

PART II
INDIGENOUS PEOPLES
AND HUMAN RIGHTS

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*The Indigenous Peoples' Right to Lands and Natural Resources
in the Inter-American Human Rights System:
Preserving Cultural Identity while Ensuring Development*

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have developed an especially progressive jurisprudence on indigenous peoples' rights. In particular, they have recognised the special tie existing between indigenous communities and their ancestral lands and natural resources contained therein as the source of their distinct cultural identity. Thus, ensuring the rights to property, possession, enjoyment and exploitation of ancestral lands and natural resources is pivotal to guaranteeing the physical and cultural survival of the indigenous peoples concerned. However, the preservation of cultural identity and traditional values of indigenous peoples through the protection of their right to lands and natural resources often clashes with state or private companies' projects and development activities. The chapter illustrates the Inter-American jurisprudence with special attention to the use of precautionary and provisional measures and the design of adequate measures of reparation in cases concerning indigenous peoples' right to lands and natural resources. An assessment of whether this jurisprudence can be regarded as successful in striking a balance between the former and the right to development of the country as a whole is provided, arguing that there is a need for reinterpreting the notion of development, going beyond a purely economic meaning and rather encompassing the human dimension.

1. *Introduction*

Over the years, the Inter-American system of human rights has developed a particularly rich - and to a certain extent pioneering - jurisprudence on indigenous peoples' rights. Both the Inter-American Commission on

* The author is extremely grateful to Professors Tullio Scovazzi, Antonietta Di Blase and Valentina Vadi for their invaluable comments on earlier versions of this chapter.

Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) have dealt with a variety of indigenous peoples' rights, including civil and political rights and fundamental freedoms, as well as social, cultural and economic rights and have analysed violations of both individual and collective nature.¹ Relevant principles of the Inter-American jurisprudence on indigenous peoples' rights can be found in country, thematic, and case reports (the latter concerning admissibility, merits or friendly settlements) adopted by the IACHR, in advisory opinions and judgments of the IACtHR, and in resolutions of both organs concerning respectively precautionary and provisional measures.² The wealth of sources and references shows the increasing attention devoted to indigenous peoples' rights in the region.³ At

¹ On the notion of 'collective rights', Art. VI of the American Declaration on the Rights of Indigenous Peoples (adopted on 15 June 2016 by the General Assembly of the Organization of American States) establishes that 'indigenous peoples have collective rights that are indispensable for their existence, well-being, and integral development as peoples. In this regard, the States recognize and respect, the right of the indigenous peoples to their collective action; to their juridical, social, political, and economic systems or institutions; to their own cultures; to profess and practice their spiritual beliefs; to use their own tongues and languages; and to their lands, territories and resources. States shall promote with the full and effective participation of the indigenous peoples the harmonious coexistence of rights and systems of the different population, groups, and cultures'.

² An in-depth analysis of country and thematic reports of the Inter-American Commission on Human Rights (IACHR) and advisory opinions of the Inter-American Court of Human Rights (IACtHR) on issues concerning indigenous peoples is beyond the scope of this chapter. In this regard see, among others, the country reports issued by the IACHR on Bolivia, Brazil, Colombia, Ecuador, Guatemala, Mexico, Nicaragua, Paraguay and Peru, as well as IACHR, *Indigenous Women and Their Human Rights in the Americas*, OEA/Ser.L/V/II.Doc.44/17, 17 April 2017; *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; *Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas*, OEA/Ser.L/V/II.Doc.47/13, 30 December 2013; *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources*, OEA/Ser.L/V/II.Doc.56/09, 30 December 2009; *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco*, OEA/Ser.L/V/II.Doc.58, 24 December 2009; and *The Human Rights Situation of the Indigenous People in the Americas*, OEA/Ser.L/V/II.108 Doc. 62, 20 October 2000; IACtHR, Advisory Opinion No. 23, 15 November 2017 *The Environment and Human Rights*, paras. 48, 59, 67-68, 113, 138, 152, 156, 164, 166 and 169; and Advisory Opinion No. 22, 26 February 2016 *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System*, paras. 71-84.

³ Acknowledging the need to devote special attention to the subject of indigenous peoples' rights, in 1990 the IACHR created the Office of the Special Rapporteur on the Rights of Indigenous Peoples <<http://www.oas.org/en/iachr/indigenous/default.asp>>. One of the members of the IACHR is appointed Special Rapporteur and serves

the core of this wealth of resources lies the search for a balance between the preservation of cultural identity and the right to development.

In cases involving indigenous peoples, both Inter-American human rights mechanisms consider that legislation, standards, policies, and practices must be read and interpreted through the lenses of cultural identity. The IACHR affirmed that 'from the standpoint of human rights, a small corn field deserves the same respect as the private property of a person that a bank account or a modern factory receives'.⁴ This notion is at the basis of some landmark decisions of the Inter-American organs and, in general, is the pivot of their jurisprudence on indigenous peoples' rights. In fact, they acknowledge the special tie existing between indigenous peoples and their ancestral lands and natural resources therein as the source of their distinct cultural identity. This interpretation has led to a progressive jurisprudence on indigenous peoples' rights over ancestral lands and their resources.

Nevertheless, recent instances show that the approach of the Inter-American human rights mechanisms has been met by increasing discomfort and resistance by states. This is mostly due to the underlying tension between an unrestricted defence of the right to lands and natural resources of indigenous peoples and a thrust towards projects and activities in strategic sectors that, while indisputably clashing with the aforementioned values, may ensure substantial development and improvement of living conditions for society at large.

This chapter aims at providing a stocktaking on whether and to what extent the Inter-American human rights system has been successful in preserving the cultural identity of indigenous peoples through the protection of their rights over ancestral lands and natural resources, while

in this capacity for two years, mandated to: a) promote the development of the Inter-American human rights system as it applies to the protection of indigenous peoples and, in particular, to advance and consolidate the system's jurisprudence on the matter and to promote the access of indigenous peoples to the system; b) to participate in the analysis of individual petitions and requests for precautionary measures that allege violations of the rights of indigenous peoples or of their members; c) to support onsite visits to member countries of the Organization of the American States (OAS) in order to delve more deeply into the observation of the general situation or to investigate particular situations involving indigenous peoples, as well as to participate in the preparation of the respective reports on such visits; d) to prepare thematic reports on subjects pertaining to the human rights of the indigenous peoples of the Americas; e) to carry out and organise activities aiming at raising awareness and analysing indigenous peoples' rights; and f) until 2016, to collaborate with the OAS Permanent Council's Working Group to draft the American Declaration on the Rights of Indigenous Peoples.

⁴ IACHR, *Report on Guatemala*, OEA/Ser.L/V/II.83 Doc. 16 rev., 1st June 1993, chapter III.

ensuring development of the country as a whole. The subject is complex and has already been explored by several scholars. Hence, some clarifications on the scope of this chapter are in order. Although in the Inter-American jurisprudence there are numerous reports, resolutions, and Judgments on indigenous peoples that involve enforced disappearance, torture, massacres, and arbitrary killings, this chapter will focus on those cases that deal with violations of a collective nature and concern the right to lands and natural resources in connection with the preservation of the cultural identity of indigenous peoples. In fact, while also other human rights violations affecting members of an indigenous community certainly have consequences on the development of the community as a whole and can be interpreted in the light of the concept of ‘cultural identity’, these aspects have not yet been explored in-depth by the IACHR and the IACtHR.⁵ Implications on the cultural identity of indigenous peoples have been mainly considered when dealing with cases concerning the right to property in relation to lands and natural resources and the effects of certain activities and projects (e.g. logging, construction of dams, mining or oil-related activities) on the indigenous community as a whole. This chapter will thus focus on the latter category of cases, moving from the premise that ancestral territories, natural resources, and land in general are among the pillars of the cultural identity of indigenous peoples. In fact, in such cases ensuring indigenous peoples’ rights to property, possession, and exploitation of natural resources is a means to actually guaranteeing the physical and cultural survival of the indigenous communities concerned.

To pursue this objective, the Inter-American human rights mechanisms have attempted to use the tools at their disposal in an original and culturally sensitive manner. On the one hand, precautionary and provisional measures have been used to prevent irreparable harm to the lands and natural resources – and thus eventually to the cultural identity – of indigenous peoples. On the other hand, where violations had already been perpetrated, special

⁵The IACtHR has concisely referred to the cultural implications for indigenous peoples of certain gross human rights violations, such as enforced disappearance, sexual violence, massacres and forced displacement, in particular with regard to the values relating the respect for mortal remains and their significance, funerals and connected rituals, as well as the relationship between physical and spiritual integrity. In this regard, see, among others, IACtHR, Case *Bámaca Velásquez v Guatemala*, Judgment 22 February 2002, Ser. C No. 91, para. 81; Case *Moiwana Community v Suriname*, Judgment 15 June 2005, Ser. C No 124, paras. 95, 98, 100 and 103; Case *Chitay Nech v Guatemala*, Judgment 25 May 2010, Ser. C No. 212, para. 146; Case *Fernández Ortega et al. v Mexico*, Judgment 30 August 2010, Ser. C No. 215, para. 126; and Case *Río Negro Massacres v Guatemala*, Judgment 4 September 2012, Ser. C No. 250, para. 160.

care has been devoted to the design of measures of reparation directed at addressing the collective dimension of the damage inflicted, at restoring – to the extent possible – the original situation before the violation took place and at preserving the cultural identity of the community at stake. The design and use of precautionary and provisional measures and of measures of reparation in cases concerning the right to lands and natural resources of indigenous peoples will be analysed in this chapter, with the aim of assessing whether they were successful means in granting the preservation of the cultural identity of the indigenous communities concerned while, at the same time, ensuring development and protection of the rights of third parties and society at large.

The first part of the chapter provides a brief overview of the interpretation of key notions and principles concerning indigenous peoples, the rights to lands and natural resources, cultural identity, and development in the jurisprudence of the IACHR and IACtHR. Through the analysis of some seminal resolutions and judgments, the following sections of the chapter illustrate the use of precautionary and provisional measures on the one hand and the design of measures of reparation on the other in cases concerning indigenous peoples' rights. Some concluding observations on the existing jurisprudence and future perspectives are provided, highlighting the challenges to strike an effective balance between the preservation of cultural identity and traditional values of indigenous peoples through the protection of their right to lands and natural resources and the promotion of development activities and projects.

2. Key Notions and Principles in the Inter-American Jurisprudence

In order to better understand the peculiarities of the Inter-American jurisprudence on indigenous peoples and their right to lands and natural resources, this section briefly examines how the IACHR and the IACtHR have developed certain key notions. The interpretative work of the IACHR and the IACtHR is even more relevant bearing in mind that the American Convention on Human Rights (ACHR) does not contain any provision explicitly referring to indigenous peoples, cultural identity, lands, territories, and natural resources.⁶

⁶ In their jurisprudence on cases concerning indigenous peoples, both the IACHR and the IACtHR have referred to other international legal instruments – binding and not – rel-

2.1. *Indigenous Peoples, Tribal Peoples, and Afro-Descendent Communities*

While this chapter refers to ‘indigenous peoples’, it is worth noting that the Inter-American jurisprudence on indigenous peoples is also applicable to tribal peoples and Afro-descendent communities. The IACHR and the IACtHR have adopted resolutions, reports, and judgments concerning these subjects. While the Inter-American human rights organs consider that there is no need to establish a precise definition of ‘indigenous peoples’ because, given their immense diversity, it would run the risk of being restrictive, ‘tribal peoples’ are considered those who are ‘not indigenous to the region, but that share similar characteristics with indigenous peoples, such as having social cultural and economic traditions different from other sections of the national community, *identifying themselves with their ancestral territories*, and regulating themselves, at least partially, by their own norms, customs and traditions’.⁷ The IACtHR held that, pursuant to Art. 1, para. 1, of the ACHR, states parties are under an obligation to adopt special measures that guarantee the full exercise of the rights of members of indigenous and tribal communities.⁸

The Inter-American organs have assimilated peoples of African descent to tribal peoples, noting that

evant on the subject. In particular, they have interpreted the provisions of the American Convention on Human Rights (ACHR) in the light of the 1989 Convention No. 169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries; the 1992 Rio Declaration on Environment and Development; and the 2007 United Nations Declaration on the Rights of Indigenous Peoples. It has been argued that the IACtHR’s jurisprudence is more conservative than these other international legal instruments. In this sense, see Jo Pasqualucci, ‘International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples’ (2009) 27 *Wisconsin International Law Journal* 51, 54 and 81. Furthermore, to better interpret the notion of ‘cultural identity’, reference has been made to a number of instruments adopted by the United Nations Educational Scientific and Cultural Organization (UNESCO), namely: the 1976 UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it; the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore; the 2001 UNESCO Universal Declaration on Cultural Diversity; the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage; and the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

⁷ IACtHR, Case *Saramaka v Suriname*, Judgment 28 November 2007, Ser. C No. 172, para. 79 (emphasis added).

⁸ *Ibid.* 85.

‘some Afro-descendants remain as ethnically and culturally distinct collectivities that share an identity, a common origin, a common history and tradition, such as for example, the Maroon in Suriname, the *quilombos* in Brazil, or the Afro-descendant communities in Colombia and Ecuador. In some cases, they went through processes of syncretism with indigenous peoples in the region, leading to distinct ethnic groups like the Garifuna that inhabit the Atlantic coast of Honduras, Guatemala and Belize, among others. Therefore, these are dynamic and evolving societies which have undergone processes of change over the years and that maintain in whole or in part their own social, cultural, or economic institutions. [...] *Certain Afro-descendant communities maintain an especial and collective relationship with the territory that they inhabit, which indicates the existence of some sort of consuetudinary land tenure system.* They also have their own forms of organization, livelihoods, language, among other elements, that account for the habitual exercise of their self-determination.’⁹

Self-identification¹⁰ and cultural distinctiveness play a crucial role, together with the relationship with ancestral lands, in determining who should be considered a member of an indigenous or tribal community. Afro-descendent communities can be regarded as tribal peoples ‘regardless of the denomination received internally by the community or that its existence is formally recognized or not, the key element is that it maintains its own traditional cultural practices and its members self-identify as part of a group with a distinct identity’.¹¹ Moreover, the IACtHR specified that, even in cases where some individual members live outside of the traditional territory and in a way that may differ from other members of the community and in accordance with traditional customs, this does not affect the distinctiveness of the group as a whole.¹² In other words, the lack of individual identification with the traditions, laws, and customs of the community by some members may not be used as a pretext to deny the concerned people their right to juridical personality.

⁹ IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, paras. 28 and 30 (emphasis added).

¹⁰ In this regard, see also Arts. I, para. 2, and VIII of the 2016 American Declaration on the Rights of Indigenous Peoples.

¹¹ IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, para. 31.

¹² IACtHR, *Case Saramaka*, para. 164.

2.2. *Territories and Natural Resources*

In the Inter-American jurisprudence, the concept of ‘territories’ is extensively interpreted so as to encompass not only traditionally used lands, but also natural resources,¹³ with the aim to include ‘not only physically occupied spaces but also those used for their cultural or subsistence activities, such as routes of access’.¹⁴

Moreover, the notion of ‘natural resources’ encompasses living and non-living resources that lie on and within the ancestral lands.¹⁵ Thus, natural resources include air, land, water, natural gas, coal, oil petroleum, minerals, wood, topsoil, fauna, flora, forests, and wildlife. Renewable natural resources are those that reproduce or renew and include animal life, plants, trees, water, and wind. Non-renewable resources are irreplaceable once extracted from water or soil and include gold, silver, fossil fuels, diamonds, natural gas, copper, and ore including forests, fauna, flora, water, minerals, and other potential energy sources, including natural gas and petroleum.¹⁶

2.3. *The Distinct Cultural Identity of Indigenous Peoples and Their Relationship with Lands and Natural Resources*

The distinct cultural identity¹⁷ of indigenous peoples is a crucial element

¹³ *Ibid.*, footnote No. 63.

¹⁴ IACHR, *Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources*, para. 40.

¹⁵ IACtHR, *Case Saramaka*, para. 122.

¹⁶ IACHR, *Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources*, para. 41. In particular, on waters, see IACHR, *Annual Report 2015*, Chapter 4.A – *Access to Water in the Americas: An Introduction to the Human Right to Water in the Inter-American System*, para. 26.

¹⁷ Section III of the 2016 American Declaration on the Rights of Indigenous Peoples is devoted to ‘cultural identity’. In particular, Art. XIII establishes that: ‘1. Indigenous peoples have the right to their own cultural identity and integrity and to their cultural heritage, both tangible and intangible, including historic and ancestral heritage; and to the protection, preservation, maintenance, and development of that cultural heritage for their collective continuity and that of their members and so as to transmit that heritage to future generations. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs. 3. Indigenous peoples have the right to the recognition and respect for all their ways of life, world views, spirituality, uses and customs, norms and traditions, forms of social, economic and political

for their identification, but also a guiding interpretative principle to ensure the effective enjoyment of fundamental rights and freedoms. In this sense, the IACtHR held that 'when [states] interpret and apply their domestic legislation, [they] must take into account the specific characteristics that differentiate the members of the indigenous peoples from the general population and that constitute their cultural identity. The Court must apply that same reasoning ... to assess the scope and content of the articles of the American Convention'.¹⁸ Moreover, 'under the principle of non-discrimination established in Article 1(1) of the Convention, recognition of the right to cultural identity is an ingredient and a crosscutting means of interpretation to understand, respect and guarantee the enjoyment and exercise of the human rights of indigenous peoples and communities protected by the Convention and, pursuant to Article 29(b) thereof, also by domestic law'.¹⁹

Both the IACHR and the IACtHR pointed out that the cultural identity of indigenous peoples is inextricably linked to their relationship with the ancestral lands they have traditionally used and occupied and the natural resources therein.²⁰ In this regard, it has been emphasised that 'land

organization, forms of transmission of knowledge, institutions, practices, beliefs, values, dress and languages, recognizing their inter-relationship as elaborated in this Declaration'. Moreover, relevant principles are enshrined in Art. XVI, concerning 'indigenous spirituality'; Art. XIX, concerning the 'right to protection of a healthy environment'; and Art. XXVIII, concerning the 'protection of cultural heritage and intellectual property'.

¹⁸ IACtHR, Case *Yakye Axa Community v Paraguay*, Judgment 17 June 2005, Ser. C No. 125, para. 51.

¹⁹ IACtHR, Case *Kichwa Indigenous Peoples of Sarayaku v Ecuador*, Judgment 27 June 2012, Ser. C No. 245, para. 213.

²⁰ Art. XXV of the 2016 American Declaration on the Rights of Indigenous Peoples provides: '1. Indigenous peoples have the right to maintain and strengthen their distinctive spiritual, cultural, and material relationship to their lands, territories, and resources and to assume their responsibilities to preserve them for themselves and for future generations. 2. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 3. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 4. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned. 5. Indigenous peoples have the right to legal recognition of the various and particular modalities and forms of property, possession and ownership of their lands, territories, and resources in accordance with the legal system of each State and the relevant international instruments. States shall establish the special regimes appropriate for such recognition, and for their effective demarcation or titling'.

is more than merely a source of subsistence for them; it is also a necessary source for the continuation of the life and cultural identity'.²¹ Lands and natural resources are part of the social, ancestral and spiritual essence of indigenous peoples and this consideration deeply influences the Inter-American jurisprudence on the subject, especially concerning the right to property. Since its first landmark Judgment concerning indigenous peoples' right to property over ancestral lands, the IACtHR affirmed that

'among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; *the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.*'²²

The IACtHR also clarified that

[the relationship between indigenous peoples and their ancestral lands] can be expressed in different ways depending on the indigenous group concerned and its specific circumstances, and ... that the relationship with the land must be possible. The ways in which this relationship is expressed may include traditional use or presence, through spiritual or ceremonial ties; sporadic settlements or cultivation; traditional forms of subsistence such as seasonal or nomadic hunting, fishing or gathering; use of natural resources associated with their customs or other elements characteristic of their culture. The second element implies that community members are not prevented, for reasons beyond their control, from carrying out those activities that reveal the enduring nature of their relationship with their traditional lands.²³

²¹ IACtHR, Case *Saramaka*, para. 82.

²² IACtHR, Case *Mayagna (Sumo) Awas Tingni v Nicaragua*, Judgment 31 August 2001, Ser. C No. 79, para. 149 (emphasis added).

²³ IACtHR, Case *Kichwa Indigenous Peoples of Sarayaku*, para. 148 (emphasis added).

In the IACtHR's words, the possession of ancestral lands is indelibly recorded in the historical memory of the members of indigenous communities and 'their relationship with the land is such that severing that tie entails the certain risk of an irreparable ethnic and cultural loss, with the ensuing loss of diversity'.²⁴

Furthermore, the IACtHR affirmed that the cultural identity – and therefore the survival – of indigenous peoples is determined also by their relationship with natural resources present in their ancestral lands:

'the culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories *and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity*. ... Therefore, 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, must be safeguarded by Article 21 of the American Convention [on the right to property].'

In this regard, the Court has previously asserted that the term "property" used in said Article 21 includes those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value'.²⁵ The IACtHR held that

'the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if *that right were not connected to the protection of natural resources in the territory. Therefore, the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their way of living*'.²⁶

The protection of the right to own, manage, exploit and develop ancestral lands and natural resources of indigenous peoples is instrumental to prevent their extinction. It has been observed that, while the Inter-American human

²⁴ IACtHR, Case *Yakye Axa Community*, paras. 215-216.

²⁵ *Ibid.* 135 and 137 (emphasis added). In the same sense, see Case *Sawohyamaxa Indigenous Community v Paraguay*, Judgment of 29 March 2006, Ser. C No. 146, para. 121.

²⁶ IACtHR, Case *Kichwa Indigenous Peoples of Sarayaku*, para. 146 (emphasis added).

rights mechanisms have traditionally relied on Art. 21 of the ACHR (right to property), reaching relevant findings concerning indigenous peoples' right to collective property in accordance with their customs and traditions,²⁷ the special connection existing between indigenous peoples and their ancestral lands and natural resources would call for a different interpretative principle, namely an analysis under the realm of Art. 4 of the ACHR (right to life).²⁸ Therefore, this is an area where jurisprudential development could take place.²⁹ However, it is noteworthy that, pursuant to the Inter-American jurisprudence, the notion of 'survival of indigenous peoples' (although analysed within the realm of Art. 21 of the ACHR), must be interpreted in a broad manner and is not tantamount to mere physical existence. Indeed, it must be understood as the ability of indigenous peoples to 'preserve, protect and guarantee the special relationship that they have with the territory, so that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system customs, beliefs and traditions are respected, granted and protected'.³⁰

2.4. The Principles Governing the Inter-American Jurisprudence on Indigenous Lands and Natural Resources

The IACtHR summarised its jurisprudence on indigenous lands and natural resources in the following way:

'1) possession of indigenous peoples' land produces equivalent effects to the formal title to property granted by the state;

²⁷ See, among others, IACtHR, *Case Xucuru Indigenous Peoples v Brazil*, Judgment of 5 February 2017 (currently available only in Spanish), Ser. C No. 346, para. 115.

²⁸ Thomas Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court' (2013) 35 *University of Pennsylvania Journal of International Law* 115.

²⁹ *Ibid.* 161-171. For a slightly different reading of the IACtHR's jurisprudence on the issue, according to which the Court would already be duly applying the notion of 'dignified life' in cases involving indigenous peoples, see Alejandro 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* 229; and Tullio Scovazzi, 'Los derechos a la alimentación, al agua y a la vivienda según la Corte Interamericana de Derechos Humanos', in Luis Efrén Ríos Vega, Irene Spigno, Magda Yadira Gómez Robles (eds), *Estudios de casos líderes latinoamericanos* (Tirant Lo Blanch 2019) 213.

³⁰ IACHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources*, para. 233.

2) traditional possession gives indigenous peoples the right to claim the formal recognition of the title to property and its registration; 3) the members of the indigenous communities who, due to causes beyond their control, have left or lost possession of their traditional lands maintain the right of property over them, even in the absence of a formal title, except when the lands have been legitimately transferred to third parties in good faith; 4) the state must delimit, demarcate and grant a title of collective property over the lands to members of indigenous communities; 5) members of indigenous communities who have involuntarily lost possession of their land which has been legitimately acquired by third parties in good faith, have the right to recover their territories or to obtain other lands of equal extension and quality; 6) states must guarantee the effective property of territories to indigenous peoples and refrain from carrying out acts that could lead to agents of the state, or third parties acting with their acquiescence or tolerance, to affect the existence, value, use or enjoyment of such territories; 7) States must guarantee the right of indigenous peoples to effectively control and own their lands without any external interference from third parties; and 8) states must guarantee the right of indigenous peoples to control and use their territory and natural resources.³¹

Therefore, states have a number of obligations, including of a positive nature, in order to ensure the full enjoyment of indigenous peoples' rights to lands and natural resources and, through this, to preserve their cultural identity and, ultimately, their survival. When indigenous peoples have been forced to move from their ancestral lands and to relocate in 'alternative' ones, their foremost right is to recover ancestral territories and, if this is impossible, to enjoy the same right to property over alternative lands.³² The main challenges arise when third parties – including corporations – are involved, and when the latter or the State, directly or indirectly, claim the use or exploitation of indigenous peoples' lands and natural resources in order to ensure development of the country as a whole. As aptly noted

³¹ IACtHR, Case *Xucuru Indigenous Peoples*, para. 117 (unofficial translation by the author).

³² IACtHR, Case *Kuna de Madugandí and Emberá de Bayano v Panama*, Judgment of 14 October 2014, Ser. C No. 284, para. 122; and Case *Garífuna de Punta Piedra v Honduras*, Judgment of 8 October 2015, Ser. C No. 304, para. 325.

by the IACHR, ‘historically, the desire of non-indigenous society for such resources has resulted in the removal, decimation or extermination of many indigenous communities’.³³

2.5. Indigenous Peoples and the Right to Progressive Development

While the ACHR does not contain any explicit definition or reference to the notions of indigenous peoples, lands, territories, cultural identity and natural resources, its Art. 26 concerns ‘progressive development’ and requires states parties to ‘adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of the American States as amended by the Protocol of Buenos Aires’. Art. XXIX of the 2016 American Declaration on the Rights of Indigenous Peoples (the 2016 American Declaration) also deals with the right to development, clarifying in its first paragraph that ‘indigenous peoples have the right to maintain and determine their own priorities with respect to their political, economic, social, and cultural development in conformity with their own world view. They also have the right to be guaranteed the enjoyment of their own means of subsistence and development, and to engage freely in all their economic activities’.³⁴

The two mentioned provisions show that, while generically speaking of a right to development, there may be a conflict between the right to development of indigenous peoples and that of the rest of society. Paragraphs 3 to 6 of Art. XXIX of the 2016 American Declaration explicitly deal with this potentially troubled relationship and set forth a number of principles, mostly building upon the jurisprudence of the IACHR and the IACtHR on the subject:

‘3. Indigenous peoples have the right to be actively involved in developing and determining development programmes

³³ IACHR, *Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources*, para. 179.

³⁴ Paragraph 2 of Art. XXIX of the 2016 American Declaration on the Rights of Indigenous Peoples reads as follows: ‘This right includes the development of policies, plans, programmes, and strategies in the exercise of their right to development and to implement them in accordance with their political and social organization, norms and procedures, their own world views and institutions’.

affecting them and, as far as possible, to administer such programmes through their own institutions.

4. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

5. Indigenous peoples have the right to effective measures to mitigate adverse ecological, economic, social, cultural, or spiritual impacts for the implementation of development projects that affect their rights. Indigenous peoples who have been deprived of their own means of subsistence and development have the right to restitution and, where this is not possible, to fair and equitable compensation. This includes the right to compensation for any damage caused to them by the implementation of state, international financial institutions or private business plans, programmes, or projects.³⁵

On this delicate relationship, the IACHR further observed that

‘the States of the Americas, and the populations that compose them, have the right to development. Such right to development implies that each state has the freedom to exploit its natural resources, including through the granting of concessions and acceptance of international investment, but development must necessarily be compatible with human rights, and specifically with the rights of indigenous and tribal peoples and their members. There is no development as such without full respect for human rights. This imposes mandatory limitations and duties on state authorities. In particular, development must be managed in a sustainable manner, which requires that states ensure protection of the environment, and specifically of the environment of indigenous and tribal ancestral territories. As the IACHR has explained, the norms of the Inter-American human rights system neither prevent nor discourage development; rather,

³⁵ For a critical reading of this jurisprudence, see Pasqualucci, ‘International Indigenous Land Rights’, 82-96.

they require that development takes place under conditions that respect and ensure the human rights of the individuals affected. As set forth in the [1994] Declaration of Principles of the Summit of the Americas: Social progress and economic prosperity can be sustained only if our people live in a healthy environment and our ecosystems and natural resources are managed carefully and responsibly.³⁶

Because indigenous peoples' lands are rich in natural resources, the latter have often been extracted, exploited and used in the context of large-scale projects and development activities, including the construction of roads, pipelines, dams, ports or the like, mining, logging, fishing, as well as concessions for the exploration or exploitation of natural resources, including natural gas, oil, and petroleum.³⁷

Development projects and activities usually have substantial human, social, health, cultural and environmental impacts. Nonetheless, in the light of indigenous peoples' special relationship with their ancestral lands, such activities may imply an irreparable harm to the cultural identity of indigenous peoples and, eventually, lead to their extinction.

In this context, a first relevant issue concerns who is the right-holder when it comes to the exploitation of natural resources located in the ancestral lands of indigenous peoples and, when such exploitation is carried out by third parties – be they state authorities or private entities, including corporations – what are their obligations vis-à-vis indigenous peoples. Another issue to be addressed concerns the limitations that can be posed to development activities (private, public or of a mixed nature) in case they are likely to produce an irreparable impact on the indigenous peoples' territories and, thus, threaten their survival. The challenge here is to ensure that initiatives that may grant the prosperity of thousands of people are not executed at the expenses of the indigenous communities who own and live in the areas concerned.

2.6 States' Positive Obligations to Secure Indigenous Peoples' Rights to Use, Exploit, and Enjoy Their Lands and Natural Resources

As already mentioned, the natural resources found on and within indigenous peoples' lands are their property. Therefore, indigenous peoples

³⁶ IACHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources*, para. 204.

³⁷ *Ibid.* 221 and 268.

have the right to use, exploit, and enjoy such resources to preserve their life, lifestyle, and cultural identity. States are under a positive obligation to adopt effective measures, including of a legislative nature, to secure indigenous peoples' rights, also when the indigenous peoples concerned lack a formal title of property over the lands at stake. Indigenous peoples must be formally and effectively enabled to claim such rights over natural resources and lands. In principle, indigenous peoples can decide whether and how to exploit the natural resources present in their lands, nevertheless being under the general obligation to avoid any ecological deterioration and irreparable harm. The indigenous community concerned is entitled to establish priorities and strategies for the use of territories and natural resources, with a view at ensuring self-development.

Granting concessions for the exploration or exploitation of natural resources in indigenous territories that have not been titled, demarcated or protected by the state without complying with the requirements of prior consultation and other related safeguards (including environmental and social impact-assessment and free informed consent) would be a breach of the state's international obligations. Pursuant to the Inter-American jurisprudence, if extraction, exploitation or other development activities are to take place in indigenous peoples' lands, states have:

'(i) the duty to adopt an appropriate and effective regulatory framework, (ii) the obligation to prevent violations of human rights, (iii) the mandate to monitor and supervise extraction, exploitation, and development activities, (iv) the duty to guarantee mechanisms of effective participation and access to information, (v) the obligation to prevent illegal activities and forms of violence, and (vi) the duty to guarantee access to justice through investigation, punishment and access to adequate reparations for violations of human rights committed in these contexts.'³⁸

Moreover, states are under a general obligation to prevent environmental damage, which, in the case of indigenous peoples, may have a special impact that goes beyond prejudices to the health of individuals and concerns the physical and cultural survival of an entire community. This positive obligation applies in cases of illegal activities and forms of violence against the indigenous population in ancestral lands affected by development

³⁸ IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, para. 5.

projects and initiatives.’³⁹

The Inter-American human rights mechanisms held that

‘the penetration of settlers and infrastructural or extractive projects in th[e] territories [of indigenous peoples], bring about extremely serious consequences in the field of health, given that the entry of inhabitants who are alien to their territories entails the entry of illnesses for which aboriginal populations lack developed immunological defences. The epidemics which have been unleashed in this manner among different indigenous peoples on the continent have decimated the population, and in some cases they have brought the corresponding ethnic groups to the point of being at risk of disappearance.’⁴⁰

Bearing in mind the extreme vulnerability of indigenous peoples in this regard, states are expected to adopt special preventive measures, in particular when indigenous peoples in voluntary isolation or initial contact are concerned. Such special measures must be effective in the face of activities carried out both by state and non-state actors, including enterprises and, in particular, foreign companies.⁴¹

When the carrying out of legal extraction, exploitation and development activities – or the issuing of concessions for such purposes – is considered, prior identification and proper monitoring of the impact that a specific project or activity may have, are required, entailing the obligation to provide information, participation of the indigenous peoples concerned in the decision-making process and the establishment of a judicial recourse.

For the purposes of granting extractive concessions or undertaking development and extraction plans and projects over natural resources in indigenous territories, the IACtHR has identified three mandatory conditions that apply when states are considering approval of such plans or projects: (a) compliance with the international law of expropriation, as reflected in Art. 21 of the ACHR; (b) non-approval of any project that would threaten the physical or cultural survival of the group; and (c) approval only after ensuring effective participation –and, where applicable, previous, free and informed consent–, a prior environmental and social

³⁹ IACHR, *Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources*, paras. 268-270.

⁴⁰ *Ibid.* 271.

⁴¹ On states’ obligations vis-à-vis foreign or transnational companies, see IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, paras. 76-81 and 141-148.

impact assessment conducted with indigenous participation, and reasonable benefit-sharing.⁴²

Once an authorisation or permit to conduct development or extractive activities in indigenous peoples' lands is issued, ongoing monitoring is required while the project is carried out⁴³ and if these activities or projects are in the hands of third parties, states retain the obligation to supervise and oversee them. The IACHR has pointed out that

‘to be compatible with the special obligations concerning indigenous peoples ..., supervision and control mechanisms must incorporate guarantees to ensure their specific rights. Such mechanisms must verify whether, once the project is approved, violations of the right to collective property, under the terms developed by the Inter-American system and other applicable international standards, are taking place. As noted by the IACHR, this implies referring not only to the impact on the natural habitat of the traditional territories of indigenous peoples, for example, but also to the special relationship that links these peoples to their territories, including their own forms of economic livelihood, their identities and cultures, and their forms of spirituality. These mechanisms must also enable a determination as to whether the plans or projects being implemented are affecting the ability of indigenous peoples ... to use and enjoy their lands and natural resources in accordance with their customary law, values, customs and mores.’⁴⁴

⁴² On the criteria to be applied on benefit-sharing; prior environmental and social impact assessments; and identification of alternatives and mitigation measures, see, in particular, IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, paras. 160 and 213-224; and IACHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources*, paras. 186-187 and 237-267. See also IACtHR, *Case Kichwa Indigenous Peoples of Sarayaku*, para. 157; and *Case Garifuna Community Triunfo de la Cruz v Honduras*, Judgment of 8 October 2015, Ser. C No. 305, paras. 156-162. In particular, with regard to environmental and social impact assessment, the IACtHR refers to the 2004 Akwé: Kon Voluntary Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. Adopted by the Secretariat of the Convention on Biological Diversity and available at <https://www.cbd.int/doc/publications/akwe-brochure-en.pdf>.

⁴³ IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, para. 6.

⁴⁴ *Ibid.* 102.

Whenever significant ecological or other harm is being caused to indigenous or tribal territories because of development or investment projects or plans or extractive concessions, the latter become illegal and states have a duty to suspend them, repair the environmental damage, and investigate and sanction those responsible for the harm.⁴⁵

Overall, the IACHR and IACtHR have shown particular care in seeking a balance between indigenous peoples' right to lands and natural resources and the legitimate interest to sustainable exploitation of such resources. As a matter of fact, the right to property is not an absolute one and may be restricted for reasons of public utility or social interest. However, restrictions can be applied only under specific and exceptional circumstances⁴⁶ and it must be kept in mind that, when exploitation of indigenous peoples' territories is concerned, besides their right to property, their very survival is at stake. The IACHR noted with concern that

'human rights are increasingly perceived as an obstacle to economic development when in fact they are its precondition. ... It is also of concern to the Commission that the majority of the benefits derived from those projects tend to be enjoyed by others and not the indigenous peoples and Afro-descendent communities which are the most negatively affected. Additionally, the zones where extractive projects are implemented report low levels of socioeconomic development.'⁴⁷

Accordingly, the IACHR has aptly suggested that the notion of 'development' itself should be revised and interpreted in a way that goes beyond economic gain and progress, but rather focuses on general human development.

Although the Inter-American jurisprudence is well established and is today reflected and enshrined in the domestic legislation of many states in the Americas, actual violations of the ACHR continue to occur. Precautionary and provisional measures are used respectively by the IACHR and IACtHR in order to prevent irreparable harm and have been granted in several cases concerning indigenous peoples. Similarly, where

⁴⁵ IACHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources*, para. 216.

⁴⁶ IACtHR, *Case Yakye Axa Community*, para. 144.

⁴⁷ IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, para. 24.

breaches of states parties' obligations vis-à-vis indigenous peoples' right to land and natural resources have been found, the Inter-American human rights mechanisms have been called to determine the adequate measures of reparation to redress the specific harm caused. Both mechanisms can play a preventive role through precautionary and provisional measures and a restorative function through the determination of measures of reparation. When it comes to provisional measures, the IACtHR has been as proactive as the IACHR and oftentimes its action has been triggered precisely by the IACHR, mostly when the latter's precautionary measures were not being implemented by the state concerned. A similar reasoning holds true with regard to measures of reparation: while indeed, only the IACtHR can order them and quantify the amounts when it comes to determining adequate compensation, also the IACHR recommends measures of reparation in its reports on individual complaints. The interpretation given to the notion of measures of reparation by the two mechanisms is equally comprehensive. Hence, the roles played by the two Inter-American mechanisms in terms of prevention and redress vis-à-vis human rights violations concerning indigenous peoples are complementary and mutually reinforcing.

3. The Use of Precautionary and Provisional Measures

The IACHR can, on its own initiative or at the request of a party, grant the adoption of precautionary measures from states in serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the Inter-American system. Therefore, precautionary measures granted by the IACHR concern cases on which a petition has been lodged, but also situations that have not yet been formally brought to its attention. Art. 25 of the IACHR Rules of Procedure clarifies that 'serious situation' refers to a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the system; 'urgent situation' refers to risk or threat that is imminent and can materialise, thus requiring immediate preventive or protective action; and 'irreparable harm' refers to injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.

Precautionary measures aim at protecting persons or groups of persons. The beneficiaries may be determined through their geographic location

or membership in, or association with, a group, people, community or organisation. Throughout the years, the IACHR has requested the adoption of precautionary measures concerning one or more duly identified members of indigenous communities or the entire community as such.

With regard to the IACtHR, pursuant to Art. 63, para. 2, of the ACHR, ‘in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission’.

Although both the IACHR and the IACtHR can grant measures directed at avoiding irreparable harm, this section will make limited reference to provisional measures ordered by the IACtHR and instead focus on precautionary measures granted by the IACHR. The choice is due to the fact that the jurisprudence of the IACHR is broader in its regard and its precautionary measures are usually adopted at an earlier stage, where the preventive function could be exercised at its best – thus allowing a realistic assessment of their potential and impact.

3.1. Precautionary Measures to Protect the Life or Personal Integrity of Indigenous Peoples

On multiple occasions, the IACHR granted precautionary measures where it deemed that external interferences could encompass risks to the life or personal integrity of members of indigenous communities. In these cases, the IACHR used precautionary measures in their most traditional function, i.e. the protection of persons and, in particular, of their right to life or personal integrity. This has played a crucial role in cases where members of indigenous peoples were subjected to harassment, threats or reprisals, a fact that is not infrequent, especially where they protest against certain extractive or development projects.

For instance, in the case of the Teribe and Bribri of Salitre indigenous peoples, in Costa Rica, the IACHR found that the members of these communities were in a ‘serious and urgent situation’ of risk of irreparable damage to their lives and personal integrity because of the actions undertaken to recover their lands⁴⁸. In this case, an NGO (Forests People Programme) lodged the request for the adoption of precautionary measures

⁴⁸ IACHR, Resolution No. 16/15 of 30 April 2015, Precautionary Measures 321-12, paras. 22-30.

on behalf of the members of two indigenous communities.⁴⁹ The Teribe community is composed of 621 people living in the South-east of Costa Rica and to whom a formal title of property over ancestral lands has been recognised since 1956.⁵⁰ However, almost 88% of their territories has been occupied by third parties and used for development projects, allegedly without any prior consent of the community concerned.⁵¹ The Teribe undertook several actions to claim their ancestral lands and some of their leaders and members have been subjected to harassment and reprisals on various occasions.⁵² Since 2010, the Bribri indigenous peoples (who also live in the South-east of Costa Rica) organised themselves and joined the Teribe in their protests and actions to claim their ancestral lands.⁵³ Again, Teribe leaders have been threatened and attacked and subjected to acts of stigmatisation and disrepute.⁵⁴ The situations of risk faced by the Teribe and Bribri concerned the indigenous leaders and other community members who play key roles in the process of claiming their rights, as well as those community members who are more vulnerable, namely young boys and girls.⁵⁵ In both cases, threats and attacks had been allegedly perpetrated by state actors (i.e. members of the local police) and private individuals.⁵⁶

The IACHR granted the request, asking Costa Rica to 'a) adopt the necessary measures to guarantee that the life and physical integrity of the members of the indigenous peoples of Teribe and Bribri of Salitre; b) agree on the measures to be adopted with the beneficiaries and their representatives; and c) report on the actions taken to investigate the alleged facts that gave rise to the adoption of the precautionary measures, in order to avoid repetition'.⁵⁷

One interesting aspect of this request of precautionary measures is that, although in their submission to the IACHR the representatives of the indigenous peoples referred to specific incidents and identified some of the members of the two communities at risk because of their position within the indigenous community (e.g. leaders or authorities), the precautionary measures are directed at the protection of all the members of

⁴⁹ *Ibid.* 1.

⁵⁰ *Ibid.* 3.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.* 4.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* 30.

the Teribe and Bri Bri peoples.

Moreover, the IACHR does not determine which specific measures must be adopted by the state to prevent the irreparable damage to the life or the physical integrity of the persons concerned. Although this lack of precision has been criticised,⁵⁸ to a certain extent it reflects the need to consider the peculiarities of each situation and ‘tailor’ the measures bearing in mind the existing circumstances and, above all, the needs and expectations, as well as the cultural sensibility and way of life of the purported beneficiaries of such precautionary measures. Where indigenous peoples are concerned, this flexibility is of particular importance and is instrumental to the preservation of their cultural identity. Finally, the fact that the IACHR requests the state to investigate on the facts that generated the risk in the first place and to report back on the results of such investigations shows the dynamic nature of the process concerning precautionary measures. Moreover, follow-up is envisaged, and this allows the IACHR to respond to changing circumstances. In fact, the IACHR periodically evaluates whether to maintain, modify or lift the precautionary measures in force.

The precautionary measures granted by the IACHR on 14 July 2018 in favour of the authorities and members of the Siona indigenous’ peoples in the Colombian region of Putumayo pursue a similar aim of avoiding irreparable harm, but go as far as finding an ‘imminent danger of being exterminated’ for the entire group concerned.⁵⁹ The Siona community has a population of approximately 2,578 members, distributed across six reserves and councils spread across 194,000 hectares of land at the border area between Colombia and Ecuador.⁶⁰ Since 2009, the Colombian Constitutional Court declared the Siona, among others, at risk of physical and cultural extermination due to the internal armed conflict and ordered the adoption of various measures to restore their rights over the ancestral lands.⁶¹ In 2016, an Agreement to End Conflict and Build Peace in Colombia was signed.⁶² Nevertheless, armed groups – mostly related with the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (FARC) and paramilitary groups – continue operating within the Siona ancestral lands and this generates multiple risks.

⁵⁸ Human Rights Clinic of the University of Texas School of Law, *Prevenir daños irreparables. Fortaleciendo las medidas cautelares de la Comisión Interamericana de Derechos Humanos*, Austin, November 2018, pp. 89-91.

⁵⁹ IACHR, Resolution No. 53/18 of 14 July 2018, Precautionary Measures 395-18.

⁶⁰ *Ibid.* 4.

⁶¹ *Ibid.* 5.

⁶² *Ibid.* See *Acuerdo sobre cese al fuego y de hostilidades bilateral y definitivo y dejación de armas*, in *Comunicado conjunto* No. 76 of 23 June 2016.

Since the beginning of 2018, the said armed groups subjected the Siona to threats, acts of intimidation, illegal occupation of homes, clashes involving firearms, restrictions on their free movement and attempts to forcibly recruit indigenous youths within armed groups.⁶³ Moreover, anti-personnel landmines and other explosive devices have allegedly been placed in the area and members of the armed groups (guerrilla and paramilitaries) prevent indigenous peoples from carrying out their traditional activities at certain times, making it impossible for them to hold cultural ceremonies and to obtain subsistence items.⁶⁴

In this case, the IACHR considered the special relationship between the Siona and their land as the fundamental basis for their culture, their spiritual life, and hence their integrity and survival.⁶⁵ In this perspective, the lack of access to certain areas of their ancestral territories exposes them to precarious living conditions and makes them especially vulnerable.⁶⁶ The IACHR noted that this situation has a special impact on the Siona leaders: not only are they allegedly unable to fulfil their mandate, but they are also exposed to various risks due to their leadership.⁶⁷ The IACHR hence considered that the overall situation in the area could lead to the extinction of the Siona peoples, in particular bearing in mind the acts targeting youths (reprisals and forced recruitment) which may erase a generation vital to recreate and transmit values, rules, and culture.⁶⁸ The IACHR ordered Colombia to adopt culturally appropriate measures to guarantee the lives and physical integrity of the Siona authorities and some families identified by the petitioners; and to adopt culturally appropriate measures to ensure that the Siona can live safely in their lands and carry out their traditional cultural and subsistence activities, free from threats and reprisals.⁶⁹ In this regard, the IACHR recommended the adoption of measures aiming at 'ensuring the safe movement of the Siona throughout their territory' so that they can perform their rituals and have access to vital resources.⁷⁰ Similarly, the IACHR requested the state to ensure the removal of anti-personnel landmines and other explosive materials and to adopt measures to prevent the forced recruitment of young Siona. Moreover, the IACHR ordered the

⁶³ IACHR, Resolution No. 53/18, para. 3.

⁶⁴ *Ibid.* 6-7 and 11-12.

⁶⁵ *Ibid.* 24.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* 31.

⁶⁸ *Ibid.* 25.

⁶⁹ *Ibid.* 36.

⁷⁰ *Ibid.*

implementation of special measures to protect the Siona leaders.⁷¹ Also in this case, the IACHR requested the state to agree on the measures to be adopted with the beneficiaries, in keeping with the Siona own decision-making mechanisms and self-government system, and to report on the actions taken to investigate the facts that led to the adoption of these precautionary measures.⁷²

3.2. Precautionary Measures to Protect the Way of Life and Customs of Indigenous Peoples

The precautionary measures granted in the case of the Siona show a holistic and progressive approach, as they aim at preventing irreparable harm not only to life and physical integrity of indigenous communities, but also to their way of life and customs. In this regard, also the precautionary measures granted in 2006 in the case of the Sitio El Rosario-Naranjo Mayan community can be recalled.

The request of measures was due to the situation of an archaeological site located in Guatemala, which was a sacred place to practice Mayan rituals and spirituality.⁷³ In 2005, the Office of National and Cultural Patrimony, at the request of a private company, authorised construction works for a housing project near the areas where the Maya performed religious ceremonies.⁷⁴ The Supreme Court of Justice declared that building in El Rosario-Naranjo obstructed the holding of Mayan religious and social celebrations, in violation of the Guatemalan Constitution.⁷⁵ Nevertheless, the company continued building, arguing that they had not been notified the decision. In the face of this situation, the IACHR granted precautionary measures, ordering Guatemala to adopt all measures to obtain the immediate suspension of the building work on the site.⁷⁶

The IACHR's decision in this case is especially relevant because the risk of irreparable harm identified does not concern the right to life or physical integrity, but concerns entirely the cultural identity and spirituality of the indigenous communities at stake. Moreover, while the order is directed at a state (i.e. Guatemala), the implementation of the precautionary measures

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Resolution of 14 July 2006 (not divided in paragraphs).

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

necessarily implies that the said state takes action vis-à-vis a private company with the aim of preserving the integrity of indigenous peoples' territories.

Similarly, in the precautionary measures granted in 2011 in the case Lof Paichil Antriao Community of the Mapuche, the IACHR requested Argentina to adopt all necessary measures to prevent the alteration or destruction of a sacred place known as Rewe and to ensure that, while pending claims concerning communal property of ancestral lands are adjudicated, members of the Lof Paichil Antriao community who need to access the Rewe to perform their rituals can do so, without police forces or other public or private security or surveillance groups hindering their access or their stay for whatever time they wish.⁷⁷

3.3 Precautionary Measures to Grant Access to Medical Care to Indigenous Peoples

The IACHR has used precautionary measures also to address risks of irreparable harm to the health of members of indigenous communities due to the lack of access to medical care. Notably, on 26 January 2017, the IACHR decided to extend the scope of previously adopted precautionary measures in order to benefit pregnant and nursing women who belong to the Wayúu indigenous community in three Colombian municipalities.⁷⁸ In this case, the risk of irreparable harm is determined by the lack of access to medical care and the high levels of malnutrition, in conditions associated with the lack of food and water in the area. The IACHR hence ordered Colombia to take all necessary measures to ensure the availability, accessibility, and quality of health services, with a comprehensive and culturally-sensitive approach, and access to clean drinking water and food in sufficient quantity and quality to meet their nutritional needs in a way that is culturally relevant.⁷⁹

Precautionary measures aiming at preventing irreparable harm to the health of members of indigenous peoples have frequently been granted by the IACHR when the risk was determined by development activities or projects conducted in their lands, including by third parties. For instance,

⁷⁷ IACHR, Precautionary Measures 269/08 of 6 April 2011.

⁷⁸ For the precautionary measures initially adopted in this case, see IACHR, Resolution 60/15, 11 December 2015, Precautionary Measures No. 51-15 on Children and Adolescents of the Communities of Uribí, Manaure, Riohacha and Maicao of the Wayúu peoples in the department of Guajira, Colombia.

⁷⁹ IACHR, Resolution No. 3/17, 26 January 2017, Precautionary Measures 51/15, para. 27.

in the case Tres Islas Native Community of Madre de Dios, the IACHR deemed that the indigenous community concerned (i.e. 125 families of the Shipibo and Ese'jea peoples) was at serious risk due to the lack of effective, comprehensive and ongoing medical attention given the presence of mercury in their bodies and in their sources of water and the soil, as a consequence of the mining activities carried out in their territory upon concessions issued by the government.⁸⁰ The IACHR ordered Peru to conduct medical tests to determine the level of contamination of the members of the Tres Islas community and to provide them medical attention in line with international standards, ensuring access to culturally adequate food.⁸¹ Furthermore, the IACHR ordered Peru to take all necessary steps to mitigate, reduce, and eliminate the source of risk identified.⁸²

In the case of 18 Sipakepense and Mam communities of the Maya People of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, the request of precautionary measures also concerned mining activities and the relevant concessions issued by Guatemala.⁸³ In November 2003, the Ministry of Energy and Mines granted to two companies (Goldcorp and Montana) a license to mine for gold and silver for 25 years, within an area of 20 square kilometres.⁸⁴ The environmental and hydrological impact area of the concession would encompass the ancestral lands of at least 18 Mayan communities.⁸⁵ Allegedly, the concession was issued without the prior consultation and complete, free and informed consent of the indigenous communities.⁸⁶ Nevertheless, Montana and Goldcorp begun constructing the Marlin I Mine in 2003 and extracting gold and silver in 2005.⁸⁷ Mining activities affected indigenous peoples by polluting the Tzalá River and its tributaries that were the only sources of water for consumption and subsistence activities.⁸⁸ Due to the mining activities, several water wells and springs dried up and the metals present in the water as a result of the said activities affected the health of the members of the indigenous community.⁸⁹

⁸⁰ IACHR, Resolution No. 38/17, 8 September 2017, Precautionary Measures 113/16, paras. 1, 3, and 5-6.

⁸¹ *Ibid.* 43.

⁸² *Ibid.*

⁸³ IACHR, Precautionary Measures 260/07, 20 May 2010 (not divided in paragraphs).

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

The IACHR ordered Guatemala to suspend mining in the Marlin I Mine and any other activities connected to the 2003 concession.⁹⁰ Moreover, it requested to take all measures to decontaminate, to the extent possible, the water sources used by the indigenous communities, and to ensure them access to water fit for human consumption; to address the health problems of the members of the communities, through a health assistance and care programme, aimed at identifying those who may have been affected by the consequences of the water-pollution and at providing them adequate and culturally-sensitive medical attention; and to prevent any additional environmental contamination.⁹¹ These precautionary measures have a far-reaching scope in that, while addressing a state, they have direct implications for third parties, namely domestic and foreign companies. Moreover, they seem to go beyond a purely preventive function, in as much as they also require Guatemala to adopt measures to mitigate damages already occurred. A similar approach has been taken by the IACHR in the precautionary measures granted in the case Community La Oroya in Peru, where the beneficiaries had already been diagnosed a series of health problems stemming from high levels of air, soil and water pollution caused by metallic particles (lead, cadmium and arsenic) released by the complex of metallurgical companies established there.⁹²

3.4 Precautionary Measures to Prevent the Abuse of Reserves and Protected Areas

The IACHR has identified patterns of abuse in the establishment of reserves and protected areas.⁹³ While the latter are allegedly created with the aim to protect indigenous territories, they are administered by states and often used to arbitrarily restrict the use and enjoyment of natural resources found in those lands by indigenous peoples.⁹⁴ However, this seems to be an area where the IACHR and IACtHR are still relatively timid in the use of

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² IACHR, Precautionary Measures 271/05, 3 May 2006 and subsequent extensions.

⁹³ IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities*, paras. 257-259. See also IACtHR, Case *Kaliña and Lokono v Suriname*, Judgment 25 November 2015, Ser. C No. 309, paras. 70-99 and 161-198; and Case *Xákmok Kásek v Paraguay*, Judgment 24 August 2010, Ser. C No. 214, paras. 80-84 and 155-182.

⁹⁴ *Ibid.*

precautionary or provisional measures.

For instance, in in the 2018 case *Leaders of the Perla Amazónica Peasant Reserve Zone*, the Colombian government established an environmental reserve in the Colombian region of Putumayo, in the Amazon, where allegedly 90% of the projects in the country related to hydrocarbon exploration and production takes place.⁹⁵ The reserve extends over 22,000 hectares and is inhabited by approximately 800 family groups who mostly live by the Putumayo river and its tributaries, which are their sole sources of drinkable water.⁹⁶ In 2009, the government granted to the company AMERISUR Exploración Colombia LTD a license for the exploration and exploitation of hydrocarbon over 4,638 hectares (known as 'Platanillo Block') within the reserve.⁹⁷ The concession has subsequently been modified and extended on multiple occasions.⁹⁸ The families living in the reserve have lodged several claims seeking the suspension of the said licence, as the exploration and extraction activities are allegedly causing a severe environmental impact.⁹⁹ The leaders of the families living in the reserve have been subjected to repeated threats and attacks. Attempts to forcibly recruit youths in the armed groups operating in the area have been registered.¹⁰⁰

The IACHR granted the measures, ordering Colombia to take all the necessary measures to, among others, protect the community leaders.¹⁰¹ In its resolution, the IACHR does not address in any way the potential abuse of the protected area, nor does it request any specific measure to suspend the exploration and extraction activities that are allegedly polluting the area and generating a risk of irreparable harm to the environment in general and to the life and physical integrity of the inhabitants of the reserve in particular.

A similar situation concerns the Ngöbe, Naso, and Bribri indigenous communities in the Bocas del Toro Region in Panama. Their ancestral territories were declared protected areas and, soon thereafter, the state granted concessions to large power plants, road constructions, and a major hydroelectric project, which implied the flooding of approximately 250 hectares surrounding a river in the ancestral lands of the indigenous peoples

⁹⁵ IACHR, Resolution No. 87/16, 3 December 2018, *Precautionary Measures 204-17*, para. 4.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.* 5.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.* 6.

¹⁰⁰ *Ibid.* 8.

¹⁰¹ *Ibid.* 36.

concerned.¹⁰² On 18 June 2009, the IACHR granted precautionary measures for members of the Ngöbe indigenous communities who live along the Changuinola river, in relation to the approval of a 20-year concession for a company to build hydroelectric dams along the river in a 6,215-hectare area within the Palo Seco protected forest.¹⁰³ The construction of the dam Chan-75 commenced in 2008 and implied flooding the area of the ancestral lands in which four indigenous communities (with a population of approximately 1,000 people) live.¹⁰⁴ In this occasion, the IACHR requested Panama to adopt the necessary measures to avoid irreparable harm to the right to property and security of the Ngöbe, but it did not order the suspension of the works.¹⁰⁵ Notably, in January 2010, the IACHR submitted a request for provisional measures on this case to the IACtHR and it asked the Court to require Panama to take all measures to, among others,

[p]rotect the life and humane treatment of the members of the Ngöbe indigenous communities ... 2. *[s]uspend the construction works and other activities related to the concession granted to AES-Changuinola along the Changuinola River in the province of Bocas del Toro, until the organs of the Inter-American System of Human Rights reach a final decision on the matter raised in this case; ... 4. [p]rotect the special relationship of the Ngöbe indigenous communities ... with their ancestral territory, especially protect the use and enjoyment of collective property and the existing natural resources, and adopt measures intended to avoid immediate and irreparable damages resulting from the activities of third parties entering the community's territory or exploiting the existing natural resources ...*¹⁰⁶

The IACtHR rejected the request of the IACHR, holding that the latter failed to provide a minimum degree of detail to allow to assess *prima facie* a situation of extreme gravity and urgency, in particular with regard to the problems that would result from the deforestation and the flood that would affect the communities and the contamination that would result from the construction works.¹⁰⁷ However, in other cases involving indigenous peoples whose ancestral lands were threatened by development projects

¹⁰² IACHR, Precautionary Measures 56/08, 18 June 2009 (not divided into paragraphs)

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ IACtHR, Order 28 May 2010 on the Request for Provisional Measures in the case *Four Ngöbe indigenous communities and their members v Panama*, para.1 (emphasis added).

¹⁰⁷ *Ibid.* 11 and 15.

(namely oil exploration and extraction), the IACtHR ordered very detailed provisional measures, including the suspension of the activities conducted by companies.¹⁰⁸

3.5. Precautionary Measures to Prevent Forced Evictions of Indigenous Peoples

On 30 November 2009, the IACHR granted precautionary measures in a somewhat related case, in order to protect the life and physical integrity of Naso People leaders and to prevent the continuation of collective forced evictions and removal of dwellings.¹⁰⁹ In March 2009, police and employees of the Ganadera Bocas company arrived at the Naso community to execute an eviction order.¹¹⁰ In this context, episodes of violence were registered (including the use of tear gas bombs, the firing of gunshots in the air and the destruction of 30 houses, of the Naso cultural centre, of the school, of the church, and of other community facilities); as well as the use of roadblocks to restrict the free movement of community members (which eventually also impeded the delivery of food and water); and the arbitrary arrest of leaders of the Naso community.¹¹¹ The IACHR requested Panama to take the necessary measures to prevent the continuation of collective forced evictions and removal of dwellings, and to provide emergency health care and housing to the members of the community subjected to forced eviction and guarantee their access and free movement across the ancestral lands.¹¹²

It would therefore seem that, while the IACHR issues precautionary measures aimed at preventing forced evictions of members of indigenous communities from their ancestral lands,¹¹³ it gradually became more cautious in requesting the suspension of construction activities or other development

¹⁰⁸ See e.g. the preventive measures ordered by the IACtHR in the case *Kichwa Indigenous Peoples of Sarayaku v Ecuador* 6 July 2004, 17 June 2005, and 4 February 2010.

¹⁰⁹ IACHR, Precautionary Measures 118/09, 30 November 2009 (not divided into paragraphs).

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ For other precautionary measures also directed at ending forced evictions of indigenous peoples in connection with the construction of hydroelectric plants and the concession of ancestral lands for agricultural exploitation from third parties, see *Q'echi Indigenous Communities in the Municipality of Panzós, Guatemala*, Precautionary Measures 121-11, 20 June 2011, 14

projects, especially when dams and hydroelectric plants are involved.¹¹⁴ In fact, a turning point in the jurisprudence of the IACHR on precautionary measures in general, and concerning indigenous peoples in particular, is represented by a case involving the construction of a hydroelectric plant which will be discussed in the next section.

3.6. *Did Precautionary Measures Collide with Their Limits?*

On 1 April 2011, the IACHR granted precautionary measures in favour of various indigenous peoples – including some communities in voluntary isolation – in the Xingu river basin, in the region of Pará, Brazil.¹¹⁵ The Brazilian government had approved the construction of a hydroelectric power plant (Belo Monte).¹¹⁶ The project entailed the deviation of 80% of the river's flow, with the subsequent flooding of the ancestral lands of various indigenous communities.¹¹⁷ The construction of the dam would allegedly require the displacement of more than 20,000 indigenous people: no prior environmental and social impact-assessment had been conducted and not all the communities involved gave their prior, free, and informed consent.¹¹⁸

The IACHR requested Brazil to 'immediately suspend the licensing process for the Belo Monte Hydroelectric Plant and stop any construction work until certain minimum conditions are met'.¹¹⁹ Furthermore, the IACHR required Brazil to 1) conduct consultation processes, in fulfilment of its international obligations – meaning prior consultations that are free, informed, in good faith, culturally appropriate, and with the aim of reaching an agreement – in relation to each of the affected indigenous communities; 2) guarantee that, in order for this to be an informed consultation process, the indigenous communities have access beforehand to a project's social and environmental impact assessment, in an accessible format, including translation into the respective indigenous languages; and 3) adopt measures to protect the life and physical integrity of the members of the indigenous communities in voluntary isolation in the Xingu Basin, and to prevent the

¹¹⁴ In this sense, see Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court', 187.

¹¹⁵ IACHR, Precautionary Measures 382/10 of 1 April 2011 (not divided into paragraphs).

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

spread of diseases and epidemics among the indigenous communities being granted the precautionary measures as a consequence of the construction of the Belo Monte hydropower plant.¹²⁰ The IACHR specified that this includes any diseases derived from the massive influx of people into the region as well as the exacerbation of transmission vectors of water-related diseases such as malaria.¹²¹

These precautionary measures collected and implemented all the principles established in the Inter-American jurisprudence on indigenous peoples and their right to lands and natural resources and met the preventive function of this procedural legal tool. However, their enforcement would have produced serious economic repercussions and would allegedly encroach on the right to development of the rest of the Brazilian society. The unprecedented reaction of the Brazilian government to these precautionary measures shows the delicate nature of the issue at stake and, ultimately, the fragility of the system. Not only did Brazil openly declare its intention not to implement the measures requested by the IACHR, but it also withdrew its ambassador to the Organization of the American States (OAS), as well as its candidate for the elections of the new members of the IACHR and threatened with not paying its annual fee (approximately 800,000 US\$) to the OAS until 2012.¹²²

The effect was immediate: on 29 July 2011, the IACHR revised and modified the previously granted measures, leaving out any reference to the suspension of the licensing process for the Belo Monte Hydroelectric Plant and the immediate interruption of construction works.¹²³ It thus required Brazil to 1) adopt measures to protect the lives, health, and physical integrity of the members of the Xingu Basin indigenous communities in voluntary isolation and to protect the cultural integrity of those communities, including effective actions to implement and execute the legal/formal measures that already exist, as well as to design and implement specific measures to mitigate the effects the construction of the Belo Monte dam will have on the territory and life of these communities in isolation; 2) adopt measures to protect the health of the members of the Xingu Basin indigenous communities affected by the Belo Monte project, including (a) accelerating

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² Interview to Mr. Francisco Eriguren conducted by the Human Rights Clinic of the University of Texas on 25 October 2017 and quoted in Human Rights Clinic of the University of Texas School of Law, *Prevenir daños irreparables. Fortaleciendo las medidas cautelares de la Comisión Interamericana de Derechos Humanos*, 97.

¹²³ *Ibid.*

the finalisation and implementation of the Integrated Programme on Indigenous Health for the Belo Monte region, and (b) designing and effectively implementing the recently stated plans and programmes ordered by domestic authorities; and 3) guarantee that the processes still pending to regularise the ancestral lands of the Xingu Basin indigenous peoples will be finalised soon, and adopt effective measures to protect those ancestral lands against intrusion and occupation by non-indigenous people and against the exploitation or deterioration of their natural resources.¹²⁴

Moreover, the IACHR decided that the debate between the parties on prior consultation and informed consent with regard to the Belo Monte project had turned into a discussion on the merits of the matter, which goes beyond the scope of precautionary measures.¹²⁵ The modified version of the precautionary measures represents a sharp change in the Inter-American jurisprudence and arguably diminished the preventive function of this procedural legal tool. The former chairperson of the IACHR acknowledged that after the Belo Monte precedent, the IACHR members self-restricted themselves in the adoption of precautionary measures.¹²⁶

In 2011, Brazil pushed for a reform of the IACHR, which led to a modification of the same in 2013. Both scholars and practitioners have criticized the reform process and its outcome, as the changes allegedly weakened the system, among others, with regard to precautionary measures.¹²⁷ In the aftermath of the Belo Monte case, the IACHR has not requested other measures explicitly directed at ensuring the protection of indigenous lands and natural resources. It has also refrained from demanding the suspension of any development project, be it related to extraction or excavation activities or hydroelectric dams.¹²⁸

An example is the case of 595 members of the Otomí-Mexica indigenous community of San Francisco Xochicuautla, in Mexico.¹²⁹ In 2006, the ancestral lands of this community were declared natural reserve (*Sanctuario*

¹²⁴ IACHR, Precautionary Measures 382/10 as amended (not divided into paragraphs).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ See, among others, Dina Shelton, 'The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System' (2015) 5 *Notre Dame International Law and Comparative Law Journal* 1; and Centro por la Justicia y el Derecho Internacional, *Apuntes sobre la reforma al reglamento de la Comisión Interamericana de Derechos Humanos*, Buenos Aires, 2013.

¹²⁸ Human Rights Clinic of the University of Texas School of Law, *Prevenir daños irreparables. Fortaleciendo las medidas cautelares de la Comisión Interamericana de Derechos Humanos*, 108.

¹²⁹ IACHR, Resolution No. 32/16 of 11 May 2016, Precautionary Measures 277-13.

del agua) by the government.¹³⁰ However, the construction of the Toluca-Naucalpan highway includes a section that cuts across the reserve, where the Otomí-Mexica conduct hunting, gathering, and fishing activities.¹³¹ Allegedly, this project was approved without prior consultation of the members of the community and followed by an expropriation decree and the issuing of a 30-year concession without the community's knowledge.¹³² In 2015, the documentation concerning the concession's process was declared confidential.¹³³ The attempts of the indigenous community to obtain the suspension of the construction of the highway were fruitless and the protests of the members of the community were violently repressed.¹³⁴

The IACHR acknowledged the existence of a risk of irreparable damage and granted precautionary measures, requesting Mexico to adopt the necessary measures to protect the life and personal integrity of some members of the Otomí-Mexica indigenous community; to reach an agreement with the beneficiaries on the measures to be adopted; and to inform the IACHR on the actions taken to investigate the facts that led to the adoption of the measures, so as to avoid recurrence.¹³⁵ The IACHR did not request to suspend the construction of the highway nor did it mention any specific measure to protect the ancestral lands of the Otomí-Mexica. The construction works are ongoing and in October 2018 the concession was extended from 30 to 60 years.¹³⁶

A partial exception in the recent jurisprudence of the IACHR is that of the measures granted to the Ayoreo Totobiegosode people in voluntary isolation in the Chaco region, in Paraguay.¹³⁷ In this case, a series of third persons' entries to the ancestral lands of these communities were reported in connection with deforestation activities.¹³⁸ Bearing in mind the devastating consequences that the presence of third parties may have on indigenous peoples in voluntary isolation, the IACHR required Paraguay to take the necessary actions, among others, to avoid deforestation in the ancestral lands of the Ayoreo Totobiegosode people; to create a mechanism to protect and prevent third parties from entering their territory; and to establish

¹³⁰ *Ibid.* 3.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.* 12-13.

¹³⁵ *Ibid.* 19.

¹³⁶ See <<https://www.proceso.com.mx/555562/gobierno-de-edomex-extiende-a-60-anos-concesion-de-carretera-toluca-naucalpan-a-hinojosa-cantu>>.

¹³⁷ IACHR, Resolution No. 4/16 of 3 February 2016, Precautionary Measures 54-13.

¹³⁸ *Ibid.* 3.

special protocols to ensure protection from sighting or unwanted contact.¹³⁹ Going beyond the request of more generic measures, the IACHR shows that it can in fact use precautionary measures so as to concretely guarantee the protection of indigenous peoples' lands and natural resources. However, the wording chosen in the case of the Ayoreo Totobiegosode is somewhat timid compared to that of the first precautionary measures granted in the Belo Monte case and suggests that when certain projects or development activities are at stake, the Inter-American human rights mechanisms become less incisive in preserving the cultural identity of indigenous peoples through the defence of their lands and natural resources.

In the case of Belo Monte, since 2011, the construction of the dam has been completed and the reservoirs are being filled.¹⁴⁰ Natural resources in the area have been severely affected and more than 40,000 indigenous people were subjected to displacement. Additionally, the government of the state of Pará issued a licence for a gold mining project in close proximity to the Belo Monte dam, without prior consultation of the indigenous communities still living in the area.¹⁴¹ The IACHR has not renewed or revised its precautionary measures since July 2011 nor has it ever considered the desirability to invest the IACtHR with the case, through a request of provisional measures. Arguably, in this instance the IACHR relinquished its preventive mandate and will look into the merits of the case, assessing whether there has been any breach of the state's international obligations, trying to quantify and redress the damage through measures of reparation and deciding whether the case deserves being submitted to the contentious competence of the IACtHR. However, it is hard to see how any measure of reparation could be adequate when the damage is, by definition, irreversible or irreparable, such as *permanent* flooding, desertification, deforestation or contamination.

4. *The Challenge of Designing Adequate Measures of Reparation*

The Inter-American jurisprudence on measures of reparation in

¹³⁹ *Ibid.* 41.

¹⁴⁰ Human Rights Clinic of the University of Texas School of Law, *Prevenir daños irreparables. Fortaleciendo las medidas cautelares de la Comisión Interamericana de Derechos Humanos*, 109. See also Special Rapporteur on the Rights of Indigenous Peoples, *Report on the Mission to Brazil*, UN Doc. A/HRC/33/42/Add.1, 8 August 2016, paras. 36-46; and IACHR, *Preliminary Report on the Mission to Brazil of November 2018*, available at <<http://www.oas.org/es/cidh/prensa/comunicados/2018/238OPeng.pdf>>, p. 9.

¹⁴¹ *Ibid.*

general has been praised as being highly innovative.¹⁴² In cases concerning indigenous peoples' claims, the IACtHR has been referred to as 'pioneering' and 'world leader', in the sense that it is a source of inspiration for domestic courts, as well as for other international human rights mechanisms.¹⁴³ The IACHR recommends measures of reparation in its reports on the merits of individual petitions and gives a comprehensive interpretation of the notion of measures of reparation.

However, this section of the chapter focuses on the measures ordered in its judgments by the IACtHR pursuant to Art. 63, para. 1, of the ACHR, which sets forth that 'if the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedies and that fair compensation be paid to the injured party'.

The choice to focus on the jurisprudence of the IACtHR is due to the fact that, being the Court the last instance within the Inter-American system, the assessment of the level of implementation of the measures at stake is more conclusive.

The design of adequate measures of reparation in cases involving violations of indigenous peoples' rights to land and natural resources poses particular challenges.¹⁴⁴ On the one hand, such measures must be conceived in a manner that considers the ways of life and cultural identity of the peoples concerned, thus also addressing the collective nature of the damages inflicted. On the other hand, these measures may have to redress damages that, by their own nature, are irreparable, with the risk of being doomed to provide only some limited mitigation.

The IACtHR is well aware of the need to reflect the cultural specificity of indigenous peoples when designing measures of reparation in their favour and it affirmed that it considers an important component of the

¹⁴² See, among others, Thomas Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011) *Stanford Journal of International Law* 279.

¹⁴³ Thomas Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples' (2015) 25 *Duke Journal of Comparative and International Law* 3.

¹⁴⁴ Art. XXXIII of the 2016 American Declaration on the Rights of Indigenous Peoples expressly establishes that 'indigenous peoples and persons have the right to effective and appropriate remedies, including prompt judicial remedies, for the reparation of all violations of their collective and individual rights. The States, with full and effective participation of indigenous peoples, shall provide the necessary mechanisms for the exercise of this right'.

individual reparation the redress granted 'to the members of the community as a whole'.¹⁴⁵ The recognition of the collective harm¹⁴⁶ in cases involving indigenous peoples led the IACtHR to choose measures meant to benefit the community as a whole, such as the establishment of development funds and community programmes. However, it has been held that the IACtHR does not always sufficiently account for the reality of indigenous petitioners and sometimes fails to have a truly victim-centred and restorative approach.¹⁴⁷

In general, in its judgments the IACtHR applies a holistic interpretation of the notion of reparation and orders measures aiming at granting compensation, restitution, rehabilitation, satisfaction (with a view at restoring victims' dignity and reputation), and guarantees of non-repetition.¹⁴⁸ In particular, in cases where it found violations of the indigenous peoples' right to lands and natural resources, the IACtHR ordered the respondent states:

- a) the restitution of communal lands and the provision of medical, nutritional, educational and other basic services while the communities concerned remain landless;¹⁴⁹
- b) the adoption of legislative, administrative and any other measures necessary to create an effective mechanism for delimitation, demarcation, and titling of communal lands in accordance with the customary law, values, customs and mores of the indigenous community concerned;¹⁵⁰
- c) the carrying out of the delimitation, demarcation and titling of indigenous peoples' ancestral lands, abstaining from any act that may affect the existence, value, use or enjoyment of their property;¹⁵¹

¹⁴⁵ IACtHR, Case *Plan de Sánchez Massacre v Guatemala*, Judgment of 19 November 2004, Ser. C No. 116, para. 86.

¹⁴⁶ On the notion of 'collective victims', see Principle 8 of the United Nations Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly through Resolution 60/147 of 16 December 2005 (UN Principles on Reparations).

¹⁴⁷ Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples', 64.

¹⁴⁸ The IACtHR interprets these notions in line with the UN Principles on Reparations. In particular, see Principles 19-23.

¹⁴⁹ IACtHR, Case *Yakye Axa*, paras. 211-227; Case *Sawhoyamaya*, paras. 229-236; and Case *Xákmok Kásek*, paras. 281-306.

¹⁵⁰ IACtHR, Case *Saramaka*, para. 194; and Case *Kaliña and Lokono*, para. 305 (b).

¹⁵¹ IACtHR, Case *Mayagna (Sumo) Awas Tigni*, para. 164; Case *Kaliña and Lokono*, para.

- d) the legal recognition of the collective juridical personality corresponding to an indigenous community in order to ensure the exercise and full enjoyment of the right to property of a communal nature;¹⁵²
- e) the adoption of health care programmes;¹⁵³
- f) the adoption of cultural promotion initiatives or the investment of a certain amount of money, through the setting up of communal funds (ranging from 50,000 to 1,500,000 US\$), in ‘works or services of collective nature for the benefit of the community and by common agreement with the latter’, including education, food security, resource management, restoring forests, housing and agricultural projects;¹⁵⁴
- g) the issuing of public apologies and the carrying out of ceremonies to acknowledge the state’s international responsibility;¹⁵⁵
- h) the adoption of legislative reforms, in particular to ensure that decisions concerning indigenous peoples’ ancestral lands are taken through prior, effective and fully informed consultations;¹⁵⁶ and
- i) the training of government officials on indigenous rights.’¹⁵⁷

The IACtHR found that:

‘in the case of the lands claimed that are in the hands of

279 (b); Case *Garifuna Community Triunfo de la Cruz*, paras. 259-260; and Case *Kuna de Madugandí and Emberá de Bayano*, para. 232.

¹⁵² IACtHR, Case *Kaliña and Lokono*, para. 279 (a); Case *Kaliña and Lokono*, para. 305 (a).

¹⁵³ IACtHR, Case *Yakye Axa*, para. 205; Case *Sawhoyamaxa*, para. 146; and Case *Xákmok Kásek*, para. 323.

¹⁵⁴ IACtHR, Case *Mayagna (Sumo) Awas Tigni*, para. 167; Case *Yakye Axa*, para. 205; Case *Sawhoyamaxa*, para. 146; Case *Xákmok Kásek*, para. 323; Case *Garifuna Community Triunfo de la Cruz*, para. 298; Case *Garifuna de Punta Piedra*, para. 335; Case *Kaliña and Lokono*, para. 296; and Case *Saramaka*, para. 201.

¹⁵⁵ IACtHR, Case *Garifuna Community Triunfo de la Cruz*, para. 274; Case *Kuna de Madugandí and Emberá de Bayano*, para. 219; and Case *Kichwa Indigenous Peoples of Sarayaku*, para. 305.

¹⁵⁶ IACtHR, Case *Saramaka*, para. 194; and Case *Kichwa Indigenous Peoples of Sarayaku*, paras. 299-301.

¹⁵⁷ IACtHR, Case *Kaliña and Lokono*, para. 309; and Case *Kichwa Indigenous Peoples of Sarayaku*, para. 302.

non-indigenous or non-tribal third parties, whether natural or legal persons, the state must, through its competent authorities, decide whether to purchase or expropriate the territory in favour of the indigenous peoples, by payment of compensation to those affected as established by domestic law. When deciding this matter, the state authorities should ... bear in mind, in particular, the special relationship that the indigenous peoples have with their lands in order to preserve their culture and ensure their survival. The decision taken by the domestic authorities should *never be based exclusively on the fact that these lands are in private hands or that they are being exploited rationally*.¹⁵⁸

The IACtHR clarified that if the return of ancestral lands is impossible, exceptionally, and for objective and duly justified reasons, the state must grant collective property titles to the indigenous people concerned on adjoining alternative lands of the same or better quality and size, chosen in agreement with the indigenous community.¹⁵⁹ Mindful of the existing tension between the defence of the right to land and natural resources and development activities and projects, the IACtHR also requested the states concerned to draw up, by mutual agreement with the indigenous peoples in the area, as well as with private third parties, 'rules for peaceful and harmonious coexistence in the territory in question that respect the uses and customs of the ... peoples, and that guarantee their relationship with their traditional areas'.¹⁶⁰

In cases where the IACtHR found that the indigenous peoples' ancestral lands were illegally occupied by third parties, it ordered the respondent state to 'remove any obstacle or interference in the territory concerned' within a given fixed deadline (e.g. 18 months)¹⁶¹ and, in the presence of environmental damages, to clean-up the concerned lands.¹⁶² In these instances, the IACtHR additionally ordered the state to take all necessary measures to ensure that the indigenous peoples concerned enjoy

¹⁵⁸ IACtHR, Case *Kaliña and Lokono*, para. 280 (emphasis added); Case *Garífuna de Punta Piedra*, para. 324; Case *Garífuna Community Triunfo de la Cruz*, para. 261; and Case *Xákmok Kásek*, para. 284.

¹⁵⁹ IACtHR, Case *Xucuru Indigenous Peoples*, para. 196; Case *Garífuna Community Triunfo de la Cruz*, para. 262; Case *Garífuna de Punta Piedra*, para. 325; and Case *Kaliña and Lokono*, para. 281.

¹⁶⁰ IACtHR, Case *Kaliña and Lokono*, para. 283; Case *Garífuna Community Triunfo de la Cruz*, para. 263; and Case *Garífuna de Punta Piedra*, para. 326.

¹⁶¹ IACtHR, Case *Xucuru Indigenous Peoples*, para. 194 (unofficial translation by the author).

¹⁶² IACtHR, Case *Garífuna de Punta Piedra*, para. 323.

‘immediately and effectively’¹⁶³ their right to collective property, preventing ‘any intrusion, interference or involvement by third parties or state agents that may undermine the existence, value, use or enjoyment of their territories’.¹⁶⁴ These orders evidently serve both remedial and preventive purposes.

The IACtHR has paid attention to certain characteristics of the indigenous peoples concerned when designing some of the above-mentioned measures. For instance, when ordering the issuing of apologies to indigenous peoples in the context of public ceremonies or the publication and diffusion of relevant excerpts of its judgments, the IACtHR requested the respondent states to use, besides the national language, that of the community at stake, and to take into account the traditions and customs of the members of the affected communities.¹⁶⁵ In some cases, bearing in mind the broad use of radio-transmissions among certain indigenous communities, besides the usual publications, the IACtHR ordered the broadcasting of a summary of the contents of its Judgments.¹⁶⁶ These details suggest that the IACtHR took into account the peculiarities of the victims, as well as their needs and expectations. However, it has been pointed out that sometimes this attitude may turn into ‘paternalism’,¹⁶⁷ especially when suggesting to the communities concerned how they should use the development funds set up pursuant to the orders of the IACtHR.

In cases where the state created natural reserves in indigenous peoples’ ancestral lands, subsequently jeopardising their right to land and natural resources, the IACtHR ordered the respondent to adopt the sufficient and necessary measures to guarantee, by appropriate mechanisms, the indigenous community’s ‘effective access, use and participation in them, in order to ensure the compatibility of environmental protection and the rights of the indigenous peoples, ... so that maintaining the reserves does not constitute an excessive obstacle to their rights. Thus, any restriction of their rights must comply with the requirements of legality, necessity and

¹⁶³ IACtHR, *Case Xucuru Indigenous Peoples*, para. 193 (unofficial translation by the author).

¹⁶⁴ *Ibid.* (unofficial translation by the author). In the same sense, see IACtHR, *Case Kaliña and Lokono*, para. 282; *Case Garifuna Community Triunfo de la Cruz*, para. 264; *Case Garifuna de Punta Piedra*, para. 324 (b); and *Case Mayagna (Sumo) Awas Tigni*, para. 153.2.

¹⁶⁵ IACtHR, *Case Garifuna Community Triunfo de la Cruz*, para. 274; *Caso Garifuna de Punta Piedra*, para. 338; *Case Kuna de Madugandi and Emberá de Bayano*, para. 219.

¹⁶⁶ IACtHR, *Case Kaliña and Lokono*, para. 313; *Case Garifuna de Punta Piedra*, para. 339; *Case Garifuna Community Triunfo de la Cruz*, para. 272; *Case Kuna de Madugandi and Emberá de Bayano*, para. 217; *Case Yakyé Axa*, para. 277; and *Case Kichwa Indigenous Peoples of Sarayaku*, para. 308.

¹⁶⁷ Antkowiak, ‘A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples’, 36.

proportionality, and the achievement of a legitimate purpose'.¹⁶⁸

In cases where the illegal and arbitrary exploitation (through activities such as logging, mining, and oil exploration and extraction) of the indigenous peoples' ancestral lands and natural resources had already produced significant environmental damages – some times of an irreversible nature (e.g. destruction of forests) – the IACtHR ordered measures directed at mitigating the consequences and at 'rehabilitating the territory', such as the 'clean-up of the territory', to be conducted in good faith, including in indigenous peoples' ancestral territories occupied by third parties.¹⁶⁹ For instance, in a case where the ancestral lands had been damaged owing to bauxite mining operations, the IACtHR ordered the state, within three years, to

- 'a) implement the sufficient and necessary actions to rehabilitate the area affected. To this end, an action plan for the effective rehabilitation of the area must be drawn up, in conjunction with the company that has been in charge of this rehabilitation, and with the participation of a representative of the Kaliña and Lokono peoples. This plan must include: (i) a complete updated evaluation of the area affected, by an assessment prepared by independent experts; (ii) a timetable for the work; (iii) the necessary measures to remediate any adverse effects of the mining operations, and (iv) measures to reforest the areas that are still affected by those operations, all of this taking into account the opinion of the peoples that have been affected, and
- b) Establish the necessary mechanisms to monitor and supervise the execution of the rehabilitation by the company. To this end, the state must appoint an expert in such matters in order to ensure total compliance with the rehabilitation of the area.'¹⁷⁰

Similarly, in a case where indigenous peoples' ancestral territories had been deeply affected by exploration activities conducted to exploit crude oil, the IACtHR ordered the respondent state to remove the explosive left throughout the territory and undertake several other clean-up and reforestation measures.¹⁷¹

Criticism has been expressed vis-à-vis the amounts of money granted by the IACtHR as compensation for pecuniary and non-pecuniary damages in cases involving violations of the right to lands and natural resources

¹⁶⁸ IACtHR, Case *Kaliña and Lokono*, para. 286.

¹⁶⁹ IACtHR, Case *Xucuru Indigenous Peoples*, para. 194.

¹⁷⁰ IACtHR, Case *Kaliña and Lokono*, para. 290.

¹⁷¹ IACtHR, Case *Kichwa Indigenous Peoples of Sarayaku*, paras. 293-295.

of indigenous peoples, holding that the sums awarded and the criteria used to calculate them 'frequently disappoint'.¹⁷² An example in this regard is the Judgment issued in the case *Saramaka v Suriname*, where the IACtHR granted 75,000 US\$ to the indigenous community concerned as compensation for material damages.¹⁷³ In this case, the IACtHR determined that, due to the states' logging and mining concessions within the ancestral Saramaka lands a considerable quantity of valuable timber had been extracted without any compensation for the community, who was left with a 'legacy of environmental destruction, despoiled substance resources and spiritual and social problems'.¹⁷⁴ The market value of the timber taken from ancestral lands amounted to over ten millions US\$.¹⁷⁵ Yet, the IACtHR rejected the petitioners' requests in this regard and granted 75,000 US\$ 'based on equitable grounds'.¹⁷⁶ Additionally, 600,000 US\$ were awarded for immaterial damages.¹⁷⁷ Similarly, in an already mentioned case where the oil exploration and exploitation concessions issued by the state caused severe environmental damage in the ancestral lands of the Kichwa Indigenous Peoples of Sarayaku, including the destruction of forests, the IACtHR granted 90,000 US\$ for material damages and 1,250,000 US\$ for the suffering caused to the people and their cultural identity.¹⁷⁸ It has been observed that 'by undercompensating indigenous petitioners in these ways, the Court fails to recognise them as full-fledged rights bearers'.¹⁷⁹ This assumption seems somewhat confirmed by the fact that in a case concerning the state's expropriation of the land of a private individual, the IACtHR awarded 18,705,000 US\$ as just compensation for material damages, plus 9,435,757,80 US\$ as interests.¹⁸⁰ Here, a private person's land weights way more than indigenous peoples' ancestral territories. The manner in which the principle of equity has been applied by the IACtHR to determine material damages in cases involving indigenous peoples does not seem to duly take into account the formidable difficulties they face to

¹⁷² Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples', 3.

¹⁷³ IACtHR, Case *Saramaka*, para. 199.

¹⁷⁴ *Ibid.* 153.

¹⁷⁵ *Ibid.* expert testimony of Dr. Robert Goodland, para. 34.

¹⁷⁶ *Ibid.* 199.

¹⁷⁷ *Ibid.* 201.

¹⁷⁸ IACtHR, Case *Kichwa Indigenous Peoples of Sarayaku*, paras. 317 and 323.

¹⁷⁹ Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples', 3.

¹⁸⁰ IACtHR, Case *Salvador Chiriboga v Ecuador*, Judgment 03 March 2011, Ser. C No. 222, paras. 84 and 101.

produce documents attesting the harm suffered, including environmental and cultural damage. This is often because they lack titles in the first place, as part of the abuses and injustices they have been subjected to.

An aspect where the IACtHR's jurisprudence concerning measures of reparation is evolving over the time is that of benefit-sharing.¹⁸¹ The Inter-American human rights mechanisms have affirmed that development projects must share a reasonable benefit with the indigenous communities concerned. However, in several judgments, the IACtHR did not include among the measures of reparation the payment of a reasonable percentage of profits to the indigenous peoples affected, most likely due to the difficulties encountered by the petitioners in proving the traditional use of the resources at stake. In its judgment on the *Kaliña Lokono* case, while ordering to Suriname the establishment of a development fund as a measure of reparation for the harm inflicted to the indigenous communities concerned, the IACtHR added that such fund 'is in addition to any other present or future benefit that might correspond to the Kaliña and Lokono peoples as a result of the state's general development obligations'.¹⁸² The IACtHR did not quantify such benefits nor provide criteria to do so in the future, but this should flow as a natural consequence and is an area where further jurisprudential progress can be envisaged.

Compared to its awards on material damages, the IACtHR has been more generous in the sums to be allocated by states for development funds (the highest amount granted so far for such purpose being 1,500,000 US\$). However, the IACtHR's jurisprudence on the matter evolved over the years.¹⁸³ In the first Judgments where it ordered to set up the said development funds, the IACtHR itself established the aims for which the fund should be used (e.g. educational or housing projects) and requested the state to set up a 3-member 'implementation committee' to decide how to allocate the budget.¹⁸⁴ In its Judgment on the *Kichwa Indigenous Peoples of Sarayaku* case, the IACtHR eventually abandoned the implementation committee's strategy and declared that the fund could be invested as

¹⁸¹ María Augusta León Moreta, 'Analysing Benefit Sharing Scheme as Compensation for Damages Caused by Resource Extraction in Indigenous Territory' (2019) 8 *International Human Rights Law Review* 89; Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27 *EJIL* 353.

¹⁸² IACtHR, Case *Kaliña Lokono*, para. 295. In the same sense, see IACtHR, Case *Xucuru*, para. 211.

¹⁸³ For a comprehensive summary of this issue, see the Concurring Opinion of Judge H.A. Sierra Porto attached to the IACtHR's Judgment on the Case *Garífuna Community Triunfo de la Cruz*, paras. 36-63.

¹⁸⁴ See, among others, IACtHR, Case *Moiwana*, para. 215.

indigenous peoples see fit, ‘in accordance with [their] own-decision making mechanisms and institutions’,¹⁸⁵ limiting itself to provide suggestions as to how the fund could be used (e.g. educational, cultural, food security, health care, and eco-tourism development projects). Eventually, in a Judgment rendered in 2017, the IACtHR ordered the establishment of a development fund, indicating that ‘the destination of said fund must be agreed with the members of the Xucuru indigenous people for any purpose that they may deem appropriate for the benefit of the indigenous land and its members’.¹⁸⁶ This phrasing appears to move away from a rather paternalistic approach and eventually empower the indigenous peoples affected to autonomously determine what really matters to them. After all, they arguably are those better placed to do so.

5. Conclusions

*You do not know the problems of us indigenous peoples. We do not know each other, but the Earth is one and the same and we live on it and It knows us all. From It we live and through It we survive. ... You do not know the indigenous struggles or the indigenous problems, but if we begin to study our problems, each one will begin to know the problem of each other, since the world, the Earth, the land is one and for her no one is alien.*¹⁸⁷

The jurisprudence of the IACHR and IACtHR with regard to indigenous peoples’ right to lands and natural resources is comprehensive and of a progressive nature. This is certainly important in the face of the systematic abuses indigenous peoples have historically been subjected to throughout the region. However, despite the recognition by the Inter-American human rights bodies of indigenous peoples’ fundamental rights and the clear spelling out of the corresponding states’ international obligations, gross violations continue being perpetrated and their survival is threatened by, among others, development projects.

Instead of upholding the Inter-American jurisprudence and genuinely embracing the criteria set forth therein, states are increasingly showing

¹⁸⁵ IACtHR, Case *Kichwa Indigenous Peoples of Sarayaku*, para. 323.

¹⁸⁶ IACtHR, Case *Xucuru*, para. 212 (unofficial translation by the author).

¹⁸⁷ Ángel María Torres., ‘Carta de un dirigente arhuaco’, in Enrique Sánchez Gutiérrez and Hernán Molina-Echeverri (eds), *Documentos para la historia del movimiento indígena colombiano contemporáneo* (Ministerio de Cultura 2010) 79 (unofficial translation by the author).

non-compliance and, in some cases, even open turn against the system—, claiming that such jurisprudence would be too generous towards indigenous peoples. The consistent delays in the enforcement of the IACtHR's orders and the disregard of precautionary and provisional measures granted are a concrete sample of this attitude.

Against this background, cases concerning indigenous peoples' lands and natural resources will likely continue being lodged before the Inter-American human rights mechanisms. It will be crucial for the IACHR and IACtHR to ensure that, while business and investment are encouraged, they are carried out in a manner that enhances and does not undermine human rights. In this regard, a truly victim-centred approach should be embraced. Indigenous peoples are those who know and understand their own reality. Listening to them and understanding their needs, expectations and priorities is the necessary first step to adequately redress injustices, designing meaningful and adequate remedies and, even better, to prevent abuses from happening. The latter aim can be pursued through precautionary and provisional measures that are conceived to avoid the infringement of indigenous peoples' right to lands and natural resources and may require the suspension of certain development projects or activities. This should not be seen as an unsolvable dichotomy, as long as the notion of development is revisited and reinterpreted, going beyond the purely economic meaning and rather encompassing the human dimension. There can be true development only if it benefits everyone and it is not pursued through activities and projects that enrich a few at the expenses of the planet and whose consequences ultimately affect everyone. After all, the Earth is one and the same for all of us. We all live on it and no one is alien to it.

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