8 Comparative jurisprudential developments and adjudication of indigenous peoples' rights. Integration of international human rights law in the Americas and Africa

Alejandro Fuentes

Abstract:

This chapter proposes a critical comparative analysis of the jurisprudence of the Inter-American Court of Human Rights (Inter-American Court), the African Commission on Human and Peoples' Rights (African Commission), and the African Court on Human and Peoples' Rights (African Court) regarding the recognition of indigenous peoples' rights. In particular, it focuses on how these regional adjudication bodies have recognised indigenous peoples' right to communal property over their traditional lands and natural resources and deliver protection to their culture and cultural identity. In analysing these legal advancements, this chapter focuses specifically on the interpretative strategies used by these regional bodies. Specifically, it looks at how they have adapted their own mission to align with the modern progression of international

human rights law concerning the rights of indigenous peoples. An analysis of the jurisprudence of these three regional bodies regarding indigenous peoples indicates that both the African Commission and Court of Human Rights have largely based their findings on the previously consolidated jurisprudence of the Inter-American Court, adopting similar innovative interpretative approaches when protecting indigenous peoples' rights. In addition, this chapter also indicates that both regional African bodies have missed the opportunity to strengthen the protection of the right to life under article 4 of the African Charter on Human and Peoples' Rights (African Charter) by recognising its *lato sensu* dimension, that is, the right to not be prevented from having access to the conditions that could guarantee a decent existence. These are conditions that could guarantee indigenous peoples the possibility to have access to a dignified life, that is, a life in accordance with their own cultural traditions, understandings, and world views. Besides this restrictive approach, the African Commission and Court should be praised for their great contribution to integrating and harmonising the *corpus juris* of international human rights law.

1 Introduction

In recent decades, the protection of indigenous peoples' rights has increased dramatically within two regional human rights systems: the Inter-American and the African human rights systems. This development started with *Awas Tingni*,[1] where the Inter-American Court of Human Rights (Inter-American Court) first recognised the right of indigenous peoples to communal property over their traditional lands and territories. Since then, the protection of indigenous peoples' rights has expanded to the point of guaranteeing their right to cultural identity and to a *dignified* life, that is, to live in accordance with their own cultural traditions and understanding of dignity. Moreover, the Inter-American Court has identified specific safeguards against unjustified restrictions on the right to communal property, in particular, to prevent potential interferences that would amount to a denial of the cultural survival of indigenous peoples.[2]

The first time the African system dealt with the recognition of the right of indigenous peoples over their traditional lands and territories was in *Ogoni*,[3] which was heard just three months after *Awas Tingni*. Even

1 *Mayagna (Sumo) Awas Tingni Community v Nicaragua* IACHR (31 August 2001) Series C No 79 (*Awas Tingni*).

2 A Fuentes 'Protection of indigenous peoples' traditional lands and exploitation of natural resources: The Inter-American Court of Human Rights' safeguards' (2017) 24 *International Journal on Minority and Group Rights* at 229-253.

3 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*Ogoni*).

though the African Commission on Human and Peoples' Rights (African Commission) recognised the collective rights of the Ogoni people over Ogoniland in this case, it did not elaborate on the scope and extension of that protection.

The full recognition of the right of indigenous peoples over their lands arrived in 2009 in *Endorois,*[4] where the African Commission protected the right of ownership of the Endorois people to their ancestral lands largely based on the comparative jurisprudence developed by the Inter-American Court. After this leading regional case, it was the turn of the African Court of Human and Peoples' Rights (African Court) to decide upon the rights of indigenous peoples in Africa. In the *Ogiek,*[5] the African Court found the responding state responsible for denying access to their land as a distinct tribe. In this latter case, references were made to the case law of the Inter-American Court regarding the link between forced evictions and the generation of conditions unfavourable to a decent life.

Based on these developments, this chapter first introduces the jurisprudential development within the jurisprudence of the Inter-American Court in connection with the protection of indigenous peoples' rights. Second, it critically analyses the influence that this jurisprudence has had on the jurisprudential evolution that has taken place within the African human rights system. In particular, it focuses on how the African Commission and Court have determined the content and scope of protection of indigenous peoples' rights under the African Charter on Human and Peoples' Rights (African Charter) and whether the systemic integration of indigenous peoples' human rights made by the Inter-American Court has influenced or played an interpretative role in expanding indigenous peoples' rights in Africa.

2 Recognition of the right to communal property over indigenous peoples' traditional lands in the Americas

The Inter-American Court was the first regional tribunal to recognise the right to communal property over indigenous peoples' traditional lands, as protected under article 21 of the American Convention on Human Rights (ACHR). Since the adoption of the landmark judgment in *Awas Tingni,*

4 *Centre for Minority Rights Development v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois*).

5 *African Commission on Human and Peoples' Rights v Kenya* (merits) (2017) 2 AfCLR 9 (*Ogiek*).

the Inter-American Court has shown 'a sensitive inclination towards the protection of indigenous peoples' rights and cultural understandings'.[6]

This innovative interpretation of the ACHR, based on the current evolution of the *corpus juris* of international human rights law,[7] has enlarged the scope of protection of article 21 of the ACHR by means of extending its protection to the 'close relationship between indigenous peoples and their lands, and with the natural resources of their ancestral territories and intangible elements stemming from these'.[8] In other words, the content of article 21 has been integrated (or re-interpreted) under the guiding light of the normative system of which the ACHR forms part, namely, the international human rights law system.

As mentioned in previous work, the systemic integration of international norms by regional human rights courts implies interpreting their own mandate under the light of other international and regional instruments that are part of the contemporary corpus juris of international human rights law.[9] In fact, it is crucial to emphasise that the systemic integration of international human rights law does not imply that the Inter-American Court would apply a different instrument than the ACHR to address a particular case directly.[10] Rather, this interpretative mechanism means that the Court would consider other relevant instruments that

6 A Fuentes 'Judicial interpretation and indigenous peoples' rights to lands, participation and consultation. The Inter-American Court of Human Rights' approach' (2015) *International Journal on Minority and Group Rights* 23 at 41.

7 According to the IACtHR, '[t]he corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law', *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, Inter-American Court of Human Rights Series A No 18 (17 September 2003) (*Undocumented Migrants)* para 120. See also *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-American Court of Human Rights Series A No 16 (1 October 1999) (*Consular Assistance*) para 115.

8 *Kichwa Indigenous People of Sarayaku v Ecuador* (merits, reparations, costs) IACtHR Series C No 245 (27 June 2012) (*Sarayaku*) para 145.

9 A Fuentes *Expanding the boundaries of international human rights law: The systemic approach of the Inter-American Court of Human Rights* (ESIL Conference Paper No. 13/2017) European Society of International Law https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3163088 (2017) 10.

10 In connection with the direct inapplicability of international instruments outside of the Inter-American System, see, amongst other, *Street Children (Villagrán Morales et al) v Guatemala* (merits) IACHR (26 May 2001) Series C No 77 (*Street Children*) paras 192-195; *Bámaca-Velásquez v Guatemala* (merits) IACHR (25 November 2000) Series C No 70 paras 208-210; *Plan de Sánchez Massacre v Guatemala* (reparations and costs) IACHR (29 April 2004) Series C No 105 (*Plan de Sánchez Massacre),* Separate Concurring Opinion of Judge Sergio Garcia-Ramírez, para 19.

form part of the *corpus juris* of international human rights law to better understand the current evolution of the scope of protection and extension of the rights enshrined in the ACHR.[11]

One of the main reasons for this *praetorian* jurisprudential development has been identified in the pressing need for the effective realisation, without discrimination of any kind, of the rights recognised in the ACHR, such as the right to property. This is nothing but the concrete (and contextual) application of the above-mentioned principle of effectiveness (*effet utile*) that considers the factual reality in which conventional rights are applied.[12] In the case of indigenous communities, this reality includes the communitarian tradition related to a form of collective land tenure, which 'does not necessarily conform to the classic concept of property'.[13] In the words of the Inter-American Court:

> Ignoring the specific forms of the right to the use and enjoyment of property based on the culture, practices, customs and beliefs of each people, would be tantamount to maintaining that there is only one way to use and dispose of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of people.[14]

These interpretative steps by the Inter-American Court paved the way for the expansion of the conventional standard enshrined in article 21 of the ACHR, which could be summarised in the following hermeneutical steps. First, it discharged the possibility of being potentially trapped in a literal reading – as indicated by article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) – of article 21 of the ACHR. Since the wording of the latter provision does not explicitly include or exclude any potential

11 Fuentes (n 6) 53.

12 When interpreting human rights instruments, the interpreter 'must take into consideration society as a whole, paying due account to the complex plurality of cultural understandings that are present (contextual interpretation) and in accordance with the current present conditions existing at a given time (evolutive interpretation)'. Fuentes (n 6) 54.

13 *Sarayaku* (n 8) para 145.

14 As above. See also *Sawhoyamaxa Indigenous Community v Paraguay* (merits, reparations and costs) IACHR (29 March 2006) Series C No 146 (*Sawhoyamaxa)* para 120; *Xákmok Kásek Indigenous Community v Paraguay* (merits, reparations and costs) IACHR (24 August 2010) Series C No 214 (*Xákmok Kásek*) para 87; *Community Garifuna Triunfo de la Cruz and its members v Honduras* (merits, reparations and costs) IACHR (8 October 2015)Series C No 305 (*Garifuna Triunfo de la Cruz*) para 100, and *Garífuna Punta Piedra Community and its members v Honduras* (preliminary objections, merits, reparations and costs) IACHR (8 October 2015) Series C No 304 (*Garífuna Punta Piedra*) para 165.

reference to communal property,[15] the Court – bearing in mind the object and purpose of the ACHR – has also recurred to the preparatory work of the ACHR as a supplementary means of interpretation (article 32 of the VCLT).[16]

The Inter- American Court found that at the time of the drafting of the ACHR, it was decided only to use the term 'enjoyment of his *property*' instead of *private property*.[17] The phrase 'everyone has the right to the use and enjoyment of private property, but the law may subordinate its use and enjoyment to public interest' was replaced by 'everyone has the right to the use and enjoyment of his property'.[18]

Therefore, in light of the *travaux préparatoires* and taking into consideration the preclusion of any potential restrictive interpretation of rights recognised in other international instruments or domestic legislation, as referred to in article 29(b) of the ACHR,[19] the Inter-American Court concluded that the wording of article 21 does not exclude the protection of the right to property in a sense which includes the rights of members of the indigenous communities within the framework of communal property.[20]

In addition, the principle of non-restrictive interpretation of the rights recognised in the Convention leads toward the second interpretative step made by the Court, namely, the integration of the substantive content of article 21 in light of other conventions that are part of the same human rights international law system applicable to a specific case.[21] In other words, to avoid a potentially restrictive interpretation of article 21 of the ACHR in the framework of indigenous lands claims by indigenous peoples, the interpreter needs to analyse other international and regional instruments that are part of the same human rights system applicable to the case.[22]

15 ACHR, art 21(1) states that '[e]veryone has the right to the use and enjoyment of this property. The law may subordinate such use and enjoyment to the interest of society'.

16 *Awas Tingni* (n 1) para 145. In addition, see *Restrictions to the Death Penalty* (arts 4.2 and 4.4 ACHR) Advisory Opinion OC-3/83, Inter-American Court of Human Rights Series A No 3 (8 September 1983) para 49.

17 My emphasis.

18 *Awas Tingni* (n 1) para 145.

19 *Awas Tingni* (n 1) para 148.

20 As above.

21 *Yakye Axa Indigenous Community v Paraguay* IACHR (17 June 2005) Series C No 125 (*Yakye Axa*) paras 124-126.

22 As above. See also *Street Children* (n 10) para 192; *Gómez-Paquiyauri Brothers v Peru* (merits, reparations and costs) IACHR (8 July 2004) Series C No 110 para 164; and *Consular Assistance* (n 7) para 113.

In this sense, it is important to clarify that the Inter-American Court has jurisdiction only over violations of the ACHR and other related instruments that are part of the Inter-American Human Rights System.[23] However, the constant jurisprudence of the Court has clearly indicated that the regional tribunal 'has found it useful and appropriate to use other international treaties [...] to analyse the content and scope of the provisions and rights of the Convention'.[24] Again, by referring to other international instruments, the Court aims at 'keeping with the evolution of the inter-American system and taking into consideration developments in this matter in international human rights law'.[25]

Among international human rights instruments, the regional tribunal found that in most cases in which indigenous peoples' property rights were at stake, the International Labour Organization (ILO) Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries was – among others – the most suitable international instrument for the interpretation of article 21 of the ACHR.[26] In light of ILO Convention 169, the Inter-American Court has drawn a line between identity, culture, traditional land and natural resources as part of the elements that integrate the scope of protection of article 21 of the ACHR.[27] Specifically, the Court took into account articles 13(1), 14(1), 15(1) and 15(2) of the ILO Convention to interpret article 21 of the ACHR.

Based on article 13(1) of ILO Convention 169,[28] the Court stated that article 21 of the ACHR must safeguard the close ties of indigenous peoples with their traditional territories and the natural resources therein associated with their culture, as well as the components derived from them.[29] Moreover, taking into account article 14(1) of ILO Convention No 169, the rights of ownership and possession of indigenous peoples shall include the use of lands not only exclusively occupied by them but also lands to which they have traditionally had access for their subsistence and

23 *Plan de Sánchez Massacre* (n 10) para 51.

24 *Xucuru Indigenous People and its members v Brazil* (preliminary objections, merits, reparations and costs) IACHR (5 February 2017) Series C No 346 (*Xucuru*) para 35.

25 As above. See also *Yakye Axa* (n 21) para 127; *Ituango Massacres v Colombia* IACHR (1 July 2006) Series C No 148 para 157.

26 *Yakye Axa* (n 21) para 127.

27 *Saramaka People v Suriname* (preliminary objections, merits, reparations and costs) IACHR (28 November 2007) Series C No 172 (*Saramaka*) para 121.

28 Article 13(1) of the ILO Convention expressly states that 'governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship'.

29 *Yakye Axa* (n 21) para 137.

traditional activities. This includes protecting the natural resources, which these peoples have traditionally used, and introducing specific safeguards to protect the right to property over traditional lands and natural resources (article 15 of ILO Convention 169).[30]

Consequently, through a systemic interpretation of article 21 of the ACHR, in light of the provisions enshrined in the ILO Convention No 169, the Inter-American Court has established not only the special relationship that indigenous communities have with their land but also the essential importance of natural resources for the physical and cultural survival of these communities.[31] Moreover, it is important to highlight that this interpretation of article 21 of the ACHR has not been developed exclusively through references to ILO Convention No 169. In fact, in different cases brought against Suriname,[32] a state that does not recognise the right to communal property of tribal peoples and has not ratified ILO Convention No 169, the Court made references to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[33]

In the cases related to Suriname, the Inter-American Court avoided referring to the ILO Convention. Instead, it decided to make references to the above-mentioned conventions, which have been ratified by Suriname, and to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[34] In particular, the Inter-American Court referred to the common article 1 of the ICCPR and ICESCR, that is, the right of self-determination, which recognises that 'all peoples' have the right to 'freely pursue their economic, social and cultural development' and 'may … freely dispose of their natural wealth and resources' without being 'deprived of its own means of subsistence'.[35]

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

30 Fuentes (n 2) 238.

31 *Saramaka* (n 27) paras 121-122.

32 See, among others, *Moiwana Community v Suriname* (preliminary objections, merits, reparations and costs) IACHR (15 June 2005) Series C No 124 (*Moiwana*) paras 127-135; and *Saramaka* (n 27) paras 92-95.

33 *Saramaka* (n 27) para 93.

34 See, among others, *Kaliña and Lokono Peoples v Suriname* (merits, reparations and costs) IACHR (25 November 2015) Series C No 309 (*Kaliña and Lokono Peoples)* para 122.

35 *Saramaka* (n 27) para 93.

of their 'own means of subsistence'.[36] This interpretation was reinforced by considering indigenous peoples as minorities in relation to article 27 of the ICCPR, which entails the protection of their right to enjoy their own culture, including 'in a way of life which is closely associated with territory and use of its resources'.[37]

This means that the right to property, as guaranteed by article 21 of the ACHR and interpreted in light of the rights recognised under common article 1 of the ICCPR and ICESCR and article 27 of the ICCPR, extends its scope of protection to the right to communal property of indigenous peoples.[38]

Furthermore, the Inter-American Court has also referred to UNDRIP to reinforce its interpretation of article 21. In fact, in several cases, the Court considered that the states had voted in favour of the Declaration before the UN General Assembly to reinforce its interpretation of the scope of protection of article 21 of the ACHR.[39] Thus, even though the UNDRIP is non-binding, the Inter-American Court has made reference to it, together with ILO Convention No 169, in order to provide content and define the extension of the obligations of the states in relation to the right to property of indigenous peoples.[40]

2.1 Indigenous peoples' right to communal property

As a consequence of the systemic interpretation of article 21 of the ACHR, it is recognised that the protection of the right to communal property of indigenous peoples under the ACHR includes the ownership of their land and some of the natural resources that belong to those territories. Specifically, the Inter-American Court has highlighted the special relationship that indigenous peoples have with their land in the sense that ownership of traditional land is not centred on an individual but rather on the group and its community.[41] For the Court, the right to communal ownership over their traditional lands relates to the 'need to

36 As above.

37 *Saramaka* (n 27) para 94.

38 *Saramaka* (n 27) para para 95. See also *Kaliña and Lokono Peoples* (n 34) para 124.

39 See *Sarayaku* (n 8) para 215 & 217. See also *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v Panama* (preliminary objections, merits, reparations and costs) IACHR (14 October 2014) Series C No 284 (*Kuna Indigenous People)* para 118; *Garifuna Triunfo de la Cruz* (n 14) para 168; *Kaliña and Lokono Peoples* (n 34) para 122; and *Saramaka* (n 27) para 131.

40 See, among others, *Saramaka* (n 27) para 131.

41 See, among others, *Sarayaku* (n 8) para 148.

ensure the security and permanence of the control and use of the natural resources …, which, in turn, preserves the way of life' of indigenous communities.[42] Hence, the Court has stated the need to recognise the close ties of indigenous peoples with their land as a fundamental basis for their cultures, spiritual life, integrity and economic survival.[43]

The Inter-American Court has established that even if this collective understanding of concepts of property and possession does not conform to the classic notion of property, it must be protected under the ACHR.[44] In the case of indigenous peoples, 'land is not owned by the individual but by the group and its community', which means that they have a 'community-based tradition relating to a communal form of collective land ownership'.[45] In fact, according to the Inter-American Court, the protection of indigenous traditional lands under the ACHR is not linked to the existence of a formal legal title; it is the traditional possession that 'grants the indigenous peoples the right to require official recognition of ownership and its registration'.[46] In other words, its recognition is given on the basis of the existence of an ancestral and spiritual relationship with their traditional territories, and it is not necessarily extinguished by the loss of possession unless the lands have been lawfully transferred to third parties in good faith.[47]

Moreover, the Court has also understood that the right to use and enjoy their territory includes the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land: without them, the very physical and cultural survival of such peoples is at stake.[48] In other words, protecting the lands and resources that indigenous peoples have traditionally used is

42 See *Indigenous Communities of the Lhaka Honhat Association (Our Land) v Argentina* (merits, reparations and costs) IACHR (6 February 2020) Series C No 400 (*Lhaka Honhat Association*) para 94; see also *Saramaka* (n 27) paras 121 & 122; and *Kuna Indigenous People* (n 39) para 112.

43 *Awas Tingni* (n 1) para 149.

44 *Sawhoyamaxa* (n 14) para 120.

45 *Kuna Indigenous People* (n 39) para 111.

46 *Xucuru* (n 24), para 117. See also *Awas Tingni* (n 1) para 164; and *Garifuna Triunfo de la Cruz* (n 14) para 105.

47 *Sawhoyamaxa* (n 14) para 128.

48 See *Saramaka* (n 27) para 121. See also *Yakye Axa* (n 21) para 137; *Sawhoyamaxa* (n 14) para 118; and *Sarayaku* (n 8) para 146.

a safeguard against their potential extinction as a group and as distinctive peoples.[49]

2.2 Protection of indigenous peoples' rights over traditionally used natural resources

After recognising the right of indigenous peoples to communal property, the Inter-American Court addressed the question of the extension of the right of the indigenous peoples to use and enjoy the natural resources that lie on and within their traditionally owned lands. In this sense, the regional tribunal has recognised that the same reasons that justify the protection of communal property rights over those lands that indigenous communities have traditionally used and occupied for centuries[50] ground the right to ownership over those natural resources that these communities 'have traditionally used'.[51]

Natural resources that lie on and within their traditional lands are essential – in the case of indigenous and tribal peoples – for the maintenance and enjoyment of their traditional way of life, social structure, economic system, etc. Access to these resources is essential for the conservation and development of their cultural identity and to have the possibility to enjoy a dignified life. Based on the intrinsic connection between the traditional lands and territories, the resources that lie on and within them, and the cultural identity and way of life of the indigenous communities, the Court has extended the protection provided by article 21 of the ACHR to 'those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life'.[52]

Accordingly, those natural resources that can be considered protected by the right to communal property recognised in article 21 of the ACHR are those that fulfil the two above-mentioned conditions. First, these resources have been traditionally used since time immemorial; second,

49 See *Saramaka* (n 27) para 121. See also *Kaliña and Lokono Peoples* (n 34) para 130; and *Garífuna Punta Piedra* (n 14) para 166.

50 It is important to bear in mind that the Inter-American jurisprudence 'has characterized indigenous territorial property as a form of property whose foundation lies not in official state recognition, but in the traditional use and possession of land and resources; indigenous and tribal peoples' territories 'are theirs by right of their ancestral use or occupancy'. Inter-American Commission Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser. L/V/II, Doc. 56/09, 30 December 2009, 26, para 68.

51 *Saramaka* (n 27) para 121.

52 S*aramaka* (n 27) para 122.

they are necessary for the very survival, development and continuation of the indigenous peoples' cultural identity and way of life.[53] Conversely, the allocation of the ownership rights over all other natural resources that 'do not satisfy' these two requirements will, of course, depend on the domestic national legislation and, hence, will fall into 'the inalienable right of each State to the full exercise of national sovereignty over its natural resources'.[54]

Therefore, in line with the acknowledgement of the states' property over those natural resources not traditionally used by these communities, the Court has expressly recognised that 'Article 21 of the Convention should not be interpreted in a way that prevents the State from granting any type of concession for the exploration and extraction of natural resources' within those traditional lands and territories.[55] The legal principle remains that states have the right to explore and exploit the natural resources that lay in and within their territories.

However, the exploitation and extraction of natural resources within indigenous peoples' lands 'is most likely to affect the use and enjoyment of other natural resources that are necessary for the survival' of these peoples.[56] Consequently, the Inter-American Court has called on member states to assess each situation under a proper 'necessity test' before granting concessions over state-owned natural resources.[57] The test aims to determine whether the restriction of the right to communal property of indigenous people upon natural resources (traditionally used) is needed to achieve a legitimate aim in a pluralist and democratic society,[58] and

53 As it has been stressed, indigenous lands and territories traditionally used 'include[s] not only physically occupied spaces but also those used for their cultural or subsistence activities, such as routes of access, [which is] compatible with the cultural reality of indigenous peoples and their special relationship with the land and territory'. Fuentes (n 2) 239.

54 The UN General Assembly, in its 2203rd plenary meeting, has '[s]trongly reaffirm[ed] the inalienable rights of States to permanent sovereignty over all their natural resources, on land within their international boundaries as well as those in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters.' *Cf* UNGA Res 3171 (XXVIII), 'Permanent sovereignty over natural resources', 2203rd plenary meeting (1973).

55 *Saramaka* (n 27) para 126.

56 As above.

57 *Saramaka* (n 27) para 127.

58 The Inter-American Commission has stressed in this sense that 'recognition and protection as culturally different peoples requires wide political and institutional structures that allow them to participate in public life, and protect their cultural, social, economic and political institutions in the decision-making process. This requires, among other aspects, the promotion of an intercultural citizenship based on dialogue,

whether or not a 'reasonable relation of proportionality' exists between the exploitation and the restriction of the indigenous rights.[59]

At this point, it is important to bear in mind that the right to property of these peoples over their traditional lands and used natural resources is not an absolute right. In this sense, the Court has emphasised that property rights, like many other rights recognised in the ACHR, are subject to certain limitations and restrictions.[60] Article 21 of the ACHR expressly states that the 'law may subordinate [the] use and enjoyment [of property] to the interest of society'.[61] Thus, states could potentially justify a restriction to the use and enjoyment of the right to communal property in those cases where the restrictions are: 'a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society'.[62] In short, '[t]he necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest'.[63]

Finally, when that exploitation generates a direct or indirect limitation on the enjoyment of the indigenous peoples' land rights, it will nevertheless be justified if it pursues the fulfilment of imperative or 'pressing social needs'; as long as it does not 'amount to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members'.[64] This is because an interference on the enjoyment of the right to communal property could eventually generate a possible restriction on their ability to have access to a 'life in dignity' and, therefore, an infringement of their right to life *lato sensu* (article 4 reading together with article 1(1) of the ACHR).[65]

the generation of culturally appropriate services, and differentiated attention for indigenous and tribal peoples.' Inter-American Commission 'Indigenous peoples, Afro-descendent communities, and natural resources: Human rights protection in the context of extraction, exploitation, and development activities,' OEA/Ser. L/V/II., Doc. 47/15, 31 December 2015, 75, para 150.

59 See *Saramaka* (n 27) para 127.

60 As above. See also *Yakye Axa* (n 21) paras 144-145 (cited *mutatis mutandis*); *Ricardo Canese v Paraguay* (merits, reparations and costs) IACHR (31 August 2004) Series C No 111 para 96; *Herrera Ulloa v Costa Rica* (preliminary objections, merits, reparations and costs) IACHR (2 July 2004) Series C No 107 para 127; *Ivcher Bronstein v Peru* (merits, reparations and costs) IACHR (6 February 2001) Series C No 74 para 155. See also *Sawhoyamaxa* (n 14) para 137.

61 *Cf* ACHR, art 21(1).

62 See *Saramaka* (n 27) para 127 *et seq.*

63 See *Yakye Axa* (n 21) para 145.

64 *Saramaka* (n 27) para 128.

65 *Saramaka* (n 27) paras 121-123. See also Inter-American Commission (n 50) para 230.

In short, what is protected under article 21 of the ACHR in relation to the right to property of indigenous peoples is the close link that these communities have with their lands and the resources found on and within their territories that are necessary for their survival. As mentioned by the Court,

> To disregard the ancestral right of members of indigenous communities over their territories could adversely impact other basic rights such as the right to cultural identity and the very survival of the indigenous communities and their members.[66]

Due to the centrality of the relationship between indigenous peoples' culture, worldviews, and their traditional territories, the Court has developed concrete safeguards that limit the possibility for member states to introduce restrictions or interference in the enjoyment of the right to communal property in cases where the survival of the group, or its right to exist, is not at stake.[67] As further developed below, the protection provided by the ACHR is not absolute. In the wording of the regional tribunal,

> [W]hen States impose limitations or restrictions on the exercise of the rights of indigenous peoples to the ownership of their lands, territories, and natural resources, certain guidelines must be respected, which must be established by law, necessary, proportionate, and aimed at achieving a legitimate objective in a democratic society.[68]

2.3 Safeguards against unjustified interferences in the enjoyment of indigenous peoples' rights

In order to preserve, protect and guarantee the unique relationship that indigenous communities have with their lands and territories, which in turn ensures their material and cultural survival as distinguished peoples, the Inter-American Court has identified three specific safeguards.[69]

For instance, it has ordered the issuance of logging and mining concessions within indigenous peoples' lands by the states to (a) effective participation of the involved communities, according to their own traditions, in any investment or development project within their lands; (b) the sharing of reasonable benefits with these communities in each project;

66 *Xucuru* (n 24) para 115.

67 *Xucuru* (n 24) para 125. See also *Saramaka* (n 27) para 128; and *Sarayaku* (n 8) para 156.

68 *Garifuna Triunfo de la Cruz* (n 14) para 154.

69 *Lhaka Honhat Association* (n 42) para 175.

and (c) the elaboration of prior and independent environmental and social impact assessment.[70]

The first safeguard required by the Court, 'participation', implies that in any development plan, the state must conduct prior and informed consultations with the communities involved in good faith and in accordance with their own customs and traditions.[71] It should take into account the representative institutions and methods of decision-making of the indigenous people in question.[72] Consultations not only guaranteed the right to property but also supported the effective realisation of the 'right of the indigenous peoples to take part in decisions that affect their rights'.[73] This consultation process must consist of effectively sharing all relevant information regarding the nature of the development project 'at all stages of the planning and implementation of a project or measure that may affect the territory [of indigenous communities] or other rights essential to their survival as people'.[74] In fact, the information shared must be sufficient, accessible, and timely.[75] Moreover, it must be shared 'from the first stages of the planning or preparation of the proposed measure or project, so that the indigenous peoples can truly participate in and influence the decision-making process'.[76]

The obligation to consult is an overarching duty that must be implemented in any situation in which a project could potentially interfere with the rights of indigenous communities over their traditional lands and territories.[77] The aim of the consultation is to seek an agreement with the affected communities. Consultation is an obligation of *means*.[78] It requires a proactive role of the states to accept and disseminate information in good faith in an understandable and publicly accessible format.[79] It must

70 Fuentes (n 2) 242.

71 *Lhaka Honhat Association* (n 42) para 174. See also *Saramaka* (n 27) para 133; *Sarayaku* (n 8) para 186; and *Kaliña and Lokono Peoples* (n 34) para 201.

72 Fuentes (n 2) 242.

73 *Lhaka Honhat Association* (n 42) para 173.

74 *Garifuna Triunfo de la Cruz* (n 14) para 160.

75 Inter-American Commission (n 50) para 198.

76 *Garifuna Triunfo de la Cruz* (n 14) para 160. See also *Garífuna Punta Piedra* (n 14) para 216.

77 Fuentes (n 2) 243.

78 Fuentes (n 2) 245.

79 See *Saramaka People v Suriname* (interpretation of the judgement on preliminary objections, merits, reparations and costs) IACHR (15 June 2005) Series C No 124 (*Saramaka interpretation*) para 17.

be in conformity with their customs and traditions, including paying due respect to their traditional decision-making institutions.[80]

Finally, in case of 'large-scale development or investment projects' that could have major impacts within the territory of the indigenous communities, the Inter-American Court has imposed on the states not only the duty to consult but also 'to obtain their free, prior and informed consent, according to their customs and traditions'.[81] The rationale of this additional requirement is clear: 'the impact of such activities must never negate the ability of members of indigenous and tribal peoples to ensure their own survival'.[82] As concluded elsewhere, this additional requirement does not provide indigenous peoples with a 'veto power' but rather establishes the need to frame consultation procedures to make every effort to build consensus on the part of all concerned.[83]

The second safeguard, benefit sharing, is based upon 'the restriction or deprivation of [indigenous peoples] right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival'.[84] This right to obtain just compensation (article 21(2) of the ACHR) applies not only to the total deprivation of the communal property title by way of expropriation by the state but also to the restriction or deprivation of the regular use and enjoyment of such property.[85]

Hence, the reasonableness in the sharing of the project's benefits has to be interpreted as the existence of a 'relation of proportionality' between the restriction suffered by the affected communities in the enjoyment of their rights and the possible benefits from the investment or development projects. Consequently, large and invasive interferences will require more participation in the benefit sharing.[86]

Finally, the third safeguard identified by the Inter-American Court is the obligation to conduct a prior environmental and social impact assessment (ESIA). The justification is based on the prevention of

80 *Saramaka interpretation* (n 79) para 18.

81 *Saramaka* (n 27) para 134.

82 *Lhaka Honhat Association* (n 42) para 175.

83 Fuentes (n 2) 229-253. See also Human Rights Council *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, A/HRC/12/34 (2009), para 48, http://unsr.jamesanaya.org/docs/annual/2009_hrc_annual_report_en.pdf 13 December 2022. See also Fuentes (n 2) 74.

84 *Saramaka* (n 27) para 139.

85 As above.

86 Fuentes (n 2) 246.

potential negative impacts that development projects could have on traditional lands, territories, and natural resources.[87] The purpose of the ESIA is to ensure that members of the community 'are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily'.[88] Moreover, the ESIA 'must conform to the relevant international standards and best practices,'[89] 'must be undertaken by independent and technically capable entities, with the State's supervision'.[90] It must also respect the communities' traditions and culture.[91]

As explicitly emphasised by the Inter-American Court, 'the guided principle with which to analyse the result of ESIAs should be that the level of impact does not deny the ability of the members of the affected communities to survive' as a distinct group.[92] In addition, the ESIA must be implemented before granting any concession for the exploration and exploitation of natural resources or the establishment of any development or investment projects within the traditional indigenous peoples' territories and lands in order to produce the least possible impact on the enjoyment and exercise of these rights.[93]

To conclude, these safeguards developed by the Inter-American Court are essential for the survival of indigenous peoples' traditional way of living.[94] They are instrumental in creating a legal framework that considers indigenous peoples' cultural distinctiveness and ensuring that any concession or development project will not take place if its socio-environmental impacts amount to a denial of their material and cultural survival.[95]

2.4 Indigenous peoples' right to cultural identity and dignified life

As argued in this chapter, the innovative interpretation of article 21 of the ACHR has expanded the scope of conventional protection beyond

87 As above.

88 *Saramaka Interpretation* (n 79) para 40.

89 *Saramaka Interpretation* (n 79) para 41.

90 As above.

91 Fuentes (n 2) 247.

92 *Saramaka Interpretation* (n 79) para 42.

93 Fuentes (n 2) 247.

94 As above.

95 *Saramaka* (n 27) para 129.

the material relation that indigenous peoples have with their land. In the wording of the Inter-American Court,

> the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations.[96]

This means that the protection afforded by the ACHR to the right to property of indigenous peoples includes a spiritual element, which is based on the fact that it is through the special relation with their land that indigenous peoples find their own cultural identity.[97] In the same vein, the UNDRIP has also recognised the axiological centrality that land plays in indigenous peoples' culture, recognising the importance of the right of these people to 'maintain and strengthen their distinctive spiritual relationship with their traditional[ly] owned or otherwise occupied and used lands'.[98]

In fact, what is truly at stake when indigenous peoples are deprived of the enjoyment of their traditional lands and territories is the possibility to maintain and further develop their own way of living and their own right to life in accordance with their own traditions and worldviews.[99] In short, what is under threat is not only their physical survival but also the persistence of their cultural identity and their *indigenousness* as distinguishable peoples.[100]

96 *Yakye Axa* (n 21) para 131.

97 As highlighted by the Court, cultural identity is a 'basic human right, and one of the collective nature in indigenous communities, which must be respected in a multicultural, pluralist and democratic society' and, as a right, 'protects the freedom of individuals [as individuals and as a members of a community] to follow a way of life connected to the culture to which they belong and to take part in its development'. See *Maya Kaqchikel Indigenous Peoples of Sumpango et al v Guatemala* (Merits, Reparations and Costs) IACHR (6 October 2021) Series C No 440 para 125.

98 UNDRIP, art 25.

99 *Yakye Axa* (n 21), Separate Dissenting Opinion of Judges AA Cançado Trindade and ME Ventura Robles, para 4. Moreover, according to the Commission, 'the term 'survival' should be understood in a coherent manner with the indigenous and tribal peoples set of rights, with the aim of not giving rise to a static conception of their ways of life'. In addition, the Commission has emphasised that 'since the requirement to ensure their "survival" has the purpose of guaranteeing the especial relationship between these peoples with their ancestral territories, reasonable deference should be given to the understanding that the indigenous and tribal peoples themselves have in regards to the scope of this relationship, as authorized interpreters of their cultures'. Inter-American Commission (n 50) para 166.

100 Fuentes (n 6) 69.

According to the consolidated jurisprudence of the Inter-American Court, cultural identity must be considered part or an integrative component of the right to life *lato sensu*.[101] Under article 4 of the ACHR, the protection of life includes 'not only the right of every human being not to be deprived of his life arbitrarily' (right to life *stricto sensu*) 'but also the right that he will not be prevented from having access to the conditions that guarantee a decent existence,' that is, the right to life *lato sensu*.[102]

This dual understanding of the right to life must be read in connection with the general 'obligation to respect and ensure' the enjoyment of fundamental rights incorporated in article 1(1) of the ACHR. Thus, it generates upon the states not only the *negative* obligation to prevent and restrain arbitrary deprivations of this right but also the *positive* obligation to guarantee the necessary conditions that would permit indigenous peoples to have a decent life.[103] Consequently, states have the positive obligation to adopt all appropriate measures to secure the full and free enjoyment of human rights, in order to 'protect and preserve' the right to life.[104]

Therefore, in order to guarantee the full enjoyment and access to a decent condition of life for all members of society, and in particular for those in a vulnerable position,[105] the Court has stressed states' positive obligation to recognise within the national legal systems the right of indigenous peoples to the communal property over their traditional lands and resources.[106] This positive obligation is grounded in the intrinsic

101 *Sawhoyamaxa* (n 14) para 151.

102 *Street Children* (n 10) para 144. See also *Sawhoyamaxa* (n 14), Separate Opinion of Judge Ventura-Robles para 10.

103 According to the Human Rights Committee, '[t]he duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.' See UN Human Rights Committee, General Comment 36, Article 6: right to life, CCPR/C/GC/36, 3 September 2019 (HRC General Comment 36) para 26.

104 See *Pueblo Bello Massacre v Colombia* (merits, reparations and costs) IACHR (31 January 2006) Series C No 140 (*Pueblo Bello Massacre*) para 120. See also *Mapiripán Massacre v Colombia* (merits, reparations and costs) IACHR (15 September 2005) Series C No 134 (*Mapiripán Massacre*) para 232.

105 Under the 'jurisprudence constant' of the IACtHR, the obligation to take positive measures *vis-à-vis* the protection of the right to life increases its imperativeness according to 'the particular needs of protection of the legal persons, whether due to their personal conditions or because of the specific situation they have to face, such as extreme poverty, exclusion or childhood.' *Pueblo Bello Massacre* (n 104) paras 111-112.

106 In connection with extractive industries, '[t]his obligation includes the adoption of the appropriate domestic legislation to protect the most relevant human rights in the field of extractive and development activities, the repeal of legislation which is incompatible with the rights enshrined in the Inter-American instruments, and to refrain from

and constitutive nature that traditional lands have vis-à-vis indigenous peoples' identity and, therefore, in the enjoyment of decent conditions of life (dignify life).[107] These are necessarily connected with their own way of living, their own culture, understandings, traditions and world views.[108]

The interrelation between the enjoyment of the right to communal property and the protection of indigenous peoples' right to cultural identity and dignified life is based on the inherent interconnection between these rights. The interpretative path of the Inter-American Court starts with expanding the scope of protection of the right to life. Protection of life includes not only the prohibition of its arbitrary deprivation (negative obligation) but as well the generation of all of those conditions that will permit and facilitate its full enjoyment, that is, the creation of conditions that will facilitate or create opportunities for a decent life (positive obligations).[109]

In addition, these positive obligations include the generation of conditions able to facilitate equal enjoyment of decent life conditions for each member of the society in accordance with their own understandings and cultural identity.[110] In this sense, Cançado Trindade highlighted that indigenous peoples' cultural identity 'is closely linked to their ancestral lands', and if members of indigenous communities 'are deprived of them, it seriously affects their cultural identity, and finally their very right to life *lato sensu*'. [111]

Furthermore, because in the case of indigenous peoples, their cultural identity is intimately connected with their traditional lands, positive measures must include adequate legal and material protection for this

adopting legislation contrary to these rights'. Inter-American Commission (n 50) para 67.

107 In the same line of views, the UN Human Rights Committee has expressed that the obligation to take appropriate measures to facilitate the enjoyment of the right to life with dignity, may include addressing the 'deprivation of indigenous peoples land, territories and resources'. See HRC General Comment 36 (n 103) para 26.

108 In this sense, in *Yakye Axa* Cançado Trindade and Ventura Robles have emphasised the fact that even if the right to life 'is a non-derogable right under the American Convention, while the right to property is not [...] the latter is especially significant because it is directly related to full enjoyment of the right to life including conditions for a decent life.' *Yakye Axa* (n 21), Separate Dissenting Opinion of AA Cançado Trindade and ME Ventura Robles, para 20.

109 See *Juan Humberto Sánchez v Honduras* (preliminary objection, merits, reparations and costs) IACHR (7 June 2003) Series C No 99 para 110.

110 As mentioned elsewhere, 'cultural identity has to be considered as part or as an integrative component of the right to life lato sensu'. See Fuentes (n 2) 235.

111 *Sawhoyamaxa* (n 14), Separate Opinion by Judge AA Cançado Trindade, para 28.

special relationship.[112] Without the recognition of communal property over their traditional lands, in accordance with its regulation in their customary laws, the life of indigenous peoples will be under threat.[113] Indeed, the intimate and inseparable connection between indigenous peoples and their traditional lands is crucial for the development of their lives in accordance with their own worldviews and traditions. Without this bond, their life projects become devoid of meaning, as they are unable to pursue a dignified existence that aligns with their own understanding of dignity.[114]

In conclusion, the jurisprudence of the Inter-American Court indicates that the nonrecognition of the right to communal property of indigenous communities to their traditional lands will amount – according to the specific circumstances of each case – not only to a violation of article 21 of the ACHR but also to an infringement of the right to life as protected by article 4(1), which is read in accordance with the dispositions contained within article 1(1) of the same instrument (the obligation to respect and protect).[115]

112 As stated by the Inter-American Commission (n 50) '[t]he obligation to adopt special and specific protective measures is inherent in ILO Convention No 169; the IACHR has highlighted the need for its States parties to "take special measures to guarantee indigenous peoples the effective enjoyment of human rights and fundamental freedoms, without restrictions, and to include measures that promote the full effectiveness of their social, economic, and cultural rights, respecting their social and cultural identity, and their customs, traditions, and institutions."' Inter-American Commission (n 50) para 51. See also A Fuentes *Cultural Diversity and indigenous peoples land claims: argumentative dynamics and jurisprudential approach in the Americas*, Doctoral thesis, Università Degli Studi di Trento (2012) 305 http://eprints-phd.biblio.unitn.it/767/ (accessed 18 June 2023).

113 Inter-American Commission (n 50) para 231.

114 In connection with the understanding of the Court toward the concept of 'project of life,' see *Street Children* (n 10) para 144; and *Loayza-Tamayo v Peru* (reparations and costs) IACHR (27 November 1998) Series C No 42 paras 147-148. Regarding the interconnection between indigenous peoples' project of life, cultural identity and traditional lands, see *Kuna Indigenous People* (n 39) para 143; *Yakye Axa* (n 21) para 146; *Sarayaku* (n 8) para 146; and *Kaliña and Lokono Peoples* (n 34) paras 138 & 272.

115 In *Yakye Axa* (n 21) para 168, the Court established that the lack of recognition of the right to communal property 'has had a negative effect on the right of the members of the community to a decent life, because it has deprived them of the possibility of access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clear water and to practise traditional medicine to prevent and cure illnesses'.

3 Recognition of the indigenous peoples' right to property over traditional lands in the African human rights system

Within the African human rights system, the protection of the right of indigenous peoples to their traditional lands and territories started, although in a preliminary manner, in 2001 with the decision adopted by the African Commission in *Ogoni*.[116] This decision was adopted at the 30th Ordinary session of the African Commission held in Banjul, The Gambia, on 13-27 October 2001. That is less than two months after the adoption of the judgment by the Inter-American Court in *Awas Tingni*.[117] Based on the ground-breaking character of the latter decision, it would have been expected that the African Commission would have made some references to it, but it did not. As is argued below, this missed opportunity resulted, to a certain extent, in a restrictive recognition of the indigenous people's collective property rights over their traditional lands and territories in *Ogoni*.

However, years later, the African Commission expanded its jurisprudence on indigenous peoples' rights in *Endorois*. Here the African Commission fully recognised the indigenous people's identity of the Endorois and the centrality that their ancestral lands play in relation to their way of life, culture, cultural identity and religious rights.[118] Based on these premises, the African Commission recognised the right of the Endorois to communal property over the lands traditionally possessed, together with the interconnected obligations of the state to grant them with a full property title over them.[119]

The recognition of the rights of indigenous peoples within the African human rights system was further developed by the African Court in *Ogiek*.[120] This was the first case in which the African Court delivered a

116 *Ogoni* (n 3).

117 *Awas Tingni* (n 1).

118 For a critical analysis of the African Commission's legal reasoning on 'the applicability of the peoples' rights provision of the African Charter to particular collectives' see, among others, FM Ndahinda 'Peoples' rights, indigenous rights and interpretative ambiguities in decisions of the African Commission on Human and Peoples' Rights' (2016) *African Human Rights Law Journal* 16 at 30.

119 *Endorois* (n 4) para 209.

120 For an in-depth analysis of this case, see, among others, R Rösch 'Indigenousness and peoples' rights in the African human rights system: situating the Ogiek judgement of the African Court on Human and Peoples' Rights' (2017) 50 *Verfassung und Recht in* Übersee / *Law and Politics in Africa, Asia and Latin America* at 242-258.

judgment on indigenous peoples' rights.[121] The African Court not only upheld the right of the Ogiek community to their traditional lands and their relevance in connection with their culture and cultural identity but also the lands' importance in generating favourable conditions to a decent life.[122]

The recognition of indigenous peoples' rights by the African Commission and Court is further explored in the following sections, together with the influence that the jurisprudence of the Inter-American Court has had on these developments. In fact, as argued below, the African Court and, in particular, the African Commission have benefited to a very large extent from the jurisprudence of the Inter-American Court, from which they have drawn inspiration in developing their interpretation of indigenous peoples' rights.

3.1 Early development in the jurisprudence of the African Commission: The *Ogoni* case

Ogoni has been celebrated as being the first case in which the African human rights system delivered protection to the special relationship that indigenous peoples have with their traditional lands. However, the communication received by the African Commission focused on the environmental damages generated by the oil exploitation in Ogoniland and the support provided by the Nigerian Government 'by placing the legal and military powers of the state at the disposal of the oil companies'.[123]

After analysing the extension of the general obligations to respect,[124] protect,[125] promote,[126] and fulfil[127] human rights that all state parties to the African Charter have, the African Commission analysed the alleged violation of articles 16 and 24 of the African Charter. In particular, the African Commission focused on the alleged failure of the Nigerian

121 Regarding the relevance of the *Ogiek* case within the African human rights system and its interconnection with the *Endorois* case (both cases against Kenya). See, among others, S Nasirumbi 'Revisiting the *Endorois* and *Ogiek* cases: is the African human rights mechanism a toothless bulldog?' (2020) 4 *African Human Rights Yearbook* at 497-518.

122 *Ogiek* (n 5) para 153. More broadly, regarding the indigenous peoples' land claims in Kenya, see A Kwokwo Barume *Land rights of indigenous peoples in Africa. With special focus on Central, Eastern and Southern Africa* (2010) IWGIA Copenhagen, Denmark 86.

123 *Ogoni* (n 3) paras 2 & 3.

124 *Ogoni* (n 3) para 45.

125 *Ogoni* (n 3) para 46.

126 As above.

127 *Ogoni* (n 3) para 47.

Government in fulfilling the minimum duties required by the right to health and the right to a clean environment.[128] For instance, states should take measures to 'prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'.[129]

In order to fulfil these overarching environmental obligations in connection with Ogoniland, state authorities should conduct or at least permit 'independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development'.[130] Moreover, they should 'undertake appropriate monitoring and providing information to those communities exposed to hazardous materials and activities'.[131] Finally, state authorities should generate 'meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'.[132]

The African Commission has been a pioneer in introducing targeted judicial guarantees for the protection of the environmental rights of the Ogoni people.[133] Guarantees that are quite similar to the safeguards developed by the Inter-American Court in later years, for example, in *Saramaka*.[134] The similarities between the jurisprudence of these two regional bodies could suggest an influence of the findings in *Ogoni* in the development of the Inter-American Court's jurisprudence.[135]

128 *Ogoni* (n 3) para 49.

129 *Ogoni* (n 3) para 52.

130 *Ogoni* (n 3) para 53.

131 As above.

132 As above.

133 However, it is important to bear in mind that the 'Ogoni crisis transcends mere environmental rights or even human rights concerns ... the Ogoni crisis involves political issues including inequalities in Nigerian fiscal structures, domination of the Ogoni by politically dominant peoples in Nigeria, exclusion of the Ogoni from the benefits of oil extraction in the region, dispossession from land, and the general perception among the Ogoni that they are colonized by the Nigerian state'. See P Tamuno 'New human rights concept for old African problems: An analysis of the challenges of introducing and implementing indigenous rights in Africa' (2017) 61 *Journal of African Law* at 318.

134 *Saramaka* (n 27) para 129. See also Fuentes (n 2) 242.

135 According to Inman, 'the African Commission in the *Ogoni* case was progressive in relation to its previous decision in the Katangese Secession case, it was still cautious, particularly with regards to using external sources in determining the rights of Indigenous Peoples'. See DM Inman 'The cross-fertilization of human rights norms and indigenous peoples in Africa: From *Endorois* and beyond' (2014) 5 *The International Indigenous Policy Journal* 4 at 7.

However, when the Inter-American Court formulated its own judicial guarantees for the protection of indigenous peoples' rights in *Saramaka*, it only referred to *Ogoni* in relation to the inclusion of natural resources as part of indigenous communities' land rights.[136] No explicit mention was made of the safeguards identified by the African Commission's case law. This omission was a missed opportunity to strengthen the universality of indigenous peoples' rights worldwide and underscore the importance of cross-fertilisation of jurisprudence.

Returning to *Ogoni*, it is important to mention that the right of the Ogoni people to their traditional lands was not an object of direct protection in this case. According to the African Commission, the Ogoni people have the right to housing or shelter as a 'corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health …, the right to property, and the protection accorded to the family'.[137] As a derivation of these rights, the African Commission identified the obligation of states to 'prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners'.[138] Based on this general obligation, Nigeria was found responsible for the violation of the right to shelter due to the actions of its security forces, which have 'obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes'.[139]

To conclude, *Ogoni* should be considered a leading case regarding the early identification of environmental safeguards for the protection of the enjoyment of traditional lands by indigenous peoples in Africa and beyond. However, it also left the sensation of a missed opportunity because the African Commission disengaged from the very recent and innovative (at the time) development in international human rights law generated by *Awas Tingni*.[140] In other words, by employing an evolutionary and systemic interpretation of international human rights law pertaining to indigenous peoples, the African Commission would have had the opportunity to incorporate the latest jurisprudential developments from

136 *Saramaka* (n 27) para 120, fn 122.

137 *Ogoni* (n 3) para 60.

138 *Ogoni* (n 3) para 61.

139 *Ogoni* (n 33) para 62.

140 The only reference made to the jurisprudence of the IACtHR was in relation to *Velásquez Rodríguez v Honduras* (preliminary objections) IACHR (26 June 1987) Series C No 1, a landmark case on enforced disappearances.

the *corpus juris* of international human rights law in its interpretation of the African Charter.[141]

In conclusion, by using an evolutive and systemic interpretation of indigenous peoples' international human rights law, African Commission would have had the possibility to benefit in its interpretation of the African Charter of the latest jurisprudential developments produced within the corpus juris of international human rights law. In addition, and perhaps even more importantly, it missed the opportunity to provide more robust and effective protection to indigenous peoples by recognising their right to communal property over their traditional lands and territories.

3.2 Consolidation of indigenous peoples' right to property through jurisprudential cross-fertilisation: The *Endorois* case

As introduced above, *Endorois* should be considered a milestone in the jurisprudence of the African Commission related to the protection of indigenous peoples' rights, not only because it was a 'landmark victory' for the Endorois community after 40 years of struggle but also due to the fact that it was the first time that the Commission recognised indigenous peoples' rights in Africa.[142] In this case, the African Commission made a substantive step forward in the manner that interpreted international human rights law and expanded the content and scope of protection of the rights recognised under the African Charter.[143]

In fact, it is possible to conclude that the African Commission approached the interpretation of the African Charter in a systemic manner as part of the *corpus juris* of international human rights law.[144] The African Commission clarified, therefore, that it 'is also enjoined

141 Fuentes (n 9) 11.

142 For an in-depth analysis of the *Endorois* case, including the outline of the key arguments presented by the parties, see C Morel 'Indigenous as equals under the African Charter: The Endorois Community versus Kenya' in R Laher & K Sing'Oei (eds) *Indigenous peoples in Africa. Contestations, empowerment and group rights* (Africa Institute of South Africa: Pretoria 2014). See also Ndahinda (n 118) 38.

143 Although the African Charter does not explicitly mention indigenous peoples' right to land, this right 'has been derived from or read into three different rights: the rights to religion, property and culture, rights which are inextricably linked to land.' See Nasirumbi (n 121) 504.

144 According to the Inter-American Court, who has developed this notion, '[t]he corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law'. See *Juridical Condition and Rights of the Undocumented Migrants* (n 7) para 120; and *Information on Consular Assistance* (n 7) para 115.

under Article 61 of the African Charter to be inspired by other subsidiary sources of international law or general principles in determining rights under the African Charter'.[145] Notably, in the case of indigenous peoples, the African Commission identified the UNDRIP, officially sanctioned by the African Commission through its 2007 Advisory Opinion,[146] as the instrument that 'deals extensively with land rights'.[147] In addition, it highlights that '[t]he jurisprudence under international law bestows the right of ownership rather than mere access' and, therefore, it concluded that 'if international law were to grant access only, indigenous peoples would remain vulnerable to further violations/dispossession by the State or third parties'.[148]

By referring to international law and, in particular, to the UNDRIP, the Commission stressed the importance of the right to collective property in protecting indigenous peoples' rights. Moreover, based on the position developed by its own Working Group on Indigenous Populations/Communities,[149] the African Commission expressly noted that 'some African minorities do face dispossession of their lands and that special measures are necessary in order to ensure their survival in accordance with their traditions and customs'.[150]

The need for the adoption of measures capable of providing additional protection for the cultural survival of African minorities and indigenous peoples paved the way for the adoption of a historical *obiter dictum*:

> The African Commission is of the view that the first step in the protection of traditional African communities is the acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute 'property' under the Charter and that special measures may have to be taken to secure such 'property rights'.[151]

145 *Endorois* (n 4) para 152.

146 See *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nation Declaration on the Rights of Indigenous Peoples*, adopted by the African Commission at its 41st Ordinary Session held in May 2007, in Accra, Ghana.

147 *Endorois* (n 4) para 204.

148 As above.

149 Report of the African Commission's Working Group of Experts, submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa, Adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2005).

150 *Endorois* (n 4) para 187.

151 As above.

Based on these preliminary considerations, and because the 'Endorois culture, religion, and traditional way of life are intimately intertwined with their ancestral lands,'[152] the African Commission concluded that Kenyan authorities have the 'duty to recognise the right to property of members of the Endorois community, within the framework of a communal property system'.[153] In addition, they also have an obligation to 'establish the mechanisms necessary to give domestic legal effect to such right recognised in the Charter and international law'.[154]

The development in the jurisprudence of the African Commission was grounded not only in its own systemic interpretation of international human rights law but also in drawing from the comparative jurisprudence of the Inter-American Court. In this sense, the African Commission extensively cited – as a source of inspiration – the findings in *Saramaka*,[155] *Moiwana*,[156] *Yakye Axa*[157] *Sawhoyamaxa*[158] and *Awas Tingni.*[159]

By relying on the jurisprudence of the Inter-American Court, the African Commission was able to expand the scope of protection of the right of the Endorois people to their traditional lands under the African Charter. It interpreted traditional possession of land as the equivalent of a state-granted full property title and recognised the right to return to their lands in case of dispossession or to be compensated by other lands of equal extension and quality.[160] In addition, the African Commission adopted similar guarantees to the Inter-American Court for the protection of the special relationship that the Endorois people have with their lands. It recognised the obligation of state authorities to guarantee the effective participation of the Endorois people in the establishment of a game reserve in their traditional lands, to carry out a prior ESIA, and to guarantee that the community will enjoy a reasonable share of the profits of the Game Reserve.[161] The non-fulfilment of these obligations led to the violation of article 14 (the right to property),[162] but also article 17(2) (the

152 *Endorois* (n 4) para 156.
153 *Endorois* (n 4) para 196.
154 As above.
155 *Saramaka* (n 27).
156 *Moiwana* (n 32).
157 *Yakye Axa* (n 21).
158 *Sawhoyamaxa* (n 14).
159 *Awas Tingni* (n 1).
160 *Endorois* (n 4) para 209.
161 *Endorois* (n 4) para 228.
162 *Endorois* (n 4) para 238.

right to take part in the cultural life of his community), and article 17(3) (the promotion and protection of morals and traditional values),[163] of the African Charter.

Moreover, based on the comparative analysis of *Saramaka* and the findings of the Inter-American Court in *Yakye Axa* and *Sawhoyamaxa*,[164] the African Commission identified the need to guarantee the protection of the Endorois peoples' way of life and their distinct cultural identity when concessions are granted over their traditional territories. In this sense, the African Commission indicated that Kenya has a 'duty to evaluate whether a restriction of these private property rights is necessary to preserve the survival of the Endorois community'.[165] And because state authorities did not engage in any meaningful balancing exercise of the potentially conflicting interests at stake, the Commission found that article 21 African Charter (right to right to free disposal of wealth and natural resources) was violated.[166]

Finally, due to the precariousness of the Endorois' post-dispossession settlement, which was very similar to the extremely destitute conditions faced by the members of the Yakye Axa community in Paraguay,[167] the African Commission considered that their 'traditional means of subsistence – through grazing their animals – has been curtailed by lack of access to the green pastures of their traditional land'.[168] According to the Commission, these precarious living conditions have affected the Endorois' right to development.[169] Thus, and following the footprint of *Saramaka*,[170] the African Commission stated that,

> any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.[171]

163 *Endorois* (n 4) para 251.

164 *Endorois* (n 4) para 260.

165 *Endorois* (n 4) para 267.

166 *Endorois* (n 4) para 268.

167 *Endorois* (n 4) paras 284-286. See also *Yakye Axa* (n 21) paras 164-168.

168 *Endorois* (n 4) para 288.

169 It is important to highlight that this decision by the Commission was one of the first, if not the first, decisions in which the implementation of the right to development by states was analysed. See Nasirumbi (n 121) 506.

170 *Saramaka* (n 27) para 134.

171 *Endorois* (n 4) para 291.

In other words, because the right to development will be violated when development projects within indigenous peoples' traditional lands and territories 'decreases the well-being of the community,' the prior and informed consent of the affected communities needs to be obtained.[172] As in the case of the Inter-American Court, African Commission paid crucial attention to the right of the Endorois communities to be consulted in all matters that might affect them. This is why the African Commission analysed the right to development implies a 'two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end … [a] violation of either the procedural or substantive element constitutes a violation of the right to development'.[173] Therefore, in order to fulfil its realisation, 'consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement'.[174]

In addition, the interference with their right to use and enjoy their traditional lands and those resources necessary for their survival, 'in the spirit of the African Charter translates into a right of the members of the Endorois community to reasonably share in the benefits' generated by the development project (i.e. game reserve).[175] The lack of observance of these guarantees, including the inadequacy of the consultation process carried out by state authorities,[176] 'left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people'.[177] Consequently, their right to economic, social and cultural development, as recognised by Article 22 of the African Charter was violated.[178]

To conclude, *Endorois* not only developed the jurisprudence of the African Commission on indigenous people's rights in line with contemporary international human rights law but also it initiated a fertile

172 *Endorois* (n 4) para 290.

173 *Endorois* (n 4) para 277. For a critical assessment of the manner in which the African Commission has interpreted the right to development, see, among others Gilbert J 'Litigating indigenous peoples' rights in Africa: Potentials, challenges and limitations' (2017) 66 *International and Comparative Law Quarterly* 3 at 674.

174 *Endorois* (n 4) para 289.

175 *Endorois* (n 4) para 295. It is important to bear in mind that development projects, such as the Game Reserve, may not necessarily be perceived as a positive outcome by indigenous peoples. In fact, as highlighted by Gilbert, '[f]or many indigenous communities across the continent, wildlife conservation, economic development and tourism have often become synonymous with destitution and loss of lands'. See Gilbert (n 173) 671.

176 Consultations are paramount for preventing state authorities from making arbitrary decisions that 'not only affect indigenous peoples' right to development but also related rights'. Nasirumbi (n 121) 507.

177 *Endorois* (n 4) para 297.

178 *Endorois* (n 4) para 298.

substantive jurisprudential dialogue between two regional human rights systems.[179] In providing content to the rights of indigenous peoples under the African Charter, through an evolutive and systemic interpretation, the Commission benefited from the consolidated indigenous peoples' rights jurisprudence of the Inter-American Court. Moreover, by promoting cross-fertilisation between these two regional jurisdictions, the African Commission has substantially contributed to the systemic harmonisation of international human rights law.[180]

3.3 Protection of indigenous peoples' rights by the African Court: The *Ogiek* case

In *Ogiek*, the African Court has confirmed, in general terms, the jurisprudence on indigenous peoples' rights developed by the African Commission. In particular, it drew inspiration from its Advisory Opinion on the rights of indigenous peoples.[181] In addition, it was also inspired by the work of the UN Special Rapporteur on Minorities, especially in connection with the notion of indigenous peoples.[182]

In a similar manner to the African Commission, the African Court also applied the systemic and evolutive interpretation of international human rights law when defining indigenous peoples' 'current normative standards'.[183] According to the African Court, this interpretative criterion 'allows it to draw inspiration from other human rights instruments' by virtue of articles 60 and 61 of the Charter.[184] Based on these interpretative principles, the African Court recognises the Ogiek as 'an indigenous population that is part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability'.[185]

Although the African Court did not make specific references to *Endorois* or to the prolific jurisprudence of the Inter-American Court

179 According to Inman, 'the Endorois decision is integral to developing an understanding of the integration, cross-fertilization, and dynamic relationship of human rights law'. Inman (n 135) 9.

180 See, among others, JM Pasqualucci *The practice and procedure of the Inter-American Court of Human Rights* (Cambridge 2013) 13. See also, M Koskenniem *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law*, Report of the Study Group of the International Law Commission, A/cn.4/L.682 (*International* Law Commission, Geneva, 1 May-9 June and 3 July-11 August 2006).

181 *Endorois* (n 4) para 105.

182 *Endorois* (n 4) para 106.

183 *Endorois* (n 4) para 108.

184 As above.

185 *Endorois* (n 4) para 112.

when analysing the Ogieks' right to property over their ancestral lands, it nevertheless arrived at a similar conclusion.[186] In the words of the African Court,

> by expelling the Ogieks from their ancestral lands against their will, without prior consultation and without respecting the conditions of expulsion in the interest of public need, the Respondent violated their rights to land […] as guaranteed by Article 14 of the Charter read in light of the United Nations Declaration on the Rights of Indigenous Peoples 2007.[187]

As in the case of the African Commission, the UNDRIP is at the centre of the African Court's systemic and evolutive interpretation of the provisions of the African Charter in connection with indigenous peoples' rights. However, the African Court departs from this point by further exploring the potential expansion of the protection afforded by indigenous peoples in the Charter by referring to the jurisprudence of the Inter-American Court related to the protection of the right to a dignified or decent life.[188]

Based on this later precedent and on the assertion that 'the violation of economic, social and cultural rights may generally endanger conditions unfavourable to a decent life,' it considered whether the eviction from traditional lands could amount to a violation of the right to life under Article 4 of the Charter.[189] Despite the fact that the African Court highlighted that 'there is no doubt that their eviction has adversely affected their decent existence in the forest,' the right to life was not considered affected because it was not established 'the causal connection between the evictions of the Ogieks by the Respondent and the deaths alleged to have occurred as a result'.[190]

Even though the African Court has acknowledged that 'a distinction between the classical meaning of the right to life and the right to decent existence of a group' could be made, it missed the opportunity to further expand the scope of protection of the right to life by means of incorporating its *lato sensu* dimension.[191] A dimension would have opened

186 As highlighted by Rösch, '[i]n the African human rights system, [the right to collective property] has been derived in three different ways: from the right to property (art 14), the right to practice religion (art 8) and the right to culture (art 17). The African Court discussed it mainly as a derivate of the right to property (art 14)' Rösch (n 120) 251.

187 *Ogiek* (n 5) para 131.

188 *Ogiek* (n 5) para 153. Reference is made to *Yakye Axa* (n 21) para 161.

189 *Ogiek* (n 5) para 153.

190 *Ogiek* (n 5) para 155.

191 *Ogiek* (n 5) para 154.

the possibility of identifying positive obligations on states to develop conditions in society for the enjoyment of a dignified or decent life.[192] In this sense, what emerges clearly from the *Ogiek* case is that African Court adopted a restrictive view of the right to life, recognising that 'Article 4 of the Charter relates to the physical rather than the existential understanding of the right to life'.[193] In other words, what is protected is the right to life *stricto sensu*, that is, against arbitrary deprivations.[194]

Besides this interpretative drawback in the development of its jurisprudence, the African Court nevertheless took the opportunity to strengthen the protection of the cultural and religious rights of the Ogiek people.[195] In this sense, it expressly recognised that their eviction from the Mau Forest has 'rendered it impossible for the community to continue its religious practices and is an unjustifiable interference with the freedom of religion of the Ogiek,' amounting to a violation of Article 8 of the African Charter (the right to freedom of conscience).[196]

In addition, the African Court took the opportunity to note that 'in the context of indigenous peoples, the preservation of culture is of particular importance'.[197] By interpreting the African Charter under the light of the Cultural Charter for Africa,[198] the UN Declaration on Indigenous Peoples,[199] and the General Comment 21 of the UN Committee on Economic, Social and Cultural Rights,[200] the African Court highlighted the interconnection between culture, cultural identity and indigenous peoples' traditional lands. In the words of the Court, 'the Ogiek population has a distinct way of life centred and dependent on the Mau Forest Complex'.[201]

192 *Pueblo Bello Massacre* (n 104) para 120. See also *Mapiripán Massacre* (n 104) para 232.

193 *Ogiek* (n 5) para 154.

194 *Street Children* (n 10) para 144.

195 Nasirumbi (n 121) 500.

196 *Ogiek* (n 5) para 169. As highlighted by Judge Ferrer Mac-Gregor Poisot in his Separate Opinion in *Lhaka Honhat Association* the African Court analysed the right to religion of indigenous peoples as an autonomous right, separate and distinguishable from the right to culture but dependent on access to land and the natural environment, *Lhaka Honhat Association* (n 42) para 37.

197 *Ogiek* (n 5) para 180.

198 *Ogiek* (n 5) paras 178-179. See also arts 3 and 6 of the Cultural Charter for Africa adopted by the Organisation of African Unity in Accra, Ghana on 5 July 1976.

199 *Ogiek* (n 5) para 181.

200 As above. See also UNCESR, General Comment 21, Right of everyone 10 take part in cultural life (art 15, para 1(a) of the Covenant on Economic, Social and Cultural Rights), 21 December 2009, UN Doc E/C.12/GC/21, paras 36-37.

201 *Ogiek* (n 5) para 182.

Therefore, 'the restrictions on access to and eviction from the Mau Forest have greatly affected their ability to preserve these traditions'.[202]

The need to preserve the natural ecosystem of the Mau Forest Complex 'may in principle be justified to safeguard the 'common interest' in terms of Article 27(2) of the Charter'.[203] However, the pursuit of this legitimate aim has generated interference in the enjoyment of the cultural rights of the Ogiek population.[204] As a hunter-gatherer community, they get their means of survival from the forest, but not only; their own language, their own spiritual and traditional values are intrinsically connected with those traditional lands.[205]

State authorities were unable to specify in which particular manner the traditional practices and cultural activities of the Ogiek have contributed to the degradation of the Mau Forest.[206] Hence, because 'the purported reason of preserving the natural environment cannot constitute a legitimate justification for the Respondent's interference with the Ogieks' exercise of their cultural rights,'[207] it amounted to a violation of articles 17(2), (3), and 21 of the Charter.[208]

To conclude, it would be possible to say that in the first case in which the African Court dealt with indigenous peoples' rights, it embraced the already developed jurisprudence of the African Commission, in particular in *Endorois*.[209] Moreover, it has also benefited from the existing comparative jurisprudence of the Inter-American Court, notably in *Yakye Axa*. However, the African Court missed the opportunity to incorporate an important evolutionary aspect of the Inter-American Court's jurisprudence. That is, expanding the scope of protection of the right to life under the African Charter by means of including the positive obligation of state authorities to create conditions that could enable the enjoyment of a life in dignity, or a dignified life, according to their own cultural understandings, traditions and world views.[210] Finally, it is also important to highlight that when the

202 *Ogiek* (n 5) para 183.

203 *Ogiek* (n 5) para 188.

204 *Ogiek* (n 5) para 183.

205 *Ogiek* (n 5) para 182.

206 *Ogiek* (n 5) para 189.

207 As above.

208 *Ogiek* (n 5) paras 190 & 201.

209 *Ogiek* (n 5) para 153, footnote 39.

210 A Fuentes & M Vannelli 'Expanding the protection of children's rights towards a dignified life: The emerging jurisprudential developments in the Americas' (2021) 10 *Laws* 4 at 12; and Fuentes (n 6) 77.

African Court refers to the jurisprudence of the Inter-American Court, it does not mean that 'it is bound by decisions and statutes from other regional human rights systems'.[211] As explained above, when introducing the interpretative method of systemic integration, references to relevant international human rights instruments or jurisprudence are made exclusively with the purpose of providing additional understanding of the current evolution of the corpus juris of international human rights law.[212] In other words, the omitted reference to the jurisprudence of the Inter-American Court regarding the interconnection between the right to life, cultural identity and the recognition of the right to communal property has allegedly prevented indigenous peoples in Africa from claiming not only the protection of their possessed traditional lands and territories but also to claim the recognition of substantive living conditions that could enable or facilitate the development of their life in dignity.

4 Concluding remarks

The jurisprudence of the Inter-American Court has paved the way for enhanced protection of the right of indigenous peoples to their traditional lands and territories in Africa. It has not only recognised their right to communal property over their lands and natural resources that they traditionally used but also generated concrete safeguards for the protection of those rights when they need to be balanced vis-à-vis competing rights or legitimate aims (e.g., public interest, right to development, private property, etc.).

Most importantly, the Inter-American Court's jurisprudence stressed the importance of culture and the centrality of cultural identity as a component of the right to life *lato sensu* (Article 4 reading together with article 1(1) of the ACHR). When indigenous peoples are deprived of getting access to their traditional lands and territories, they are directly affected in the practice of their culture and religion and from enjoying their own cultural identity. According to the Inter-American Court, indigenous peoples' culture and traditions are intrinsically connected with their traditional lands; the latter is essential in the construction of indigenous peoples' cultural identity.

Thus, any restriction or interference with the enjoyment of the special relationship that indigenous peoples have with their traditional lands and territories would not only endanger their identity as distinguishable

211 *Ogiek* (n 5) para 71.

212 As stated by African Court, the Court 'can draw inspiration from pronouncements emerging from other supranational human rights bodies', *Ogiek* (n 5) para 71.

peoples but also – and most importantly – their possibility to enjoy a life in dignity or a dignified life, according to their own cultural understandings, traditions, and world views. According to the consolidated jurisprudence of the Inter-American Court, state authorities have an obligation to introduce 'positive measures to protect the right to life, even when it includes providing for vulnerable populations affected by extreme poverty',[213] or when they are dependent on their lands for the preservation of their physical and cultural survival.[214]

This far-reaching jurisprudence has inspired the development of equally inclusive and innovative case law within the African Commission and Court of Human and Peoples' Rights. The Commission was the first to benefit from this inter-continental cross-fertilisation. Especially in *Endorois*, it took the opportunity to expand the scope of protection of the rights enshrined within the African Charter by means of reading its provisions under the light of the relevant instruments part of the *corpus juris* of international human rights law. In particular, it draws inspiration from the UNDRIP, ILO Convention 169, and the jurisprudence of the Inter-American Court. Five different judgments of the latter Regional Court were extensively cited in *Endorois*.

The meticulous reviewing of the Inter-American Court's case law paved the way for the African Commission to incorporate, almost entirely, this jurisprudence into its own case law. The only missing link was the inherent interconnection between protecting the right to communal property over traditional lands and protecting their cultural identity by creating conditions for a decent life. In other words, the Commission did not fully explore the three-prong link between the right to communal property over traditional lands, the right to culture and cultural identity, and the right to life in lato sensu.

In *Ogiek*, it was the turn of the African Court of Human and Peoples' Rights to remediate this missed opportunity. The Regional Court embraced the findings of the African Commission, consolidating the recognition of indigenous peoples as different peoples, entitled to enjoy their own culture, including their own religious practices and their own distinctive cultural identity. Even though the notion of indigenous peoples could be potentially considered contested in the African context, it is clear that

213 *Xákmok Kásek* (n 14), concurring and dissenting opinion of Judge A Fogel Pedrozo, para 23.

214 *Saramaka* (n 27) para 90.

indigenous peoples' rights are indeed protected under the African Charter after this landmark judgment.[215]

Unfortunately, there were still some shortcomings. The African Court missed the opportunity to further develop the findings of the African Commission by recognising the missing link between the protection of communal property life, the right to culture and cultural identity, and the right to life *lato sensu.* On the contrary, it embraced a restrictive interpretation of the right to life under Article 4 of the Charter, which excluded the 'right to decent existence of a group'.[216] As clearly stated by the Court, 'Article 4 of the Charter relates to the physical rather than the existential understanding of the right to life'.[217] In other words, the restrictive interpretation of the right to life made by the Regional Court could, unfortunately, prevent millions of Africans from pleading for better life-related conditions that could facilitate the enjoyment of their fundamental rights.

Finally, despite the above-mentioned restrictive interpretation, we should praise both the African Commission and Court for their courageous opening for cross-fertilisation between regional human rights systems. Their evolving interpretation of the rights of indigenous peoples has promoted an open dialogue between different legal cultures that will certainly contribute to the strengthening and harmonisation of the *corpus juris* of international human rights law.

215 *Endorois* (n 4) para 147.

216 *Ogiek* (n 5) para 154.

217 As above.

Table of abbreviations

SERAC	Social and Economic Rights Action Centre
ACHR	American Convention on Human Rights
ESIA	Environmental and social impact assessment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
VCLT	Vienna Convention on the Law of Treaties

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