consultation and found that this consultation needed to be conducted prior to granting licences and allowing activities of development, investment, exploration or mining within indigenous peoples territories.\footnote{Ibid., para 169.} The Court also found that the States were bound to take positive actions such as conducting inspection and supervision on the actions of third parties and deploying effective means to safeguard indigenous peoples rights through corresponding judicial organs.\footnote{Ibid., para 181.}

\subsection*{3.3 Conclusions}

To conclude this chapter and having explored the legal mechanisms of the Inter-American System, it appears that the organs of the OAS provide a unique means of complaint and redress for indigenous peoples’ claims, especially regarding their land rights. Indigenous peoples have legal standing before the Court through petitions submitted to the Commission which may process the submissions with some delay because of its important backlog but it has the competence to impose provisional measures. As to the Court, it has found a judiciable ground in indigenous peoples’ property rights. Other rights such as culture, religion, political participation and self-determination are, in general, only mentioned by reference within land and resources disputes because they have weaker legal grounds and are less judiciable in the regional and international legal instruments.\footnote{Ibid., page 968.}

In the following part of the thesis, the rights and interpretations of the Court will be analysed in the context of specific cases reviewed by the Court in 2015. This review will
enable a better understanding of the reasoning and mechanism of interpretation of the Court and will enable an assessment of the effectivity of the integration of environmental principles within indigenous rights protection, in practice.
4. The IACtHR’s recent jurisprudence

This Chapter will focus on two recent judgements of the IACtHR; one involving the Community Garífuna Triunfo de la Cruz\(^{287}\) and the other one, involving the Community Garífuna de Punta Piedra\(^{288}\) and the State of Honduras. Both are related to nature conservation measures.

[Disclaimer: the following presentation of the cases is based on a translation of the original Spanish version of the IACtHR decisions – no other official version of the decision is available to date\(^{289}\) – made by the author of the thesis.]

4.1 De la Cruz case

The recollection of facts, arguments and conclusions in this specific case is extensive because it sheds light on concrete aspects of the impact of the jurisprudence of IACtHR and it gives an exhaustive summary of the conclusions established in previous decisions in cases involving indigenous peoples and their lands.

4.1.1 Facts

The facts of the case are related to the Community Garífuna Triunfo de la Cruz, located in Honduras, in the Municipality of Tela (Atlántida department) next to the Caribbean Sea.\(^{290}\)

The Garífuna people originated in the 18\(^{th}\) century from the union of the wrecked Africans who arrived on Spanish boats on the Saint Vincent Island in 1635 and the Amerindians who lived there since before the colonization (Arawak and Kalinagu people).\(^{291}\) From the union of these peoples emerged the Karaphunas who were displaced by the British colonizers when the United Kingdom took control of the Saint Vincent Island in 1797. They were deported to the Roatan Island and, from there, they emigrated to the mainland in the territory that is today Honduras, expanding from the North coast of Honduras, to the Caribbean coast of Guatemala, Nicaragua and Belize.\(^{292}\) The Garífuna people are now divided into approximatively 40 communities that expand on the Atlantic littoral and the Caribbean coast.\(^{293}\) The Garífuna peoples maintain a specific relationship with land, beaches, forest and sea which are

---

\(^{287}\) Supra note 21, De la Cruz case.

\(^{288}\) Supra note 22, Punta Piedra case.

\(^{289}\) Decisions of the IACtHR available online at: http://www.corteidh.or.cr/CF/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en [Last accessed on 6 November 2018]

\(^{290}\) Supra note 21, De la Cruz case, para 54.

\(^{291}\) Ibid., para 47.

\(^{292}\) Ibid.

\(^{293}\) Ibid.
fundamental for their survival as peoples and fundamental for their religious ceremonies and commemorations. They uphold collective uses of the lands and other patterns of work that reflect their origins. The Garifuna economy is made of, *inter alia*, artisanal fishing, manioc, yucca and avocado cropping and hunting of small animals (deer, turtles, agoutis, manatees).\textsuperscript{294}

Today the community consists of approximately 10,000 inhabitants living in rural areas.\textsuperscript{295} Since 1950, the State of Honduras started delivering land property titles to the Community Garífuna Triunfo de la Cruz following claims initiated by the Community in 1946, 1969, 1997, 1998 and 2001.\textsuperscript{296} At the time of the claim before the IACtHR around 615 hectares and 28,71m² were attributed to the Community in full property (“dominio pleno”) title and around 128,40 hectares were attributed to them in occupation title (“garantía de ocupación”). Some more territory was claimed by the Community as traditional lands but was not recognized as such by the State.\textsuperscript{297}

Different problems were raised with respect to the above-mentioned traditional territory of the Garífuna Triunfo de la Cruz Community:

a. The extension of the urban limits of the municipality of Tela in 1989 which extended to part of the traditional lands of the Community recognized by the State of Honduras.\textsuperscript{298}

b. The cession between 1993 and 1995 of about 44 hectares of the traditional lands - recognized by the State and which were granted to the Community under an occupation title - to a private company and third parties for the implementation of a touristic project.\textsuperscript{299}

c. The transfer in 1997 of 22,81 lots that were on the recognized traditional lands of the Community to a workers’ union.\textsuperscript{300}

d. The creation of the protected area “National Park Punta Izopo” in part of the traditional territory of the Community.\textsuperscript{301}

\textsuperscript{294} Ibid., para 50-53
\textsuperscript{295} Official summary of the *De la Cruz* case made by the IACtHR, 1. Avaible online at: http://www.corteidh.or.cr/CF/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en (in Spanish only)
\textsuperscript{296} Supra note 21, *De la Cruz* case, para 110.
\textsuperscript{297} Ibid., para 55. The Representatives and the Commission alleged that the ancestral territory of the community is located beween the Caribbean sea in the North, the Mount El Tigre in the South, the national park Punta Izopo in the East and Mount Triunfo de la Cruz in the West, including a total of 2840 hectares (living area and functional habitat of the Community).
\textsuperscript{298} Supra note 295, Official summary of the *De la Cruz* case, 2.
\textsuperscript{299} Ibid.
\textsuperscript{300} Ibid.
\textsuperscript{301} Ibid.
e. Other touristic projects on the Community’s traditional lands.\textsuperscript{302}

f. Conflicts that emerged from the usurpation of lands, threats and homicide of members and leaders of the Community.\textsuperscript{303}

### 4.1.2 Merits

Before going further into the merits, the case raised the preliminary question of the indigenous status of the Community.\textsuperscript{304} Once this issue addressed by the Court, the main question that remained is the one of the international responsibility of Honduras (the State) for the absence of an adequate property title on the traditional territory of the Community of Triunfo de la Cruz.\textsuperscript{305}

### 4.1.3 Arguments of the parties

**Arguments of the Representatives**

The case was submitted by the representatives of the indigenous community (OFRANEH, “Organizacion fraternal Negra Hondureña”) on 29 October 2003 to the Commission which approved its admissibility on 14 March 2006.\textsuperscript{306}

**Preliminary Issue of the Indigenous Status of the Community**

The representatives argued that the State denying the indigenous status of the community was late in submitting its argument where the argument was available during the whole time of the judicial process, including the internal process.\textsuperscript{307} The representatives therefore considered the argument as a violation of due process and good faith.\textsuperscript{308}

The Representatives claimed that the State had breached their property rights by omission since the delimitation and demarcation of the lands that were actually recognized as traditional lands were conducted 7 years after the Community was granted property titles.\textsuperscript{309}

As to the extension of the urban area and the touristic projects, the Representatives alleged that the State had organized meetings with the leaders of the indigenous communities and conducted information process but that they could not qualify as free prior informed

\textsuperscript{302} Ibid.
\textsuperscript{303} Ibid.
\textsuperscript{304} Supra note 21, De la Cruz case, para 19-23.
\textsuperscript{305} Ibid., pages 30-56.
\textsuperscript{306} Ibid., para 2.
\textsuperscript{307} Ibid., para 20.
\textsuperscript{308} Ibid.
\textsuperscript{309} Ibid., para 94.
consent.\textsuperscript{310} The Representatives alleged that the so-called consultation made by the State in fact limited and reduced the possibility of free prior informed consent and should be considered as a violation of good faith under Article 6.2 of Convention No. 169.\textsuperscript{311}

\textit{Arguments of the Commission}

The Commission observed that the State, by its actions and omissions, had impeded the recognition of the Community’s traditional property rights and the effective use and enjoyment of its lands and natural resources.\textsuperscript{312}

The Commission also pointed out that the State granted full property titles to the Community for only 615 hectares and 28,71m\textsuperscript{2} of the 2840 hectares that the Community claimed and that the remaining territories that were not recognized as traditional lands by the State were used by the Community for subsistence activities such as hunting, fishing and cropping.\textsuperscript{313}

In the Commission’s view, the Community was unable to enjoy a pacific occupation and ownership of its lands due to:

i. An alleged lack of demarcation and delimitation;\textsuperscript{314}

ii. An alleged lack of legal certainty in the titles delivered;\textsuperscript{315}

iii. An alleged restriction in the access to certain parts of the territory because of the creation of protected areas;\textsuperscript{316}

iv. An alleged omission to effectively protect the land against the occupation and disposal by third parties;\textsuperscript{317}

v. An alleged lack of free prior informed consultation with respect to the adoption of decisions such as the planification and execution of touristic projects, the creation of a protected area and the alleged cession of the community’s land.\textsuperscript{318}

The Commission concluded that the State was responsible for the following human rights breaches of the American Convention:

\textsuperscript{310} Ibid., para 95.
\textsuperscript{311} Ibid.
\textsuperscript{312} Ibid., para 91.
\textsuperscript{313} Ibid.
\textsuperscript{314} Ibid., para 1.
\textsuperscript{315} Ibid.
\textsuperscript{316} Ibid.
\textsuperscript{317} Ibid.
\textsuperscript{318} Ibid.
- Violation of Article 21 with respect to Articles 1.1 and 2 on property right for not having secured an effective access to their lands and guaranteed a collective property title for the community.\textsuperscript{319}

- Violation of Article 21 with respect to Article 1.1 for undertaking decisions that affected the territory of the Garífuna de la Cruz Community without conducting an expropriation process, restraining from threatening the subsistence of the indigenous communities, failing to guarantee the benefit sharing of the revenues generated by the concessions granted to third parties.\textsuperscript{320}

- Violation of Articles 8 and 25 with respect to Articles 1.1 and 2 due to the lack of adequate and effective process for the recognition, qualification, demarcation, delimitation of the claimed territories that would guarantee their pacific ownership and recovery of their ancestral lands.\textsuperscript{321}

- Violation of Articles 8 and 25 with respect to Article 1.1 for the lack of serious, effective and timely investigation for the establishment of the truth and determination of responsibilities with regard to the complaints lodged by members and leaders of the Community.\textsuperscript{322}

The Commission requested provisional measures, the recognition of the responsibility of the State, the adoption of a legislative measure to ensure indigenous peoples’ right to free prior informed consent, the investigation and sanction of the authors of threats and violences against the Community, reparation and redress both at the individual and collective scale, and the adoption of measures in order to avoid that similar acts occur in the future.\textsuperscript{323}

\textit{Preliminary Issue of the Status of Indigenous Peoples}

The Commission found the allegations of the State particularly grave given that the Community had already claimed their indigenous status during the internal procedures and that they self-identify as indigenous. The Commission claimed the application of the principle of estoppel.\textsuperscript{324}

\textsuperscript{319} Ibid., para 2.
\textsuperscript{320} Ibid.
\textsuperscript{321} Ibid.
\textsuperscript{322} Ibid.
\textsuperscript{323} Ibid., para 3.
\textsuperscript{324} Ibid., para 21.
Arguments of the State

The State submitted that the Garífuna Triunfo de la Cruz Community was not a native population but an ethnic minority of afro descendants, but the State submitted its argument at a late stage of the procedure (during the public hearing of the trial). 325

The State also claimed that it had prescribed means of protection for the rights and interests of the Community in a progressive way with entitlement, extension and sanitation. As regards the later stage, the State argued that the alleged zone comprised of several occupiers who were not Garífunas but held legal property documents and were also protected by national law. 326

The State added that part of the territory claimed by the Community comprised of beaches and sea and that they could not be subject to ownership (according to the theory of goods of public use and Honduran national law), therefore the State concluded that the Community had a right to access and use these zones but not to claim a property title or exclusive use. 327

The State also claimed that the consultation did take place for the national park Punta Izopo. 328

4.1.4 Considerations of the Court

On the Preliminary Issue of the Indigenous Status of the Community

The Court considered that, according to the principles of good faith, estoppel, procedural equity and legal certainty, the State could not substantially change its position that it held during the internal process and that the new position of the State should be rejected. 329

The Court also considered that Article 21 of the American Convention and the ILO Convention’s provision concerning collective property applied indistinctively to indigenous and tribal people. The Court’s position is that the absence of recognition by the State of the Community as native peoples did not have consequences on the rights that are enjoyed by their members nor did it impact on the obligations of the State towards them. 330

325 Ibid., para 19.
326 Ibid., para 95.
327 Ibid., para 97.
328 Ibid., para 98.
329 Ibid., para 23.
330 Ibid., para 57
On the Applicable Standards to the Collective Property Rights

The Court, recalling its jurisprudence, considered that Article 21 of the American Convention protects the close relationship that indigenous peoples hold with their lands, as well as the natural resources therein and the incorporeal elements they include. The Court considered that, among indigenous and tribal people, there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community.

Such notions of ownership may not conform with the classical conception of property but the Court established that it required the same protection under Article 21 of the American Convention. Ignoring the specific versions of the right to use and enjoy goods – would it be for cultural reasons, practice or custom – would, for the Court, result in recognizing only one type of use and enjoyment and make ineffective the protection of Article 21 for collective groups.

The Court took into account the fact that indigenous peoples, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous peoples with the land must be recognised and understood as the fundamental basis of their culture, their spiritual life, their integrity and their economic survival.

In the Court’s view, the relationship of indigenous peoples with the land is not merely a matter of possession and production but a material and spiritual element that they must fully enjoy, even to preserve their cultural legacy and to transmit it to future generations.

The Court recalled that, the culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity and, therefore, of their cultural identity.

The Court considered that, because of the intrinsic connection between indigenous peoples and their lands, Article 21 entails that their traditional way of living, cultural identity,
social structure, economic system, customs and traditions be respected, guaranteed and protected by the States.\textsuperscript{337}

The obligation to protect the Court considered to be covered by Article 21 requires the States to:

- Adopt measures to ensure indigenous peoples property rights;
- Delimitate, demarcate and grant title for the lands
- Materialize the territorial rights of indigenous peoples by adopting legislative and administrative measures to create an effective mechanism of delimitation, demarcation and granting title that recognize indigenous rights in practice. This includes granting a formal property title that ensures legal certainty and guarantees the right against the action of third parties.\textsuperscript{338}

In this respect, the Court recalled its previous jurisprudence that specified that:

i. The traditional ownership that indigenous people hold over their lands have equivalent effects to the full property title that is granted by the State;\textsuperscript{339}

ii. The traditional ownership of indigenous peoples give them the right to request the official recognition of the property and its registration;\textsuperscript{340}

iii. Members of indigenous communities whom, for reasons beyond their will, have left or lost the ownership of their traditional lands maintain a property right over them, even without legal title, except when those lands have been legitimately transferred to third parties, in good faith;\textsuperscript{341}

iv. The State should delimitate, demarcate and grant collective title over the lands to indigenous peoples who involuntarily have lost ownership of their lands and, for those that have legitimately been transferred to third parties in good faith, they are entitled to get them back or get other lands of equal size and quality.\textsuperscript{342}

The Court considered that failing to comply with the above would create an environment of permanent uncertainty for indigenous peoples.\textsuperscript{343}

\textsuperscript{337} Ibid., para 102-103.
\textsuperscript{338} Ibid., para 104.
\textsuperscript{339} Ibid., para 105, by reference to, inter alia, Supra note 272, Sawhoyamaxa v. Paraguay case, para 128 and Supra note 280 Community Xákmok Kásek case, para 109.
\textsuperscript{340} Ibid.
\textsuperscript{341} Ibid.
\textsuperscript{342} Ibid.
\textsuperscript{343} Ibid., para 106.
As to the Traditional Territory of the Community

The Court found that there was no indication that the traditional territory of the Garífuna Triunfo de la Cruz Community extended to 2840 hectares as the representatives and the Commission were claiming. The Court found that there was a lack of sufficient proof to determine with certainty the exact limits of the traditional territory of the Community. However, the Court – for the purpose of the case – decided to consider that the traditional territory comprised of the 615 hectares and 28,71m² that were attributed to the Community in full property title and 128,40 hectares that were attributed to them in occupation title and recognized by the State as traditional.

The Court established that the State was responsible for breaching Article 21 of the American Convention on collective property with regard to Article 1.1 of the same Convention on non-discrimination for not having effectively delimitated and demarcated the limits of the territory of the Community. The Court considered that it created an environment of permanent uncertainty for the indigenous peoples who did not know to which geographical extent they could enjoy their collective property right and to what extent they could freely use and enjoy their property.

The Court did not state upon the alleged violation of the collective property rights with regard to the beaches and sea, but it recalled that the States should guarantee the use and enjoyment under equal conditions and without discrimination of the beaches and seas and other natural resources that the indigenous and tribal peoples have traditionally used in accordance with their habits and customs.

On the Right to Consultation

The Court recalled that when States impose limits or restrictions to the exercise of indigenous and tribal peoples’ rights over their lands, territories and natural resources, these should be undertaken in conformity with certain conditions. The Court listed the conditions of such restrictions as follows: a) they should be established by law; b) they must be necessary; c) they must be proportional, and d) their purpose must be to attain a legitimate goal in a democratic society.

---

344 Ibid., para 116.  
345 Ibid., para 117.  
346 Ibid.  
347 Ibid., para 125, 127 and 153.  
348 Ibid., para 137.  
349 Ibid., para 154.  
350 Ibid. by reference to Supra note 19, Yakye Axa v. Paraguay case, para 144.
The Court added that a limit or restriction of the right to property should not entail a denial of their survival as people.\textsuperscript{351}

For the exploitation and extraction of natural resources within traditional territories not to imply a denial of the subsistence of the indigenous peoples’ rights, the Court established that the State should comply with the following safeguards:

i. conduct an adequate participative process that ensure the right to consultation; especially in cases of big scale development plans or investments;\textsuperscript{352}

ii. conduct an environmental impact assessment;\textsuperscript{353}

iii. ensure that the community will receive a reasonable share of the benefits produced by the exploitation of natural resources, with the community deciding who the beneficiaries of this compensation should be, according to its customs and traditions.\textsuperscript{354}

\textbf{As to the Obligation to Conduct a Participative Process Securing the Right to Consultation}

The Court found four legal sources to sustain the grounds of such obligation:

1. a right to consultation of indigenous peoples as a general principle of international law;\textsuperscript{355}

2. the Preamble of the ILO Convention No. 169, paragraph 5, which recognizes the aspirations of indigenous and tribal peoples to exercise control over their own institutions, ways of life, and economic development and to maintain and develop

\begin{footnotesize}
\textsuperscript{351} Ibid., para 155, by reference to Supra note 275, Saramaka People v. Surinam case, para 128.
\textsuperscript{352} Ibid., para 156, by reference to Supra note 275, Saramaka v. Surinam case, para 129 and Supra note 20, Kichwa people of Sarayaku case, para 157.
\textsuperscript{353} Ibid.
\textsuperscript{354} Ibid.
\textsuperscript{355} Ibid., para 158 by reference to Supra note 20 Kichwa people of Sarayaku case, para 164: “Several Member States of the Organization of American States have incorporated these standards in their domestic laws and through their highest courts. Thus, the domestic laws of several States in the region, such as Argentina, Bolivia, Chile, Colombia, United States, Mexico, Nicaragua, Paraguay, Peru and Venezuela, refer to the importance of consultation or of communal property. In addition, several domestic courts of States of the region that have ratified ILO Convention No. 169 have referred to the right to prior consultation in accordance with the latter’s provisions. Thus high courts of Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Peru and Venezuela have indicated the need to respect the norms of prior consultation and of this Convention. Other courts of countries that have not ratified ILO Convention No. 169 have also referred to the need to carry out prior consultations with indigenous, autochthonous or tribal communities regarding any administrative or legislative measure that directly affects them, as well as with regard to the exploitation of natural resources on their territory. Thus, similar developments in case law are evident by the high courts of countries of the region, such as Canada or the United States of America, or outside the region such as New Zealand. In other words, the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law.”
\end{footnotesize}
their identities, languages and religions, within the framework of the States in which they live;\textsuperscript{356}

3. Article 6.1(a) of the ILO Convention No. 169 (consultation);\textsuperscript{357}

4. Article 1.1 of the American Convention on obligation of States to ensure the free and full exercise of “all persons” rights without discrimination.\textsuperscript{358}

The Court specifies that the consultation should include a participative process with the representative institutions of the communities.\textsuperscript{359}

The Court also held that the right to consultation should be guaranteed by the State at all stages of the implementation of the project or measure that is likely to affect the territory of an indigenous or tribal community or any other essential rights to their survival as people.\textsuperscript{360}

Such consultation should start from the first stages of elaboration of the project or measure in order to enable the indigenous community to actually participate and influence the decision-making process in accordance with relevant international standards.\textsuperscript{361}

In the same spirit, the State should ensure that the rights of indigenous peoples are not disregarded by any other activity or contract that is concluded with third parties or any decision of the executive power that can affect their rights and interests. The State may also implement audit tasks, and deploy, when relevant, effective judicial protection with the relevant judicial bodies.\textsuperscript{362}

As to the conditions for the consultation to be valid, it should be performed:

- prior to the decision or measure;\textsuperscript{363}
- in good faith;\textsuperscript{364}
- with the objective of reaching an adequate accessible and informed agreement.\textsuperscript{365}

As to the burden of proof, it lies on the State – and not the indigenous peoples – to prove that all aspects of the right to prior consultation were effectively guaranteed.\textsuperscript{366}

\textsuperscript{356} Ibid., para 158.
\textsuperscript{357} Ibid.
\textsuperscript{358} Ibid., para 159 by reference to Supra note 20 Kichwa people of Sarayaku case, para 166.
\textsuperscript{359} Ibid.
\textsuperscript{360} Ibid., para 160.
\textsuperscript{361} Ibid.
\textsuperscript{362} Ibid.
\textsuperscript{363} Ibid. by reference to Supra note 20 Kichwa people of Sarayaku case, para 178.
\textsuperscript{364} Ibid.
\textsuperscript{365} Ibid.
\textsuperscript{366} Ibid., para 163 by reference to Supra note 20 Kichwa people of Sarayaku case, para 179.
In the case at stake, the Court found that, with regard to the touristic projects, the State had failed to demonstrate that the Community was consulted for the projects which were located on their traditional territory, and the Court found that the State had breached the right to consultation.\textsuperscript{367}

With regard to the natural protected area, the Court found that the State had organized workshops and had brought evidence of them but it did not bring evidence of the participation of the Community in the creation of the national park and the making of the management plan.\textsuperscript{368}

The Court considered that even though the State had proven that socialization and information workshops had taken place with the legitimate representatives of the Community, the mere socialization with the Community or the delivery of information does not necessarily comply with the minimum standards of an adequate prior consultation, as far as it does not constitute a genuine dialogue that would be part of a participation process with the aim of reaching an agreement.\textsuperscript{369}

The obligation to consult for the extension of the urban area of the Municipality of Tela was not considered as breached by the Court because the project was made before Honduras was bound by the obligation to consult.\textsuperscript{370}

\textit{As to the Realisation of an Environmental Impact Assessment}

The basis for the obligation to conduct an environmental impact assessment (“EIA”) is found by the Court in article 7.3 of the ILO Convention No. 169. The Court considered that the EIA enables the evaluation of the possible impact of a development project or investment on the property and the Community. Therefore, the objective of such an EIA is not only to give an objective way of measuring the potential impact on the lands and individuals but also to ensure that the members of the Community know the possible risks, including environmental and sanitary risks, in order for the Community to have an opinion on the project. Therefore, the Court included the EIA as part of the consultation right because it enables a voluntary and knowledgeable opinion.\textsuperscript{371}

As to the conditions for conducting an EIA, the Court considered that it should:

\textsuperscript{367} Ibid., para 165-167.
\textsuperscript{368} Ibid., para 168-173.
\textsuperscript{369} Ibid., para 173.
\textsuperscript{370} Ibid., para 175.
\textsuperscript{371} Ibid., para 180, by reference to Supra note 275, Saramaka v Surinam case, para 40.
be conducted in accordance with international standards and good practices;\textsuperscript{372}  
- respect the traditions and culture of indigenous peoples;\textsuperscript{373}  
- be conducted before the granting of a concession or licence.\textsuperscript{374}

In the case at stake, the Court found that no proof of the conduct of an EIA by the State was submitted to the Court. Given that the burden of the proof lies on the State for demonstrating such evidence, the Court found the State in breach of its obligation to conduct an EIA.

The Court also mentioned that the State was in breach for not having indicated that the benefits of the project would be shared with the indigenous and tribal communities.\textsuperscript{375}

\textit{As to the Obligation to Adopt Internal Measures}

Up to the date of the claim in the case at stake, the Court found that the State had not adopted internal measures to implement the right to consultation of indigenous and tribal peoples and that therefore the State was in breach of its obligation since the entry into force of the ILO Convention No. 169 in Honduras in 1996.\textsuperscript{376}

\textit{As to the Question of Right to Life}

This part will not be analysed in the context of this thesis because it does not tackle environmental law issues \textit{per se}.

\textit{As to the Right to Judicial Protection and Legal Process}

The Court referred to Articles 25, 8.1 and 1.1 of the American Convention and recalled that the State parties should provide effective legal remedies to victims of human rights violations which should be substantiated in conformity with the rules of legal process within the general obligation of States to ensure free and complete enjoyment of the rights recognized by the Convention to any person under its jurisdiction.\textsuperscript{377}

The Court added that indigenous peoples have a right to effective and efficient administrative mechanisms to protect, guarantee and promote their right over their lands that

\textsuperscript{372} Ibid. by reference to \textit{Supra} note 275, \textit{Saramaka v Surinam} case, para 41.  
\textsuperscript{373} Ibid.  
\textsuperscript{374} Ibid.  
\textsuperscript{375} Ibid., para 183.  
\textsuperscript{376} Ibid., para 199.  
\textsuperscript{377} Ibid., para 226.
would assist them in finalizing processes of recognition, granting of title and delimitation of their territorial property.\textsuperscript{378}

\section*{4.2 Punta Piedra case}

The facts and reasoning of this case are similar to those of the previously presented case and it will therefore be presented in a more synthetic way, giving an emphasis on the specificities and inputs found in the facts and considerations of the Court in this case that are significant for the present analysis.

\subsection*{4.2.1 Facts}

The facts of the case are related to the Community Garífuna de Punta Piedra located in the Municipality of Iriona (Colón department), next to the Caribbean Sea. Similarly to the Garífuna Triunfo de la Cruz Community, the Community Garífuna de Punta Piedra is a Community of afro-descendants that self-identifies as indigenous people. The Community was established around 1797 and is composed of approximately 6,000 inhabitants.\textsuperscript{379} The members of the Garífuna people used to move in groups and to cultivate the lands collectively but nowadays, their territories having been occupied by third parties, the communities try to disseminate their use of lands in order to avoid usurpation of lands.\textsuperscript{380} Traditionally they would use a land for about 4 years and leave it as fallow land for 10 to 12 years but they now disseminate their use in order to avoid appropriation by third parties.\textsuperscript{381}

In 1993, the State delivered a full property title to the Community for 800 hectares considered as traditional land, the title was extended to 1,513.54 hectares totalizing 2,314 hectares but excluding lands that were occupied and exploited by third parties (about 46 hectares) with a clause that was cancelled in 2000.\textsuperscript{382}

A conflict on the ownership of the land with the inhabitants of the Municipality of Rio Miel resulted from the extension and remained ever after. The Community Punta Piedra intended several actions to claim the property of the said lands.

In view of adopting acts of restitution, the State signed acts of conciliation with the Community of Punta Piedra and the population of the Municipality of Rio Miel in 2001 and 2006 but such acts of restitution were not executed and the populations of Rio Miel remained on the alleged territory of the Community of Punta Piedra.\textsuperscript{383}

\begin{thebibliography}{9}
\bibitem{378} Ibid., para 227.
\bibitem{379} Supra note 22, Punta Piedra case, para 90.
\bibitem{380} Ibid., para 87.
\bibitem{381} Ibid.
\bibitem{382} Ibid., para 93-101.
\bibitem{383} Ibid., para 110-112.
\end{thebibliography}
A member of the Community of Punta Piedra initiated in 2003 an individual judicial action in usurpation of territory against an individual of the Municipality of Rio Miel. The plaintiff died in 2007 of three bullet impacts and the State initiated a criminal investigation process but, at the date of the decision of the Court, the investigation stage had still not started.

In 2014, a mining industry was granted a licence for non-metallic minerals exploration on a 800 hectares territory that comprised part of the territories of the Punta Piedra Community. The licence expressly authorized the use of the subsoil by the mining industry in addition to mining activities, geological activities, geophysical activities and other construction activities.

4.2.2 Merits

Before going further into the merits, the case raised the preliminary question of the indigenous status of the Community. Once this issue addressed by the Court, the main question that remained is the one of the international the responsibility of Honduras (the State) with regard to collective property rights of the Community of Punta Piedra, their right to judicial protection and their right to life.

4.2.3 Arguments of the parties

Arguments of the Representatives and the Commission

As to the Property Titles and Regularization

The Commission considered that the State had violated Article 21 of the American Convention with regard to Article 1.1 and 2 because, even though it had recognized the property rights of the Community, the State had breached its obligation to guarantee the pacific ownership of the territory by failing to engage in a restitution and effective protection of the territories against third parties and by failing to investigate complaints.

Ibid., para 133.
Ibid., para 130.
Ibid., para 33 and 301.
Ibid., para 219.
Ibid.
Ibid., para 51-57.
Ibid., page 50-68.
Ibid., page 84-93.
Ibid., page 77-84.
Ibid., para 159.
As to the Mining Industry Licence
A consultation process was not conducted by the State prior to the granting of a licence to the mining industry for non-metallic exploration. 394

As to the Right to Judicial Protection and Right to Life
The representatives and Commission claimed a breach of the State’s responsibility for not conducting an investigation upon claims and not conducting a criminal procedure pursuant to the death of a Community member. 395

Arguments of the State
As to the Mining Industry Licence
According to the State, the consultation should occur at the stage of the exploitation and not at the stage of exploration, in accordance with the internal legislation, and the State was not in breach of its obligations when it granted an exploration licence to the mining industry. 396

4.2.4 Considerations of the Court
Preliminary Question on the Indigenous Status of the Community
The Court made the same conclusions as it did in the Garifuna Triunfo de la Cruz case establishing that neither the native nature or the acknowledgement of it by the State are necessary for the Community to enjoy the rights they are entitled to. 397

As to the Regularization of the Territories of the Community
The court considered that the State is under the obligation to guarantee the effective use and enjoyment of the indigenous and tribal peoples’ right to property and that involves taking measures such as restitution of lands. 398 The Court considered that, in the case at stake, the restitution was to be understood as an obligation of the State to eliminate any type of interference on the relevant territory. In particular, the obligation is completed with the full ownership by the legal owner and the payment and relocation of occupying third parties so that the Community can peacefully and effectively use and enjoy their full collective property

394 Ibid., para 212.
395 Ibid., para 257-258.
396 Ibid., para 214.
397 Ibid., para 91.
398 Ibid., para 181.
The Court found the State responsible of a breach of Article 21 of the American Convention in the case at stake.\(^{399}\)

As to the conciliation acts, the Court considered that the State had the responsibility to guarantee the means of execution of the decisions created by the competent bodies.\(^{401}\)

**As to the Mining Industry Licence**

The Court recalled its jurisprudence with regard to development plans, investments, exploration or extraction in traditional lands of indigenous or tribal peoples.\(^{402}\) It recalled that the State is under the obligation to conduct the following safeguard measures:

- Make an adequate participative process that would ensure indigenous peoples’ consultation rights;\(^{403}\)
- Realize an environmental impact assessment;\(^{404}\)
- Give a reasonable share of the benefits incurred by the exploitation of the natural resources to indigenous peoples;\(^{405}\)

With regard to the consultation, the Court referred to Article 15.2 of the ILO Convention No. 169 and added to its previous jurisprudence that the consultation must be applied *prior* to any exploration project that may affect the traditional lands of the indigenous and tribal Communities\(^{406}\) and that the State was therefore in breach of its obligation with regard to Articles 21 of the American Convention and articles 1.1 and 2 of the same Convention.\(^{407}\)

**As to the right to judicial protection and right to life**

The Court found the State internationally responsible for not having demonstrated necessary diligence in establishing the facts and applying a sanction in the usurpation of lands and for violating the rights provided by Article 8.1 and 25.1 of the American Convention with respect to the Community member who died but also to the Community as a whole.\(^{408}\)

---

\(^{399}\) *Ibid.*  
\(^{403}\) *Ibid.*  
\(^{404}\) *Ibid.*  
\(^{405}\) *Ibid.*  
\(^{408}\) *Ibid.*, para 352.
Mechanisms and Guarantees of the IACtHR’s Jurisprudence on Indigenous Peoples (IP) Collective Property Rights (Article 21 American Convention)

Obligations of the States:
- Adopt measures to ensure property rights
- Delimitate, demarcate, grant title
- Adopt legislative and administrative measures to enable delimitation demarcation, granting of title

Rights to Traditional Ownership of IP:
- Equivalent effect to full property title
- Right to request official recognition and registration
- Property right maintained over left or lost lands
- Except if legitimately transferred to third party in good faith
- IP entitled to get lands back or get lands of equal size and quality

Restriction to IP Property Rights by States Legal if:
- Established by law
- Necessary
- Proportional
- Objective is to attain a legitimate goal in a democratic society
- Does not entail denial of the survival of the IP

Conditions for Consultation to be Valid:
- Prior to the decision or measure + prior to delivery of licence for exploration of natural resources + during the implementation of the project (Article 15 ILO Convention No. 169)
- In good faith
- With the objective of reaching an adequate and informed agreement

Legal Sources of Right to Consultation:
- General principle of international law
- Preamble ILO Convention No 169
- Articles 6.1(a) & 6.2 ILO Convention No 169
- Article 1.1 American Convention

Conditions to Fulfill if Big Scale Development Plan or Exploitation of Natural Resources on IP Lands:
- Participative process ensuring right to consultation
- Environmental impact assessment (EIA)
- Reasonable share of benefits

Legal Source of EIA:
- Article 7.3 ILO Convention No. 169

Burden of Proof on the State
4.3 Environmental Principles Identified in the IACtHR’s jurisprudence

*De la Cruz* and *Punta Piedra* cases are two thorough examples confirming and developing the mechanisms of enforcement of the collective property land rights of indigenous peoples within the IACtHR’s jurisprudence. The study of this jurisprudence enabled the shaping of the above table which illustrates the reasoning of the Court in those two cases. The conclusions of the Court of these two cases was long-waited because of the overlap, between nature conservation issues and indigenous peoples’ lands rights, that it triggers. The conclusions of the Court in these cases are strongly based on its previous jurisprudence that was already imposing extensive procedural obligations on States in relation to environmental matters. The Court found, in indigenous peoples’ property rights an effective way of resolving the limitations that could be encountered in the application of the right to life.

First, the two cases have an important impact on the scope of collective land rights holders since the Court basically applied the self-identification criteria to define the afro-descendant communities as indigenous peoples and added that the recognition of the State as such had no impact on the enjoyment of their rights. This may have an important impact on recognizing land rights to a larger amount of communities that hold a traditional relationship with their lands.

Second, the balance between nature conservation and indigenous rights may fall in favour of indigenous peoples but the procedural aspects that the Court impose on the States for any exploitation plan on indigenous lands very much relate to the environmental principles that were discussed in the initial chapter of this thesis. The Court requires that States secure the prior consultation and participation of indigenous peoples, that they conduct environmental impact assessments prior to authorizing an exploration or exploitation of the natural resources enclosed in indigenous peoples’ lands, and that a reasonable benefit sharing process is created. Participation and consultation are to be held at all stages of the process and States are expected to involve indigenous peoples in the management and planning process. The significant input of IACtHR in this regard is that it considers that the obligation is based on, *inter alia*, a general principle of international law, which can be explained by the multiple international instruments having such a provision, but it also reinforces the current uncertain

---

410 Supra note 233 Ricardo Pavoni, 97.
value of the prior informed consent and participation principles of international environmental law. As to the EIA, the Court’s interpretation of the enforcement of the EIA obligation, it does not say much on the procedure and content. The main input in these two cases is on the indication as to the party on which the burden of proof lies. More generally, the Court’s jurisprudence lowers the trigger to conduct an EIA since it applies to all exploration or exploitation plans to be conducted on the territory of indigenous peoples without requiring a risk of transboundary effects. As to free, prior informed consent, this principle still lies on the distinction between small and large scale projects and the above mentioned cases do not add more information to its earlier jurisprudence on how to distinguish those two.

More importantly, the Court decided that it was for the State to prove that all stages of the consultation and EIA procedure were properly implemented. The assumption is that indigenous peoples can never be deprived of their lands unless the States have proven that they have adopted the relevant measures and followed all applicable procedures. This is the shift in the burden of proof that enables effective implementation of international environmental principles.

A last significant link between indigenous land rights and environmental principles can be found in the essential safeguard required by the Court of ensuring that the restriction to indigenous peoples’ property rights does not entail a denial of their survival as indigenous peoples. Together with paragraph 249 of de la Cruz case, referring to the needs of future generations of indigenous peoples, it offers a substantial protection of indigenous property rights. This substantial dimension, on which all the procedural safeguards rely, can be interpreted as an application of the sustainable development principle. It is somehow an accomplishment of the provisions of the UNDRIP preamble on the importance of protecting indigenous rights for ensuring a sustainable path.

Through and through, this jurisprudence has shown that all cultural, self-determination, collective rights, and environmental principles are deeply interconnected and that one cannot find a full application without finding effective ways of implementing the others.

Should indigenous peoples hold a specific status before the IACtHR, it does not lessen the impact that those interconnections may play in other fields of human rights law more generally. Some may find the human rights interpretation of the IACtHR

---

audacious,\textsuperscript{414} that the inter-American system of human rights need economic resources and structural reforms\textsuperscript{415} and that ratification of the American Convention may be limited at international scale. Nonetheless, it triggers a reality that is much more complex than the binary classification of international environmental law principles and human rights recourse mechanisms is willing to offer. In fact, the influence of the IACtHR on international and European and African human rights institutions is currently significantly growing.\textsuperscript{416}

The present topic did not extend to the analysis of the remedies in environmental claims but opportunities and limitations could also be discussed within the IACtHR jurisprudence\textsuperscript{417} which has a very expansive approach directing remedies to individuals, communities and whole societies.\textsuperscript{418}

It should also be noted that the two decisions, \textit{de la Cruz} and \textit{Punta Piedra}, were adopted before the OAS had adopted the American Declaration on the Rights of indigenous peoples which now would reinforce the customary value of several rights.

\textsuperscript{414}Mouloud Boumghar, “Missing opportunities to shed light on climate change in the Inter-American human rights protection system” in Ottavio Quirico and Mouloud Boumghar (eds) \textit{Climate Change and Human Rights, An international and comparative law perspective} (Routledge 2016), 269, 276.


\textsuperscript{417}Concurring vote of judge Humberto Antonio Sierra Porto in de la Cruz case, 5-14.

\textsuperscript{418}Ibid., 432.
5. Conclusions

This research focusing on indigenous peoples’ rights enabled to tackle the following questions: the connection between international environmental law and human rights (1), the legal standing in international human rights and environmental disputes (2), the environmental law principles that are cited in the IACtHR’s jurisprudence (3), the status of indigenous peoples in international law and before the IACtHR (4), the relationship between indigenous peoples and their environment (5) and the possible limits of a transposition of the IACtHR’s interpretation to other international or regional jurisdictions or other types of human rights disputes (6).

1- Connection between International Environmental Law and Human Rights

It was made clear from the chapters above that the effects of environmental degradation could be felt by individuals and more particularly vulnerable groups such as indigenous peoples in a way that may affect the enjoyment of their human rights. It appeared also that on the one hand, a certain conception of environmental law and several international environmental law principles such as sustainable development implied the application of several human rights and that, on the other hand several procedural human rights may be used as a means of effectively implementing environmental principles. Some substantive human rights (right to life or right to health) may also be invoked but be found less effective. The participation principle, the prior informed consent principle and the environmental impact assessment principle are, in the end, indistinctly linked to human rights. Despite this clear interconnectedness between the two fields, it is not systematically reflected into international human rights or environmental law instruments and it is often in the human rights courts that the link is invoked in practice.

2- Legal Standing

The practice of human rights courts leads to the second question of the legal standing which, as it was demonstrated in the research, is a crucial question for the implementation of environmental law principles. The fact that only states have standing before courts in public international law and environment law diminishes significantly the effectiveness of implementing environmental law principles. The Human Rights courts, because they allow claims raised by individuals, and sometimes groups, are more likely to be addressed with a
question regarding an individual or a group’s environment and the enforcement of the international environmental law principles.

3- Environmental principles within IACtHR’s cases
The specificity of the IACtHR is that it hears both individual and groups claims, the latter being claims of indigenous peoples with regard to their rights under the ILO Convention No. 169 and the American Convention. The approach of the IACtHR is that, while assessing the violation or not of specific human rights such as collective property rights, it assesses whether the limitations to these rights were taken by the states with full respect of several safeguards that include the participation of the affected communities, the respect of the general principle of prior informed consent and the conduct of an environmental impact assessment. This direct integration of the principles of international environmental law is part of the safeguard control mechanism of the Court to ensure that the appropriate human right was respected. A latent source of interpretation in the IACtHR’s jurisprudence is the concept of sustainable development which is not expressly addressed but seems to act as a balancing element in the interpretation of human rights issues regarding indigenous peoples.

4- IP Status
At the current point, it appears that the status of indigenous peoples and their specific group rights (self-determination, collective property, cultural rights) which are also strongly interconnected and play a key role in the integration of environmental law principles into the jurisprudence of the IACtHR. This can be explained by their specific relationship with the environment in general and their environment. It is also, it seems, due to the fact that their specific status led to a shift of burden of proof where states are responsible for demonstrating that they ensured the appropriate safeguards. Additionally, the absence of a fixed definition of indigenous peoples may have a great influence on the scope of the protections that they enjoy and lead to more influence on other human rights protections.

5- IP Relationship with the(ir) environment
The relationship that indigenous peoples hold with their lands and the natural resources that they enclose is the essence of their specific rights such as self-determination, collective property rights and cultural rights. Their interests in the environment is critically linked to their survival as people. This explains the fact that indigenous peoples enjoy additional safeguard with regard to their environment that find a more effective application then other
general provisions such as the right to a healthy environment, and that indigenous peoples interests may not always meet the needs of environmental conservation.

6- Transposition to other jurisdictions or claims
Difficult to transpose it to other claimants such as NGOs because of a frequent “victim” requirement such as before the ECHR, but it may find application in the African Court of Human Rights. In international public law the question of the legal standing is an obstacle to a similar integration of environmental principles.

However, the main input that may be found in the IACtHR and that may find an echo into several other courts and legal instances is that some principles such as prior informed concept may apply as a general principle of law, even without text. The status of the environmental impact assessment, even though it was not developed as to the content, comes reinforced by the integration into indigenous collective property rights since it is no longer limited to cases of transboundary harm.

There is also a chance that environmental revolution through human rights enforcement emerge from national jurisdictions419 where group claims and national environmental regulations may find enforcement more easily.

---

Bibliography

Books

Ahren Mattas, *Indigenous peoples’ status in the international legal system* (Oxford University Press 2016)


Prieur Michel, *Droit de l’environnement durable* (Bruylant 2014)


Sepulveda Cesar, *Derecho international* (Editorial Porrua 1991),


Articles


Bakker Christine, “Climate change and right to life, Limits and potentialities of the human rights protection system” in Ottavio Quirico and Mouloud Boumghar (eds) Climate Change and Human Rights, An international and comparative law perspective (Routledge 2016), 71

Barelli Mauro, “Development projects and indigenous peoples’ land, Defining the scope of free, prior and informed consent” in Corinne Lennox and Damien Short (eds) Handbook of Indigenous Peoples’ Rights (Routledge 2016), 69

Bekhoven Jeroen van, “Public participation as a general principle in international environmental law: its current status and real impact” (2016) Vol. 11.2 National Taiwan University Law Review, 219

Boumghar Mouloud, “Missing opportunities to shed light on climate change in the Inter-American human rights protection system” in Ottavio Quirico and Mouloud Boumghar (eds) Climate Change and Human Rights, An international and comparative law perspective (Routledge 2016), 269


Castro Lucic Milka, “La universalización de la condición indígena”, Alteridades, 2008 18(35), 21


Firestone Jerry et al., *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental law*, *American University International Law Review* 20, no. 2 (2005), 219


Richardson Benjamin J., “Indigenous peoples, international law and sustainability”, Reciel 10 (1) 2001, 1


79
Tsosie Rebecca, “Indigenous people and environmental justice: the impact of climate change”, *University of Colorado Law review* vol 78 (2007), 1625


**Legal instruments**

Covenant of the League of Nations (1919)

Charter of the United Nations and Statute of the International Court of Justice (1945) UNTS 80
American Declaration of the Rights and Duties of Man (1948)

Charter of the Organization of American States (1948) UNTS 119

Universal Declaration on Human Rights (1948) UN GA, Resolution 217 A

International Convention for the Regulation of Whaling (1948) UNTS 161


Indigenous and Tribal Populations Convention (1957) (C107)

French Constitution (1958)

International Covenant on Civil and Political Rights (1966) UNTS 999

International Covenant on Economic, Social and Cultural Rights (1966) UNTS 993

Convention for the Elimination of Racial Discrimination (1966) UNTS 660


Statute of the Inter-American Court of Human Rights (1979) OAS GA 9th Res. No. 448


Indigenous and Tribal Peoples Convention of the International Labour Organization (1989) (No. 169) UNTS 1650


United Nations Framework Convention on Climate Change (1992) UNTS 1771


Convention on Biological Diversity (1992) UNTS 1760


Nagoya protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (2010) UNTS 1760 No. A-30619

Paris Agreement (2015) UN Doc FCCCC/CP/2015/10/Add.1, 21

American Declaration on the Rights of Indigenous peoples (2016) OAS AG/RES.2888 (XLVI-O/16)

**Cases**

_Yanomami v. Brazil_, Resolution 12/85, IAComHR case 7615 (5 March 1985)


_Lopez Ostra v. Spain_ App no. 000167998/90 (ECHR 9 December 1994)

_Guerra v. Italy_ App no. 116/1996/735/932 (ECHR 19 February 1998)


_Thoma v. Luxembourg_ App no. 38432/97 (ECHR 29 March 2001)
Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment IACtHR (Ser. C) No.79 (Aug 31, 2001)

Aizsadzibas Klubs v. Lettony App no. 57829/00 (ECHR 27 May 2004)

Maya Indigenous Communities of the Toledo district v Belize, IAComHR case 12.053 (12 October 2004)

San Mateo de Huanchor v. Peru, IAComHR Report n°69/04, Petition 504/03, Admissibility, 15 October 2004

Oneryildiz v. Turkey App no. 48939/99 (ECHR 30 November 2004)

Steel and Morris v. United Kingdom App no. 68416/01 (ECHR 14 February 2005)

Yakye Axa Indigenous Community v. Paraguay Merits, Reparations, and Costs, Judgment, IACtHR (Ser. C) No. 125 (17 June 2005)

Iera Moni Profitou Iliou Thiras v. Greece App no. 32259/02 (ECHR 22 December 2005)

Taskin and others v. Turkey App no. 46117/99 (ECHR, 26 March 2006)

Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment IACtHR (Ser. C) No. 146, (29 March 2006)

Navajo Nation v. United States Forest Service, 479 F. 3d 1024 (9th Cir. 2007).

Turgut v. Turkey Application No. 1411/03 (ECHR 8 July 2008)

Kawas Fernandéz v. Honduras, Merits, Reparations and Costs, Judgment IACtHR (ser. C) No. 196 (3 April 2009)

Brosset Triboulet and others v France App no. 34078/02 (ECHR 29 March 2010)

Pulp Mills (Argentina v Uruguay) [2010] ICJ Rep 2010

Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment IACtHR (Ser C) No. 214, (24 August 2010).


Mangouras v Spain App no. 12050/04 (ECHR 28 September 2010)

Elefteriadis v. Romania App no. 38427/05 (ECHR 25 January 2011)

Kichwa people of Sarayaku v. Ecuador, Merits, Reparations and Costs, Judgment IACtHR (ser. C) No. 245 (27 June 2012)
Indigenous peoples of Madugandi and Embera de Bayano and their members v Panama, Preliminary exceptions, Merits, Reparations, Judgment IACtHR (Ser. C) No. 284 (14 October 2014)


Costel Popa v Romania App no. 47558/10 (ECHR 26 April 2016)

The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights). Advisory Opinion. IACtHR, OC-23/17 Series A No. 23 (15 November 2017)

Other


Declaration on the Establishment of the Artic Council, Canada, Denmark, Finland, Iceland, Norway, Russian Federation, Sweden and United States, 19 September 1996, 35 I.L.M. 1387

The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights (SERAC) v Nigeria, Communication 155/96 (African Commission on Human and Peoples Rights, October 2001)

Report of the World Summit on Sustainable Development, 4 September 2002, UN Doc. A/CONF.199/20, Chap I, item 1 Political Declaration


ILO, Indigenous & Tribal peoples rights in practice, a guide to ILO Convention No. 169, 12 December 2009


UN General Assembly Resolution 70/1, Transforming our World: The 2030 Agenda for Sustainable development, 21 October 2015, UN Doc. A/RES/70/1.


UNESCO Policy on engaging with indigenous peoples, 201 EX/6, 2018, unesdoc.unesco.org/images/0026/002627/262748e.pdf

Websites


http://www.corteidh.or.cr/CF/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en

https://en.oxforddictionaries.com/


http://www.oas.org/en/about/who_we_are.asp

http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm

http://www.wipo.int