

Land, Consultation and Participation Rights of Indigenous Peoples in the Jurisprudence of the Inter-American Court of Human Rights

The Cases of Kichwa Indigenous People of Sarayaku v. Ecuador and Kaliña and Lokono Peoples v. Suriname

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1 Introduction*

The role of the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights (hereinafter, the Commission and the Court, respectively) in assessing the interpretation and advancing the rights of Indigenous peoples in the context of the Americas, and especially Latin America, is absolutely undeniable. The landmark decisions of these bodies have set what has been defined by the Court itself as an “evolutionary interpretation” of human rights, which has been firstly conceived and applied in a case of violation of land rights of Indigenous peoples, i.e. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001, para. 148). In the words of the Court, “human rights treaties are living instruments, the interpretation of which must evolve over time and reflect current living conditions” (*Kichwa Indigenous People of Sarayaku v. Ecuador* 2012, para. 161). In particular, the American Declaration on the Rights and Duties of Man of 1948 and the American Convention on Human Rights – Pact of San José (ACHR) of 1969 must be interpreted extensively to protect the rights of Indigenous peoples. This notwithstanding the absence of any expressive norm or provision on Indigenous rights until the adoption of the American Declaration on the Rights of Indigenous Peoples in 2016, which, however, is a non-binding document.

In this frame, this chapter aims to explore both how the Commission and the Court have analysed the alleged violations of Indigenous rights and how they have developed their legal reasonings in two pivotal cases, namely *Kichwa*

* In the common elaboration of this chapter, sections 2 and 3 have been written by Alexandra Tomaselli, section 4 by Federica Cittadino, and sections 1 and 5 by both.

Indigenous People of Sarayaku v. Ecuador (2012) and *Kaliña and Lokono Peoples v. Suriname* (2015). Both these cases build upon what the Court calls the “case law of the organs of the Inter-American system” (*Kichwa Indigenous People of Sarayaku v. Ecuador* 2012, para. 125), i.e., previous ground-breaking decisions such as the abovementioned *Awas Tingni* case (2001) or *Saramaka People v. Suriname* (2007). This chapter explores the cases of *Kichwa Indigenous People of Sarayaku v. Ecuador* and *Kaliña and Lokono Peoples v. Suriname* not only because they have comparatively received less academic attention (especially the latter), but particularly because of the innovative and pioneering effect of these judgments with regard to the interpretation of the rights to land, consultation and participation of Indigenous peoples. This chapter does not aim to assess the content of such rights or how to exercise them, also in relation to their right to self-determination, since this has been tackled elsewhere¹ but it rather focuses on the milestones that these two decisions offer for an evolutionary (and systematic) interpretation of such Indigenous rights that may be applied or inspire other judiciary bodies in other parts of the world, as it occurred in the past in the African regional human rights system with the case of *Endorois Welfare Council v. Kenya* (2010).²

Hence, this chapter first briefly introduces the Inter-American system of human rights;³ second, it delves into the two above-mentioned decisions; and, finally, it draws some concluding remarks on the significance of such rulings for the current and future Indigenous rights agenda.⁴

1 See, for example., Gilbert (2006; 2013), Doyle (2015), Tomaselli (2016b; 2017) and Cittadino (2019).

2 The African Commission on Human and Peoples’ Rights expressively recalled the *Awas Tingni* case (2001) especially in paras. 190, 207 and 208 of its decision in *Endorois Welfare Council v. Kenya* (2010).

3 For a complete analysis of the work of the Inter-American Court of Human Rights, see Haeck, Ruiz-Chiriboga and Burbano-Herrera (2015).

4 The authors would like to specify that they are both well-aware that the mere adoption of these decisions do not imply their ultimate execution on the part of the involved state. Indeed, even the best-known cases, such as *Awas Tingni* (2001) or *Sarayaku People* analysed here (2012), remain partially or totally unimplemented. On the former, see the recent analysis of Macdonald and Wetterslev (2019). In the latter case, the Sarayaku people have filed a complaint before the Constitutional Court of Ecuador to demand the full and fair implementation of the Court’s decisions on 13 November 2019 (Pueblo Originario Kichwa de Sarayaku, 2019).

2 A Brief Overview on the Inter-American System of Human Rights and Its Role for Indigenous Peoples

After the (non-binding) American Declaration was signed in 1948, the Inter-American Specialised Conference on Human Rights led to the adoption of ACHR on 22 November 1969 in San José (Costa Rica). Initially, 12 States signed the ACHR, which ultimately entered into force in 1978 after 11 State Parties ratified it as in accordance with its Article 74(2). The competences and the procedure to be followed before the Commission and Court are regulated by the ACHR itself. However, the former has been operative before the adoption of the ACHR, in 1959, at the same time during which the Inter-American Council of Jurists began working on the ACHR's draft (Organization of American States 1959). The Court had to wait for the ACHR to enter into force in 1978, but it took another ten years to adopt its first decision in 1988.

Along with the ACHR and its two judicial bodies, several other thematic conventions complete the Inter-American system of human rights, and seven thematic Rapporteurships were created by the Commission during the 1990s. These Rapporteurships were to draw attention to human rights issues related to specific groups that face or have faced systematic discrimination, live at the margins of the society, and may therefore be more at risk of human rights violations than other sectors of the society. Among the marginalised groups for which the Inter-American system has instituted a Rapporteurship, there are Indigenous peoples and Afro-descendants.⁵

The Rapporteurship on the Rights of Indigenous Peoples has the tasks to enhance, foster, and categorise the work of the Commission's work on Indigenous peoples of the Americas. *Inter alia*, the mandate of this Rapporteurship includes coordinating, consolidating and advancing the Inter-American system of human rights in relation to Indigenous peoples and their rights, promoting and enabling Indigenous access to this system, co-analysing Indigenous petitions, organizing on-site visits in member states of the Organization of American States (OAS) to observe more closely the situation

5 The Rapporteurships are currently as follows (ordered per year of creation): Rapporteurship on the Rights of Indigenous Peoples (1990); Rapporteurship on the Rights of Women (1994); Rapporteurship on the Rights of Migrants (1996); Rapporteurship on the Rights of the Child (1998); Rapporteurship on Human Rights Defenders (2001); Rapporteurship on the Rights of Persons Deprived of Liberty (2004); and Rapporteurship on the Rights of Afro-Descendants and against Racial Discrimination (2005). Additionally, one Special Rapporteurship for the Freedom of Expression and two Units on the Rights of Lesbian, Gay, Trans, Bisexual and Intersex Persons and on Economic, Social and Cultural Rights were founded in 1997, 2011 and 2012, respectively.

on the ground, and preparing thematic reports.⁶ Among recent reforms, the OAS annual review in 2008–2009 led to the adoption of new procedural rules and thus reinforced the role of the Commission, in particular, to grant precautionary measures (Meyer 2018, 14). Since then, the Rapporteurships may also urge the Commission to adopt such measures. Hence, these bodies constitute a reference point for those vulnerable groups they are dedicated to in order to report alleged violations of their rights.

In more general terms, the jurisprudence that involved Indigenous peoples and their rights has passed through three different phases: the late-indigenist period (*tardo-indigenista*) during the 1970s; the growing interest during the 1980s and 1990s; and the present-day phase beginning in the 2000s with the start of the “evolutionary jurisprudence” in the abovementioned *Awás Tingni* case (Rodríguez-Piñero Royo 2006, 160).⁷ In a nutshell, the applicants of this case were the Awás Tingni Indigenous people of Nicaragua that requested the definitive demarcation of their land in accordance with Article 5(3) of the Nicaraguan Constitution. This case has become a pivotal ruling mainly because the Court, *inter alia*, recognised that an Indigenous people may enjoy a collective right to land within the frame of the general property right enshrined in Article 21 of the ACHR. In particular, it stated that:

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.

Mayagna (Sumo) Awás Tingni Community v. Nicaragua 2001, para. 148

The Court recalled this case in a number of subsequent decisions (Tomaselli 2016a), among which the following are best known: *Yakye Axa Indigenous Community v. Paraguay* (2005), *Moiwana Community v. Suriname* (2005), *Sawhoyamaxa Indigenous Community v. Paraguay* (2006), *Xákmok Kásek*

⁶ For details, see the information published on the webpage of the Rapporteurship on the Rights of Indigenous Peoples at <http://oas.org/en/iachr/indigenous/mandate/Functions.asp> (accessed November 17, 2020).

⁷ For an overview on the jurisprudence of the Inter-American Court of Human Rights on Indigenous peoples' rights, see Fuentes (2015).

Indigenous Community v. Paraguay (2010); *Saramaka People v. Suriname* (2007); *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012); *Kaliña and Lokono Peoples v. Suriname* (2015); and the most recent decisions of *Xucuru Indigenous People and its members v. Brazil* (2018) and *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina* (2020).⁸ In addition, in those cases in which the Court had no jurisdiction, the Commission used the *Awás Tingni* case to argue for the right to collective land, e.g. in *Mary and Carrie Dann v. United States* (2002) and *Maya Indigenous Communities v. Belize* (2004).

3 *Sarayaku People v. Ecuador*

The 2012 landmark decision of the Court in *Kichwa Indigenous People of Sarayaku v. Ecuador* (hereinafter *Sarayaku People v. Ecuador*) is particularly known for having assessed that the protection of property rights for Indigenous peoples, in terms of collective land rights, and the use and enjoyment thereof is of utmost importance since it ensures the survival of these peoples (*Sarayaku People v. Ecuador* 2012, para. 146), and that the right to consultation of Indigenous peoples – which must be prior to any measure likely to affect them – is a principle of international law (*Ibid.*, para. 164).

This case was initiated by the Association of the Kichwa People of Sarayaku (*Tayjasaruta*), the Center of Economic and Social Rights (*Centro de Derechos Económicos y Sociales*) and the Center for Justice and International Law (*Ibid.*, para. 1), which sued the Ecuadorian state before the Inter-American system of human rights by alleging that a number of rights of the Kichwa Indigenous people of Sarayaku (hereinafter Sarayaku people) had been violated. In a nutshell, this case regarded the granting of concessions for oil exploration and exploitation activities and the use of explosives in the Sarayaku Kichwa territory without having consulted these peoples or obtaining their consent (*Ibid.*, para. 2).

The petition reached the Commission in December 2003. In June 2004, the Commission urged the Court to issue provisional measures in favour of the Sarayaku people and its members in accordance with Article 63(2) of ACHR and Article 25 of the Court's Rules of Procedure. Such measures were ordered the following July and remained in effect until the adoption of the decision (*Ibid.*, para. 5). The Commission deemed the case admissible in October 2004

⁸ All these judgments are available online at https://www.corteidh.or.cr/casos_sentencias.cfm?lang=en (accessed December 1, 2020).

and adopted its Report on Merits no. 138/09 in December 2009 (*Ibid.*, para. 1). The Commission further requested the Court to declare the international responsibility of Ecuador for having violated the following ACHR provisions to the detriment of the Sarayaku people: the right to private property (Article 21, in relation to Articles 13, 23, and 1.1); the right to life and personal integrity (ACHR Articles 4 and 5 in relation to Article 1.1); freedom of movement and residence (ACHR Article 22 in relation to Article 1.1); and the right to judicial guarantees and judicial protection (ACHR Articles 8, and 25 in relation to Article 1.1). The Commission also urged the adoption of both domestic legal measures established in Article 2 of ACHR and specific measures of reparation (Inter-American Court of Human Rights 2012, para.3). The petition was notified to the parties on 9 July 2010 (*Ibid.*, para. 4). The plaintiffs' requests coincided with the Commission's but also alleged violations of Article 26 of ACHR with regard to the right to culture, the right to personal integrity and the right to personal liberty (Articles 5 and 7 ACHR) and Article 6 on the prevention and punishment of torture (*Ibid.*, para. 6).

Concerning the factual background of the case, the Sarayaku people live in different sectors of the province of Pastaza, along the banks of the Bobonaza River in the Amazonian region of Ecuador (*Ibid.*, para. 52), in one undivided parcel of land (Block 9), which was granted by Ecuador to all the communities of the Bobonaza River – including them – in 1992 (*Ibid.*, para. 61). The Sarayaku people count for approximately 1,200 members, who are divided into five groups (*Ibid.*, para. 52). They provide for their livelihoods by carrying out traditional activities such as collective family-based farming, hunting, fishing and gathering (*Ibid.*, para. 54). In 2004, the Sarayaku people registered their Statute before the competent governmental body, which included indications on the dimension of their territory (*Ibid.*, para. 61).

In 1996, following the results of a call for proposals, the state granted a concession to *Petroecuador* (the national oil company of Ecuador), consociated with the *Compañía General de Combustibles S.A.* and *Petrolera Argentina San Jorge S.A.*, for the exploration and exploitation of hydrocarbons in Block 23 of the Amazonian basin (*Ibid.*, paras. 63–64). These companies had to comply with two obligations: to elaborate an environmental impact assessment and to make every effort to preserve the existing ecological balance in the surrounding area of the granted block (*Ibid.*, para. 67). The environmental impact assessment was completed in 1997 but was never executed (*Ibid.*, para. 69). Similarly, the obligation to maintain an ecological balance was not seriously taken into account and the companies' lawyers tried to obtain Sarayaku people's consent by offering them different types of monetary compensations (*Ibid.*, para. 73). Following this, the Sarayaku people appealed for the protection of the national

Ombudsman (*Ibid.*, para. 86), and filed a constitutional protection lawsuit (*amparo*) before the First Civil Judge of Pastaza against the *Compañía General de Combustibles S.A* and its subcontractor, *Daymi Services*, in November 2002. Although the judge ordered the suspension of the activities as precautionary measure (*Ibid.*, para. 88), the hearing never took place (*Ibid.*, para. 90), and when the case reached the Superior Court of Justice of Pastaza, the latter noted irregularities in the proceeding of first instance (*Ibid.*, para. 91). In December 2002, the Ecuadorian government adopted the “Regulations for Consultation on Hydrocarbon Activities”, which included a standard procedure to consult Indigenous peoples in accordance with the national Constitution of 1998 (*Ibid.*, para. 93). Between 2002 and 2003, few meetings were held between the government and Sarayaku people and other Sarayaku representatives, but these never reached any substantial common agreement (*Ibid.*, paras. 94–97). In the same two years, many other facts occurred: *inter alia*, four members of Sarayaku people were accused of criminal offences; the company placed 1,433 kilograms of explosive (pentolite) both in the surface and at deeper levels to continue the seismic operations, which damaged Sarayaku people’s sacred sites and their surrounding environment and remained in the Sarayaku territory until the time of the decision; and, other grave facts, such as threats and attacks to the community by the involved companies and other local people (*Ibid.*, paras. 98–113). On some of these facts, the Ecuadorian Ombudsman of the province of Pastaza opened *ex officio* a complaint procedure in December 2003 (*Ibid.*, para. 112). Although in 2007 the police were put in charge of removing the explosive from the Sarayaku territory, by the end of 2009 only 14 kilograms had been eventually taken away (*Ibid.*, paras. 114 and 121). The oil exploration activities were resumed in May 2009 (*Ibid.*, para. 118). In 2010, *Petroecuador* and *Compañía General de Combustibles S.A.* terminated their partnership agreement without informing the Sarayaku people (*Ibid.*, para. 123).

3.1 *Substantive Points of the Decision and Reparations*

Eventually, the Court found that Ecuador had violated certain rights of the Sarayaku people: a) the rights to consultation, to Indigenous communal property, and to cultural identity, in accordance with Article 21 ACHR on the right to property; b) the rights to life and to personal integrity (Articles 4 and 5 ACHR), which according to the Court had been severely jeopardised; and c) the right to judicial guarantees and judicial protection (Articles 8 and 25 ACHR) (*Sarayaku People v. Ecuador* 2012, para. 341). The Court dismissed the allegations on threats, attacks and torture in accordance with Articles 5, 6, and 7 ACHR due to insufficiency of the provided evidence (*Ibid.*, paras. 250–254). The main substantive points of the decision and the reparations are reported as follows.

a) **Right to Consultation and to Indigenous Communal Property**
 Unlike other cases, such as the abovementioned *Awas Tingni* (2001) or *Saramaka v. Suriname* (2007), the Court affirms that in the case of the Sarayaku people there is no doubt regarding the recognition of the rights to their territories, since it has been also acknowledged by the state in the domestic proceedings (*Sarayaku People v. Ecuador*, para. 124). Moreover, the state never contested that a number of standards to guarantee the right to consultation were in force (*Ibid.*, paras. 172–173), and clearly the Sarayaku people have always opposed the oil exploration project (*Ibid.*, paras. 174–175).

Content-wise, the Court recalls the spiritual relationship between Indigenous peoples and their land, which includes an essential component (i.e., their cultural identity and worldviews) that needs to be respected in a democratic society and may be precisely safeguarded by their right to consultation (*Ibid.*, para. 159). The Court supports this argument by citing domestic jurisprudence, and, more specifically, that of the Constitutional Court of Colombia and the judgment C-169/01 (*Ibid.*, para. 159, footnote 177).⁹ Thus, the Court links participation with consultation by affirming that the right to consultation is one of the fundamental guarantees to safeguard not only the participation of Indigenous peoples but also the exercise of those rights that imply decision-making on measures likely to affect their rights (including, to communal property) (*Ibid.*, para. 160). Participation and consultation rights of Indigenous peoples are both recognised in the ILO Convention no. 169 concerning Indigenous and Tribal Peoples in Independent Countries of 1989 (hereinafter the ILO Convention 169) and other international instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (*Ibid.*, para. 160, footnote 178). In this respect, the Court reiterates that “human rights treaties are living instruments, the interpretation of which must evolve over time and reflect current living conditions” (*Ibid.*, para. 161). This is consistent with both Article 29(b) ACHR¹⁰ and Article 31 of the Vienna

9 The Constitutional Court of Colombia affirmed that Colombia has an obligation to carry out prior consultations with Indigenous peoples (and Afro-descendants) whenever new legislative or administrative measures may directly affect them (Constitutional Court of Colombia 2001, para. 2.3. of para V. *Consideraciones*).

10 Article 29(b) reads as follows: “No provision of this Convention shall be interpreted as... restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party”.

Convention on the Law of Treaties (*Ibid.*).¹¹ Hence, by indicating how the right to consultation of Indigenous peoples is increasingly enshrined in both international and/or domestic legislations and jurisprudence, the Court reaches the very innovative conclusion that “the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law” (*Ibid.*, para. 164). Additionally, the Court clarifies the content and the process of the right to consultation and participation of Indigenous peoples, as follows:

Given that the State must guarantee these rights to consultation and participation at *all stages of the planning and implementation of a project* that may affect the territory on which an indigenous or tribal community is settled, or other rights essential to their survival as a people, *these dialogue and consensus-building processes must be conducted from the first stages of the planning or preparation of the proposed measure, so that the indigenous peoples can truly participate in and influence the decision-making process*, in accordance with the relevant international standards. In this regard, the State must ensure that *the rights of indigenous peoples are not ignored in any other activity or agreement reached with private individuals, or in the context of decisions of the public authorities that would affect their rights and interests.*

Ibid., para. 167; emphasis added.

Moreover, by recalling the previous case of *Saramaka v. Suriname* (2007), the Court sets some parameters to assess whether the actions of the Ecuadorian state *vis-à-vis* the Sarayaku community respected those

minimum standards and essential requirements of a valid consultation process with indigenous communities (...) [which are]: (a) the prior nature of the consultation; (b) good faith and the aim of reaching an agreement; (c) appropriate and accessible consultation; (d) the environmental impact assessment, and (e) informed consultation.

Sarayaku People v. Ecuador, para. 178.

The Court also added that consultation is an obligation of the state, which cannot be avoided by delegating it to a company (*Ibid.*, para. 187) and thus

11 Moreover, the Court recalls its case law in cases against Nicaragua, Paraguay, and Suriname where it has interpreted Article 21 ACHR on property rights in the light of ILO Convention 169 (*Sarayaku People v. Ecuador* 2012, para. 161).

the State's failure to conduct a serious and responsible consultation (...) encouraged, by omission, a climate of conflict (...). Although it is true that numerous meetings took place, (...) it is also evident that there was a disconnect between these efforts and a clear determination to seek consensus, which encouraged situations of tension and dispute.

Ibid., para. 198

As to Indigenous communal land rights, the Court recalls its previous cases *Awas Tingni* (2001) and *Saramaka v. Suriname* (2007) and affirms that, in accordance with Article 21 in relation to Articles 1(1) and 2 ACHR, States have a "positive obligation to adopt special measures to ensure that members of indigenous and tribal peoples enjoy the full and equal exercise of their right to the lands that they have traditionally used and occupied" (*Sarayaku People v. Ecuador* 2012, para. 171). This must be interpreted in relation to other domestic or international instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹² Moreover, the Court assesses that the special relationship the Sarayaku people have with their land encompasses not only their livelihoods, but also worldview and cultural and spiritual identity (*Ibid.*, para. 155), based on the statements made by Sarayaku representatives in the provided evidence (*Ibid.*, paras. 150–154).

Finally, the Court concludes that:

The State, by failing to consult the Sarayaku People on the execution of a project that would have a direct impact on their territory, *failed* to comply with its obligations, under the principles of international law and its own domestic law, *to adopt all necessary measures to guarantee the participation of the Sarayaku People, through their own institutions and mechanisms and in accordance with their values, practices, customs and forms of organization, in the decisions made regarding matters and policies that had or could have an impact on their territory, their life and their cultural and social identity, affecting their rights to communal property and to cultural identity.*

Ibid., para. 232; emphasis added.

¹² Specifically, the Court argues that Articles 21 and 29 of ACHR on Indigenous communal property need to be interpreted in accordance with other international norms, included Article 1(1) and (2) of both ICCPR and ICESCR with reference the right to pursue their economic, social and cultural development, freely dispose of their natural wealth and resources, and thus not be deprived of their own means of subsistence (*Sarayaku People v. Ecuador* 2012, para.171).

Hence, the Court found that the Ecuadorian state was responsible at least since May 1999 due to the ratification of the ILO Convention 169 and the adoption of the new Constitution in 1998 (*Ibid.*, para. 176).

b) Rights to Life, to Personal Integrity, and to Personal Liberty

Although in this case fortunately no Sarayaku individual passed away, the Court decides to examine alleged violations under Article 4 ACHR on the right to life. It does so by recalling its similar previous case law in which there was no human loss but the exceptional circumstances of the case had allowed the Court to evaluate the allegations in the context of Article 4 (*Sarayaku People v. Ecuador* 2012, para. 244).¹³ The Court starts by clarifying that it is not possible to hold a state responsible any time that the right to life is at risk. However, it adds that a positive obligation on the part of the state does arise whenever the state authorities were or should have been acquainted with a situation that posed at risk the life of one or more individuals and did not take any reasonable measure to prevent such risk (*Ibid.*, para. 245). This applies in the case of the Sarayaku people because of the huge amount of explosives deposited in their territory, the almost totality of which was never removed (*Ibid.*, paras. 246–248). Hence, the Court holds Ecuador responsible for having put at serious risk the life and the physical integrity of the Sarayaku people in accordance with Articles 4(1) and 5(2) ACHR in relation with their right to communal property (Articles 21 and 1(1) ACHR) (*Ibid.*, para. 249).

c) Rights to Judicial Guarantees and to Judicial Protection

The Court frames the content of the rights to judicial guarantees and judicial protection (Articles 8(1) and 25 ACHR) by making reference to its previous case law. It thus clarifies that it is the state that has an obligation to provide effective judicial remedies that are substantiated by the rules of the due process of law (*Sarayaku People v. Ecuador* 2012, para. 260).¹⁴ The Court also specifies that the right to remedies and to judicial guarantees are pillars of both the ACHR and the principle of the rule of law in a democratic society (*Ibid.*, para. 262).¹⁵ In addition, a proper interpretation of Article 25 ACHR does not only imply (and cannot be reduced to) the existence of such legal remedies or the access to them but it also requires from the state that

13 The Court refers, in particular, to the case of *Yakye Axa Indigenous Community v. Paraguay* (2005).

14 The Court recalls its previous decisions in the cases of *Velásquez-Rodríguez v. Honduras* (1987), and *Lysias Fleury et al. v. Haiti* (2011).

15 For this argument, the Court recalls its previous decisions in the cases of *Castillo Páez v. Peru* (1997), and *Xákmok Kásek Indigenous Community v. Paraguay* (2010).

such remedies are truly effective (*Ibid.*, para. 261).¹⁶ This is also related to the legal certainty that a final judgment (i.e., a *res judicata*) shall provide on the examined right or dispute and thus the mandatory nature of compliance (and execution) of the decision (*Ibid.*, para. 263). Moreover, whenever Indigenous peoples are involved, their inherent and socio-economic characteristics, their customary law, customs, practices and values as well as their status of vulnerability (and power imbalance) need to be taken into account by the state in order to comply with its obligation of granting effective remedies (*Ibid.*, para. 264).¹⁷ In the specific case of the Sarayaku people, the lack of investigation and due diligence on the part of the state notwithstanding the many complaints filed by the Sarayaku people (*Ibid.*, paras. 270–271), irregularities in the constitutional protection lawsuit (*amparo*), the very same admission by the state that the remedy was ineffective, and the lack of compliance by the state to provide those necessary measure to ensure compliance of the *res judicata* lead the Court to conclude that Ecuador violated Articles 5(1), 8(1), 25(1), 25(2)(a), and 25(2)(c) in relation to Article 1(1) ACHR (*Ibid.*, paras. 274–278).

3.2 *Legal Argumentation Techniques of the Court*

The principal legal argumentation techniques of the Court in the case of *Sarayaku People v. Ecuador* may be grouped into the following fourfold categorisation, which, however, has no pretension to be exhaustive, but is illustrative of the peculiarities of how the Court has analysed the alleged violations in this case and reached its conclusions.

First, this case promoted the very first visit of the Court *in situ* (*Sarayaku People v. Ecuador* 2012, para. 21), which had repercussions in the proceedings. This is also linked to the Ecuadorian state's own admission of responsibility, which was clearly enunciated during the visit to the Sarayaku lands (*Ibid.*, paras. 21, 23 and 24). The visit was requested both by the Ecuadorian state in their final arguments brief during the public hearing on 5 August 2011 and by one of the presumed victims. The (then) president of Ecuador Rafael Correa Delgado approached the Court's president to formalise and organise the visit in late September 2011 (*Ibid.*, para. 18). Hence, a delegation from the Court was appointed in January 2012 with the goal to gather additional information about the alleged violations and the presumed victims in those parts of the Sarayaku lands where the events had occurred (*Ibid.*, paras. 19 and 20). The visit

16 For this argument, the Court recalls the case of *Saramaka People v. Suriname* (2007).

17 On this, the Court recalls its previous judgments in cases of *Rosendo Cantú et al. v. Mexico* (2010) and *Xákmok Kásek Indigenous Community v. Paraguay* (2010).

eventually took place in the second half of April 2012, and the Court's representatives was accompanied by delegations from the Commission, the claimants, and the state. This visit was the opportunity for the Court's delegation to hear many statements by the Sarayaku people themselves, including women, children and elderly, to visit the center of Sarayaku, and to fly over the territory where the events had occurred (*Ibid.*, para. 21). At the Court's request to the other delegations to express their opinions, the Secretary for Legal Affairs of the Presidency of Ecuador acknowledged the state's responsibility for the events occurred from 2003 on (i.e., the environmental damages, the placement of explosive, etc.) by praising the role of the then administration¹⁸ to avoid future oil extraction activities without the consent of the involved Indigenous peoples (*Ibid.*, para. 23).¹⁹ This admission eventually led to the conclusion that a dispute no longer existed. Nonetheless, the Court deemed it appropriate to ascertain the events "because this contributes to making reparation to the victims, to preventing a recurrence of similar acts and, in general, to the satisfaction of the purposes of the inter-American jurisdiction over human rights" (*Ibid.*, para. 28).

Second, the Court builds its reasoning on general principles of law. Hence, as previously mentioned, judicial guarantees and judicial protection are seen by the Court as pillars of the rule of law in a democratic society (*Ibid.*, para. 262). A pluralistic, multicultural and democratic society requires respect for Indigenous peoples' rights to culture or cultural identity and, thus, to land and to consultation (*Ibid.*, para. 159). More specifically, for the justification of the above-mentioned on-site visit, the Court adheres to the adversarial principle and procedural equality by arguing the need for the Court's delegation to be accompanied by other delegations, especially from both the claimants and the defendant (*Ibid.*, para. 20). In the same vein, the Court specifies that the statements heard during such visit were to be considered in conjunction with other provided evidence (*Ibid.*, para. 49). For the overall assessment of the provided documentary evidence, the Court finally abides by the principles of sound judicial discretion within the applicable legal framework (*Ibid.*, para. 31).

Third, the Court frames the applicable legal framework by making use of other international human rights treaties (ICCPR and ICESCR),²⁰ *ad*

18 President Correa was first elected in 2006, and the new Constitution entered into force in 2008.

19 This has eventually proved to be false in the case, e.g., of the Yasuní National Park, which has become an area of oil extraction without any process of consultation to the Indigenous peoples living there. For details see San Lucas Ceballos (2019).

20 On the use of ICCPR and ICESCR, see note 12 *supra*.

hoc international Indigenous rights instruments (ILO Convention 169 and UNDRIP)²¹ as well as domestic law and jurisprudence of Ecuador,²² and of other Latin American countries (e.g., Colombia) to sustain its arguments (*Ibid.*, paras. 160, 168 and 159). In particular, as mentioned, the Court builds an elaborated argument on how international and/or domestic legislations and jurisprudence in the region of the Americas (ranging from those Latin American countries that have ratified ILO Convention 169 to those which have not but have shown relevant domestic jurisprudence, e.g., Canada)²³ have contributed to recognise the right to consultation of Indigenous peoples and innovatively concludes that “the obligation to consult (...) is also a general principle of international law” (*Ibid.*, para. 164).

Last, but not least, the Court makes a wide use of the previous case law of the organs of the Inter-American system (*Ibid.*, para. 125) by citing numerous previous Court decisions as well as reports of the Commission as mentioned in the previous sections. For instance, it suffices to recall here how the Court builds upon the pivotal *Awas Tingni* decision (2001) to assess what Article 21 of ACHR implies in terms of Indigenous communal property in the case of the Sarayaku people (*Sarayaku People v. Ecuador* 2012, paras. 145–147); the Court recalls its reasoning in *Yakye Axa Indigenous Community v. Paraguay* (2005) to examine alleged violations of Article 4 ACHR on the right to life also in those cases in which there was no human loss (*Sarayaku People v. Ecuador* 2012, para. 244); or, again, it refers to the cases of *Castillo Páez v. Peru* (1997) and *Xákmok Kásek Indigenous Community v. Paraguay* (2010) to assess how the right to remedies and to judicial guarantees are pillars of the ACHR (*Sarayaku People v. Ecuador* 2012, para. 262).

4 *Kaliña and Lokono Peoples v. Suriname*

In January 2014, the Inter-American Commission of Human Rights, after adopting its report on the merits (*The Kaliña and Lokono Peoples* 2013), seized

21 See, in particular, on the triangulation among Indigenous participation, communal land rights and consultation by using both ILO Convention 169 and UNDRIP (*Sarayaku People v. Ecuador* 2012, para. 160, footnote 178).

22 On how Article 57 of the new Ecuadorian Constitution of 2008 fully recognises both the rights to land and consultation of Indigenous peoples see *Sarayaku People v. Ecuador* (2012, para. 168).

23 Among the best-known cases, the Court refers to judgments of the Constitutional Court of Colombia (2001), the Constitutional Court of Peru (2010), and the Supreme Court of Canada (2004) (*Sarayaku People v. Ecuador* 2012, para. 164, footnotes 206, 211, and 213).

the Inter-American Court about “a series of violations of the rights of the members of eight communities of the Kaliña and Lokono indigenous peoples of the Lower Marowijne River”, allegedly committed by Suriname (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 1). On 25 November 2015, the Court released its decision where it found the responsibility of Suriname for the violation of Articles 3 (legal personality), 21 (property) and 25 (judicial protection) of the ACHR.

The case originated from the unresolved land claims of the Kaliña and Lokono peoples aggravated by both the actions and inactions of Suriname. In 1966, 1969 and 1986 respectively the Wia Wia, Galibi and the Wane Kreek nature reserves were created by order of the president of Suriname in areas that are partly located on the Kaliña and Lokono peoples’ lands without their consultation.²⁴ Following this designation, fishing and hunting, activities essential for the material and spiritual development of these Indigenous peoples, were forbidden except partially in the Wane Kreek reserve. Later, in the last part of the 1980s and the beginning of the 1990s, the Kaliña and Lokono were forced to flee their traditional lands in the Northeast part of the country during the internal conflict between some Maroon tribes²⁵ and the military regime. After that period, some members of the community managed to come back to their territories but at the same time the tourism development projects of the State started on the same lands. Then in 1958 Suriname granted bauxite mining concessions to a company called *Suralco* until 2033. Some of these activities were planned to take place in some areas of the Wane Kreek reserve and started in 1997. Mining operations resulted in the prohibition for the Kaliña and Lokono peoples to enter their traditional territory in the Wane Kreek reserve. Furthermore, mining caused a significant environmental impact, which further contributed to the decline of fishing and hunting. Mining activities in the Wane Kreek area only ended in 2009.

Already in 1992, the Kaliña and Lokono peoples started legal actions to recover their lands before national jurisdictions and via different forms of petitions. These actions, however, failed to get recognition of traditional ownership over the claimed traditional territories. That is why the Kaliña and

24 “[T]he three reserves cover approximately 59,800 ha of the 133,945 ha claimed in this case” (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 71).

25 The Maroons are descendants of Africans who fled the colonial Dutch forced labour plantations along the coast and established their own communities in the interior rainforests. They have retained a distinctive identity based on their West African origins. For details, see <https://minorityrights.org/minorities/maroons/> (accessed November 20, 2020).

Lokono submitted their claims to the Inter-American Commission, which in turn seized the Court.

The following subsections recount the main points of the decision in the *Kaliña and Lokono* case concerning the issues of legal personality, land rights and judicial protection; they also illustrate the main legal argumentation techniques used by the Court to reach its conclusions.

4.1 *Substantive Points of the Decision and Reparations*

The Court pronounces itself on the violation of Articles 3, 21, and 25 in connection to Articles 1(1) and 2 of the ACHR. The analysis of these provisions allows the Court to address the following substantive issues: (a) the existence of a collective legal personality of Indigenous peoples; (b) the content of and limitations to Indigenous collective property rights, which includes an analysis of Indigenous participation rights and the safeguards necessary in the face of the creation and management of protected areas and of mining operations; and (c) the meaning of effective judicial protection.

a) Legal Personality

Concerning legal personality, the Court finds a violation of Article 3 of the ACHR based on the fact that the Surinamese legal framework on this matter was not amended after the Court's previous decisions, which ascertained the lack of recognition of Indigenous legal personality (*Kaliña and Lokono Peoples v. Suriname* 2015, paras. 112 and 114). In the *Saramaka* case, the Court considers that legal personality is "one of the special measures" that may allow for the enjoyment of collective rights to land (*Saramaka People v. Suriname* 2007, para. 172).²⁶ In *Kaliña and Lokono*, the Court takes a step further since it orders Suriname to grant legal personality both to the Kaliña and Lokono peoples and to all Indigenous peoples in the country, in order to ensure the conditions for the protection of their right to land and to judicial protection (Inter-American Court of Human Rights 2015, paras. 107, 279(i)(a) and 305). The novelty of the solution adopted by the Court concerns not only the recognition of collective legal personality (Lixinski 2017, 152), but also its acceptance as a necessary step to ensure the enjoyment of other rights. This is also reflected in the collective nature of the reparations that are owed to both Kaliña and Lokono peoples and to the Indigenous peoples of Suriname (MacKay 2018, 37–38). It is interesting to note that, according to Judge Pérez Pérez, who issued a partially

26 In other countries, such as Argentina, the recognition and registration of the legal personality of Indigenous peoples is a requirement for the recognition of their right to land. See Rosti (2019, 211).

dissenting opinion, the invocation of Article 3 is unnecessary, because a collective legal personality can be presumed under Article 21, and *praeter legem*, because Article 3 only grants legal personality to individuals (*Kaliña and Lokono Peoples v. Suriname* 2015, Partially dissenting opinion of Judge Alberto Pérez Pérez, para. 9). Judge Pérez Pérez, however, seems to overlook the fact that Article 21 of the ACHR literally grants individual property rights. In this sense, the Court's interpretation of Article 3 is certainly in line with the evolutionary interpretation of the scope of the rights guaranteed under the ACHR with regard to Indigenous peoples. Furthermore, the invocation of Article 3 configures an autonomous violation of the ACHR, which can be used in the future independently from the violation of Indigenous land rights.

b) Land Rights: Collective Property, Related Restrictions, and Participatory Rights

Concerning collective property rights, the Court is called upon to assess violations to Article 21 deriving from four main acts of Suriname: (1) the lack of recognition of collective property rights and failure to delimit, demarcate or grant land titles to Indigenous peoples; (2) the continuous granting of property titles to non-Indigenous persons; (3) the creation of the nature reserves; and (4) the mining concessions without free, prior and informed “consultation”, (social and environmental) impact assessment, and benefit-sharing.

Before assessing the abovementioned alleged violations, the Court proceeds to delimit the scope of collective property for Indigenous peoples under Article 21 of the ACHR. This provision, interpreted in light of common Article 1 ICCPR and ICESCR on self-determination and Article 27 ICCPR,²⁷ delineates a collective right to property based on traditional occupation and use, which confers to Indigenous peoples the full enjoyment of property rights “in keeping with their community-based tradition” (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 124). Furthermore, the spiritual relationship of Indigenous peoples with land makes their traditional property titles survive even when possession had been lost involuntarily (*Ibid.*, paras. 149–159 and 152). Thus, the need to defend this spiritual relationship and the concrete enjoyment of land rights obliges States to delimit, demarcate and grant title on traditional territories

27 Article 27 ICCPR reads as follows: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”.

“following a consultation process” (*Ibid.*, para. 141)²⁸ which Suriname, concludes the Court, had failed to do (*Ibid.*, para. 136).

When a conflict exists between Indigenous traditional property and property titles granted to non-Indigenous third parties, states must assess on a case-by-case basis whether the limits on Indigenous land rights deriving from individual property are legal, necessary, proportional, and pursue a legitimate aim in a democratic society (*Ibid.*, para. 152). The Court proceeds then to delegate the performance of this balance of interests and rights to the national courts of Suriname (*Ibid.*, para. 156). While this subsidiarity may risk giving too much discretion to national authorities (Lixinski 2017, 153), limits to that are set out by the Court in the *Kaliña and Lokono* case, which recalls that the right balance between Indigenous rights and private titles cannot pose a threat to “the survival of the members of the indigenous communities as a people” (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 155). The survival as distinct peoples is indeed a general limit to the restrictions imposed on Indigenous rights both in the jurisprudence of the Inter-American Court and the decisions of human rights treaty bodies more generally (Cittadino 2019, 21, 35, 88–89, 111 and 160). In other words, the mere existence of private titles on Indigenous lands cannot be considered a sufficient reason to deny Indigenous peoples their traditional land rights and thus does not meet the requirements of legality, necessity and proportionality invoked by the Court. At the same time, the existence of Indigenous land claims cannot nationally produce any automatic prevalence of Indigenous rights over third-party property titles. The balance to be struck between these conflicting titles is therefore delicate and must be achieved by considering the special nature of Indigenous peoples’ rights.

Even when third-party rights do prevail and restitution is not possible, Indigenous peoples must both “obtain other lands of the same size and quality” (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 149) and be able to continue to have access to the natural resources with which they have a traditional relationship (*Ibid.*, paras. 159 and 283). The Court, therefore, foresees as a form of reparation that Suriname decides whether to expropriate and compensate non-Indigenous third parties or to grant the *Kaliña and Lokono* with alternative and comparable lands (*Ibid.*, para. 281). Until then, Suriname must additionally refrain from any actions that could interfere with the enjoyment of traditional lands by the *Kaliña and Lokono*, thus avoiding granting additional property titles to third parties (*Ibid.*, para. 282).

28 This measure is also foreseen as a form of reparation by the Court (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 279(i)(b)).

The Court similarly pronounces itself on the restrictions placed on Indigenous land rights deriving from the creation of protected areas. Since all nature reserves were created before Suriname accepted the Court's jurisdiction in 1987, the Court is not competent to reach conclusions on the modalities of the establishment of these nature reserves (*Ibid.*, para. 162). It can instead evaluate the consequences of this establishment and the management choices made thereafter. In other words, the Court is called to assess whether the restrictions on traditional land and resource use following the creation of the nature reserves was proportionate to the public interest of protecting the environment.

According to the Commission and the representatives, proportionality was not met since granting mining concession within the reserves while restricting hunting and fishing rights was hardly justifiable as proportionate (*Ibid.*, paras. 117–118). The Court reaches similar conclusions and affirms the compatibility in principle of the protection of nature through the creation of nature reserves and the protection of the rights of Indigenous peoples, going so far as to affirm that “the indigenous and tribal peoples can make an important contribution to (...) conservation” (MacKay 2018, 36–37).²⁹ In addition, the Court concludes that “the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities” (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 177).

The risk of cultural stagnation deriving from this asserted complementarity lamented by some authors (Lixinski 2017, 154; Young 2020, 181) must be relativised in the face of the circumstances of the case, which have prompted the Court to rely on the argument of the mutual supportiveness of Indigenous rights and nature protection. The Court aimed to demonstrate that access to natural resources in the reserve as well as the Kaliña and Lokono's participation in the management of these protected areas do not negatively affect the legitimate purpose of protecting the environment. This conclusion does not necessarily limit the development ambitions of Indigenous peoples in ways that are not in line with the environmental objectives of states but only requires that a number of guarantees are met when creating or managing protected areas. As affirmed by the Court, in order to ensure that natural reserves are compatible with the full enjoyment of Indigenous peoples' rights, three criteria have to be met, namely “a) effective participation, b) access and use of their traditional territories, and c) the possibility of receiving benefits from conservation” (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 181). These criteria

29 See also *Kaliña and Lokono Peoples v. Suriname* (2015, paras. 173 and 181).

mirror those established in the *Saramaka v. Suriname* decision to assess the restrictions posed on Indigenous land rights but adapt it to the possible threats posed by the existence of protected areas on Indigenous lands. In this context, the continued access to natural resources plays a specific role when it comes to ensuring the compatibility of natural reserves with Indigenous rights. Effective participation and benefit-sharing allow moreover for a double-checking and an adaptation of environmental goals with the needs of the Indigenous peoples that have land rights over the areas included in the nature reserves.

Based on these criteria, the Court reaches the conclusion that with regard to both the Galibi reserve and the Wane Kreek reserve, Suriname has violated Article 21 in conjunction with Article 23 (right to participate in government)³⁰ of the ACHR since it impeded the Kaliña and Lokono's participation in the conservation of these reserves, it denied access to some portions of their traditional land and it therefore prevented these Indigenous peoples from enjoying the benefits the reserve could yield (*Ibid.*, paras. 196–198). Therefore, the Court does not condemn the limited restrictions to access to natural resources posed by Suriname or private parties, nor the supervisory role of the state in the management of these reserves (*Ibid.*, paras. 183–184, 189 and 191). Rather, it bases the responsibility of Suriname on its failure to meet the criteria that would have ensured the compatibility of some restrictions deriving from the operation of the nature reserves with Indigenous peoples' rights. As reparation, the Court orders Suriname to adopt the necessary measures to “guarantee, by appropriate mechanisms, the Kaliña and Lokono peoples' effective access, use and participation” in the Galibi and Wane Kreek nature reserves (*Ibid.*, para. 286). In addition, the State must deal with restitution claims of the territory included in the protected areas, as in the case of the issuance of private property titles discussed above (*Ibid.*, para. 168).

In addition to the substantive points raised above, the Court based its reasoning by relying extensively not only on human and Indigenous rights instruments other than the ACHR, such as the UNDRIP,³¹ but also on international environmental law sources, including Articles 8(j) and 10(c) of the Convention

30 Article 23(1) reads as follows: “Every citizen shall enjoy the following rights and opportunities: a. to take part in the conduct of public affairs, directly or through freely chosen representatives; b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and c. to have access, under general conditions of equality, to the public service of his country”.

31 The Court makes reference to Articles 29 (right to environment), 25 (spiritual relationship with land), and 18 (participation in matters that could affect their rights) of UNDRIP (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 179).

on Biological Diversity (CBD) of 1992, decisions of the CBD Conference of the Parties,³² and Principle 22 of the Declaration of the United Nations Conference on Environment and Development (*Ibid.*, paras. 173, 177–179). This testifies to both the increasing contamination between international human rights law and international environmental law (Cittadino 2019) and the importance of soft law and non-binding standards in the evolution of the jurisprudence of the Inter-American Court (Barelli 2009; Tomaselli 2015).

Concerning the mining operations, the Court was competent to judge about the compatibility of the extractive operation started in 1997 in the Wane Kreek reserve with the collective property rights of the Kaliña and Lokono under Article 21 of the ACHR. In this respect, the Court reiterates the applicability of the guarantees elaborated in the 2007 *Saramaka v. Suriname* case to ensure the survival of Indigenous peoples when mining operations restrict their rights to collective property (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 201). In particular, three conditions must be met: (1) the state must ensure the effective participation of the members of Indigenous peoples with regard to any development and investment plans; (2) Indigenous peoples must receive a reasonable benefit; (3) no concession can be issued without a prior social and environmental impact assessment.

With regard to effective participation, the Court defines the scope of this guarantee with reference to Article 23 of the ACHR, and Articles 18 and 32 of the UNDRIP (*Ibid.*, paras. 202–203, and 305). As observed by some commentators, the way in which this requirement is framed in *Kaliña and Lokono* is more restrictive than the Court's previous jurisprudence since the Court only refers to free, prior and informed "consultation" rather than to free, prior and informed consent, as the reference to the UNDRIP would have let us presume (MacKay 2018; Hofbauer 2016, 270–272; Young 2020, 182).³³ Differently from the *Saramaka v. Suriname* case, for instance, even in the face of multiple and reiterated violations of collective property rights by Suriname, the Court does not delineate the conditions under which consent would be needed (MacKay 2018, 40–41). Notwithstanding the restrictive interpretation of participatory rights,

32 Among the decisions of the CBD Conference of the Parties referred to, two deserve specific mention, namely the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (Decision VI/12) and the Programme of Work on Protected Areas (Decision VII/28). They are available online at <https://www.cbd.int/decisions/cop/7> (accessed November 20, 2020).

33 Interestingly, reporting on the state's allegations, the Court refers to free, prior and informed "consultation" (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 210), where the state had explicitly referred to free, prior and informed consent (*Ibid.*, para. 204).

the Court concludes that Suriname has not met the guarantee of effective participation because the state failed to consult with the Kaliña and Lokono peoples prior to the commencement of the mining operations (*Kaliña and Lokono Peoples v. Suriname* 2015, paras. 207 and 212).

Concerning the conduct of a prior social and environmental impact assessment, the Court highlights not only that no such assessment had been conducted in 1997 when the mining operations started, but also that Suriname failed to exercise its supervisory role, by guaranteeing *inter alia* the participation of the Kaliña and Lokono, in the 2005 assessment carried out on the initiative of the mining company (*Ibid.*, paras. 214–216 and 226). The supervisory role of the state, according to the Court, derives from a joint reading of Article 21 of the ACHR with Article 32 of the UNDRIP, which imposes on states a duty to provide effective mechanisms for just and fair redress, and with the UN Guiding Principles on Business and Human Rights (*Ibid.*, paras. 221 and 224).

Furthermore, the lack of an impact assessment has aggravated the consequences of the mining operations on the Kaliña and Lokono peoples. Following bauxite extraction in the Wane Kreek reserve, an area originally created to protect the environment, tangible environmental damages have been produced, such as deforestation, water pollution and noise. These environmental impacts in turn have had consequences on the cultural survival and land rights of the Kaliña and Lokono peoples affecting the natural resources of the area and, thus, these peoples' traditional hunting and fishing activities and the possibility for them to access the area traditionally used (*Ibid.*, para. 222).

Concerning the sharing of benefits, the Court derives this duty from Article 21(2) of the ACHR, which foresees compensation in case property or its normal uses are restricted (*Ibid.*, para. 227). In this respect, the Court acknowledges the lack of this safeguard in the Surinamese legal frameworks. Furthermore, it concludes that the unrestricted access to the highway constructed to prepare for the mining operations and other exploitation activities “cannot be considered to provide a direct, mutually-agreed benefit for the peoples” (*Ibid.*, para. 229).

Having found the absence of consultation, impact assessment and benefit-sharing, the Court declares the violation of Articles 21 and 23 of the ACHR (*Ibid.*, para. 230),³⁴ and orders reparations to reverse the negative effects of the mining operations. Although the mining concession in the Wane Kreek reserve must not be revoked given that mining activities have ceased in 2009, in light of the fact that the mining licence is valid until 2033, Suriname “must take the

34 See also the partially dissenting opinion of Judge Pérez Pérez who claims no violation of Article 23 since the latter is about political participation (*Kaliña and Lokono Peoples v. Suriname* 2015, Partially dissenting opinion of Judge Alberto Pérez Pérez, para. 23).

necessary measures to ensure that no actions are taken that could affect the traditional territory” without the consultation of the Kaliña and Lokono peoples (*Ibid.*, para. 287). Furthermore, the state must be responsible for adopting and supervising the execution of an action plan, in conjunction with the mining company and with the participation of Kaliña and Lokono, in order to remedy the adverse effects of the mining operations and to ensure reforestation (*Ibid.*, para. 290). Finally, to compensate for the material and immaterial damages suffered by the Kaliña and Lokono peoples (MacKay 2018, 38), Suriname must create a community-development fund of 1 million US dollars administered by a state-nominated authority “to develop projects in the areas of health, education, food security, resource management, and others that the Kaliña and Lokono peoples consider pertinent for their development” (*Kaliña and Lokono Peoples v. Suriname* 2015, paras. 295–296).

c) Judicial Protection

The Court is also called to judge on the violation of Article 25 of the ACHR on judicial protection with regards to two allegations, namely the lack of effective remedies at national level available for Indigenous peoples alleging the violation of their rights and the failure of the state to provide the Kaliña and Lokono with the requested information on third-party property titles. Regarding the former aspect, the Court emphasises not only that states must have an adequate system of judicial and non-judicial remedies in place (*Kaliña and Lokono Peoples v. Suriname* 2015, paras. 238–239), but also that these remedies must be both effectively available for Indigenous peoples and instrumental for obtaining the redress of their rights in line with the guarantees of due process. On the existence of appropriate remedies in the national legislation, the Court concludes that the obligation to establish appropriate proceedings under national law has not been met, as ascertained in previous decisions and international reports (*Ibid.*, para. 240). Furthermore, existing remedies are judged as ineffective both because the procedures activated by the Kaliña and Lokono have not been successful and since the lack of recognition of collective legal personality would hamper the award of collective land titles (*Ibid.*, paras. 247–248, 251 and 258). On the guarantees of due process with regard to Indigenous peoples, the Court also requires the use of interpreters to guarantee mutual understanding, access to legal and technical assistance for the most vulnerable, the need to reduce physical distances with judicial and administrative bodies and to mitigate too elevated costs, and the issuance of appropriate measures to guarantee demarcation and titling. These requirements are necessary to take into account the specific characteristics that differentiate Indigenous peoples from the general population and to avoid discrimination (*Ibid.*, para. 251).

Concerning the right to access information, the Court finds a violation of Articles 25 and 13 of the ACHR. In the view of the Court, the latter provision “includes not only the right and freedom to express one’s own thoughts, but also the right and freedom to seek, receive and disseminate information and ideas of all kinds” (*Ibid.*, para. 261).³⁵ In this respect, Suriname has failed to justify its refusal to provide the respondents with the pieces of information required (*Ibid.*, para. 266). In turn, the lack of information on the extent of the property titles granted to third parties has put the Kaliña and Lokono peoples in a position of disadvantage since these could have used the details requested to better substantiate their land claims before domestic jurisdictions (*Ibid.*, para. 267). For these reasons, the Court finds a violation of Article 25 in relation to Article 13 of the ACHR (*Ibid.*, para. 268). It further establishes, as a form of reparation, that Suriname must “ensure effective collective access to justice for the indigenous and tribal peoples, and also to ensure access to the necessary information to exercise this right” (*Ibid.*, para. 305).

4.2 *Legal Argumentation Techniques of the Court*

The Court reaches the substantive conclusions discussed in the previous subsection mainly through four legal argumentation techniques. First, the Court refers extensively to its previous jurisprudence concerning the violation of Indigenous peoples’ rights in Suriname. It does so by arguing that Suriname’s legal system does not recognise Indigenous peoples’ legal personality (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 112), their right to communal property (*Ibid.*, para. 122), and their right to judicial protection (*Ibid.*, para. 240), and, finally, reiterates that Suriname has not complied with its previous decisions in these matters (Koorndijk 2019). The Court also makes reference to previous decisions on Indigenous peoples’ rights to delimit the scope of the rights analysed, although in some cases it distances itself from previous conclusions, such as on legal personality and on the scope of participatory rights.³⁶

Second, the Court relies explicitly on the conclusions reached by other UN bodies. For instance, it makes reference to the Committee on Economic, Social and Cultural Rights to embrace the interpretation that common Article 1 of ICCPR and ICESCR is applicable to Indigenous peoples (*Kaliña and Lokono*

35 According to Judge Pérez Pérez, the reference to this provision is unjustified, because access to the information requested by the respondents was not related to the democratic control of state actions, but rather to the exercise of some rights (*Kaliña and Lokono Peoples v. Suriname* 2015, Partially dissenting opinion of Judge Alberto Pérez Pérez, para. 15).

36 See sections 4.1.a and 4.1.b of this chapter.

Peoples v. Suriname 2015, para. 122). It cites General Comment no. 23 of the Human Rights Committee to support the argument on the collective scope of Indigenous communal property rights (*Ibid.*). It refers twice to the reports of the UN Special Rapporteur on the Rights of Indigenous Peoples both to support the factual conclusions that international environmental law and international human rights law are complementary bodies of law (*Ibid.*, para. 174), and to ascertain the lack of effective national remedies against the violation of Indigenous peoples' rights (*Ibid.*, para. 248). The Court also "takes note of" the UN Guiding Principles on Business and Human Rights to claim that Suriname has supervisory duties with regard to the actions carried out by national mining companies operating on Indigenous lands (*Ibid.*, para. 224; MacKay 2018, 32).

Third, as highlighted in section 4.1.b of this chapter, on the basis of Article 29(b) of the ACHR,³⁷ the Court interprets in an evolutionary way the provisions of the ACHR in light of other human rights provisions protecting Indigenous peoples' rights, such as common Article 1 of ICCPR and ICESCR, Article 27 ICCPR, and some UNDRIP provisions (*Kaliña and Lokono Peoples v. Suriname* 2015, paras. 122 and 124).³⁸ Moreover, the Court uses binding and non-binding legal instruments within the realm of international biodiversity law to found its argument that the protection of nature and the rights of Indigenous peoples must be seen as complementary.³⁹

Finally, the Court recurs to the *iura novit curia* principle to interpret respectively Article 21 in light of Article 23 and Article 25 in light of Article 13 of the ACHR (*Ibid.*, paras. 196 and 260). In the former case, the result has been to dilute Indigenous participation rights, while in the latter the right to receive information instrumental for ensuring effective judicial protection could have been probably subsumed only on the basis of Article 25.⁴⁰

A last brief remark concerns the role of on-site visits and experts, which cannot be considered an argumentation technique but rather represent a mechanism of proof when it comes to ascertain Indigenous peoples' rights (MacKay, 32–33). For instance, in *Kaliña and Lokono*, Jeremy Gilbert's testimony that Indigenous peoples "are part of the protection of nature" (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 175) was used again to find the complementarity between the protection of nature and the rights of Indigenous peoples. The on-site visit was instrumental for assessing the impact of mining activities, as in the *Sarayaku People v. Ecuador* case.

37 See note 10 *supra*.

38 On the interpretative role of the UNDRIP, see MacKay (2018, 33).

39 See the CBD and the decisions of the CBD Conference of the Parties at note 32 *supra*.

40 See sections 4.1.b and 4.1.c of this chapter.

5 Conclusions

This chapter has explored the content and the legal argumentation techniques of two pivotal decisions of the Inter-American Court of Human Rights, namely the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador* (2012) and the *Case of the Kaliña and Lokono Peoples v. Suriname* (2015). Both these cases are extremely significant with regard to the interpretation of the Indigenous peoples' rights to land, participation and consultation in the light of the ACHR. Moreover, both decisions have not only built upon other previous landmark decisions of the Court but also added new elements for framing such rights within the Inter-American system and beyond it.

In particular, in *Sarayaku People v. Ecuador*, the Court has ascertained that the protection of communal property of Indigenous peoples, and the use and enjoyment thereof, is of utmost importance since it ensures the survival of these peoples (*Sarayaku People v. Ecuador* 2012, para. 146). Also, the Court finds interdependencies among four fundamental Indigenous rights, i.e., to culture or cultural identity, consultation, participation and land. First, it argues that the spiritual relationship between Indigenous peoples and their land includes an essential component that need to be respected, i.e., their cultural identity and worldviews. One way to safeguard this identity is precisely the right to consultation of Indigenous peoples (*Ibid.*, para. 159). Second, the Court specifies that such right to consultation is one of the fundamental guarantees to protect not only Indigenous participation but also the exercise of those rights that imply decision-making on measures likely to affect Indigenous peoples and their rights (including, their communal property) (*Ibid.*, para. 160). Last, but not least, the Court reaches the very innovative conclusion that such right to consultation – which must be prior to any measure likely to affect them – is a principle of international law (*Ibid.*, para. 164).

In *Kaliña and Lokono Peoples v. Suriname*, the Court innovatively recognises Indigenous collective legal personality as both an autonomous right and a necessary step to ensure the enjoyment of other rights, including the right to land. Concerning land rights, the Court not only emphasises the importance of demarcation of Indigenous territories but it also identifies the survival of Indigenous peoples as an important element to strike the right balance between national restrictions and the enjoyment of Indigenous property rights. Importantly, the parameter of survival must be used even when the decision on the right balance is delegated to national authorities. Finally, the Court identifies innovative requirements when establishing or managing protected areas on Indigenous territories. The main difference with respect to its previous jurisprudence is the guarantee to ensure the compatibility between

conservation and Indigenous rights, which includes the continued access to natural resources and the possibility of receiving benefits from conservation (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 181).

Both cases are, furthermore, very relevant when it comes to defining the legal scope of the rights to consultation and participation. While in *Sarayaku People v. Ecuador* consultation is framed as a general principle of international law and must be “aimed at reaching an agreement” with Indigenous peoples (*Sarayaku People v. Ecuador* 2012, paras. 177 and 185 ff.), in *Kaliña and Lokono* consultation must be free, prior and informed although no mention of consent is made notwithstanding the reference to the survival of Indigenous peoples to assess restrictions to land rights (Young 2020, 183).

The legal argumentation techniques of the Court partly coincide. First, in both cases, the Court makes a wide use of the previous case law of the organs of the Inter-American system, which is formed not only by its previous decisions but also by those ones of the Commission in those countries that have not accepted the jurisdiction of the Court (e.g., Canada, Belize, USA) as well as other reports, etc. Second, the Court invokes in both cases other international human rights treaties (ICCPR and ICESCR) and international Indigenous instruments (ILO Convention 169 and UNDRIP), but in *Kaliña and Lokono* it amply refers also to the works of other UN bodies as well as to binding and non-binding legal instruments of international biodiversity law. Third, in *Sarayaku People v. Ecuador* the Court uses a number of general principles of law (e.g., adversarial principle, rule of law) in order to cement its reasoning for legal certainty. In *Kaliña and Lokono* the Court specifically uses the *iura novit curia* principle to interpret respectively Article 21 in light of Article 23 and Article 25 in light of Article 13 of the ACHR. In both cases, the Court has performed on-site visits, without which, perhaps, the Court’s legal reasoning (but maybe not the outcome) would have been different, especially in the case of *Sarayaku People v. Ecuador*. Finally, in both cases the consideration of national circumstances has played an important role in the legal argumentation of the Court. In *Sarayaku People v. Ecuador*, the Court extensively refers to national legislation and international treaties ensuring Indigenous rights to consultation and participation, including the circumstance that Ecuador has ratified ILO Convention 169. In *Kaliña and Lokono*, the Court delegates the national judiciary system with the task to strike a balance between Indigenous land rights and third-party property titles.

As a final general reflection, we would like to point out that, while these two decisions undeniably represent a milestone for Indigenous rights in the continent, there is a need to go *beyond* them and their implementation, and point out that Indigenous peoples continue to face significant power imbalances.

Hitherto, even according to the Court, Indigenous peoples can only resist, be consulted or eventually give the consent to states' or private parties' projects (Melo 2014, 289). Giving the necessary relevance to Indigenous peoples' projects and worldviews is a challenge that the Inter-American human rights system, as well as national systems that wish to embrace Indigenous peoples' needs and fully comply with their rights, still need to appropriately face.

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Case Law

Please refer to the list on pages viii–xvi.