Goettingen Journal of International Law 5 (2013) 1, 155-185

A Step Further on Traditional Peoples Human Rights: Unveiling the Key-Factor for the Protection of Communal Property

Giovana F. Teodoro & Ana Paula N. L. Garcia*

Table of Contents

* J.D. candidates (Faculdade de Direito da Universidade de São Paulo, 2014). Ana Paula N. L. Garcia and Giovana F. Teodoro are currently on a year-long exchange program at the Université de Nantes and at the Université Paris I Panthéon-Sorbonne, respectively. They were both oralists at the 2012 Inter-American Human Rights Moot Court Competition, where they had the opportunity to deepen their studies on indigenous peoples' human rights and were awarded for the Best Memorial of the Victims in Portuguese.

doi: 10.3249/1868-1581-5-1-teodoro-garcia

Abstract[1]

The purpose of this article is to provide a new perspective in relation to the protection of property rights of indigenous and non-indigenous peoples. Through an analysis based on the jurisprudence of the Inter-American Human Rights System, it is possible to identify the core elements that justify the special protection concerning traditional territories, leading to a rationality that revolves around the unique bond that traditional peoples establish with their land. By studying the recent evolution of the debate within the Inter-American Court of Human Rights, the article intends to shift the focus from formal and constricted ethnic classifications to the underlying cultural identity aspects of the relationship between a certain people and its own land. This change of perspective allows the consolidation of a singular idea of property rights towards traditional territories. Aimed not only at indigenous peoples, but also to any community that shows a distinguished and deep cultural tie to its land, this particular property right notion leads to a more comprehensive and consistent protection of indigenous and non-indigenous peoples' fundamental rights.

A. Introduction: The Protection of Property Rights in the Human Rights Context

Frequently placed in the center of the most pre-eminent human rights debates, the protection of property rights has been increasingly discussed in its various aspects and by distinguished recipients. In this scenario, indigenous peoples and all sorts of traditional communities have become the protagonists of many claims concerning the safeguards of their property rights; but these claims have shown another perspective on the dynamic of the right to property, essentially changing the notion of individual property rights to a concept of communal ownership. Once the traditional view on human rights implies the idea of individuals as recipients, the claims led by traditional communities come along with the necessity to incorporate a collective perspective to the protection

[1] The authors wish to thank LL.M. candidate Raquel da Cruz Lima for her supervision and remarkable incentive towards the promotion of human rights, J.S.D. candidate Jefferson Nascimento for his helpful comments and Jorge Calderón Gamboa, Senior Staff Attorney of the Inter-American Court of Human Rights, for his insightful discussion with the participants of the 2012 Inter-American Human Rights Moot Court Competition and exceptional work formulating the hypothetical case.

of certain human rights issues, and the property rights should be reached by this differentiated approach.

As an international jurisdiction for many demands concerning the protection of property rights, the Inter-American Court of Human Rights (Inter-American Court) has managed to develop solid jurisprudence on the protection of communal property rights,[2] fitting this protection into the scope of Article 21 of the *American Convention on Human Rights* (ACHR)[3] primarily interpreted as a safeguard to individual property rights. As the Court dealt with cases concerning the collective ownership of property by indigenous peoples, it became clear that, due to the close ties the community and its members establish with their traditional territories, indigenous peoples should have their communal property rights embraced by the protection under Article 21 ACHR. Furthermore, noticing that tribal peoples also demonstrate such bond to their lands and this bond is a key-element to their cultural integrity, the Inter-American Court extended the scope of communal rights to peoples such as the Moiwana and the Saramaka, even though they do not present the ethnical and cultural aspects that would qualify them as indigenous.[4]

In order to address the integrality of property rights protection, dealing with the communal aspect of such rights is imperative. Through the analysis of cases involving the restriction of property rights, it is possible to identify how the collective perspective of property plays an essential role, once its particularities must be taken into account so as to grant a special protection to communities that perceive their territories as part of their physical and cultural integrity. If a violation or any kind of restriction of traditional communities property rights is in question, the distinctiveness of the recipients of such rights must be considered, comprising not only a *prima facie* perspective of individual property

2 For examples of the Court's recognition of a broader scope of Article 21 comprising the protection of communal property rights, see *Saramaka People v. Suriname*, Judgment of 28 November 2007, IACtHR Series C, No. 172, 26-27, paras 88-92 [Saramaka Case]; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, IACtHR Series C, No. 79, 75, paras 152-153 [Awas Tingni Case]; *Indigenous Community Yakye Axa v. Paraguay*, Judgment of 17 June 2005, IACtHR Series C, No. 125, 76-77, paras 138-139 [Yakye Axa Case]; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C, No. 146, 72, paras 122-123 [Sawhoyamaxa Case].

3 *American Convention on Human Rights*, 22 November 1969, Art. 21, 1144 UNTS 123, 150 [ACHR].

4 See *infra* discussion (Section D) on the development of the Inter-American Court jurisprudence.

rights, but also the implications of a communal ownership of property and the special ties between traditional communities and their land.

B. A Legal Frame for the Restriction of Property Rights: The Criteria Presented by the International Environmental Law and the American Convention on Human Rights

The rise of economic development policies comes closely attached to a wide range of infra-structural changes that States must undergo in order to pursue their development goals. As the rush for progress expands its domain, along with a variety of environmental and social issues, the struggle between public priorities and the protection of individual rights comes to the center of the debate – especially when it enters the scope of property rights and environmental issues. In this scenario, legal standards of international environmental law have been evoked as an important tool to balance development policies and the impacts they may cause on the sphere of fundamental rights.

Analyzing the international legal framework on the matter, international environmental law addresses the debate between human rights safeguards and development in a broad manner, embracing any individuals that may have their rights restricted.[5] It is possible to identify explicit mention of the State's duty to consult the people that will be affected by development projects, as Article 1 of the *Aarhus Convention*[6] and Principle 10 of the *Rio Declaration*[7] reveal. These texts require that any public initiative that may lead to significant environmental impacts must take into account the implications of these impacts on the potentially affected communities, fostering consultation procedures and other instruments to ensure that the affected population takes part in the decision-making process. The leading argument is that an effective and informed participation of the community is a guarantee that the right to a sustainable and environmentally sound development will not be overlapped by public interest justifications that haven't been thoroughly discussed. According to the *Rio Declaration*, in order to offer a real opportunity for the participation of

5 M. N. Shaw, *International Law*, 6th ed. (2008), 847-849.

6 *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, 25 June 1998, Art. 1, 2161 UNTS 447, 451.

7 *The Rio Declaration on Environment and Development*, UN Doc A/CONF.151/5/Rev. 1, 13 June 1992, 31 ILM 874, 878, Principle 10.

all concerned citizens, States must safeguard the access to administrative and judicial proceedings, as well as an appropriate access to all relevant information related to environmental concerns.[8]

Together with these environmental issues raised by the implementation of development projects, the restriction of property rights, in particular, also implies a series of procedures that should be taken by the State when executing public initiatives that may interfere on the full enjoyment of fundamental rights. Consequently, besides the State's duty to undertake public consultations before the submission of any project that may impact the environment, development initiatives should also be considered under the framework of what is admissible when restricting the right to property on behalf of the public interest. Development goals set by public authorities frequently imply limitations to the full enjoyment of property rights in order to achieve a supposedly 'greater good', which compensates such restrictions and, more importantly, legitimizes them. Therefore, the tipping point is to determine in which cases there is a fair balance between public and private interests.

In *Salvador Chiriboga v. Equador*, the Court gives some evidence of how these limitations of individual rights may be possible.[9] The Inter-American Court held that any limitation to these rights must be exceptional and emphasizes that the property right "must be understood within the context of a democratic society where in order for the public welfare and collective rights to prevail there must be proportional measures that guarantee individual rights".[10] The State is charged and it is necessary to respect not only the requirements set by Article 21 ACHR but also the rules of international law, considering the social role of property.

In the Latin-American context, the incorporation of frenetic development projects is not a recent phenomenon, and neither are its social and environmental impacts. These impacts usually result from a poorly handled assessment of the pre-requisites to restrict individual rights and the failure of the State to recognize the different extensions of the property rights protection. A suitable illustration of the problem is the growing number of complaints that have been placed before the Inter-American Human Rights System concerning the violation of Article 21 ACHR. This Article establishes that "[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public

8 *Ibid.*

9 See *Salvador Chiriboga v. Equador*, Judgment of 6 May 2008, IACtHR Series C, No. 179, 19-34, paras 60-124 [Salvador Chiriboga Case].

10 *Ibid.*, 19, para. 60.

utility or social interest, and in the cases and according to the forms established by law" and although the Article itself does not express the implications of these "reasons of public utility or social interest", the Inter-American Court has already consolidated the criteria to this purpose. As demonstrated in cases such as the *Sawhoyamaxa Indigenous Community v. Paraguay*, the State must demonstrate the imperativeness of the alleged public interest and how the limitations it implies are the least restrictive possible concerning the individual right in question.[11]

Comprehensively described in the case of the *Community Yakie Axa v. Paraguay*, a triple-based requirement imposes that the means a State shall use to pursue a public interest must fulfill the criteria of adequacy, necessity, and proportionality in order to properly justify the restriction of an individual's right to property.[12] Firstly, concerning the adequacy aspect, the restrictions applied to the right to property must be appropriate and clearly connected to the achievement of a legitimate objective in a democratic society. Secondly, the necessity analysis relies on the already mentioned imperativeness of the public interest, in a way that its legitimacy alone is insufficient to support the restriction of a fundamental right. Moreover, an adequate and necessary measure shall also be proportionate, implying that the extent of a right's restriction is limited to the exact extent of the public interest that is being pursued, avoiding excessive restrictions. The restriction of the right to property will only be considered legitimate after the conclusion of this complex examination, accompanied by the payment of compensations and a specific legal provision concerning this restriction.

The right to just compensation, a general principle of international law[13] also comprised by Article 21 (2) ACHR, must be respected by the State, which shall determine the amount of the compensation taking into account the balance between public and private interest. The Court also states, in the aforementioned case *Salvador Chiriboga*, that in determining the value of the property, the State must take into account their legal and natural characteristics, in order to provide adequate compensation to the real value that those lands have to the displaced populations.[14] Nevertheless, when the idea of property itself gains

11 *Sawhoyamaxa Case*, *supra* note 2, 76, para. 138.

12 *Yakye Axa Case*, *supra* note 2, 78, para. 145.

13 *Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, Art. 1, 213 UNTS 262, 262; *The Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, PCIJ Series A, No. 7 (1926), para. 68; Shaw, *supra* note 5, 743-747.

14 *Salvador Chiriboga Case*, *supra* note 9, 27, para. 98.

multiple connotations, the recipients of these safeguards must be appropriately distinguished to ensure the effective protection of their fundamental rights.

C. The Special Protection due to the Property Rights of Indigenous and Tribal Peoples: Analysis of the Specific Criteria

Through an evolutionary interpretation of the international human rights instruments, taking into account the *ILO Convention No. 169*[15] and in accordance with Article 29 (b) ACHR, the Inter-American Court has recognized that Article 21 ACHR[16] comprises communal property rights of traditional

[15] International Labor Organization (ILO), *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 ILM 1382 [ILO Convention No. 169]. Although the *ILO Convention No. 169* is only directly binding for those States that have ratified it, its content has been evoked not only by courts of countries that have not ratified the document, such as in the case of the United States Ninth Circuit Appeals Court (*Hoopa Valley Tribe v. Christie,* 812 F.2d 1097 (1986)) and in the case *New Zealand Maori Council v. Attorney General*, [1987] 1 NZLR 641. This increasingly frequent use of the *ILO Convention 169* concerning the indigenous and tribal peoples' rights shows how some of its statements, like the obligation to consult, have been accepted as more than a treaty-based provision, leaning towards the idea of general principles of international law. Furthermore, when it comes to the protection of traditional peoples' property rights, the non-ratification of the *ILO Convention No. 169* should not be considered as an alibi to the violation of these peoples' rights; as some national courts have already outlined, it should rather be (at least) a parameter in order to identify whether or not these peoples are having their rights effectively protected by the State they inhabit, independently of their status as State parties of the *ILO Convention No. 169*. Concerning the employment of the *ILO Convention No. 169* by other courts, see *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012, IACtHR Series C, No. 245, 41-45, paras 163-165 [Sarayaku Case].

[16] The ACHR is definitely an essential document of the Inter-American System and plays an important role in the OAS as a whole, but has not been ratified by some OAS members such as Canada and the United States. However, even to the States that are not Parties to the Convention, the ACHR is fundamental on the protection of human rights in the region and even in other countries. In this sense, provisions such as the one stated by Art. 21 ACHR should be considered as part of an international *corpus iuris*, specially knowing that several international organisms have already established the importance of safeguarding tribal and indigenous peoples' property rights. Some examples can be identified on *Recommendation XXIII* by the Committee on the Elimination of Racial Discrimination (CERD/C/51/Misc.23/rev.1 (1997)) and on the *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* (UN Doc A/HRC/9/9 (2008)) by the Human Rights Council. For further developments on the *corpus iuris* concerning the

peoples.[17] This expansive interpretation is proved necessary due to the close ties that these peoples have with their traditional territory and its natural resources, a direct consequence of their way of life and the basis of their cultures, spiritual life, integrity, and economic survival.[18]

The traditional communities have a collective perception of the concept of property, as the ownership of the land "is not centered on an individual, but rather on the group and its community".[19] This notion diverges from the classic concept of property as an essentially individual right, but should be contemplated, at least, with an equal protection under Article 21 ACHR. Supporting this general idea, there is a provision set forth in Article 13 of the *ILO Convention No. 169*, which establishes that the States must respect "the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship".[20]

Accordingly, the Inter-American Court has already stressed that, when associated to traditional peoples, the term "property" used in Article 21 ACHR incorporates "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 movable and immovable, corporeal and incorporeal elements and any other intangible object capable of having value",[21] consolidating that this close connection of

indigenous and tribal peoples' right to property, see IACHR, *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, 2-9, paras 5-23 [IACHR, Norms and Jurisprudence of the Inter-American Human Rights System].

17 See *Awas Tingni Case, supra* note 2, 75 & 76, paras 148 & 151; S. J. Anaya & C. Grossman, 'The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples', 19 *Arizona Journal of International and Comparative Law* (2002) 1, 1, 12; M. Melo, 'Recent Advances in the Justiciability of Indigenous Rights in the Inter-American System of Human Rights', 3 *SUR – International Journal on Human Rights* (2006) 4, 30, 34-37.

18 See *Plan de Sánchez Massacre v. Guatemala*, Judgement, 19 November 2004, IACtHR Series C, No. 116, 81, para. 85; *Yakye Axa Case, supra* note 2, 75 & 76, paras 131 & 135; C. Courtis, 'Notes on the Implementation by Latin-American Courts of the ILO Convention 169 of Indigenous Peoples', 6 *SUR – International Journal on Human Rights* (2009) 10, 53, 61-64.

19 *Awas Tingni Case, supra* note 2, 74, para. 149.

20 *ILO Convention No. 169*, Art. 13 (1), *supra* note 15, 1387.

21 *Yakye Axa Case*, *supra* note 2, 76, para. 137; *Awas Tingni Case*, *supra* note 2, 74, para. 144; *Sawhoyamaxa Case*, *supra* note 2, 72, para. 121. Cf. *Ivcher Bronstein v. Peru*, Judgment of

indigenous peoples with their traditional lands, as well as with the incorporeal elements deriving therefrom, must be secured under Article 21 ACHR. This broader perspective regarding the property rights of traditional peoples clarifies the idea of communal property as a necessary extension under the protection fixed by Article 21 ACHR, once the collective ownership of the land is essential for these communities to protect their cultural heritage.

In the light of the extended interpretation of Article 1 (1) of the Convention concerning the obligation to respect rights, the Inter-American Court has already affirmed that, in order to properly protect the physical and the cultural integrity of traditional peoples, such communities should be entitled to a specific set of safeguards,[22] ensuring the "full exercise of their property rights".[23] These requirements are stated in Articles 6 and 7 of the *ILO Convention No. 169*, determining the obligation of the State authorities to consult the peoples concerned, through appropriate procedures and respecting their representative institutions. It is also a State's duty to establish means by which these peoples can freely participate in the decision-making process and to foster the full development of these peoples' own institutions and initiatives. In addition, these Articles of the *ILO Convention No. 169* emphasize that the consultations carried out must be undertaken in good faith and with the objective of achieving consent to the proposed measures.

Thus, in order to guarantee that the restrictions to their property rights do not lead to a denial of their survival as a traditional people, the State must comply with three additional safeguards: it must ensure the effective participation of the community members, while respecting their customs and traditions; it must deliver a reasonable benefit-sharing plan; and, finally, the State shall ensure that no concession will be granted until an independent and adequate assessment of the environmental and social impacts is completed.[24]

According to the *Saramaka* case, the consultation of the affected communities must be in good faith, through culturally appropriate procedures

6 February 2001, IACtHR Series C, No. 74, 50, para. 122.

22 *Saramaka Case*, *supra* note 2, 25, para. 85.

23 *Ibid.*; I. M. Cuneo, 'The Rights of Indigenous Peoples and the Inter-American Human Rights System', 22 *Arizona Journal of International and Comparative Law* (2005) 1, 53, 56.

24 See *ILO Convention No. 169*, Art. 15 (2), *supra* note 15, 1387; Human Rights Committee (HRC), *General Comment No. 23*, UN Doc CCPR/C/21/Rev.1/Add.5, 26 April 1994, 2 & 4, paras 4 & 7 [General Comment 23]; HRC, *Apirana Mahuika et al. v. New Zeland*, Communication No. 547/1993, UN Doc CCPR/C/70/D/547/1993, 15 November 2000, 14-17, para. 9.

and with the purpose of reaching an agreement.[25] Moreover, the consultation process must begin at the early stages of the public initiative itself, not only when it becomes necessary formality for the State to obtain the community approval in order to start implementing the project. Only a truly previous notification will enable the community to undergo adequate internal discussions, with the participation of all interested parties. The State is also required to provide proper access to information, ensuring that the affected communities are aware of the potential risks and securing that the project is accepted knowingly and voluntarily. Lastly, as it was presented in *Maya Indigenous Communities of the Toledo District v. Belize*, and in the case of the *Yakye Axa Indigenous Community v. Paraguay*, the consultation must take account of the peoples' traditional methods of decision-making, respecting their representative structures.[26]

Additionally, the Court has affirmed that, when dealing with large-scale development or investment projects, the State has the onus, when consulting with the affected people, to obtain their free, prior, and informed consent.[27] Following the same argument, the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People observed that a "free, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects".[28]

This additional protection is justified by the fact that large-scale projects have the potential to trigger profound and permanent social and economic changes to the affected communities. In the case of the *Maya Indigenous Communities of the Toledo District v. Belize*, the Inter-American Commission on Human Rights (Inter-American Commission) goes further, fleshing out the notion of informed consent and establishing that this requires "at a minimum, that all of the members of the community are fully and accurately informed

25 *Saramaka Case, supra* note 2, 40, paras 133-134.

26 *Yakye Axa Case*, *supra* note 2, 91, para. 195.

27 *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, Art. 10, 19 & 32, GA Res. 61/295 annex, UN Doc A/RES/61/295, 1, 5, 6 & 9 [UNDRIP]; T. Ward, 'The Right to Free, Prior and Informed Consent: Indigenous Peoples' Participation Rights Within International Law', 10 *Northwestern Journal of International Human Rights* (2011) 2, 54, 61.

28 Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Indigenous Issues: Human Rights and Indigenous Issues*, UN Doc E/CN.4/2003/90, 21 January 2003, 23, para. 66 [Special Rapporteur on the Situation of Indigenous People, Human Rights and Indigenous Issues].

of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives".[29]

The second safeguard the State must observe when carrying out development projects in lands of traditional communities is the offer of a reasonable benefit-sharing plan.[30] This concept arises from the right of compensation, recognized under Article 21 (2) ACHR, which states that "[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law".[31]

In this sense, the Committee on the Elimination of Racial Discrimination (CERD) has recommended that, in the case of large-scale exploitation activities, "[t]he equitable sharing of benefits to be derived from such exploitation [must] be ensured".[32] This same idea is affirmed by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People – to assure "the human rights of indigenous peoples in relation to major development projects, [States should ensure] a mutually acceptable benefit sharing [...]."[33] Thus, an appropriate benefit sharing is supposed to guarantee an adequate compensation for any damage caused by the exploitation of communal lands and, as the Inter-American Court has determined, the community shall decide who will be the specific recipient(s) of these shared benefits.

The assessment of environmental and social impacts, the third of the special safeguards is that the State shall observe when restraining the communal property rights of traditional peoples, is a requirement that encompasses the access to information about the possible consequences of the State projects to be conducted on their lands. Therefore, it is imperative that the Environmental and Social Impacts Assessment (ESIA) is not only dedicated to address potential environmental problems, but it should also present the possible social implications of the State's initiative, such as the modification of migration flows, the end of traditional economic activities, etc. Thus, the process of preparing the ESIA

29 *Maya Indigenous Communities in the Toledo District v. Belize*, IACHR Case 12.053, Report No. 40/04, 12 October 2004, para. 142.

30 UNDRIP, Art. 15 (2), *supra* note 27, 6.

31 ACHR, Art. 21 (2), *supra* note 3, 150.

32 Committee on the Elimination of Racial Discrimination (CERD), *Considerations of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ecuador*, UN Doc CERD/C/62/CO/2, 2 June 2003, 3-4, para. 16.

33 Special Rapporteur on the Situation of Indigenous People, *Human Rights and Indigenous Issues*, *supra* note 28, 23, para. 66.

does not represent the mere formality of writing a report – it must thoroughly consider the social and environmental concerns of the affected communities. Additionally, aiming to minimize the damaging consequences of the project, the ESIA shall present alternatives for the economic activities rendered unviable or impeded, as well as for the use of the natural resources affected.

As the specific safeguards to the protection of communal property rights are consolidated, indigenous and tribal people tend to have a more solid legal structure to guarantee their physical and cultural survival, reassuring the collective perspective of their close ties to the land they live in. Acknowledging the key-role played by the Inter-American Court of Human Rights in this matter, a comprehensive analysis of its jurisprudence demonstrates the underlying evolution of the communal property rights framework.

D. The Analysis of the Contentious Jurisprudence of the Inter-American Human Rights System Revealing the Special Link to the Land as a Key-Factor

The special bond that indigenous peoples have with their territories is recognized throughout the jurisprudence of the Inter-American Court, considering the communal property as the determining factor for the protection of traditional peoples' property rights. This finding can be achieved through a systematic analysis of the cases: *Mayagna Awas Tigni v. Nicaragua* (2000); *Moiwana Community v. Suriname* (2005); *Yakye Axa Indigenous Community v. Paraguay* (2005); *Sawhoyamaxa Indigenous Community v. Paraguay* (2006); *Saramaka People v. Suriname* (2007); *Xákmok Kásek Indigenous Community v. Paraguay* (2010); and *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012). Such cases demonstrate that strictly formal factors such as the length of stay in the territory and its continued occupation are not decisive for the right to a differentiated protection of the communal property.

Thus, in this section the article will analyze the evolution of the Inter-American System jurisprudence in the matter, highlighting its major steps. The protection of traditional peoples' property rights has significantly developed, evolving from the recognition that Article 21 ACHR comprises the right to communal property to the clear statement that the need to a special protection, addressed by item 2 of Article 21 ACHR, is based on the close tie that those peoples have with their traditional lands.

I. Tendencies on the Inter-American Human Rights System: The First Cases on Communal Property of its Contentious Jurisprudence

In this first sub-section the article will analyze the major progress brought by the first four cases of communal property of the contentious jurisprudence of the Inter-American Human Rights System. Beginning with the case *Mayagna* and passing by the cases *Moiwana*, *Yakye Axa*, and *Sahoyamaxa*, it will be examined how the Court has developed its jurisprudence with regard to the protection offered by Article 21 ACHR and to the safeguards that must be observed for an admissible restriction of the traditional peoples' property rights.

In the case of the Mayagna community, first to appear in the jurisprudence of the Inter-American System on the subject, the Court explained the reasoning carried out towards the assertion that Article 21 ACHR does encompass the protection of the right to communal property of indigenous peoples:

> "Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention -which precludes a restrictive interpretation of rights-, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua."[34]

Also in this case, the Court clarifies the content of Article 21 ACHR to determine that the term "property" therein present "can be defined as 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".[35]

Already, in this first of its kind jurisprudence on the matter, the Court addresses the topic that will later be shown at the core of the protection provided to the right to communal ownership of property: the special relationship

[34] *Awas Tingni Case*, *supra* note 2, 74, para. 148.
[35] *Ibid.*, 73, para. 144.

that this people has with the traditional territory it inhabits. In this sense, it underlines the communal form of exercising property ownership that surrounds these communities, as well as the fact that the relationship with the land is the fundamental basis of their cultures, spiritual life, integrity, and 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."[36]

The Court explains that although such bond with the territory is crucial for the recognition of a special protection due to the communal property of these peoples, it is not necessary for the community to have inhabited one single place or possessed the same configuration over the centuries. Therefore, in spite of the community's different placements along its history, this factor does not withdraw the protection of their property rights under the ACHR.[37] In this sense, a report by the Inter-American Commission established that such movements are a natural part of the culture and history of these peoples, adding that "the history of indigenous peoples and their cultural adaptations along time are not obstacles for preserving their fundamental relationship with their territory, and the rights that stem from it".[38]

In this case, the Court also draws attention to the fact that the relationship these peoples have with their land and natural resources is also protected by other rights under the ACHR, such as the right to life, honor and dignity, freedom of conscience and religion, freedom of association, family rights, and freedom of movement and resistance.[39] This statement not only demonstrates the indivisible character of the human rights, but also reinforces the finding that the relationship with the territory inhabited by these communities goes beyond material aspects, representing an intrinsic part of their entire mode of existence.

In the same case, the Court justifies the violation of the property right of the Mayagna by the fact that the limits of their territory have not been effectively

36 *Ibid.*, 74, para. 149.
37 *Ibid.*, 70, para. 140 a.
38 IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 16, 27-28, para. 70.
39 *Awas Tingni Case*, *supra* note 2, 70-74, para. 140-141.

delimited and demarcated by the State, whose officials granted a concession on the lands without the Mayagnas' consent.[40] Although the Court enumerates the requirements set by Article 21 ACHR for an admissible restriction of the right to property,[41] it still does not develop such criteria. These requirements are better developed in the following cases, and represent an important tool to address the conflict between fundamental rights, when finding a level of compatibility is necessary, but in the least restrictive possible way.

Some years later, the Court analyzes the first case of communal property rights of tribal peoples, the case of the *Moiwana Community*, in which it emphasizes once more the importance of the special relationship that traditional peoples have with their territory and the communal form in which they exercise their property rights.

The *Moiwana* case represents an important step in the jurisprudence of the Inter-American Court towards an increasingly solid protection of the right to communal property. Therein, the Court clearly establishes the necessary extension of the special protection to communal property to tribal communities, taking as a starting point the bond they have with their ancestral lands. The Court begins by stating that the Moiwana people do not have a legal title of the land of Moiwana Village, territory that formally belongs to the State, but adds, in reference to the case of the *Mayagna*, that for indigenous communities who have occupied their traditional lands in accordance with theirs customary practice, the mere possession of land should be sufficient to obtain legal recognition of property.[42]

In this regard, the Inter-American Court considers that

> "[t]he Moiwana community members are not indigenous to the region; according to the proven facts, Moiwana Village was settled by N'djuka clans late in the 19th Century (supra paragraph 86(11)). Nevertheless, from that time until the 1986 attack, the community members lived in the area in strict adherence to N'djuka custom".[43]

40 *Ibid.*, 76, para. 153.
41 *Ibid.*, 74, para. 143.
42 *Moiwana Community v. Suriname*, Judgment of 15 June 2005, IACtHR Series C, No. 124, 54, paras 130 & 131. [Moiwana Case].
43 *Ibid.*, 54, para. 132.

Thus, their "all-encompassing relationship" to their traditional lands is a sufficient element to obtain the State recognition of their ownership.[44]

In the following years, the Court reinforces this logic in the cases *Yakye Axa* and *Sawhoyamaxa*, making increasingly clear references to the significance of these special ties to the land, until the case of the *Saramaka People v. Suriname* (2007), when the Inter-American Court goes further with regard to the special protection that traditional peoples are entitled concerning communal property rights.

In each one of these cases, the Court refers to the protection already granted in its previous decisions, demonstrating the consistent and evolving character of such protection to property rights. Regarding the case of the Community Yakye Axa, the Court states that it will consider "the special meaning of communal property of ancestral lands for the indigenous peoples, including the preservation of their cultural identity and its transmission to future generation".[45]

In this case, the Court itself recognizes the importance and the necessity of this development, considering that its interpretation should accompany the evolution of international instruments on the subject, since they are live instruments.[46] This statement is consistent with the general interpretation presented on Article 29 ACHR and on Article 31 of the *Vienna Convention on the Law of Treaties*.[47]

Likewise, the Court recognizes the need to resort to other international texts on the subject, in an effort to interpret the ACHR according to the evolution of the Inter-American Human Rights System, taking into account the parallel developments in the international human rights law.[48] Thus, it emphasizes the particular importance of *ILO Convention No. 169*,[49] since it contains several provisions relating to the right to property concerning indigenous and tribal peoples, which may be used to clarify the content and scope of Article 21 ACHR.

The most important advancement brought about by this case, however, is the development of the content of these requirements present in Article 21 ACHR, setting the guidelines for what can be considered as permissible restrictions on property rights. Accordingly, the Court clarifies that such restrictions must be established by law; must be necessary; must be proportional; and must present a

44 *Ibid.*, 54-55, para. 133.
45 *Yakye Axa Case, supra* note 2, 74, para. 124.
46 *Ibid.*, 74, para. 125.
47 *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 31, 1155 UNTS 331, 340.
48 *Yakye Axa Case*, *supra* note 2, 74, para. 127.
49 *Ibid.*, 75, para. 130.

purpose to attain a legitimate goal in a democratic society.[50] The Court further declared the following:

> "The necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest; it is insufficient to prove, for example, that the law fulfills a useful or timely purpose. Proportionality is based on the restriction being closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right. Finally, for the restrictions to be compatible with the Convention, they must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right."[51]

The criteria, however, refer to general requirements that must be met by the State government when a project may cause restrictions in the enjoyment of property rights of its citizens. The case still does not mention the specific criteria established by the *ILO Convention No. 169* and how this document should be considered when dealing with communal property rights of traditional peoples. The Court limits its statement to the need for compensatory measures when there are no means of restoring the lands and the natural resources taken,[52] failing to consider other demands such as the right to consultation, benefit sharing and appropriate study of social and environmental impacts.

In the case of the *Sawhoyamaxa Community*, the Court reiterates the need for compensatory measures whenever it is not possible to return the land set aside, adding the requirement that such lands must be chosen through an appropriate consultation procedure,[53] to be performed with the affected communities. Once again referencing the first case on the subject, the Court highlights:

> "[T]he close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving therefrom, must be secured under Article 21 of the American Convention. The culture of the members of indigenous communities reflects a

50 *Ibid.*, 77, para. 144.
51 *Ibid.*, 78, para. 145.
52 *Ibid.*, 78, para. 149.
53 *Sawhoyamaxa Case*, *supra* note 2, 76, paras 135 & 212.

> particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because the form part of their worldview, of their religiousness, and consequently, of their cultural identity."[54]

II. The *Saramaka* Case and the Subsequent Progress: The Consolidation of the Special Link to the Land as a Key-Factor

Leading to another examination of the Inter-American Court about the violation of the right to communal ownership of tribal peoples, the *Saramaka* case is a milestone in the Inter-American System jurisprudence. This case can be considered as a starting point for analyzing the progress made by Inter-American System to consolidate the special link with the territory as the determining factor for granting special protection for the right to communal property. The reasons for this choice will be analyzed in this sub-section.

Originated from the maroon communities of Surinam, the Saramaka people is not indigenous to the region it inhabits, as its members were taken to the area during the colonization period.[55] Thus, the Saramaka claim their rights as a tribal people, once their community presents characteristics similar to those of indigenous peoples, such as social, cultural, and economic traditions different from other sectors of the society and possesses its own form of organization, being governed at least partially by their own rules, customs, and traditions.[56] More importantly, their relationship with the land is one of the main aspects of their culture and is intrinsically linked to its historic struggle against slavery.[57]

This case is paradigmatic for the analysis the article wants to achieve because it develops, for the first time in the jurisprudence of the Inter-American Court, the need to conduct consultation, benefit sharing and studies of the social and cultural impacts in situations of restriction on the enjoyment of the right to communal ownership of traditional peoples. Furthermore, the *Saramaka* case establishes, even more clearly, that the criteria for granting such special safeguards to communal property rights were centered on the identification of a particular tie to the territory.[58]

54 *Ibid.*, 71, para. 118.
55 *Saramaka Case*, *supra* note 2, 23, para. 79.
56 *ILO Convention No. 169*, Art. 1 (1), *supra* note 15, 1384-1385.
57 *Saramaka Case*, *supra* note 2, 24, para. 82.
58 See L. Brunnes, 'The Rise of Peoples' Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights', 7 *Chinese Journal of International Law* (2008) 3, 699, 702, 704-706, paras 6, 14 & 16.

In this regard, and evolving from the basic requirements already presented, the Court adds an essential factor: such restrictions, although meeting the mentioned criteria, can only be admissible if they do not amount to a denial of the community's traditions and customs in a way that endangers the very survival of the concerned group and its members.[59]

Besides the above-mentioned developments, in the *Saramaka* case, the Inter-American Court states precisely that the special relationship that some peoples have with their traditional territories is the central criterion used by it to give special protection to the right to common property of these populations. In this sense, the Court states "this special relationship to land, as well as their communal concept of ownership, prompted the Court to apply to the tribal Moiwana community its jurisprudence regarding indigenous peoples and their right to communal property under Article 21 of the Convention".[60] Reinforcing this reasoning, the Court elucidates "decisions to this effect have all been based upon the special relationship that members of indigenous and tribal peoples have with their territory, and on the need to protect their right to that territory in order to safeguard the physical and cultural survival of such peoples".[61]

The case of the *Indigenous Community Xakmok Kásek* brings some further innovations in the field when recognizing that the multi-ethnic character of the community concerned does not affect their right to communal property. It emphasizes, referring to the Commission's allegations, that "the multi-ethnic composition of the Community [...] is due to its history" and that the indigenous peoples are dynamic human groups whose cultural composition "is restructured and reconfigured with the passage of time without this giving rise to the loss of its specific indigenous status".[62] This statement is important in the way that it reinforces the trend that has been settled throughout the jurisprudence on the subject in order to rely upon the protection of communal property rights on criteria related to the ties with the land.

In the case of the *Kichwa Indigenous People of Sarayaku v. Ecuador*, the most recent case of the Inter-American Court's jurisprudence on the matter, consolidates the progressive approach that had been carried out by the previous cases, setting out even more clearly the decisive character of the relationship that traditional peoples establish with their territories. Thus, the Court states

59 *Saramaka Case*, *supra* note 2, 38, para. 128.
60 *Ibid.*, 25-26, para. 85.
61 *Ibid.*, 26, para. 90.
62 *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010, IACtHR Series C, No. 214, 10, para. 35 [Xákmok Kásek Case].

that "[n]evertheless, in addition to the considerations in the chapter on the facts of the case [...], the Court considers it pertinent to emphasize the profound cultural, intangible and spiritual ties that the community has with its territory, in order to understand more fully the harm caused in this case".[63]

The Court goes a step further, by referring to the fact that in addition to the indigenous and tribal peoples, native and autochthonous communities must also hold a special protection of the right to property. Thus, it reinforces its argumentative logic that, when dealing with traditional property rights, the main aspect to be considered must be the link to the land, suggesting that other groups, which are not ethnically classified as indigenous or tribal, shall also have access to these rights.

It confirms that the identification of a bond with the territory is the most appropriate criterion for granting this protection, in opposition to criteria based on ethnic aspects, which depend on the classification of these groups as indigenous or tribal peoples and are not able to represent all the complexity that they present.

Those ethnic aspects, insufficient standards for granting the special protection to communal property of traditional peoples, may fail to provide the guarantees to enforce these rights. On one side, they force the classification of these groups into categories that do not represent them, associating their inclusion among the holders of those special protections to an oversimplification of their identity realities. On the other side, they deny these peoples the rights that are owed to them as a community connected to its territory, based on under-inclusive criteria that should not be determinant to safeguard communal property rights.

This tendency can also be identified in the United Nations System, in a series of recent instruments that give other traditional peoples the same rights granted to the indigenous and tribal communities regarding the protection of their communal property. It demonstrates an effort to overcome the restriction imposed by terminological terms, moving towards a protection grounded in the bond established with the territory inhabited by the traditional community. In the *Guiding Principles on Internal Displacement*, the Human Rights Commission discusses the state obligation to take actions to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.[64] The range of recipients

63 *Sarayaku Case*, *supra* note 15, 37, para. 149 [Kichwa Case].

64 United Nations Commission on Human Rights, *Guiding Principles on Internal Displacement*, UN Doc E/CN.4.1998/53/Add.2 (1998), reprinted as UN Doc OCHA/

of this particular protection is one more time enlarged, and another reference is made to the essence of communal property rights: the special attachment to their lands.

The Human Rights Committee in its *General Comment No. 23* on Article 27 of the *International Covenant on Civil and Political Rights* brings a similar provision. Article 27 of the document emphasizes the importance that minorities are not denied the right to enjoy their own culture.[65] These rights consist, according to the *General Comment No. 23*[66] of the enjoyment of a way of life closely associated with the territory and the use of its resources and complements, stating that

> "[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them."[67]

In this paragraph, there is also a direct reference to the right of these communities to participate in the decisions that may affect their right to communal property.

The fact that these two examples are featured in recent documents raises an important issue: the binding documents on the protection of communal property of indigenous and tribal peoples in the Inter-American System, among which the most relevant are the ACHR and the *ILO Convention No. 169*[68] need a contextualization effort to remedy the outdated approach concerning some issues, like the right to communal property. Therefore, to effectively fulfill their role safeguarding human rights, these texts should be adapted and interpreted according to the new developments of the international law. Some

IDP/2004/01 (2004), 5, Principle 9.

65 *International Covenant on Civil and Political Rights*, 16 December 1966, Art. 27, 999 UNTS 171, 179.

66 HRC, *General Comment 23*, *supra* note 24, 2, para. 3.2.

67 *Ibid.*, 4, para. 7.

68 See *supra* notes 15 & 16.

of these documents still present an assimilationist approach[69] when dealing with indigenous and tribal peoples and even those texts that have already surpassed this point of view insist on employing notions that are no longer correspond to the existing demands of traditional communities. Taking into account the progress reported by the jurisprudence development of the Inter-American Court and the international documents on the matter, retaining the use of the classifications such as "indigenous and tribal peoples" may reveal a reluctance to overcome the terminology limits for the offering of an adequate protection to communal property rights.

There have been several evidences of the increasingly broad recognition of special guarantees for the right of communal ownership of traditional peoples, accepting they should be granted based on the analysis of their bond with their territory. This resistance to put aside terminology issues is often based on the apprehension concerning the effects of an excessive extension of such protection, which may lead to an emptying of its meaning and the impossibility of identifying the legitimate recipients of communal property safeguards. Although understandable, this preoccupation should not pose a barrier to the protection of the common property of these groups. It is a question that shall be addressed by the proper analysis of the key-element that substantiates the granting of specific property rights safeguards: the identification of a special bond between the traditional community and its territory.

E. The Limitations of Formal Ethnic Classifications to an Effective Protection of Human Rights: The *Garifuna* Case

The detachment of communal property rights from the terminology discussion regarding indigenous and tribal peoples is an essential element to make sure that the protection of these special property rights reaches all its due recipients – not only due to the difficulty of specifying the holders of indigenous and tribal designations, but mainly because these terminological aspects are

69 R. D. Cordero, 'Los Derechos de los Pueblos Indígenas y la Protéccion al Medio Ambiente Dentro del Sistema Interamericano de Protéction de los Derechos Humanos', 24 *American University International Law Review* (2008) 1, 7, 9; ILO, *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-tribal Populations in Independent Countries*, 26 June 1957, Art. 1, 328 UNTS 247, 250 [ILO Convention No. 107]. The Convention describes tribal and semi-tribal peoples as populations whose "social and economics conditions are at a less advanced stage".

not important to the rights here discussed. Particularly in the Latin-American context, traditional communities often are classified as "indigenous", "tribal" or "peasants" even though their cultural dynamic over time made this communities undertake a multi-ethnic profile. That is the case of the *Garifuna People*, a community that emerged from the singular combination of multiple ethnic backgrounds, embracing African, Amerindian, and European traditions.[70]

Due to its complex ethnicity, to its claim placed before the Inter-American Commission[71] and to the recently filed application before the Inter-American Courts,[72] the Garifuna people represents an excellent example to demonstrate the negative effects of basing the safeguarding of property rights on restrictive anthropological classifications. As they built their cultural identity as a community, members of the Garifuna people have persistently maintained a specific relationship to their territory, and this is a constant defining-element of the Garifuna way of life. The traditions from the Caribs and Africans were preserved and blended, forming a hybrid people[73] whose traditional customs and values, including their bond to the land, must be considered elements of the Garifuna identity, that should not be restricted to only one of its ethnic origins. Just as well as the communities that fully fulfill all the formal characteristics of what can legally be considered an "indigenous people", the Garifuna may also present, even though their multi-ethnical heritage, cultural adaptations and structures that are based on a special relationship to their territory.[74]

Closely examining the idea of defining what should be understood as "indigenous peoples", it is possible to identify a contradiction between the dynamic of the traditional communities and the static characteristic of a legal definition.[75] Once we admit that definitions like the one established by the *ILO Convention No. 169* make reference to a preset ensemble of elements that should be found in a community in order to consider it "indigenous"

70 K. Stevens, 'Garifuna Cultural History' (2000), available at http://www.stanford.edu/group/arts/honduras/discovery_eng/ history/culthist.html (last visited 02 May 2013).

71 *Garifuna Community of Cayos Cochinos and its Members v. Honduras*, IACHR Case 1118-03, Report No. 39/07, 24 July 2007, [Garifuna Case].

72 *Garifuna Community of "Triunfo de la Cruz" and its Members v. Honduras*, IACHR Case No. 12.548, 21 February 2013.

73 See J. A. Mills, 'Legal Constructions of Cultural Identity in Latin America: An Argument Against Defining 'Indigenous Peoples", 8 *Texas Hispanic Journal of Law and Policy* (2002), 49, 64-66.

74 IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 16, 11 & 12, paras 35 & 36.

75 Mills, *supra* note 73, 67.

or "tribal", using these denominations to define the scope of the amplified protection of property rights necessarily excludes traditional communities like the Garifuna from the field of these special safeguards.[76] However, this exclusion is based on how a static legal definition qualified the recipients of communal property rights protection according to the conjuncture in which the text was elaborated,[77] improperly dissociating this protection from its core fundament: the special ties these communities have with their territory.

Moreover, the relationship to the land itself is presented as a dynamic and adaptable social phenomenon,[78] which deserves an accordingly flexible approach. Otherwise, the specificities of the Garifuna historic organization as unique community would implicate a denial of its rights related to the common ownership of property, based on the fact that, according to most international law parameters regarding indigenous peoples' rights, the Garifuna barely satisfy the requirements to achieve a special protection in order to preserve their

76 While the *ILO Convention No.169* is being used as an example of the insufficiency of legal definitions to an effective safeguard of traditional peoples' rights, it is necessary to point out how this document already shows a significant evolution on the protection of indigenous and tribal peoples' rights, specially once it considers, on Art. 1, "[S]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion" in order to define the groups under the protection of the Convention. On the other hand, it still attaches this "self-identification" to the tribal or indigenous classifications – a traditional community, which does not identify itself as tribal or indigenous, would remain excluded from the Convention safeguards, even though such group could demonstrate a special bond to its territory that should justify a broader protection to its property rights.

77 The *ILO Convention No.169* is an example itself of how legal definitions not always respond promptly to constantly evolving demands. Advancing on the protection of indigenous and tribal peoples' rights, the *ILO Convention No. 169* is the result of several contestations concerning the ILO previous document on the matter, *ILO Convention No. 107*. Although the *ILO Convention No. 169* is a fundamental step towards a more comprehensive and effective protection of indigenous and tribal peoples' rights, leaving behind the assimilationist ideas that were incrusted in the *ILO Convention No. 107*, it does not mean that the earlier conceptions, which sustained its elaboration in 1989, have not been surpassed by the ever-changing scenario of traditional communities and their claims. The *Garifuna Case* in question, for example, was only brought before the Inter-American Commission on Human Rights in 2007, raising inquiries that the *ILO Convention 169* has not managed to embrace within its text. For an analysis of the evolution of the ILO work on indigenous peoples' rights, see L. Swepston, 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989', 15 *Oklahoma City University Law Review*, (1990) 1, 677.

78 M. Chapmam, 'Indigenous Peoples and International Human Rights: Towards a Guarantee for the Territorial Connection', 26 *Anglo-American Law Review* (1997) 3, 357, 360.

cultural integrity as a community.[79] Considering the Commission on Human Rights definition presented in the *Cobo* study,[80] for example, the Garifuna do qualify as a "non-dominant sector of society", but they do not show a "historical continuity with pre-invasion and pre-colonial societies that developed on their territories"[81] once they consider themselves a separate and distinguished group from the Carib population.[82]

The critical point in the *Garifuna* case also relies on a particular tendency towards the modernization of certain practices. Members of the Garifuna community may have acquired new habits, incorporating some aspects of the other sectors of society in a movement towards their adaptation and even to their own survival in a continually changing social conjuncture. Rather than a decharacterization of the community, the process of adaptation is a trait frequently found in the context of indigenous peoples and other traditional groups,[83] that do not need to freeze in time in order to demonstrate their legitimate will to uphold their cultural identity. Although this development of their practices does not imply the elimination of the cultural identity of the Garifuna people, it is contrary to the formal exigencies of the legal frame for the protection of indigenous property rights. If these formal requirements are rigidly respected, it might lead to an extremely incongruous scenario:

> "[O]ver time the Garifuna might intentionally become less socially, culturally, and economically distinct from the rest of the Honduran community. Nevertheless, the law should recognize and protect the right to retain a unique Garifuna identity despite the fact that self-identified Garifuna individuals choose wealth over poverty. Allowing disinterested lawyers and officials – people who would not

79 Mills, *supra* note 73, 66-67.

80 The definition presented by M. Cobo also fails to comprise the protection to other traditional communities such as the Wayúu (community living in the outskirts of Maracaibo, Venezuela; although they were unable to preserve ancestral territories, they did not lose their indigenous identity) and the Fijians (a group that has recently achieved preeminence in a nation-state, failing to meet the criterion of non-dominant sector in the society). For more details on the Cobo definition under-inclusiveness, see S. Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis', 12 *Harvard Human Rights Journal* (1999), 57, 111.

81 Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1986/7Add.4 (1986), para. 379.

82 See Mills, *supra* note 73, 67 (note 98).

83 D. Stephen & P. Wearne, *Central America's Indians* (1984), 3, 11.

> identify themselves as indigenous – to formulate a legal definition of indigenous peoples, could potentially and quite ironically require the Garifuna to choose a hut over a house in order to benefit from the indigenous rights movement."[84]

This idea demonstrates how the stereotype of indigenous peoples can overshadow the basic notion that traditional communities are not determined to live permanently attached to their native habits in order to prove their cultural identity. In this sense, one cannot sustain that the fact that the community has incorporated other practices – such as variations on its dialect or changes on its traditional clothing – will completely suppress its cultural integrity. In fact, it is due to its adaptations overtime that the Garifuna have been able to maintain their uniqueness, absorbing new cultural elements as long as they represented an actual contribution to the Garifuna culture itself.[85]

On the other hand, it is important to underline that it is not a matter of enlarging the concept of indigenous peoples itself; the focus is rather on how the Garifuna people should qualify to a special protection of their communal property rights once their cultural subsistence as a community is attached to their relationship to the territory. Consequently, observing the existence of a tie to the land as a key-factor, the impossibility to formally classify the Garifuna people as a tribal or indigenous community should not interfere in the protection of their right to communal property. This reasoning, although not yet directly applied by the Inter-American Court, is perfectly suitable to support the Inter-American Commission allegation in the Admissibility Report of the Garifuna Community of Cayos Cochinos and its members' petition, acknowledging the violation of Article 21 of the Convention, in conjunction with Article 1 (1). [86] The Report states that once the Garifuna were prevented to fully enjoy their communal property rights, being unable to pursue the traditional activities linked to their territory.

The Inter-American Commission recognizes, consequently, the importance of the due respect of Article 21 ACHR towards the Garifuna community, once their traditional activities are closely related to the property collectively owned by them. Questions concerning the ancestral character of such lands or if the members of the community have an indigenous heritage are left aside, prioritizing the effective tie the Garifuna people establishes

84 See Mills, *supra* note 73, 68.
85 See Stevens, *supra* note 70.
86 *Garifuna Case*, *supra* note 71, para. 66.

with its territory and how this specific connection to the land is an essential element for the preservation of the cultural and physical integrity of the Garifuna community and its members. If the Commission were to consider the legal definitions of indigenous and tribal peoples consolidated by the international *corpus iuris*,[87] the Garifuna would not be reached by the protection of communal property rights, because these legal frames favor the historic continuity with a preinvasion society and other requirements that are not centered on the actual relationship between the community and the territory.[88]

Showing a complex composition and particular conditions of cultural development, the Garifuna case is able to reveal the limitations of applying a pre-established legal definition in order to define the recipients of the safeguard of communal property rights. The lively structure of this community – and definitely of other cases of multi-ethnic communities[89] – is not compatible with the static nature of the attempt to classify all kinds of traditional communities into the "indigenous" or "tribal" denomination provided by international human rights instruments. Furthermore, the controversy and evolution of such definitions themselves demonstrate that indigenous and tribal peoples are also susceptible to dynamic legal frames.[90] However, once a close tie to the land

87 Some examples of the most commonly used legal definitions used in the field of the international human rights law can be found in Article 1 of the *ILO Convention No. 169* and in Cobo, *supra* note 81.

88 See Mills, *supra* note 73, 67.

89 For the analysis of how several traditional communities in the United States still wait for a recognition in order to be entitled to the safeguards restricted to those who present the status of "Indian tribe" based on scientific evidence see Chairperson-Rapporteur of the Working Group on Indigenous Populations, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People: Working Paper*, UN Doc E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996.

90 It is important to emphasize that, today, we can find other international instruments that attribute the indigenous status to groups that not necessarily demonstrate historical continuity with pre-colonial communities (this element is more present in the Cobo definition and is used only as a subsidiary objective element to define indigenous peoples on the *ILO Convention No. 169*). Such examples may include the World Bank's *Operational Policy 4.10*, the International Law Association's *Final Report on the Rights of Indigenous Peoples* and on UN works such as the *Guidelines on Indigenous Peoples*' (Issue 8 (2008)) by the UN Development Group. However, even these more updated documents on indigenous peoples' rights, fail to relate the protection of traditional territories to the special bond traditional peoples have with their lands. Determining the protection of such rights based on their self-identification as tribal or indigenous is already a step forward considering criteria like historical continuity or perpetuation of cultural specificity, but it still obliges traditional people to choose between two pre-defined ethnical classifications

emerges as a fundamental aspect of the cultural integrity of these peoples, the formality of a legal definition cannot deny the due respect of their rights to property, safeguarding the full enjoyment of the range of human rights that arises from the special relationship the community nurtures with its territory.

F. A Step Further on the Protection of Traditional Lands and Cultural Identity

Presenting a substantial jurisprudence on tribal and indigenous peoples' rights, the Inter-American Human Rights System has shown a progressive understanding on the matter, leading to a more comprehensive protection of the rights of these traditional communities. However, the addressing of communal property rights issues needs to take a step further in order to properly deal with the increasingly complexity of the cases presented before the Inter-American Court and Commission on Human Rights. As the Inter-American System exercises a global influence on the subject, it plays a key-role on the consolidation of traditional peoples' rights.[91] The effectiveness of this consolidation, nevertheless, relies on the acknowledgement of the fundamental importance of a community's close tie to the land when it comes to property rights.

Again, it is imperative to point out, nevertheless, that considering the bond to traditional territories as the defining element to the safeguard of communal property does not imply an unlimited extension of the special standards on the protection of property rights. The relationship between traditional communities to the land they inhabit is relevant from the moment it represents an essential element of these communities' cultural identity and integrity. This specific characteristic is clearly distinguishable from the cultural patterns of other society segments, and there resides the need to a distinguished protection of the property rights. Consequently, a careful analysis of the existence of a true bond to the territory in question should be carried out when demands concerning communal property rights are placed; but this examination shall not be based on

– tribal or indigenous – in order to qualify as recipients of a special protection of property rights that should rather focus on the actual relationship these communities nurture with their territories (see *supra* note 76).

91 See A. R Harrington, 'Internalizing Human Rights in Latin America: The Role of the Inter-American Court of Human Rights System', 26 *Temple International & Comparative Law Journal* (2012) 1, 1, 20. Concerning the Inter-American jurisprudence on the recognition and protection of communal property rights, see also *Sawhoyamaxa Case*, *supra* note 2, 30-58, 71-72 & 105-106, paras 73, 120 & 248; *Xákmok Kásek Case, supra* note 62, 21, paras 85-86.

pre-established definitions regarding the ethnical classification of a traditional people.

Moreover, the change of perspective from the ethnical classification of a community to what its close ties to the land really mean is not linked to an amplification of the "indigenous people" concept. Although indigenous peoples are the main figure when it comes to communal property issues, it is not necessary to frame, in a single ethnic group, all the other peoples that demonstrate a special bond to their traditional lands. This remark is crucial to support the reasoning developed in this article, once we believe that to guarantee a peoples' right to communal property, the relationship of these peoples to their land transcends the need to attribute a classification to the community in question. Thus, discussions on how a certain people should be considered tribal, indigenous or whichever other ethnic designation should be put aside in order to avoid the exclusion of peoples that do have a close tie to their traditional lands, but fail to fulfill the criteria that would allow them to be classified as one of these juridical categories.

Through the analysis of the *Moiwana* case it is possible to notice that while the Inter-American Court did recognize that tribal peoples should have their communal property rights guaranteed *due to their bond with their ancestral lands*,[92] the argument used by the Court remains attached to the concept of "tribal people". According to the reasoning presented on this case, the Court set out a new extent for the special protection to communal property rights: tribal communities should also fall under the expanded protection of Article 21 ACHR. On the other hand, as the Court does not sufficiently emphasize the centrality of a community's tie to its territory when granting a special protection of property rights, other traditional peoples that do not correspond to the legal definitions for tribal or indigenous peoples remain vulnerable on the matter of communal property rights safeguards. The ultimate consequence of this logic is that communities like the Garifuna people, despite having on its relationship to the land a determinant factor for the physical and cultural survival of the community, cannot rely on this tie to its territory to be granted the due protection of their communal property rights.

When the bond of the community to its territory comes to the center of the legal analysis on communal property rights, defining which ethnical category this community belongs to is taken to a second plan, and the focus is given to the essence of the reasoning behind the special protection of traditional peoples' property rights. The definition of indigenous and tribal peoples may

[92] *Moiwana Case*, *supra* note 42, 54-55, para. 133.

embody important tools for the study of traditional peoples, but they should not be the basis of the legal analysis performed here. Besides the fact that they fail to include traditional communities that equally demonstrate to be entitled to a wider right to property, it artificially forces a complex ethnic group into either the indigenous or the tribal people classification. The critical point here is to risk denying basic rights to traditional peoples based on the fact that these differentiated groups will not reduce their cultural identity to one single ethnical background. Hereafter, the non-recognition of special standards on the protection of property rights to certain groups due to the absence of specific elements required to their classification as indigenous or tribal peoples – such as historical continuity with pre-invasion societies – is inconsistent with the protection of all the fundamental rights of these groups right to uphold their cultural integrity as a community.

The provision of a special protection to the right of communal ownership should not be centered on another aspect than the special bond of intrinsic dependence they establish with their territories. Nonetheless, by disengaging the offer of such protection from ethnic classifications, we do not intend to extend such rights to any person to whom the land has any significance. Our main objective is to use the progressive understanding already reached on the matter to lead to a more comprehensive protection of the rights of these traditional communities, being aware that an unreasonable extension of this protection may take away the material and legal substance of such rights. In this sense, the employment of the tie to the land as the defining element to the protection on of communal property rights should be considered as a legal criterion to grant a distinctive range of juridical safeguards and as such, should maintain the exclusion of those individuals and groups that do not meet the necessary criterion to be qualify as a recipient of this amplified protection.

These excluded recipients would be, for instance, minorities that depend economically on their land, but would not have their cultural integrity affected if their relationship by the interruption of their relationship with the territory. This commonly found interdependence to the land resources based on a relationship of physical subsistence differs from the cultural bonds traditional communities develop with their territories, failing to demonstrate the strong spiritual and cultural dimensions of a non-physical relationship to the land.[93] Notwithstanding some communities like the peasant groups present this

[93] E. Dannenmaier, 'Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine', 86 *Washington University Law Review* (2008-2009) 1, 53, 103.

economical link to the territory they inhabit, this interdependence does not imply an outspread understanding of property, which means that the concept of communal property cannot be evoked in such situations.

It is crucial to clearly identify the criteria to be considered on the field of communal property rights, directly linking them to the aims of providing a differentiated protection. At the same time, these criteria cannot lead to the under-inclusiveness presented by the restrictive placement of traditional communities under a preset ensemble of categories, such forcing to fit them into the indigenous or tribal classification. Hence, the close ties to the land cannot be considered as a random criterion; it is, in fact, an essential element of the community structure[94] and when deprived of its due protection, can disrupt the entire existence of the community, which represents a violation of its cultural integrity and may conduce to its ethnic suppression. Furthermore, an adequate identification of the key-elements of communal property rights protection prevents a boundless extension of these guarantees to any ethnic groups that use their lands purely as a mean of subsistence. The specific protection to communal property rights is rather directed to safeguard those who, if deprived of their territories, will also be deprived of the main aspects of their own lives, being unable to maintain their cultural, religious, and social traditions – the foundation of their existence as a people.

[94] At this point, it is possible to approximate the reasoning of this article to the "distinctive connection doctrine" proposed by Professor Eric Dannenmaier, when the author refrains from adopting a pre-defined concept of what is "indigenous", stating "It is important to note, however, that a unique relationship with the land is inherent in most [of these] understandings of what is indigenous. It is also a critical feature of many public statements by indigenous peoples and advocates. Thus, it should be seen not merely as a collateral feature of an indigenous lifestyle, but rather as a core element of indigenous identity". *Ibid., 63.*