HARMONIZATION OF INTERNATIONAL HUMAN RIGHTS LAW THROUGH JUDICIAL DIALOGUE: THE INDIGENOUS RIGHTS' PARADIGM

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Abstract

This paper explores the increasing frequency with which regional human rights courts have made cross-references to the decisions of their counterparts in other regions. It asks whether this practice indicates that international human rights law is becoming more 'universal' and the possible impacts of this outcome. It focuses specifically on recent jurisprudence concerning indigenous rights. Analysing points of convergence and divergence between regional courts, the paper advocates an interregional judicial dialogue which would produce a harmonised and universal interpretation and implementation of human rights standards.

1 Introduction

Fragmentation¹ and constitutionalization² have been regarded as two contradictory discourses in international law.³ Furthermore, regionalization of human rights protection and proliferation of judicial organs have been considered to hinder consistency of human rights norms. Given that truth lies somewhere in between, this paper discusses harmonization of human rights norms through judicial interpretation by regional courts in indigenous rights cases. It first demonstrates the multiplication of regional human rights courts and their law-making function in general, and then turns to the case of indigenous peoples. It concludes that a dialectic interpretation of indigenous rights has been developed through regional jurisprudence. In this context, inter-regional judicial dialogue advances

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¹ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682, 13 April 2006.

² J Klabbers, A Peters & G Ulfstein (eds), *The Constitutionalization of International Law* (2009).

³ H G Cohen, 'From Fragmentation to Constitutionalization' (2011) 24 *Pacific McGeorge Global Business & Development Law Journal*; UGA Legal Studies Research Paper No 11–14, <<http://ssrn.com/abstract=1974550>> [accessed 28 March 2015].

coherence of international human rights law, which could be regarded as a sign of constitutionalization, but not of its *telos*.

2 Regional Judiciaries in the Field of Human Rights

In the post-war era, the pursuit of peace was based upon international cooperation and unity through the realization of common ideals. Consequently, regional organizations emerged or were reformed with a view to 'bring states into closer association'⁴ and establish a common public order.⁵ In this context, human rights gained paramount importance. After all, the proclamation of fundamental rights under the United Nations Charter and the adoption of the Universal Declaration of Human Rights (*UDHR*) had marked 'the internationalization of human rights and the humanization of international law'.⁶ Apart from the political factors which enabled European cooperation, the UN's inaction led to decentralized action and the enforcement of human rights through regional instruments.

From a more theoretical perspective, the fragmentation of international law and the development of specialized or self-contained regional regimes enhanced the multiplication of regional human rights courts. Even though the International Criminal Court for the Former Yugoslavia (*ICTY*) has noted that 'every tribunal is a self-contained system',⁷ there is no legal system which functions in isolation.⁸

Judicial proliferation has been questioned as to whether it has any positive impact,⁹ and regarded as a 'systemic problem',¹⁰ whereas various concerns have

⁴ Statute of the Council of Europe, 5 May 1949, 87 UNTS 103, Preamble, para 5.

⁵ *Austria v Italy*, ECmHR App No 788/60, 11 January 1961, 18, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115598>> [accessed 28 March 2015].

⁶ T Buergenthal, 'The Normative and Institutional Evolution of International Human Rights' (1997) 19 *HRQ* 703.

⁷ *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, IT-94-1-AR72, 2 October 1995), 11.

⁸ In this regard, Judge Guilleme, using the words of English poet John Donne, comments on the proliferation of international courts that: 'No man is an island, entire of itself. Every man is piece of the continent, a part of the main'. G Guilleme, 'The proliferation of international judicial bodies: The outlook for the international legal order' (Speech delivered at the Sixth Committee of the General Assembly of the United Nations, 27 October 2000), <<http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1>> [accessed 28 March 2015].

⁹ T Buergenthal, 'Proliferation of International Courts and Tribunals: Is It Good or Bad?' (2001) 14 *LJIL* 267.

¹⁰ B Kingsbury, 'Foreword: Is the proliferation of International courts and tribunals a systemic problem?' (1999) 31 *NYUJILP* 679.

been raised on the universality and coherence of international law.¹¹ Case law reflects such inconsistencies on the interpretation and implementation of international law in different courts. The case of *Loizidou v Turkey*,¹² for example, has been criticized as being inconsistent with the jurisprudence of the International Court of Justice (ICJ) on treaty interpretation.¹³

Without disregarding these issues, international courts have responded to international concerns to strengthen the rule of law. Regional human rights regimes echo international human rights norms as enshrined in UDHR and later the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Given that international covenants served as the model for regional ones, the conventional framework is, to a large extent, reproduced with minor adjustments as analyzed subsequently.

2.1 The Regional Institutional Framework in a Comparative Perspective

Starting with Europe, which had suffered severely because of the disastrous World Wars I and II, the establishment of the Council of Europe resulted in the formation a human rights system within a year. The European Convention on Human Rights (ECHR) created a framework for European human rights protection and stands as its cornerstone. From the very beginning, it became apparent that human rights protection would be a dead letter without the necessary supervisory mechanisms.¹⁴ To ensure the observance of the Convention, two organs were set up: the European Commission of Human Rights (ECmHR) and the European Court of Human Rights (ECtHR).¹⁵ The Commission could be either be informed on alleged breaches of the Convention by member states, or receive

¹¹ See P Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1999) 31 *NYUJILP* 791, 791-792; J I Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *RCADI* 162; R Higgins, 'Respecting Sovereign States and Running a Tight Courtroom' (2001) 50 *ICLQ* 121, 121-122.

¹² *Loizidou v Turkey* (1995) ECtHR Ser A 310.

¹³ K Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions' (2001) 5 *Max Planck UNYB* 67, 81.

¹⁴ As Bradley notes, 'the Court gives flesh and blood to the bare bones of the Convention': A Bradley, 'Introduction: The need for both international and national protection of human rights – the European challenge', in S Flogaitis, T Zwart & J Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism Into Strength* (2013) 1, 3.

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222, Art 19.

petitions from victims—individuals, groups and NGOs—against member states which have recognized the Commission's competence to do so.¹⁶ Its main task was to secure a friendly settlement of the matter between the parties; otherwise the case would be referred to the European Court of Human Rights. The Council of Europe's Protocol No 11 (1998) reformed this rather complex structure, replacing the Commission and its filtering competence with a single European Court of Human Rights.

The significant role of the ECtHR in the field of human rights protection is undisputed. Two key achievements should be highlighted in particular. First of all, the accession of the vast majority of European states, including Russia and Turkey, to the Convention, establishes a European area with common human rights standards in and between member states. Secondly, the individual gains an active role as it has *locus standi* in front of the Court. This led to a significant increase in the number of applications to the ECtHR and gave rise to further institutional improvements. Protocol No 14 (2010) introduced new admissibility criteria with a view to address the increase in the Court's workload and backlog. Further, the newly adopted Protocol No. 15 underlines the principle of subsidiarity, whereas Protocol No. 16 will enable national courts to seek advisory opinions in the context of cases pending before it relating to the interpretation or application of the rights and freedoms defined in the ECHR or the protocols thereto. Although this envisages a wider role for the ECtHR similar to the European Court of Justice (ECJ), the figures are discouraging since only 29 states have signed Protocol No. 15, of which only 10 states have ratified it.¹⁷ There is, at present, a sign of reluctance towards future constitutionalization of the human rights in the ECHR.

The Organization of American States (OAS) followed the European example, albeit with a delay, through the adoption of the American Convention on Human Rights (ACHR) in 1969.¹⁸ The larger number of rights in the ACHR—the inclusion of economic, social and cultural rights in particular—reflects the regional particularities,¹⁹ apart from which the institutional structure is quite similar to the ECHR. Two organs are entrusted with the supervision of the

¹⁶ ECHR Arts 25 and 26.

¹⁷ Council of Europe, 'Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No 213', <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=213&CM=7&DF=23/02/2015&CL=ENG>> [accessed 28 March 2015].

¹⁸ J Rehman, *International Human Rights Law: A Practical Approach* (2003).

¹⁹ See T Buergeenthal, 'The American and the European Conventions on Human Rights: Similarities and Differences' (1980–1981) 30 *Am U LR* 155, 156.

conventional framework, namely the Inter-American Commission of Human Rights (IACmHR) and the Inter-American Court of Human Rights (IACtHR). The Commission is vested with the same competences as the ECtHR, including the friendly settlement of petitions brought by any person, group of persons or NGOs containing denunciations or complaints of violation of the ACHR by a State Party,²⁰ examination of inter-state communications,²¹ or otherwise transfer cases to the IACtHR. Despite statutory limitations on the IACtHR's power to review cases, steps have been made for procedural improvements through the revision of Rules of Procedure of the respective organs in order to streamline their work and strengthen the status of the petitioner.²² However, the American system follows the 'two-tier structure'²³ that existed in the European system before 1998.

Last but not least, the Organization of African Unity adopted the African (Banjul) Charter on Human and Peoples' Rights in 1981.²⁴ This instrument is innovative as it adapts to the African social reality and adds group rights to its protective regime. Unlike the other regional conventions, the Banjul Charter is limited to the creation of the African Commission on Human and Peoples' Rights (ACmHPR) as the only competent organ to ensure its implementation and address communications and/or complaints by states and non-state actors.²⁵ In 1998, the OAU adopted a Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights with a view to enhance the efficiency of the African Commission. The relationship between the two organs is explicitly clarified under Article 2 of the Protocol which specifies their complementary function. Under Article 5 of the Protocol, states, the African Commission, African intergovernmental organizations, as well as NGOs and individuals may have *locus standi* to bring a case before the Court upon a state's prior acceptance.²⁶ The Protocol came into force on 25 January 2004 and the Court officially started its operation in 2006, even though

²⁰ American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, Art 44.

²¹ ACHR Art 45.

²² J M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2003) 17–18.

²³ L Burgorgue-Larsen, 'The Indirect Contentious Jurisdiction of the Court', in L Burgorgue-Larsen & A Ubeda de Torres (eds), *The Inter-American Court of Human Rights: Case Law and Commentary* (2011) 25, 28.

²⁴ African Charter on Human Rights and Peoples' Rights (Banjul Charter), 28 June 1981, 1520 UNTS 217.

²⁵ See V O Orlu Nmehielle, *The African Human Rights System: Its Laws, Practice, and Institutions* (2001).

²⁶ As of October 2012, only five countries have made such a Declaration. Those countries are Burkina Faso, Ghana, Malawi, Mali, and Tanzania. The African Union Commission, 'The African

it delivered its first judgment in 2009. In the meantime, the Assembly of the African Union decided on the merger of its Human Rights Court and the Court of Justice,²⁷ due to considerations about the availability of resources,²⁸ and legal certainty.²⁹ The Protocol on the establishment of a single court, namely the African Court of Justice and Human Rights, was adopted in July 2008. Since then, only five states have ratified it.³⁰ In addition, a Draft Protocol is under preparation with a view to amend the 2008 Protocol.³¹ The draft expands the Court's jurisdiction, reaffirms the complementary relationship between the Court and the African Commission on Human and Peoples' Rights and changes its nomenclature to 'African Court of Justice and Human and Peoples Rights'. Apparently, the African human rights system has entered into a legal labyrinth, but the Ariadne's Thread is missing.³² The outcomes of these amendments remain uncertain as the ratification of different legal instruments is required in order to render the new Court operational and effective. Thus, the role of the Commission remains crucial given its competencies in the field.

Thus, this analysis shows that regional human rights protective regimes are structured alike. Furthermore, the complementarity between each Commission and its respective Court denotes the unified procedure followed and their shared competences in the field which strengthens the value and impact of relevant case

Court on Human and Peoples' Rights', <<http://www.au.int/en/organs/cj>> [accessed 28 March 2015].

²⁷ African Union Assembly, *Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union*, AU Doc Assembly/AU/Dec.83(V), July 2005.

²⁸ O Elias, 'Introductory Note to the Protocol on the Statute of the African Court of Justice and Human Rights' (2009) 48 ILM 334.

²⁹ 'An integrated pan-African court offers opportunities for developing a unified, integrated, cohesive, and hopefully, indigenous jurisprudence for Africa. Years later, this jurisprudence will be used as a yardstick for determining 'whether or not one can talk of a regionally peculiar corpus of African international law'. K Kindiki, 'The Proposed Integration of the African Court of Justice and the African Court of Human and Peoples' Rights: Legal Difficulties and Merits' (2007) 15 *Af JICL* 145.

³⁰ Benin, Burkina Faso, Congo, Libya and Mali. See African Court Coalition, 'Ratification Status: Protocol on the Statute of the African Court of Justice and Human Rights', <http://www.african-courtcoalition.org/index.php?option=com_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12> [accessed 28 March 2015].

³¹ *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, AU Doc Exp/Min/IV/Rev.7, 15 May 2012, <<http://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf>> [accessed 28 March 2015].

³² In Greek mythology, Ariadne's Thread connotes the means that guides one out of the labyrinth.

law.

2.2 Development of Human Rights Law through Judicial Dialogue

Regional human rights courts are significantly different from international judicial organs, whose main responsibility is the peaceful settlement of legal disputes.³³ As the ECtHR noted in *Loizidou v Turkey*:

The International Court is called on *inter alia* to examine any legal dispute between States that might occur in any part of the globe with reference to principles of international law. The subject-matter of a dispute may relate to any area of international law. In the second place, unlike the Convention institutions, the role of the International Court is not exclusively limited to direct supervisory functions in respect of a law-making treaty such as the Convention.³⁴

Regional courts stand as the guardians of human rights protection. Their task is not only to ensure the observance of the engagements,³⁵ or the fulfillment,³⁶ of commitments undertaken by the contracting parties, but also to secure the ‘common interest’.³⁷ As Judge Cançado Trindade notes ‘the interpretation and application of human rights treaties have been guided by considerations of a superior interest or *ordre public* which transcends the individual interest of State Parties’.³⁸ Hence, judicial organs foster uniform implementation of human rights on a wider scale.

Judicial organs are further entrusted with the interpretation and application of the constitutive convention.³⁹ This signifies derogation from absolute legal

³³ See for instance the Statute of the International Court of Justice, 26 June 1945, 33 UNTS 993, Art 36.

³⁴ *Loizidou v Turkey*, above n 12, para 84.

³⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (*ECHR*), 4 November 1950, 213 UNTS 221, Art 19; Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, 9 June 1998, 1001 UNTS 45, Art 3.

³⁶ American Convention on Human Rights (*ACHR*), 22 November 1969, 1144 UNTS 123, Art 33.

³⁷ *Capital Bank AD v Bulgaria*, No 49429/99, ECtHR 2005, para 78–79; *Rantsev v Cyprus and Russia*, No 25965/04, ECtHR 2010, para 197.

³⁸ A A C Trindade, *The Access of Individuals to International Justice* (2011) 83.

³⁹ ECHR, above n 35, Art 32; ACHR, above n 36, Art 3(1) para 1; Rules of Procedure of the Inter-American Commission on Human Rights, 1 August 2013, Art 62(3).

positivism, since interpretation ‘gives meaning to norms and generates legal normativity’.⁴⁰ The general and often abstract wording of conventional provisions further enhances the need for judicial interpretation as it illustrates the content, scope and limitations of rights,⁴¹ while at the same time developing conventional rules.⁴² For instance, even though there is no provision on the right to environment under the ECHR, it has been held to be protected within the meaning of Article 8 of the ECHR—the right to respect for private and family life⁴³—in the course of progressive jurisprudence. As a result, judicial lawmaking seems inextricably linked a court’s function.⁴⁴

Judicial interpretation follows the general rules on treaty interpretation under the Vienna Convention on the Law of Treaties.⁴⁵ Emphasis is also placed on present-day standards⁴⁶ which reflect the evolutive features of international law. To this end, the ECHR⁴⁷ and ACHR⁴⁸ are regarded as ‘living instruments’ which adapt to current realities. Regional consensus has a vital role in this process

⁴⁰ I Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012) 17.

⁴¹ For instance, see Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9, where the right to education contained therein has been reviewed on various occasions. In *Leyla Şahin v Turkey*, No 44774/98, ECtHR 2004, para 137, the ECtHR noted that institutions of higher education can’t be excluded from the scope of the Protocol. The limits of the right were drawn in *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, para 5: ‘[The limits of the right to education] by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention’.

⁴² *Ireland v United Kingdom* (1978) ECtHR Ser A No 25, para 154.

⁴³ *Tatar v Romania*, No 67021/01, ECtHR 2009.

⁴⁴ See A von Bogdandy & M Jacob, ‘The Judge as Law-Maker: Thoughts on Bruno Simma’s Declaration in the Kosovo Opinion’, in U Fastenrath et al (ed), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011) 824.

⁴⁵ A Ubeda de Torres, ‘The optional contentious jurisdiction of the Court’, in L Burgorgue-Larsen & A Ubeda de Torres (eds), *The Inter-American Court of Human Rights: Case Law and Commentary* (2011). See also *Blake v Guatemala* (1997) IACtHR Ser C No 7, para 21.

⁴⁶ G Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (2010) 21 *EJIL* 509.

⁴⁷ *Tyrer v United Kingdom* (1978) 2 EHRR 1, para 35. See also G Letsas, ‘The ECHR as a Living Instrument: Its Meaning and its Legitimacy’, in A Føllesdal, B Peters & G Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (2013).

⁴⁸ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999) IACtHR Ser A No 16, paras 114–15.

as an element of shared interest and common standards within its respective regime emanating from an intra-regional perspective.

Apart from regional perceptions, interpretation follows universalistic approaches,⁴⁹ as enshrined in the Vienna Declaration (1993)⁵⁰ according which 'all human rights are universal, indivisible and interdependent, and interrelated'.⁵¹ In this context, the African Charter is not only innovative but also revolutionary. Article 60 and 61 enables the ACmHPR to draw lessons through the practice of other human rights organs when reviewing a case. Therefore, the ACmHPR endorses international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other UN instruments and those adopted by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the State Parties to the African Charter are members.

Similarly, both the ECtHR and the IACtHR follow general interpretation methods. Regional courts should 'take into account developments in the *corpus juris gentium* of international human rights law over time and in present-day conditions',⁵² as 'an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation'.⁵³ In this regard, the regional courts transform 'global soft law into regional hard law'.⁵⁴

⁴⁹ In *Purohit v The Gambia*, the African Commission affirms that: 'In interpreting and applying the African Charter, the African Commission relies on its own jurisprudence, and as provided by articles 60 and 61 of the African Charter, on appropriate and relevant international and regional human rights instruments, principles and standards. The African Commission is, therefore, more than willing to accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms and standards taking into account the well recognized principle of universality.' *Purohit v The Gambia*, ACmHPR Comm No 241/2001, paras 47–48.

⁵⁰ UN General Assembly, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23, 12 July 1993.

⁵¹ *Ibid*, para 5.

⁵² *Mary and Carrie Dan v United States* (2002) IACtHR Report No 75/02, para 96. See also the following ECHR cases that include cross-references: *Tryer v United Kingdom* (1978) 2 EHRR 1; *Marckx v Belgium* (1979) 2 EHRR 330; *Loizidou v Turkey*, above n 12.

⁵³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971 p 16, 31.

⁵⁴ G L Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 *EJIL* 101, 111.

However, the use of inter-court dialogue as an interpretative tool is complementary in nature serving as a guide for international practice. After all, given that international law is a consent-based system, the transplant of legal interpretations of other regional systems would contravene this general principle.⁵⁵

Despite criticisms that ‘judicial dialogue between regional tribunals is to some extent a monologue’,⁵⁶ as reference to African case law is scarce, such claims are not well-founded. Taking into consideration the organizational and operational features of each judicial system, the vast case law of the European and American regional Courts apparently offers a plethora of interpretative guidelines regarding a wide variety individual rights which served as interpretative guidelines for the African one. On the other hand, the African Commission shied away in developing rights where there was little concrete international jurisprudence.⁵⁷ Consequently, the development of human rights case law in each legal system defines the limits of intercourt dialogue.

In practical terms, the ECtHR has referred to the Inter-American human rights system in more than 50 cases regarding general practice or interpretation of particular human rights—e.g. enforced disappearances, exhaustion of domestic remedies, death penalty, torture, right to life, domestic violence etc.⁵⁸—and vice versa. Likewise, the ECtHR has also taken African case law into consideration, although in a rather limited number of cases—e.g. the case of *Sitaropoulos and Giakoumopoulos v Greece* on political participation.⁵⁹ The African jurisprudence is also cited in Concurring or Dissenting Opinions as in the cases of *De Souza Ribeiro v France*,⁶⁰ *Konstantin Markin v Russia*,⁶¹ *Hirsi Jamaa v Italy*.⁶² These three judgments were all handed down by Judge Pinto de Albuquerque, which signifies the role of judges in this regard. On the other hand, the American-African interaction is intensive with dense cross-references in the relevant case law, especially

⁵⁵ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Preamble.

⁵⁶ M Killander, ‘Interpreting Regional Human Rights Treaties’ (2011) 7 *SUR IJHR* 145, 154.

⁵⁷ *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa*, IWAGIA (Copenhagen) and ACHPR (Banjul) (2005) 72.

⁵⁸ See European Court of Human Rights, *Research Report: References to the Inter-American Court of Human Rights in the case law of the European Court of Human Rights*, 2012, <http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf> [accessed 28 March 2015].

⁵⁹ *Sitaropoulos and Giakoumopoulos v Greece*, No 42202/07, ECtHR 2012, paras 30–31.

⁶⁰ *De Souza Ribeiro v France*, No 22689/07, ECtHR 2012.

⁶¹ *Konstantin Markin v Russia*, No 30078/06, ECtHR 2012.

⁶² *Hirsi Jamaa v Italy*, No 27765/09, ECtHR 2012.

in the case of indigenous rights.

Thus, regional courts base their interpretation on a universal grammar, namely international law, which enhances coherence⁶³ allowing them to ‘operate within the same dialectic and reach compatible conclusions.’⁶⁴ Accordingly, indigenous rights jurisprudence is analyzed in the following section from a comparative perspective, with a view to affirm the harmonization of human rights standards through judicial dialogue.

3 The Curious Case of Indigenous Rights

Indigenous rights are placed in the spotlight in this article for various reasons. First, indigenous people represent distinct groups and in particular, communities, peoples and nations which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁶⁵

Secondly, standard-setting is underway, leaving room to ‘legalization of indigenous rights through human rights jurisprudence.’⁶⁶ Last, but not least, indigenous rights have been much debated in the course of inter-regional dialogue. Accordingly, the analysis in this article assesses current practice with a view to draw lessons and identify prospects and challenges in this field.

⁶³ D Pulkowski, ‘Universal International Law’s Grammar’ in U Fastenrath, R Geiger, D Khan, A Paulus, S von Schorlemer & C Vedder (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011) 154.

⁶⁴ *Ibid*, 183.

⁶⁵ J R M Cobo, *Study on the Problem of Discrimination against Indigenous Populations*, UN Doc E./CN.4/Sub.2/1986/7/Add.4, 1986, para 379.

⁶⁶ G Pentassuglia, ‘Towards a Jurisprudential Articulation of Indigenous Land Rights’ (2011) 22 *EJIL* 165, 199.

3.1 The struggle for indigenous rights protection

Indigenous people had been traditionally deprived of rights or status, which enabled the legitimization of colonialism.⁶⁷ Nevertheless, the humanistic approach of the UN Charter brought about various international initiatives for the protection of human rights. The International Labour Organization (*ILO*) was innovative in the field of indigenous protection, with the General Conference adopting the Indigenous and Tribal Populations Convention in 1957,⁶⁸ under which protection was laid upon integration of these populations to national community. The Convention was revised in 1989 by Convention No 169.⁶⁹ The 'integration principle' was replaced by a participatory model based upon self-identification and respect. Both instruments gained little attention whereas the latter numbers only 22 ratifications.

Although the protection of the indigenous entered the UN agenda during the decolonization process, an international agreement was reached in 2007 with the adoption of the UN Declaration on the Rights of Indigenous Peoples by the General Assembly.⁷⁰ The Declaration establishes a universal framework of minimum protection and recognizes individual and collective rights.⁷¹ Further, it reaffirms that indigenous individuals are entitled without discrimination to all human rights recognized in international law, whereas indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.⁷² In other words, each member of the group

⁶⁷ For an overview on these developments from Vitoria, to Grotius, Oppenheim and the UN, see S J Anaya, *Indigenous Peoples in International Law* (2000) 9–71.

⁶⁸ Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957, 328 UNTS 247.

⁶⁹ Indigenous and Tribal Peoples Convention, 27 June 1989, 1650 UNTS 383.

⁷⁰ United Nations Declaration on the Rights of Indigenous Peoples (*UNDRIP*), GA Res 61/295, 13 September 2007. The UN Declaration was adopted by a majority of 143 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). It is worth noting that the US, Canada and New Zealand have recently expressed their consent to the Declaration.

⁷¹ As Sicilianos notes, the Declaration reflects the erosion of the traditional distinction between individual and group rights and the syneresis of the various phases of the development of international law of human rights in light of the differentiation and empowerment of actors of those rights. L A Sicilianos, *The Human Dimension of International Law: Interactions between General International law and Human Rights* (2010) 334.

⁷² UNDRIP, above n 70, Preamble and para 19. See also B G Ramcharan, 'Individual, Collective and Group Rights: History, Theory, Practice and Contemporary Evolution' (1993) 1 *International Journal on Minority and Group Rights* 27, 42.

carries with him/her the individual rights into the group, on top of what the group enjoys in its collectivity.⁷³ In spite of the legal value of 'soft law' instruments,⁷⁴ the Declaration not only advances indigenous protection but also crystallizes international practice.⁷⁵

Indigeneness is closely linked with numerous characteristics and affinities, which confers a distinct identity and includes a common history, linguistic tradition, territorial connection and political outlook.⁷⁶ Thus, Judge Ziemele in his partly dissenting opinion in the *Handölsdalen Sami Village v Sweden* criticizes the majority's reasoning in that case for disregarding the indigeneness of the group despite analyzing their distinct characteristics.⁷⁷

In the absence of a binding legal instrument, indigenous protection rests upon international human rights law and the legalization of their rights through human rights jurisprudence.⁷⁸ In this respect, 'classic individual rights have been re-read to accommodate communal perspectives in ways that challenge rigid dichotomies between the individual and the group within human rights law',⁷⁹ even though

⁷³ *Kevin Mgwanga Gunme v Cameroon* (2003) ACmHPR Comm No 266/03, para 176 ('The Commission deduces [...] that peoples' rights are equally important as are individual rights. They deserve, and must be given protection').

⁷⁴ 'En somme, la soft law n'est ni du non-droit ni une lex imperfecta. Elle n'est pas non plus toujours et nécessairement un droit en gestion, car il peut s'agir également d'un droit différent, ou d'une variété de droit qui remplit une fonction différente de celle du droit limite; non pas le droit du justicier ou du gendarme, mais celui, plus discret et malléable, de l'architecte social': G Abi-Saab, 'Cours général de droit international public' (1987) 207 Hague *Receuil* 213.

⁷⁵ For instance, UNDRIP, above n 70, Art 3 recognizes the right to self-determination, in accordance with Art 46 of the UN Charter. As the ACmHPR has noted, self-determination is exercised within national boundaries, with respect to sovereignty and territorial integrity: *Katangese Peoples' Congress v Zaire* (1995) ACmHPR Comm No 75/92, para 6. See also E Stamatopoulou, 'Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples', in S Allen & A Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2010) 394, 411.

⁷⁶ See *Kevin Mgwanga Gunme v Cameroon*, above n 73, para 179.

⁷⁷ In *Handölsdalen Sami Village v Sweden*, No 39013/04, ECtHR 2010, para 7, the Court considered the characteristics of Sami habitants noting that the Sami have, since ancient times, inhabited the northern parts of Scandinavia and the Kola Peninsula. Originally living by hunting, fishing and collecting, the Sami activities changed over time to concern mainly reindeer herding. Their historical use of the land has given rise to a special right to real estate, the reindeer herding right (*renskötselrätten*). Due to lack of any public legal status of the villages as such, the Court assessed the case on an individual base (ECHR Art 6: right to fair trial), disregarding their special status as indigenous people.

⁷⁸ Pentassuglia, above n 66.

⁷⁹ G Pentassuglia, 'Indigenous Groups and the Developing Jurisprudence of the African Commission on Human and Peoples' Rights: Some reflections' (2010) 3 *UCL Human Rights Review* 150,

‘transposing communal principles of indigenous people into an individualistic rights framework is not a task to be taken lightly’.⁸⁰

The right to lands traditionally owned, occupied or used by the indigenous⁸¹ is indicative. Land disputes of this kind call for a reconceptualization of individual rights in accordance with the particular needs of indigenous peoples on a case-by-case basis.⁸² As Pentassuglia notes, property to land lies at ‘the intersection of a critical understanding of possession and title and material and spiritual connection’ as well as the exercise of traditional livelihoods.⁸³ For this reason, violation of land rights would even entail risk to economic, social and cultural development, the right to property, integrity of their persons, enjoyment of cultural rights and protection of tradition values.⁸⁴

These critical remarks are discussed further in the context of interregional dialogue and its role in developing law below.

3.2 Indigenous rights discourse within interregional dialogue

Judicial dialogue has enabled the integration of international standards in regional systems as well as the harmonization between different regional systems. Besides, regional framework applies ‘with due regard to the particular principles of international human rights law governing the individual and collective

159.

⁸⁰ T Antkowiak, ‘Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court’ (2014) 35 *U Pa JIL* 113.

⁸¹ See *Bakweri Land Claims Committee v Cameroon* (2004) ACmHPR Comm No 260/02.

⁸² *Yakye Axa Indigenous Community v Paraguay* (2005) IACtHR Ser C No 125, paras 146 & 217 (*Yakye Axa*).

⁸³ Pentassuglia, ‘Towards a Jurisprudential Articulation of Indigenous Land Rights’, above n 66, 171. See also *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) IACtHR Ser C No 79, para 149 (*Mayagna*); *Maya Indigenous Communities in the Toledo District v Belize* (2004) IACmHR Report No 40/04, para 114.

⁸⁴ *ACmHPR v Kenya* (2011) ACmHPR Comm No 006/2012 (Order of Provisional Measures) paras 23–5. The African Commission instituted proceedings against Kenya for alleged serious and massive violations of the African Charter against the *ogiek* community of the Mau forest as it had issued an eviction notice with a view to create a reserved water catchment zone. The Commission ordered provisional measures as it found that the situation was one of extreme gravity and urgency, as well as there being a risk of irreparable harm. It unanimously ordered the respondent to reinstate the restrictions imposed on land transactions and refrain from any act that would or might irreparably prejudice the main application before the Commission.

interests of indigenous peoples'.⁸⁵ Common principles and standards have been formulated through extensive jurisprudential cross-references and incorporated in international instruments, such as the Declaration of Indigenous Rights. In this context, emphasis is put on the case *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*⁸⁶ as it stands as a typical example of intercourt dialogue summarizing the basic principles of indigenous protection.

3.2.1 Indigenous peoples as actors

Indigenous rights are conferred to peoples as collective subjects of international law and not only as members of such communities or peoples. Inter-American case law refers extensively to the UDHR, the 2007 Declaration, as well as the African legal framework.⁸⁷ As a result, states have a duty to guarantee the juridical personality of individual members of a community, which is evidently necessary for their enjoyment of other rights,⁸⁸ and recognize the juridical capacity of the members of the indigenous people to fully exercise these rights in a collective manner.⁸⁹

Legal personality allows indigenous communities to enforce existing rights. In *Indigenous Community Yakye Axa v Paraguay*, the IACtHR stated that:

Indigenous communities, under Paraguayan laws, are no longer just a factual reality to become legal entities with the capacity to fully enjoy legal rights vested not only in its individual members, but in the community itself, that is endowed with its own singular

⁸⁵ *Mary and Carrie Dann v United States*, above n 52, para 131; *Maya Indigenous Communities of the Toledo District v Belize* (2004) IACtHR Report No 40/04, para 98.

⁸⁶ The complaint was filed by the Centre for Minority Rights Development (CEMIRIDE) with the assistance of Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions (COHRE) (which submitted an *amicus curiae* brief) on behalf of the Endorois community. Kenya was accused of evicting the indigenous community from their ancestral lands, failing to adequately compensate them for the loss of their property, disrupting the community's pastoral enterprise and violating their right to practice their religion and culture, as well as the overall process of development of the Endorois people. *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (2010) ACmHPR Comm No 276/2003 (Endorois).

⁸⁷ *Kichwa Indigenous People of Sarayaku v Ecuador* (2012) IACtHR Ser C No 245, para 231.

⁸⁸ *Endorois*, above n 86, para 162, quoting *Saramaka People v Suriname* (2007) IACtHR Ser C No 172, para 168 (*Saramaka*).

⁸⁹ *Ibid.*

existence. Legal personality is the legal mechanism granting them the necessary status to enjoy certain fundamental rights, such as the right to hold title to communal property and to demand protection against any breach thereof.⁹⁰

Consequently, the indigenous gain a primary role in the realization of their rights as they have evolved from victims to 'actors of their own future'.⁹¹

3.2.2 Self-determination

Self-determination is an 'evolving force'⁹² in the context of indigenous protection. Although originally related to the decolonization process, it has gained a broader scope within indigenous rights protection and contains principles of self-identification and autonomy. The indigenous are entitled to determine their political status and freely pursue their economic, social and cultural development, and have the right to autonomy or self-government.⁹³ Self-identification is a precondition for the exercise of that right. In determining indigenous status for individual members as well the group as a whole, the African Court on Human and Peoples' Rights (*ACtHPR*) has transposed the *IACtHR*'s criteria, such as the particular social, cultural and economic characteristics, the special bonds with their ancestral territories and the existence of internal determination, even partially,⁹⁴ by their own norms, customs, and/or traditions.⁹⁵ The sacred relationship of the community with their lands has been also a crucial element in defining indigenous communities, and as an indispensable element to full enjoyment of their cultural and religious rights.⁹⁶

The distinctiveness of the group is not eroded by individual conduct. The fact that some individual members of the indigenous people may live outside of the traditional territory and in a way that may differ from the rest has no affect for the group as a whole, nor can it be used as a pretext to deny the people their right to juridical personality.⁹⁷

⁹⁰ *Yakye Axa*, above n 82, para 83.

⁹¹ J Gilbert, *Indigenous Peoples' Land Rights under International Law* (2006) 198.

⁹² *Ibid*, 248.

⁹³ *UNDRIP*, above n 70, Arts 3–5.

⁹⁴ Self government and internal determination is an inherent right as proclaimed in the Declaration: *ibid*, Arts 4–6.

⁹⁵ *Saramaka*, above n 88, para 84.

⁹⁶ *Endorois*, above n 86, para 156.

⁹⁷ *Ibid*, para 162.

Jurisprudence, thus, affirms that self-determination and autonomy set the framework within which indigenous peoples can be featured as a distinct group and their rights can be realized.

3.2.3 The duty to protect

States have a general duty to ensure the realization of rights and their unimpeded enjoyment. Positive measures, whether legislative, judicial or administrative, are therefore addressed not only against the acts of the State party itself, but also against non state actors. In *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*,⁹⁸ the ACmHPR noted that the Government of Nigeria had facilitated the destruction of the Ogoniland,⁹⁹ as it had allowed private actors to devastatingly affect individuals as well as the Ogoni Community as a whole¹⁰⁰. In assessing state responsibility, ACmHPR considered the relevant practice of other regional tribunals, namely the ECtHR¹⁰¹ and IACtHR,¹⁰² and highlighted the state's duty to protect from damaging acts that may be perpetrated by private parties.

Protection of indigenous peoples often entails special legal measures of protection, and measures to ensure effective participation of the members of

⁹⁸ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (2001) ACmHPR Comm 155/96, para 48 (*Ogoni*). The case concerned the involvement of the military government of Nigeria in oil production through the State oil company which has caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.

⁹⁹ Ibid, para 58.

¹⁰⁰ Ibid, para 67. See also F Coomans, 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52 *ICLQ* 749; C A Odinkalu, 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights' (2001) 23 *HRQ* 346–7.

¹⁰¹ *X and Y v Netherlands* (1985) ECHR Ser A 91.

¹⁰² *Velásquez Rodríguez v Honduras* (1988) IACtHR Ser C No 4.

such communities,¹⁰³ in order to safeguard their physical and cultural survival.¹⁰⁴ Even though states tend to contest such measures as discriminatory, regional courts have applied international and regional standards, noting that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination.¹⁰⁵ After all, the principle of non-discrimination is the corollary of the principle of equality.¹⁰⁶ In order to eliminate substantive discrimination, States parties are under the obligation to adopt special safeguards to attenuate or suppress conditions that perpetuate discrimination, provided that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved. Special protection is attributed to members of such vulnerable communities as the only means to guarantee the full exercise of their rights,¹⁰⁷ to provide equality under the law,¹⁰⁸ and address historical and present day injustices and inequalities.¹⁰⁹

Protection should, thus, reflect the particular conditions of the indigenous peoples, reflect their economic and social situation,¹¹⁰ and also be effective, which implies adequate enforcement. In *Sawhoyamaxa Indigenous Community v*

¹⁰³ On the non-discriminatory effect of special measures, see especially, United Nations Human Rights Committee, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, UN Doc CCPR/C/21/Rev.1/Add.5, 8 April 1994; United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Rights of indigenous peoples*, UN Doc A/52/18, 18 August 1997, para 4; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/20, 2 July 2009; CESCR, *General Comment No 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Article 3)*, UN Doc E/C.12/2005/4, 11 August 2005; CESCR, *General Comment 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (Article 15, paragraph 1(c), of the Covenant)*, UN Doc E/C.12/GC/17, 2006.

¹⁰⁴ *Saramaka*, above n 88, paras 85 & 103.

¹⁰⁵ *Ibid*, para 196. The ACmHPR explicitly referred to the ECtHR case *Connors v United Kingdom*, No 66746/01, ECtHR 2004, and the following IACtHR cases: *Saramaka*, above n 88; *Moiwana v Suriname* (2005) IACtHR Ser C No 124; *Yakye Axa*, above n 82; *Mayagna*, above n 83.

¹⁰⁶ J Clifford, 'Equality' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (2013) 426.

¹⁰⁷ *Endorois*, above n 86, para 197, quoting *Yakye Axa*, above n 82, para 163.

¹⁰⁸ See *Saramaka*, above n 88, para 85; *Mayagna*, above n 83, paras 148–149 & 151; *Indigenous Community Sawhoyamaxa v Paraguay* (2006) IACtHR Ser C No 146, paras 118–121 & 131 (*Sawhoyamaxa*); *Yakye Axa*, above n 82, paras 124, 131 & 135–137.

¹⁰⁹ *Endorois*, above n 86, para 149.

¹¹⁰ *Endorois*, above n 86, para 197; *Yakye Axa*, above n 82, citing *Sawhoyamaxa*, above n 108.

Paraguay, Paraguay had adopted a quite advanced legal framework of protection but did not have effective measures to promote and enforce the laws. The Court ruled that the state shall enact into its domestic laws within a reasonable time all the legislative, administrative or other measures necessary to enforce rights as well as to establish a mechanism to claim restitution of the ancestral lands of the members of indigenous communities. After all, international law gives real protection to human rights and imposes on the state the duty to give flesh and bone to 'paper rights'.

3.2.4 Freedom of religion

In *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, the complainants alleged religious violations such as denial of access to religious sites within the game reserve. The ACmHPR adhered to the position of the UN Human Rights Committee,¹¹¹ affirming that 'freedom of conscience and religion should, among other things, mean the right to worship, engage in rituals, observe days of rest, and wear religious garb',¹¹² and that the Endorois spiritual beliefs and ceremonial practices constituted a religion.¹¹³

Religion practice is inextricably linked to ancestral lands in which religious sites are situated. Traditional land is of fundamental religious significance and is an inherent part of the exercise of religious practices and beliefs. Guided by the IACtHR's jurisprudence,¹¹⁴ the ACmHPR acknowledges that expulsion from traditional lands:

[I]nterfered with the Endorois' right to religious freedom and removed them from the sacred grounds essential to the practice of their religion, and rendered it virtually impossible for the community to maintain religious practices central to their culture and religion.¹¹⁵

¹¹¹ United Nations Human Rights Committee, *CCPR General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc CCPR/C/21/Rev.1/Add.4, 30 July 1993.

¹¹² *Endorois*, above n 86, para 165

¹¹³ *Ibid*, para 168.

¹¹⁴ *Loren Laroye Riebe Star, Jorge Alberto Baron Guttlein and Rodolfo Izal Elorz v Mexico* (1999) IACmHR Report No 49/99; *Dianna Ortiz v Guatemala* (1997) IACmHR Report No 31/96.

¹¹⁵ *Endorois*, above n 86, para 171.

Such restrictions are not only illegitimate in the absence of any significant public security interest or other justification, but also constitutes a disproportionate measure,¹¹⁶ and manifestly violates freedom of religion.

This case shows that inter-court dialogue advances indigenous religious protection in general. Moreover, it specifies its content, recognizing access to ancestral land as a significant element of religious freedom.

3.2.5 Property rights and indigenous communities

International rights have an autonomous meaning under international human rights law, which supersedes national legal definitions,¹¹⁷ and individual rights are redefined in the context of indigenous people. The broad conception of property rights in relation to indigenous peoples is developed through regional jurisprudence and has been reaffirmed in the *Endorois* case, where the ACmHPR held that ‘the rights, interests and benefits of [indigenous] communities in their traditional lands constitute “property” under the Charter and that special measures may have to be taken to secure such “property rights”’.¹¹⁸

Even in the absence of registered titles,¹¹⁹ possession of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.¹²⁰ Indigenous land rights imply the right of ownership rather than mere access, as ‘[o]nly *de jure* ownership can guarantee indigenous peoples’ effective protection’.¹²¹

Summing up common standards as co-formulated in the course of inter-regional cross references, the Commission affirmed that:

- (1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official

¹¹⁶ Ibid, para 173.

¹¹⁷ *Endorois*, above n 86, para 185, citing *Mayagna*, above n 83.

¹¹⁸ In particular, the ACmHPR cites the case of *Dogan v Turkey*, in which the Court held that the notion ‘possessions’ (in French: *biens*) in Article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods; certain other rights and interests constituting assets can also be regarded as ‘property rights’, and thus as ‘possessions’ for the purposes of this provision. *Dogan v Turkey*, No 8803-8811/02, 8813/02 and 8815-8819/02, ECtHR 2004, paras 138–139 (*Dogan*).

¹¹⁹ *Endorois*, above n 86, para 188, citing *Dogan*, above n 118, paras 138–139; *Endorois*, above n 86, para 190, citing *Mayagna*, above n 83, paras 140 & 151.

¹²⁰ Ibid.

¹²¹ *Endorois*, above n 86, paras 204–5, quoting *Saramaka*, above n 88, para 110.

recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights.¹²²

In this regard, the unlawful eviction of the indigenous from their ancestral land and destruction of their possession, even when it serves public need, constitutes a violation of right to property if limitations of the said right were not 'proportionate to the legitimate aim pursued'.¹²³ Forced eviction also entails violations of the right to adequate housing which is inherent in property rights.¹²⁴ In addition, it constitutes a violation of the right to life as the living conditions of the community are incompatible with the principles of human dignity.¹²⁵

Finally, restrictions of land rights of indigenous people require prior consultation and compensation in order to be legitimate. Incorporating the criteria formed in *Saramaka v Suriname*, *Moiwana v Suriname*,¹²⁶ the ACmHPR set out three guarantees the attainment of which ensures the survival of indigenous in this situation: effective participation of indigenous people in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan; reasonable benefit for the indigenous from any such plan within their territory; and a prior environmental and social impact assessment. In the light of an extensive overview of regional case law with regard to compensation on loss of land, the ACHPR concluded in the *Endorois* case that the

¹²² *Endorois*, above n 86, para 209.

¹²³ *Endorois*, above n 86, paras 214–15, citing *Handyside v United Kingdom* (1976) ECtHR Ser A No 24, para 49.

¹²⁴ *Endorois*, above n 86, para 191, citing *Ogoni*, above n 98, referring to CESCR, *General Comment No. 7, The right to adequate housing (Article II (1) of the Covenant): forced evictions*, UN Doc E/1998/22, 20 May 1997, para 4. *Endorois*, above n 86, para 202, citing *Akdivar v Turkey*, No 21893/93, ECtHR 1996.

¹²⁵ *Endorois*, above n 86, para 216, citing *Yakye Axa*, above n 82.

¹²⁶ *Endorois*, above n 86, para 227.

Endorois people as a distinct people have suffered a violation of their property rights.¹²⁷

3.2.6 The right to culture

With regards to cultural rights allegations, the ACmHPR affirms that human rights requires both respect for, and protection of, religious and cultural heritage essential to indigenous' group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues.¹²⁸ To this end, it follows the UN Human Rights Committee's interpretation of land resources manifestly linked to indigenous culture and their particular way of life. By restricting access to ancestral lands, the state denies the community access to an integrated system of beliefs, values, norms, mores, traditions and artifacts,¹²⁹ thus violating the right to culture.

3.2.7 The right to natural resources and development

The right to natural resources is defined in relation to the right of property as interpreted in the American system. The ACmHPR follows the reasoning of IACtHR in the *Saramaka* case to denote violations of indigenous rights in the absence of free disposal of their wealth and natural resources in consultation with the state,¹³⁰ and subsequently, the obligation to make restitution and compensate as discussed above.

The right to development is also interrelated to land resources. As in the cases of *Saramaka* and *Yakye Axa*, the ACmHPR demonstrates that the loss of ancestral lands without prior consultation affects their access to a traditional means of substance and natural resources hindering their development and threatening their very existence.¹³¹

¹²⁷ Ibid, paras 233–8.

¹²⁸ Ibid, para 241.

¹²⁹ Ibid, para 250.

¹³⁰ The ACmHPR applied the reasoning of the *Saramaka* case, noting that the State has a duty to consult with them, in conformity with their traditions and customs, regarding any proposed mining concession within Saramaka territory, as well as allow the members of the community to reasonably participate in the benefits derived from any such possible concession, and perform or supervise an assessment on the environmental and social impact prior to the commencement of the project. *Endorois*, above n 86, para 266.

¹³¹ *Endorois*, above n 86, paras 269–98.

4 Concluding Remarks

The *Endorois* case indicates the extent and importance of inter-court dialogue in developing a common understanding and protection standards in the case of indigenous rights. In this context, various considerations arise: what lessons can be drawn by using an indigenous paradigm? Are we moving towards constitutionalization of international law?

Although international law is far from achieving a constitutionalist order, legal norms are subject to judicial interaction. Accordingly, judicial interpretation enables the development of common standards within regions systems. This work depends greatly on the attitude of judges and international lawyers and on their ability to transpose international and regional law in their respective cases.

The analysis in this article demonstrates that, in today's totally interconnected world, judicial dialogue enhances the uniform interpretation of indigenous rights, promotes common standards and strengthens unity of law. According to Klein, 'constitutionalization in public international law suggests that international law and its suborders have reached a degree of "objectivity" in order to limit state sovereignty like a constitutional order.'¹³² In that regard, cross-references between regional human rights bodies are indicators of harmonization of human rights law, if not constitutional features of international law.

¹³²T Kleinlein, 'Constitutionalization in International Law' (2012) 231 *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* 703, 703.