

In the times of judicial dialogue, which court is more engaged: the Brazilian Supreme Court or the Inter-American Court?

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Abstract: This article analyzes the case law of indigenous communal property by the Brazilian Supreme Federal Court and the Inter-American Court of Human Rights. Specifically, I focus on the light of adoption of the Judicial Dialogue Theory through a theoretical and empirical approach. After a brief overview of human rights rules in Latin America, this work draws upon an original dataset of cases to discuss actions taken by the two courts. I call attention to the importance of crescent exchange among constitutional and international law in the scope of Human Rights, and the necessity of judicial dialogue between courts. However, the judicial dialogue in case law for the national court is hard but not impossible. In conclusion, I argue that the Brazilian Supreme Court is resistant to judicial dialogue with the Inter-American Court through silence which is the posture regarding not a lack of knowledge but of interest to consider the use of foreign or transnational sources.

Keywords: Judicial Dialogue Theory. Brazilian Supreme Court. Inter-American Court of Human Rights. Indigenous comunal property. Resistance.

1. Introduction

The birth of the Inter-American Human Rights system (IAHRS) has inaugurated a new conception of international responsibility of the State in the Americas, that is to say, from the institutionalization of the system, the international responsibility of the State no longer derived only from inter-State relations but also from the possibility of individuals to demand the compliance of State obligations in regards to Human Rights, thus reproducing the European move – with the creation of the European Human Rights system – of creating supranational supervision mechanisms for Human Rights.

In the beginning, the system's main challenges concerned the reinstatement of democracy and the grave Human Rights violations that took place during the rule of authoritarian regimes. As such, the work of the bodies of the IAHRS consisted in

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questioning government and dictatorial courts abuses, warn about structural flaws and strengthen the construction and preservation of the Democratic State.

From the 1990s on, other actors begun to more systematically use the system's protective mechanisms, which allowed for the expansion of its role, becoming a stage of activism as it shifted the focus of its institutional agenda from specific cases to work on paradigmatic cases, that is, cases that reflect social and institutional contexts of Human Rights violations and structural patterns of discrimination in the Americas – as it is the case of Indigenous people.

Indigenous people's activism in the IAHRs has made public several violations suffered in the American continent and allowed for the institutionalization of a committee in the Inter-American Commission of Human Rights (henceforth, IACHR) only to conduct on-site visits, publish general reports about the Human Rights situation in a country and special reports on a specific issue of concern and the inclusion of their claims in the jurisprudence of the Inter-American Human Rights Court (henceforth: Court).

Besides exposing negative information on Humans Rights protection for these people, such activism, by means of litigation in the Court, has provided an interpretation of the American Convention of Human Rights (henceforth: American Convention) based on its rights and those from other international treaties, such as the International Labor Organization's (ILO) Convention no.129, which achieved the status of the most important document pertaining Indigenous People, and also that these people's main claim was incorporated into the IAHRs, that is, the respect to its traditional territories.

Traditional territories were initially discussed in the Court in the *Mayagna Sumo (Awes) Tingni* community case against Nicaragua. After the judgement, other litigations have generated jurisprudential advances in the Court's interpretation, such as the *Yakye Axa* community, which provided a joint reading of the American Convention with ILO's Convention no.169, and the *Kichwa* Indigenous People of *Sarayku* against Ecuador, in which the Court expanded its interpretation as to the protection to traditional territories, developing its current understanding about the right to consultation to indigenous peoples.

These cases have contributed to the consolidation of international litigation over indigenous lands in the Court's jurisprudence, once they have provided the understanding that indigenous peoples have the right to demarcation and concession of official land titles from traditionally occupied territories², thus broadening State obligations, as well as the reparations imposed to States, which, for having an integral – not simply patrimonial – perspective, seek to safeguard justice, the territory's rehabilitation, the right to previous consultation in projects that will possibly affect them, the reparation of other rights violated and the public recognition of international responsibility³.

In this way, this work aims to analyze the Court's jurisprudence over indigenous communal property and its reception by the Brazilian Supreme Federal Court, in the light of the adoption of the "Judicial Dialogue Theory" as an instrument of analysis of this reception and from the comparison between the judgements of the cases of the *Mayagna Sumo (Awes) Tingni Community vs. Nicaragua* (2001), the *Yakye Axa Indigenous Community v. Paraguay* (2005), the *Kichwa Indigenous People*

² PASQUALUCCI, J. "International Indigenous Land Rights: a critique of the jurisprudence of the American Court of Human Rights in light of the United Nations Declaration on the Rights of Indigenous People". *Wisconsin International Law Journal*, vol. 27, nº. 01, 2009, p.64.

³ CALDERÓN GAMBOA, J. F. *La evolución de la reparación integral en la jurisprudencia de la Corte Interamericana de Derechos Humanos*. México: Comisión Nacional de los Derechos Humanos, 2013, p.50.

of *Sarayaku v. Ecuador* (2012), and the cases of “*Raposa Serra do Sol*” Indigenous land trial (Petition 3.388-4 STF) and the Writ of Security no. 29.087 (judged by the Supreme Federal Court in September 16, 2014), in order to understand the Supreme Federal Court’s position in the dialogue with the Inter-American Court.

In order to do this, the work will be didactically structured in (1) a brief overview of the facts addressed in the Court’s judgements on indigenous communal property; (2) an analysis of the Court’s interpretation; (3) a description of the Supreme Federal Court cases; and (4) a critical analysis of the Supreme Federal Court’s position in the dialogue with the Inter-American Court.

In this sense, the methodology adopted for the selection of both Court’s cases took into account three requirements: (I) cases decided after the recognition of the Court’s competency by Brazil; (II) cases in which there is a thematic pertinence, that is, the indigenous communal property, which is the key element from which all the other rights stem; (III) the complexity of the claim, for since it is about indigenous peoples, it cannot be understood in terms of the sum of individuals, for the quality of a *people* with its own self-determination and identity must be intrinsic to this discussion, and of the peculiarities of the Latin-American context, which make cases like these a recurrent matter.

2. The Inter-American Human Rights Court case law about indigenous comunal property

Indigenous people’s activism in the Inter-American Human Rights System has allowed for the creation of a right to communal property, resulting from a progressive interpretation, according to the Court, applied to the main inter-American documents: the American Declaration of the Rights and Duties of Man (henceforth: the Bogota Declaration); the Charter of the Organization of the American States (henceforth: Charter of the OAS) and the American Convention of Human Rights (henceforth: American Convention).

The first case in which the Court has adopted such positioning was in the *Mayagna Sumo (Awas) Tingni* community against Nicaragua, in 2001. This case’s judgement represents a true framework for traditional peoples’ litigation in the IAHRs, once it is the first of a series of judgements about the right to territoriality institutionalized through the jurisprudential creation of the institution of the communal property

Other Court’s judgements about indigenous communal property that must be highlighted are the *Yakye Axa Indigenous Community v. Paraguay*, in 2005, for allowing for the joint interpretation of the American Convention and the ILO Convention no.169, and the *Kichwa Indigenous People of Sarayaku v. Ecuador*, in 2012, when the Court considered the right to consultation to indigenous peoples as a right derived from the protection of traditional territories.

These are the judgements I will analyze in the work. In this sense, firstly, I will expose the facts from each case in order to present the Court’s position.

2.1 Mayagna Sumo (Awas) Tingni Community v. Nicaragua case (2001)

The case’s petitioner is the Indigenous people Awas Tingni, of the Mayagna/Sumo ethnicity, composed by more than six hundred people, settled in the Caribbean Atlantic Coast of Nicaragua, in the North Atlantic Autonomous Region (NAAR), which, in 1995, file a complaint to the IAHRs against the State of Nicaragua for granting a concession of their lands to the “Sol del Caribe S.A.” company (SOLCARSA) without their previous consent⁴.

⁴ This demand was initiated in October 1995 before the IACHR, which, two months later, received a petition of injunction by the petitioners. In the next year, other indigenous communities of the NAAR adhered to this petition. The IACHR held two meetings between the parties aiming for a conciliation, to no avail. At the third meeting, the petitioners requested that the State grant no more concessions in the territory and initiate the demarcation process

This case was presented to the Court by the IACHR in 1998. In August 2001, the Court has convicted the State of Nicaragua for the violation of the right to judicial protection (article 25 of the American Convention) and the right to property (article 21), in connection with the obligation to respect the rights provided by the American Convention and the duty to adopt the domestic legal dispositions (articles 1.1 and 2 of the American Convention).

It is a concern of this study to analyze the Court's interpretation on the right to property (article 21)⁵. Regarding this article, by adopting a "progressive interpretation" and not restrictive of the American Convention, the Court has considered that the article protects the right to property, in a sense that comprises both the rights of the members of indigenous communities in the framework of the communal property as it is recognized by Nicaragua's Political Constitution.

The Court considers that according to this Political Constitution, the Awas Tingni community has a right to communal property over the lands it occupies. Furthermore, Nicaragua's domestic legislation considers communal property as comprising the lands, waters and woods which have traditionally belonged to the Atlantic Coast communities, being inalienable, as well as under a restraint of mortgage, and cannot be donated, sold nor subject to taxation. Community members have the right to cultivate and use the good it generates with their work in the communal property. However, despite such recognition, Nicaragua has not guaranteed a specific procedure to implement it.

The Inter-American Court borrowed this concept from the Nicaraguan Constitution without making any distinctions or approximations to the right to territoriality of indigenous peoples and without observing if there was, at the international level, existent treaties regulating the matter, such as ILO's 169 Convention.

in the lands of the communities, differentiating them from State-owned lands. The State announced the creation of the National Commission of Demarcation and invited them to participate. In 1997, the IACHR held a hearing in which the petitioners Stated that forest operations yet continued and requested their visitation *in loco*, but this was not met. In March 1998, the IACHR issued a report recognizing that the State of Nicaragua had not complied with the obligations disposed in the American Convention on Human Rights and recommended that the State adopt, in its legal system, a procedure of demarcation and granting of title deeds for indigenous territory that would be acceptable for the involved peoples; that it suspend all activity related to the title deed granted to the SOLCARSA and that it initiate a dialogue with the petitioners for the purpose of conciliation within a month. Since the State did not comply with the recommendation, the IACHR presented the case to the Inter-American Court of Human Rights in June.

⁵ In relation to article 25 of the American Convention on Human Rights, the Inter-American Court understood that judicial protection requires not only the formal existence of judicial means, but also that these are effective, which is why it recognized the violation of this article from two parameters: (1) first, because, in Nicaragua, there is not effective procedure to delimitate, demarcate and grant titles on indigenous territories, so much so that, since 1990, there has not been any granting of title deeds involving indigenous people in the whole State, and (2) the second, regarding the absence of specific legislation on the exercise of the rights of indigenous peoples, which made it impossible to adopt an effective judicial resort so that the communities could question the State for having disposed of their lands, without their consent, in a contract of concession for the SOLCARSA to exploit them. The Inter-American Court interpreted this article in conjunction with the general obligation to adapt one's internal law to the American Convention (articles 1.1 and 2 of the Convention), understanding that Nicaragua had not adopted adequate measures to demarcate the indigenous territory and had not conceded a reasonable term for the judicial appeals interposed by the representatives of the *Mayagna* people. For this, the Court considered indispensable for Nicaragua to make effective the rights recognized in the Political Constitution and in the Nicaraguan legislation in conformity with the American Convention, and for the country to adopt, in its internal law, the legislative and administrative measures and those of any other character that may be necessary to create an effective mechanism of delimitation, demarcation and granting title deeds for this People's territory, according to its customary law, values, uses and customs.

In addition, the Court has not substantiated why it employed the institute of communal property to interpret the American Convention. It simply explained that among indigenous peoples there is a communal tradition over collective property over land, which belongs not to the individual, but to the group and the community; and that there is a close relationship between indigenous peoples and their territories, which must be recognized and understood as foundational to their culture, spiritual life, integrity and economic survival, for such relation is not simply a matter of ownership and production, but a spiritual and material element of which should be fully enjoyed in order to assure the preservation and transmission of their cultural legacy to future generations.

The Court thus concluded that there was a violation of the article 21 of the American Convention, because it deals with a communal property right that was disrespected to the detriment of the *Mayagna* people, and that the State should delimit, demarcate and grant title deed over their territory, thus abstaining from acting in such a way that it would be prejudicial to the existence, value, use and enjoyment of those resources located in the geographic zone in which its members work and live.

2.2 Yakye Axa Indigenous Community v. Paraguay case (2005)

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Another important example of litigation was the case of *Yakye Axa* indigenous community against Paraguay, in 2005, since it consolidates the joint application of the American Convention and the ILO Convention no.169, in a context involving indigenous peoples and for expanding the content of communal property rights.

This case has as petitioner the indigenous community *Yakye Axa*, a part of the *Lengua Enxet Sur* people, a sedentary people which has ancestrally occupied the region of the Paraguayan Chaco. The petitioners submitted a complaint to the IAHR⁶ against the State of Paraguay for having handed their territory to individuals since the year of 1996, leading between 28 and 57 families of the *Yakye Axa* people to settle by a roadside in conditions of extreme poverty, some suffering from malnutrition, anemia and other illnesses, and not being able to fulfill their cultural ceremonies and subsistence activities. The remaining group was either in nearby villages or dispersed in other places in the Paraguayan Chaco.

The case was taken to the Court in the year of 2003. The Court has convicted the State of Paraguay in the year of 2005 for the violation of the Rights to a Fair Trial

⁶ The complaint initiated in the year of 2000. In the following year, the IAHR made a recommendation for the State to adopt precautionary measures in favor of the *Yakye Axa* people, aiming at suspending a judicial order that prohibited entry into the territory that they were claiming and consume its water, having only permission to remain where they were settled, but that was not done. In 2002, the IACHR declared the case admissible, published the report on the merit and recommended that the State should, within two months: delimit, demarcate and granted a title deed over the territory of the petitioners; adopt necessary measures to solve the conditions of misery suffered by the People; establish an effective judicial resort for the reclamation of traditional territory and indemnify the victims individually. After the refusal from the State of Paraguay in meeting the recommendations, the case was taken to the Inter-American Court in 2003.

and Judicial Protection (articles 8 and 25)⁷, the right to life (article 4.1.)⁸ and the right to property (article 21 of the American Convention).

As for the violation of the right to property (article 21), the Court revisits its interpretation on the *Mayagna* case, as well as the institute of the *communal property*, provided by the Nicaraguan Constitution, and identifies that the case is about the violation of the right to communal property and that the American Convention, because it is a "living instrument which interpretation must follow the evolution of times and nowadays living conditions", must be interpreted in consonance with like treaties and with the system of which it is part. The Court used this approach to analyze the American Convention jointly with the ILO Convention no.169, a document which Paraguay has ratified.

The Court emphasizes the close relation between the *Yakye Axa* people and its territory, recognizing that its culture corresponds to a particular way of life, a particular way of being, seeing and acting in the world, for this relation cannot be justified only because the territory provides this community main means of subsistence, but also because it is an integral part of its cosmology, religiosity and cultural identity, being thus an ancestral right of the *Yakye Axa* people that relates with its members own survival and a State duty, as prescribed in the article 13 of the ILO Convention no.169.

Still according to the Court, there is in the Paraguayan Constitution a recognition of the relation between indigenous territory and cultural identity, one that still lacks sense due to the absence of a physical delimiting of property. The Court also States that while the State is unable, for concrete and justified reasons, to adopt measures to develop traditional territory and to give resources to indigenous peoples,

⁷ The violation of the right to judicial guarantee and protection (articles 8 and 25 of the American Convention) was analyzed by the Inter-American Court from a double perspective: (1) the existence or not of an effective procedure for the indigenous peoples to claim their territories, by which the Court considered that the administrative procedure in Paraguay was ineffective, that the acting of the competent State authorities was not compatible with the principle of proportionality, considering that the procedure took approximately twelve years, and that the actions interposed by the *Yakye Axa* leaders, for being accessory, depending on the administrative procedure, were also ineffective to solve demands with that thematic, and (2) whether the criminal procedure that was inStated respected the judicial guarantees consecrated in the American Convention; as the petitioners could only rely on a public defender two years after the process was initiated, there was injury to the right to defense, which, in and of itself, already constitutes a violation of judicial guarantees.

⁸ On the violation of article 4.1 of the American Convention, regarding the right to life, the Inter-American Court understood that the State, by having the position of a guarantor, must adopt positive and concrete measures, oriented towards the satisfaction of the right to a dignified life, especially when regarding people in a situation of vulnerability and risk, for which the attention must be a priority, as was the case of the *Yakye Axa* People, who lived in conditions of extreme misery as a consequence of the lack of land and access to natural resources, since the settlement in which they were forced to remain in order to wait for the resolution of their claim was very precarious, lacking resources related to the right to health and to food, impacting the right to a dignified existence and the basic conditions for the exercise of other Human Rights, such as the right to education and to cultural identity. Besides that, the Court recognized that the State must assume a special position of guarantor, with more carefulness and responsibility, when it comes to children. And, about the *Yakye Axa*, the Court declared that the State of Paraguay had the obligation to provide basic conditions to ensure that the situation of vulnerability in which the community was found, for the lack of a territory, would not limit the children's development and life project. Besides the children, the Court also acknowledged the violation of the right to life relative to people of advanced age, who deserve special consideration for being important that the State adopt measures destined to keep their functionality and autonomy, guaranteeing the right to adequate feeding, access to clean water and to health, especially those who possess chronic diseases or are at a terminal phase, since, in the *Yakye Axa* People, oral transmission of culture to new generations is a task of the elderly.

the compensation to be granted must have as main orientation the land's meaning to these peoples, and be a product of a consensus between invested peoples, which was not verified in the case.

The Court thus concluded that Paraguay's violation of article 21 of the American Convention was due to the lack of an effective guarantee to the *Yakye Axa* people's right to *Communal property*, as there was no recognition, in practice, of the relation between the territory being vindicated to their traditions, oral expressions, customs, rituals, traditional knowledge, philosophy and history, once that the members of the community pass this immaterial patrimony on to the next generation, and as such it is constantly recreated.

It is worth noting that in this case, the Court had the opportunity to employ the right to traditional territories provided by ILO Convention no.169 and thus to withdraw from the Nicaraguan institute of the communal property, which would provide a more coherent interpretation of the right to territoriality to international law, as well as had the opportunity to institutionalize in its jurisprudence an internationally known concept, but has not done that, hence opting for converting the Nicaraguan provision into a right to communal property embraced by the American Convention, as it did in the *Mayagna* case.

The Inter-American Court considered that since the State of Paraguay was unable to guarantee the communal property it harmed *Yakye Axa* people's right to life, once that it deprived them from the possibility of providing their own subsistence, from the use and enjoyment of those natural resources that are necessary to obtaining clean water and to the practice of traditional medicine. In addition, the State has not adopted positive measures to safeguard community member's Human Rights during the period they remained landless, while those that have been adopted, such as medical services and food, were insufficient.

In 2006, a year after the publication of the judgement, the *Yakye Axa* people requested the Court an interpretation judgement in regard to two issues: (1) the reach of the obligation to identify and deliver traditional territory's content; and (2) the deadline due to the identification of the territory and the constitution of the fund dedicated to land acquisition.

In relation to the first request, the Court declared that the State of Paraguay has the role of delimiting, identifying and granting title deed to the territory. But it must take into account the values, uses, customs and the customary law of an indigenous people in relation to its territory. In this way, if the identification process determines that the territory belonging to a specific community is in a private person's possession, the State must maximize the possibility of expropriation, and the impossibility of doing this must be reasonably justified. In this case, the State will be committed to acquire alternative lands, to be chosen via consensus within the community.

In what concerns the second request, the Court sustained the view that Paraguay has the obligation to delimit, grant title deed and transfer free of costs the traditional lands of the *Yakye Axa* community within three years. If, during this period, it becomes proven and reasonably justified that those lands are in private hands and that there is no means to expropriate them, the State will have a year to establish a fund that will provide the cash amount necessary to the purchase of alternative land to be chosen by the indigenous communities.

2.3 Kichwa Indigenous People of Sarayaku v. Ecuador (2012)

In what concerns the second request, the Court sustained the view that Paraguay has the obligation to delimit, grant title deed and transfer free of costs the traditional lands of the *Yakye Axa* community within three years. If, during this period, it becomes proven and reasonably justified that those lands are in private hands and that there is no means to expropriate them, the State will have a year to establish a fund that will provide the cash amount necessary to the purchase of alternative land to be chosen by the indigenous communities.

The *Kichwa of Sarayaku* against the State of Ecuador case comprises the judicial claim made by the Kichwa people, which comprises two communities that share the same linguistic and cultural traditions: the Napo-Kichwa people and the Kichwa de Pastaza people, both being politically organized in community assemblies⁹, and are located in the Ecuadorian amazon region, by the Bobonaza river, a place of difficult access, but that contains lands that were adjudicated by the State in 1992, where these peoples live according to their customs and traditions.

The claim was presented to the IAHRC in 2003 by the Association of the Kichwa People of Sarayaku (Tayjasaruta), the Center of Economic and Social Rights (CESR) and the Center for Justice and International Law (CEJIL)¹⁰.

According to the IARHC, the case comprises the concession by the State of a permission to a private oil company to explore oil in the Sarayaku people's territory, in the 1990s, without previous consultation and consent. During the exploration, powerful explosives were used at several points of the indigenous territory, which created a risk to the population, prevented it from seeking its subsistence means and limited its movement and cultural expression rights. In addition, the case also deals with the alleged lack of judicial protection and inobservance of judicial guarantees.

In 2010, the IARHC presented the claim to the Court, which condemns the State of Ecuador in June 2012, for the violation of the rights to consultation, indigenous communal property and cultural identity (according to article 21 of the American Convention in relation to articles 1.1. and 2); for having seriously jeopardized the rights to life and personal integrity (articles 4.1. and 5.1. of the American Convention)¹¹, in relation to the obligation of safeguarding the right to communal property, in terms of articles 1.1 and 21 of the American Convention, and for the violation of the rights to judicial guarantees (articles 8.1 e 25 of the Convention in relation to article 1.1)¹².

Unlike the aforementioned judgements, the Court does not indicate the Convention's articles that were violated but the rights provided by the document. The relevance of this observation is because it is in this case that the Court will cement its interpretation on the right to consultation in its intersections with other rights – a strategy adopted due to the inexistence of a literal provision for this right in the American Convention.

The Court considers that it should determine whether the State observed and properly guaranteed the rights of the Sarayaku people, that would have been violated

⁹ The Assembly's Statute has been recognized and registered by Ecuador in 2004, the same year in which they were recognized as Original Kichwa of Sarayaku people.

¹⁰ The Admissibility Report was approved in October 13th, 2004 and the Report on the Merits in December 18th, 2009.

¹¹ On the right to life and personal integrity, the Court sustained that the first imposes to the State "special obligations... which can be determined based on the particular needs for protection of the holder of the right, due either to their personal status or to the specific situation in which they find themselves." (p.69). However, this does not implicate in the State being responsible for every situation in which there is a risk to the right to life, which means that the Court admits that the State must decide according to its priorities and resources. Hence, to recognize State's positive obligation, it must be established in the facts that authorities knew or should have known about the existence of an "immediate and certain" risk and that they did not take the necessary measures to prevent or avoid such risk. The State violated this right when it allowed for the placement of explosives and in not removing them despite precautionary measures imposed by the Court in June 2005. In relation to the threats to individuals of the Sarayku people, the Court considered that there was not enough evidence of the claims attributed to the State, as well as of the claim of torture. In what concerns the right to personal liberty, the claims concerning the illegal detention of four members of the Sarayaku people also lacked sufficient evidence.

¹² The Court held that the flaws in the investigations over the reported facts show that State authorities did not act with due diligence and that the State did not guaranteed an effective remedy, nor that the competent authority decided on the alleged rights, nor did it execute the necessary measures

by the hiring of a private company to the prospection and exploration of oil in their territory, for the implementation of the contract and other related events. Distinctly from other cases addressed by the Court, the right of the Sarayaku people to its territory is not questioned, since it was widely recognized by the State in its domestic acts and not contested during the process in the IARHC. The Court initially analyses the right to indigenous communal property, based on article 21 of the American Convention and from which it bases the analysis of other rights, such as (1) the right to indigenous communal property; (b) State obligation to guarantee the right to consultation of the Sarayaku people; (c) right to cultural identity; (d) obligation to adopt provisions of domestic law; (e) freedom of movement and residence; and (e) freedom of thought and expression, political rights, and economic, social and cultural rights.

As to the right to indigenous communal property, the Court maintains its understanding about the merits of this right, in that it "protects the close relationship between indigenous peoples and their lands", since it recognizes that "indigenous peoples have a community-based tradition related to a form of communal collective land ownership", and this protection offers a guarantee that they can continue "their traditional way of living, and that their distinctive cultural identity, social structure" and that there is a special relationship between the Sarayaku people and its territory.

This "intrinsic connection" with their territory makes the protection of the right to property necessary to guarantee the survival of indigenous peoples, which is to say, this is also a matter of protecting the natural resources located in it, which allow them to maintain their way of life, that is, their "physical and cultural survival, as well as the development and continuity of their cosmovision". For this reason, the lack of access to territories may lead to several violations of Human Rights, leading the indigenous peoples to situations of extreme lack of protection.

When determining the existence of the special relationship of the Sarayaku People with their territory, the Inter-American Court utilized criteria already established in their jurisprudence: a) there are many ways to express this relationship (traditional usage or presence, through spiritual or ceremonial bonds; sporadic settlements and crops; traditional forms of subsistence; usage of natural resources): b) the relationship must be possible, that is, the community members cannot be impeded, for reasons other than their will, from conducting those activities that reveal the persistence of the relationship with their traditional lands.

In *obiter dicta*, the Court reminded that eventual limits or restrictions imposed by the State to the exercise of the right to property by indigenous peoples must respect certain guidelines: they must be established by law, be necessary, be proportional and have the aim to meet a legitimate objective in a democratic society, without implicating in a denegation of subsistence as a people. However, the Court understood that it was not necessary to analyze these themes, since there were no allegations presented about them.

As for obligation (b) of the State to guarantee the right to consultation of the Sarayaku People, the Court understood that this close relationship of the indigenous communities with their territory, which carries an essential component of cultural identification, imposes its recognition and respect "as differentiated social and political actors in multicultural societies". This right to one's culture or cultural identity bases the recognition of the right to consultation. Therefore, "one of the fundamental guarantees to ensure the participation of indigenous peoples and communities in decisions regarding measures that affect their rights and, in particular, their right to communal property, is precisely the recognition of their right to consultation, which is established in ILO Convention No. 169, and other complementary international instruments.", for example, the United Nations Declaration on the Rights of Indigenous Peoples.

To sustain this interpretation, the Inter-American Court highlighted that Human Rights treaties are "living instruments, whose interpretation must follow the evolution of times and the current conditions of life", according to article 29 of the

American Convention and the Vienna Convention¹³. Besides this, the Court makes reference to the articles of Convention no. 169 that are related to the case and lists the members of the OAS which have ratified it already (15), besides mentioning internal law dispositions on the right to consultation or the right to communal property and many judicial decisions that recognize the right to consultation even in countries that had not ratified the ILO Convention. This allowed the Court to conclude that "the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law".

This duty to consult, that involves any administrative or legislative measure that affects the rights of indigenous peoples, as well as the obligation to ensure the rights of indigenous peoples to participation in the decisions related to their interests, find themselves in direct relation to the general duty of ensuring the free and total exercise of the rights recognized in the American Convention (article 1.1). This means that the State must structure its norms and institutions so that consultation to indigenous communities may be conducted effectively, according to the international parameters on the matter. The right to consultation and participation must be ensured in all phases of planning and development of the project, so that the indigenous peoples can truly participate and influence the decision-making process. Because of this, the State shall be responsible for monitoring, controlling and protecting this right.

Next, the Court delimits the application of the right to consultation in this case and verifies if the actions taken by the company meet the following criteria: (1) previous character of the consultation¹⁴; (2) good will and objective to reach an

¹³ Therefore, when interpreting a treaty, the Court considers not only the agreements and instruments formally related to it (article 31.2 of the Vienna Convention), but also the system in which it is registered (article 31.3 of the same Convention). In the same way, the Court uses treaties that are directly related to the protection of Human Rights, even if they originated from another system. The Court also invokes the article 24 of the American Convention (equality before law), to affirm that, to guarantee the rights of indigenous peoples, States must take into consideration "the specific characteristics" that differentiate them from the general population and constitute their cultural identity, and that the same should be done by the Court.

¹⁴ According to article 15.2 of Convention 169, consultation must be done before the State executes or authorizes any program of prospection and exploration of the resources existent in indigenous lands. The Inter-American Court understands that the consultation must be done "in the first steps of the plan of development or investment and not only when the necessity comes to obtain the community's approval, if it is the case, since early notice allows an adequate time for discussion inside the communities and to give an appropriate response to the State". The Court cites opinion of the Committee of Experts of the ILO, besides national legislation and jurisprudence, in this sense.

agreement¹⁵; (3) adequate and accessible consultation¹⁶; (4) study on environmental impact¹⁷ and that (5) consultation must be informed¹⁸.

Regarding (c) the right to cultural identity, the Inter-American Court acknowledges the "the close relationship that exists between indigenous peoples and their land and their traditions, customs, languages, arts, rituals, knowledge and other aspects of their identity" and that this "non-material cultural heritage" is transmitted from generation to generation. Based on the principle of non-discrimination (article 1.1 of the American Convention), the right to cultural identity is an "an ingredient and a crosscutting means of interpretation" to ensure the Human Rights of indigenous peoples¹⁹. This way, the Court considers that "the right to cultural identity is a

¹⁵ According to article 6.2 of the Convention 169, consultations must be done with good will, aiming to reach an agreement or achieve consent over the measures. Using various documents from the ILO and from the UN (notes 244 and 245), the Court considers that consultation must be conceived as "a true instrument of participation", that it must "establish a dialogue between the parties based on the principles of mutual trust and respect, aiming to reach a consensus among them". Good will requires the "absence of any kind of coercion on the part of the State, agents or third parties that act with its authorization or acquiescence", and it is incompatible with practices of disintegration of the social cohesion of the affected communities, such as corruption, establishment of parallel leaderships and negotiations with individual members. National legislation and jurisprudence also State these criteria. Furthermore, the Court emphasizes that the obligation to consult is a responsibility of the State and it cannot be delegated to private companies or third parties, even less so when they are interested in the exploration of the resources.

¹⁶ According to articles 6.1.a and 12 of Convention 169, consultation must be done through appropriate instruments and, particularly, through representative institutions, besides allowing that the peoples may comprehend and make themselves comprehended, rights also recognized in the articles 30.2 and 36.2 of the United States Declaration on the Rights of Indigenous Peoples. The Inter-American Court had already Stated that procedures must be "culturally adequate, that is, in conformity with their own traditions". Using the opinion of the Commission of Experts of the ILO, the Court points that there is not a single appropriate model of procedure, but both the national and the indigenous peoples' circumstances must always be taken into consideration, and the indigenous ways of decision-making in the temporal dimension must also be respected. Said elements are also recognized in the national legislation and jurisprudence. The company's actions, wrongfully delegated *de facto* by the State, aiming to have direct relationships with some members of the Saravaku, without respecting their form of political organization, demonstrate the violation of these criteria.

¹⁷ According to article 7.3 of the Convention No.169, governments must ensure that studies are carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities, and the results of these studies shall be considered as fundamental criteria for the implementation of these activities. To the Court, conducting such studies is an assurance that restrictions to rights to property do not result in the denial of a people's subsistence, which means that no concession within an indigenous territory can be made unless these studies are carried out by independent entities with reasonable technical knowledge and under the supervision of the State. Studies are also important for indigenous peoples to have knowledge of risks, so that they can evaluate if they accept what is being proposed. In addition, the Court establishes that studies on environmental impacts must: be conducted in accordance with international standards and best practices; respect indigenous people's traditions and culture; be concluded before the concession. Therefore, State obligation coincides with its duty to guarantee "effective participation" of the indigenous people in the process of granting concessions. In the case under analysis, there was no participation of the Sarayaku's people, studies were conducted without State oversight, and the process' social, spiritual and cultural impacts were not considered.

¹⁸ Consultation must be informed, in that people have knowledge of the possible risks of the plans being proposed. This requires that the State provides information and implicates in a constant communication between parties. This element is also recognized in national legislation and jurisprudence. The company's practices have not met these criteria.

¹⁹ At this point, the Court quotes the Rio Declaration on Environment and Development, the Convention No.169, the UN Declaration on the Rights of Indigenous Peoples and several other international documents from UNESCO, in addition to decisions by the African Commission on

fundamental right - and one of a collective nature - of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society", which was violated by the actions that affected zones of great value for the Saravaku in terms of environment, culture and their subsistence.

On the (d) obligation to adopt domestic measures, the Court recalls its jurisprudence over article 2 of the American Convention, according to which the States "not only have the positive obligation to adopt the legislative measures necessary to guarantee the exercise of the rights established in the Convention, but must also avoid enacting laws that prevent the free exercise of those rights, and ensure that laws that protect these rights are not annulled or amended".

On (e) the rights to movement and of residence, the Court understood that there was no sufficient evidence of their violation, regarding the passage of members of the Sarayaku on the Bobonaza River. In regard to the restrictions imposed by the placement of explosives, the Court understands that it must analyze them based on the right to communal property and to previous consultation, as well as in relation to the rights to life and to personal integrity.

And, finally, (f) regarding freedom of thought and expression, political, economic, social and cultural rights, the Inter-American Court decides not to discuss about the violation of these norms, understanding that the facts of the present case were sufficiently analyzed with basis on the rights to communal property, to consultation and to cultural identity.

3. Indigenous territory in the jurisprudence of the Brazilian Supreme Federal Court

The provisions on indigenous rights in the Constitution of 1988 enabled the Brazilian Supreme Federal Court (STF) to judge a series of cases over the matter, producing its particular interpretation on the content of these rights.

As it is widely recognized even by the Tribunal itself, the main decision of the Supreme Federal Court on indigenous rights was taken in the Raposa Serra do Sol (Petition no. 3.388) Case, judged on March 19, 2009. The extensive judgment, which has over 600 pages, demonstrates the complexity of the matter analyzed by the Tribunal and the difficulty faced by their members to compose a majority of votes, which had the divergence of Justices Joaquim Barbosa and Marco Aurélio.

Petition no. 3.388 was initiated as a popular lawsuit by Senators Augusto Botelho Neto and Mozarildo Cavalcanti, asking for the nullity of the Ordinance no. 534/2005, from the Minister of Justice, which defined the continuous model of demarcation of the Indigenous Land Raposa Serra do Sol, located in Roraima. Among other arguments, the plaintiffs questioned the administrative process of demarcation and that the reserve in a continuous area would be harmful for the State of Roraima, for national security and for the rural producers and workers who lived in the region.

The judgment declared the action partially successful, declaring the constitutionality of the continuous demarcation of the Indigenous Land Raposa Serra do Sol, but establishing a group of "institutional safeguards" which should be applied to this and to other processes of demarcation. Such safeguards were formulated from a composition of the votes of Justices Ayres Britto (Rapporteur) and Menezes Direito, obtained during the debates in the Court, which resulted in an unsystematic text which, sometimes, just repeats what was already provided by the Constitution.

Human and People's rights, from the Committee on Economic, Social and Cultural Rights and from the European Court of Human Rights.

Despite this, the safeguards Stated in the decision constitute the parameters established by the Supreme Federal Court over demarcation of indigenous lands, as recognized in the judgment of the embargoes of declaration that were presented (see below). It is the interpretation of a fundamental bundle of indigenous rights that has been used as a precedent in the scope of the Tribunal itself.

Such jurisprudence develops, on one hand, the content of the indigenous rights provided in the Constitution, but, on the other, restricts the exercise of those rights²⁰. After highlighting that the Constitution does not allow that the indigenous communities form "spatial circumscription or instance that carries a political dimension (...) By which none of the Brazilian indigenous communities possesses normative stature to come before the International Juridical Order as a "Nation", "Country", "Homeland", "national territory" or independent "people"", the decision recognizes the right owned by Indigenous peoples to enjoy "a land space that ensures them dignified means of economic subsistence to more effectively preserve their somatic, linguistic and cultural identity.

This vision on "ethnic identity" supports the interpretation of the Supreme Federal Court over the demarcation²¹, whose continuous character is in accordance with article 231, par. 1 of the Constitution²², and also contributes to avoid the "progressive elimination of the elements of a given culture (ethnocide)".

However, the demarcation is subject to two limits: a) time frame of occupation: "The Federal Constitution worked with a precise date – the date of its own promulgation (October 5, 1988) – as an irreplaceable referential for the starting point of the occupation of a given geographic space by this or that aboriginal ethnicity; in other words, for the recognition, to indigenous people, of the original rights over the lands that they traditionally occupy".

Besides that, the amplification of already demarcated land is prohibited; b) limit over the traditionality of the occupation: "It is necessary that this being collectively situated on a certain land space also bears the trait of lasting, in the spiritual and psychical sense of ethnographic continuity. The traditionality of the possession is not lost, however, where, at the time of the promulgation of the Constitution of 1988, reoccupation has not occurred only due to persistent plundering by non-indigenous peoples, which is the case of the 'eStates' situated at the Indigenous Land Raposa Serra do Sol, the occupation of which did not quench in the Indigenous peoples their capacity of resistance and affirmation of their particular presence in all the geographic complex of 'Raposa Serra do Sol'".

Besides this, the Tribunal also affirms that the exclusivity of usage of the natural resources in indigenous lands is "compatible" with the installation of public equipment, communication ways, provision of public services or of those that have public relevance, which must be processed "under the institutional leadership of the Union" and the "supporting action" of entities representing the natives, which diminishes the importance of the right to consultation, which must precede any intervention in indigenous lands, as understood by the Inter-American Court.

This imposed limitation on the right to consultation – that influences property rights as acknowledged by the Inter-American Court – also reveals itself in the bundle of safeguards of the demarcation process. On one hand, the Supreme Federal Court

²⁰ Due to the limit of space of this work, I will not discuss the issue of the competences of the Union, the States and the Municipalities in relation to indigenous lands, which is also analyzed by the STF.

²¹ Although ethnic identity is recognized, the conception is nuanced in the decision when, defending the compatibility of having military installations at indigenous lands' borders, it affirms that this constitutes a "unique opportunity" to mobilize indigenous peoples in defense of national sovereignty and reinforce in them an innate feeling of Brazilianness".

²² See "Art. 231, par. 1. The lands traditionally occupied by the indigenous peoples are those inhabited by them on a permanent basis, those used for their productive activities, those indispensable for the preservation of the environmental resources necessary for their well-being and those necessary for their physical and cultural reproduction, according to their uses, customs and traditions".

does not concern itself with developing the content of constitutional provisions as the hearing of the affected communities, which is required for the National Congress to authorize the exploitation of water and mineral resources in indigenous lands. On the other hand, the Tribunal expressly rejects the right to consultation: "e) the usage by natives is not above the interests of national security policy; the installation of military bases, units and posts and other military interventions, the strategic expansion of the road network, the exploration of energetic alternatives of strategic value and the protection of the riches of equally strategic nature, under discretion of the competent agencies (Ministry of Defense, having the National Defense Council been heard), shall be implemented regardless of consultation to the involved indigenous communities, as well as the National Foundation of the Indigenous Peoples (the FUNAI – Fundação Nacional do Índio); f) the acting of the Armed Forces and of the Federal Police in the indigenous area, in the scope of the respective attributions, rests assured and shall happen regardless of consultation of the respective indigenous communities or of the FUNAI". Only regarding the administration of conservation units also affected by indigenous area, the Tribunal recognizes that there must be the participation of the communities, "which must be heard".

With the filing of many embargoes of declaration, the Tribunal manifested itself again on the matter on October 23, 2013. In this decision, the Tribunal negated any transformative effect to the embargoes and simply clarified some points of its decision. Among these clarifications, contained in the abstract of the judgment, deserves attention the understanding that, although the decision given in popular action does not possess a binding effect, "in a technical sense", the judgment of the Raposa Serra do Sol case "shows the moral and persuasive strength of a decision from the highest court in the country, from which comes an elevated argumentative responsibility in the cases when the overcoming of these reasons is cogitated". Thus, the Supreme Federal Court admits that the "institutional safeguards" established in this judgment constitute a precedent that must be utilized in other cases of demarcation of indigenous areas.

This happened in the judgment of the Writ of Security no. 29.087, on September 16, 2014. In this case, the legality of the Ordinance that had declared the permanent possession of the indigenous land Guyraroka, in an area situated in Mato Grosso do Sul, to the Guarani Kaiowá People, was discussed. According to the allegations of the plaintiff, there would have been no occupation of that land by the natives, which would have been acknowledged in the anthropological report made by FUNAI itself upon declaring that the indigenous possession was "past".

In a divergent vote that conducted the majority, Justice Gilmar Mendes highlighted the fact that the Kaiowá population had lived in the claimed land until the 1940s, having been forced to abandon it "due to the pressures received by the colonizers who obtained the first title deeds in the region". Although many families had remained in the local, working for the farmers, the last families were forced to leave in the beginning of the 1980s.

From this information, and even in the scope of a writ of security, Justice Gilmar Mendes considered that these elements did not suffice to configure the existence of "traditionally occupied lands" ((article 231, par. 1), evoking in its reasoning the Precedent no. 650 of the Supreme Federal Court ("The clauses I and XI of article 20 of the Constitution do not reach lands of extinct settlements, even if occupied by natives in a distant past) and the "institutional fundamentals and safeguards" established in the decision of Petition no. 3,338, especially the "time frame of the occupation" and the "limit of traditionality of the occupation".

For the Justice, "the second limit is complementary to the first", thus, only if the land was being occupied by the natives on the date of the Constitution's promulgation is when there can be an analysis of "the effective relationship of the natives with the land that they occupy. Conversely, if they are not occupying the land on October 5, 1988, it is not necessary to assess the second limit".

One can verify that this interpretation, besides adding elements to what had been decided by the Tribunal in the Raposa Serra do Sol case, does not adjust itself to the interpretation of the Inter-American Court over indigenous rights.

4. Conclusion: Judicial dialogue and resistance

The most important precedents from the Brazilian Supreme Federal Court stray clearly from the orientations of the Inter-American Court. Such situation can be considered grave, once the State has the duty to adapt its legislation to the American Convention²³ and the Court is the final interpreter of this institutional instrument²⁴.

Such divergences have led to a search for solutions to the conflicts between national and international courts by means of dialogue between them²⁵. Since the end of the Cold War, it is observed that there has been a strengthening of communication between judges and tribunals, which can be attributed to different causes, such as the process of globalization, the expansion of democratic regimes and the creation of supranational tribunals. In Latin America, the context of re-democratization in the 1990s generated a notable reinforcement of the inter-American system of Human Rights protection, which made more relevant the jurisprudence of the Inter-American Court for the States Parties of the American Convention.

This communication may be developed in different ways, according to the degree of reciprocal engagement of the involved tribunals, and it can vary from a direct dialogue, in which there is an exchange where the positions of a court are answered by the other; monologue, in which a court's ideas and conclusions are used by others, and intermediated dialogue, in which a court spreads in a conscious way the ideas of a court to others, making the courts react to them²⁶.

The interest of both parties in the development of this communication must be highlighted: on one side, the Inter-American Court does not possess its own instruments to implement its decisions, which makes necessary the cooperation of the national authorities for this execution, including the Judiciary Power. On the other side, the national courts must also accept their responsibility so that the State does not become in default with its international obligations.

Therefore, it is observed that, in various countries, the national tribunals have become an important institutional force in the protection of the international rule of law, making national and international juridical orders complementary. According to Nollkaemper, national courts contribute to this result when they exercise the following functions: deliberation based on international norms and resolution of conflicts over their application; conventionality control; determination and development of international law²⁷.

Considering the common problems involving the interpretation of Human Rights, courts also have incentives to learn the jurisprudence of their peers in order

²³ See "Article 2. Domestic Legal Effects. "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms".

²⁴ See "Article 62.3. "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement".

²⁵ BURGORGUE-LARSEN, L. *El diálogo judicial: máximo desafío de los tiempos jurídicos modernos*. México: Porrúa, 2013.

²⁶ SLAUGHTER, A. *A Typology of Transjudicial Communication*. University of Richmond Law Review, vol. 29, p. 99-137, 1994.

²⁷ NOLLKAEMPER, A. *National courts and the international rule of law*. Oxford: Oxford University Press, 2011.

to improve the quality of their decisions and ensure their legitimacy. These latter elements facilitate the transformation of judicial communication into dialogue. This situation is not only a question of national tribunals using precedents from the Inter-American Court, but also of the existence of an interaction, in which the national Judiciary aims to make its decisions using the jurisprudence of the Court and vice-versa, recognizing that both precedents possess persuasive authority²⁸.

In this new context of crescent exchange among internal and international law in the scope of Human Rights, Vicky Jackson identifies three different attitudes that are adopted as a course of action by the Judiciary as much as by other national authorities²⁹: a) Resistance: considers that only juridical norms that were adopted in accordance to procedural rules of each juridical community must be utilized in the interpretation of law. To this attitude, international or foreign law is irrelevant for the application of the Constitution, since the aim is to avoid an amplification of the powers of the judge, to defend the specificity of the Constitutional and the development of one's own constitutional culture. This resistance would manifest itself in the form of indifference, characterized by the absence of interest in using international sources, in the form of active resistance, when there is a refusal to use these sources;

b) Convergence: considers that internal constitutional law is a place for the implementation of international juridical order or a participant in a decentralized process of transnational convergence of rules. Placing itself at the opposite pole of resistance, this attitude proposes an identification between national and international juridical norms. According to the author, one of the greatest influences on this posture refers to the utilization of international instruments of Human Rights as models for the internal guarantees of rights. In which concerns us more closely, the attitude of convergence is facilitated when the institutional texts require interpretation according to Human Rights treaties or when they incorporate rights from these instruments;

c) Engagement: aims to increase the judges' capacity to make a more informed and impartial deliberation over the content of their constitutional rules, recognizing both possibilities of harmony and dissonance between their interpretation and that developed in the international scope. In this attitude, international law is conceived more as a "tool for reflection" than as a group of rules that impose themselves hierarchically. Though similar, engagement is not equal to dialogue, since it does not require reciprocity: a court may get itself involved with the work of other courts or experiences of other political communities or international instruments of Human Rights, without expecting a response. This means that the authority attributed to the jurisprudence from international bodies is more persuasive than binding, but it can contribute to better understand internal law. The attitude of engagement can assume two forms: deliberative, when there is no obligation to use international law, but that allowed by the Judiciary, and relational, when there may be an obligation to take international sources into account, but not necessarily to follow them.

In the cases under analysis, it is not difficult to conclude that the Supreme Federal Court adopts a posture of resistance to dialogue with the Inter-American Court, which means the risk of future convictions for the Brazilian State, besides reducing the protection to indigenous rights in our country. I shall see this point with more detail concerning the criteria for restriction of communal property.

The Inter-American Court understands that, although communal property deserves the State's special protection, this is a right that can be restricted. In this

²⁸ SLAUGHTER, A. "A Global Community of Courts". *Harvard International Law Journal*, v. 44, p. 191-219, 2003.

²⁹ JACKSON, V. *Constitutional engagement in a transnational era*. Oxford: Oxford University Press, 2010.

regard, the Court developed criteria containing a series of specificities, that States Parties must respect for that restriction to be legitimate.

There are four general criteria for evaluating the possibility of restriction to communal property: (a) reasons of public utility or social interest; (b) payment of fair indemnification; (c) accordance with parameters established by law and (d) in face of the special cultural relationship of the indigenous peoples with their lands, it must also be analyzed if traditions and customs will be significantly affected.

The first criterion refers to (a) reasons of public utility or social interest and it has relation to the article 21 of the American Convention, which expressly mentions that the right to property may be subordinated to the "social interest". However, for the Inter-American Court, these reasons of public utility or social interest comprehend all means that provide a better development of a democratic society; thus, States have the duty to utilize all instruments at their reach that implicate in attitudes and obligations which are adequate to the American Convention and that affect the indigenous peoples' rights the least, having in mind that concepts such as "public order" or "common good", derived from the concept of "general interest", when invoked as fundamentals to restrict Human Rights, must be object of an interpretation strictly limited to the fair demands of a democratic society, considering the distinct interests there existent and the necessity to preserve the final objective of the American Convention³⁰.

The second criterion regards (b) the payment of fair indemnification, since the mere limitation of the use and enjoyment of any property is sufficient to generate to right to indemnification, and such requirement is already expressed in article 21 of the American Convention. This criterion is considered by the Inter-American Court as a General Principle of International Law, that stems from the necessity to reach a balance between the general interest and the owner's rights, and must be adequate, fast and effective.

And, in regard to communal property, payment must occur, preferentially, by lands equivalent to those restricted, since, in the event of an impossibility to return, in all possible cases, such peoples must receive lands whose qualities and juridical statues are equivalent to the lands that were previously occupied, allowing them to satisfy their needs and ensure the development of their future. When the interested peoples prefer to receive an indemnification in cash, this shall be granted with appropriate guarantees³¹.

The third criterion is about (c) accordance with parameters established in law. Article 21 of the American Convention stresses that the use and enjoyment of the right to property, as well as its restriction, must be subordinated to the law. Therefore, the predominant understanding in the Inter-American Court is that the law may not provide all the possible hypotheses in which the State may intervene in communal property, but there must be parameters established in law that legitimate this conduct from the State and do not violate the rights of the Traditional Peoples, since "this right supposes that every limitation measure must be exceptional.

³⁰ That is, the restriction to legally established communal property must answer to "an imperative public interest", which is not restricted to the mere fulfillment of a useful and timely purpose, demanding that State action verify if the protection of indigenous peoples' rights is being implemented even in face of a restriction of their right and, most importantly, if there is the least possible intervention in their territory. This is necessary so that these terms of open texture are not used without foundation or with empty grounds with the sole purpose of violating Human Rights, because this restriction can only be authorized when the fulfillment of this criterion occurs in a concrete and reasoned way, so that an indefinite concept is not allowed to be used to restrict Human Rights.

³¹ The Court understands that when reparations are paid on lands, these must be in accordance with affected peoples' customs and traditions, in view of the fact that, in spite of being a State's decision (whether in land or money in kind), after actually consulting the traditional peoples, it should not be based only on economic aspects, but also on cultural and social aspects, so that impact of this restriction is the least possible.

Exceptionality must be necessary in every restriction measure for the achievement of a legitimate objective in a democratic society"³².

And, finally, the fourth criterion provides that (d) in face of the special cultural relationship of the indigenous peoples with their lands, it must also be analyzed whether traditions and customs will be significantly affected, given that the Inter-American Court understands that the land belonging to indigenous peoples surpasses patrimonial value, since the right to property here discussed evolves to the way how indigenous peoples identify themselves, seeing that the relationship with the land is not merely a question of possession and production, but indeed a material and spiritual element which they must fully enjoy in order to preserve their cultural legacy and transmit it to future generations.

Therefore, the fact of the limitation to property being a threat to these peoples' survival or not must be taken into account, considering that, as there is a relationship of identification between the indigenous peoples and their territory, in this restriction, it must be observed whether their customs and traditions are going to be negatively affected. Besides that, it must be analyzed whether the lands that are being offered as compensation can provide instruments that enable the execution of the life project of these peoples.

The exposition of these criteria corroborates the posture of resistance adopted by the Supreme Federal Court, since the conditions proposed do not dialogue with the restriction criteria created by the Inter-American Court, besides there not being a based construction or deconstruction for its non-utilization.

When the STF does not utilize those criteria as parameters, there is a *resistance* that can be classified as a *passive resistance* manifested through *indifference/silence*, which is the posture regarding not lack of knowledge but of interest and willingness to consider the use of foreign or transnational sources, that is, the rejection of their relevance³³.

This posture fosters an isolation of the Supreme Federal Court in a global context of interaction between courts, being that a posture incompatible with the *reception*, since this model weakens the Inter-American System, considering that being its signatory requires from the Judiciary Power the duty of coherence and *dialogue* with this system.

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³² It is necessary to analyze if restriction parameters, which have already been previously established in law, are in accordance with the purposes of a democratic society and with the goal and purposes of the American Convention.

³³ JACKSON, V. *Constitutional engagement in a transnational era*. Oxford: Oxford University Press, 2010, p.33.

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