http://dx.doi.org/10.18623/rvd.v14i30.1182

THE ECOLOGICAL FUNCTION OF THE COLLECTIVE PROPERTY OF THE ANCIENT LANDS: A NEW MODEL FOR THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND THE GUARANTEE OF THE ENVIRONMENT?

Saverio Di Benedetto

Professore associato di diritto internazionale - Università del Salento, Lecce. Questo lavoro ha origine nell'attività di indagine condotta insieme agli amici e colleghi ricercatori dell'Università del Salento facenti parte del gruppo L.A.I.R., ai quali va il mio sincero ringraziamento.
Email: saverio.dibenedetto@unisalento.it

ABSTRACT

A função ecológica das propriedades comuns das terras ancestrais: um novo modelo para a relação entre os direitos humanos e a proteção ambiental
Human rights courts, such as the ECHR, usually afford protection to the environment only in an indirect way, when applying rules aimed at protecting different values, such as human life or private home, in cases involving an injury to natural or ecological goods. This article analyzes the particular approach to the environmental protection developed by the IACHR when defining and protecting the right of communal property on the ancestral lands of indigenous and tribal peoples. The idea is that such a right encompasses direct function of environmental protection due to the intrinsic ecological character of the communal property. This entails important consequences also in the role of public powers in protecting the environment, as the very recent Kaliña case shows.

***Keywords*:** ancestral lands; communal property rights; indigenous and tribal peoples; American Convention of Human Rights; environmental protection; ecological function of property

INTRODUCTION

The way in which environmental protection bodies can find concrete action thanks to the discipline and practice of the main international systems for the protection of human rights[1] is a remarkably debated issue. If the affirmation of a human right to a healthy environment has limited application in international practice[2] and raises conflicting opinions among the various authors[3], on the other hand, there was a tendency to apply some human rights which have a high degree of incidence in favor of environmental protection. Thus, numerous decisions - beginning with those taken by the European Court of Human Rights - had as their object the (alleged) injury to the State of the right to life[4], respect for the right

1 This is essentially legal experience of *the European Convention on Human Rights* (ECHR), *the American Convention on Human Rights* (ACHR) and the *African Charter on Human and Peoples' Rights*.

2 The *ECHR* and its protocols do not provide for such a right (notwithstanding: Council of Europe, Parliamentary Assembly, *Environment and human rights*, Recommendation No 1614 of 27 June 2003), while the Strasbourg seen - it was oriented to interpret some human rights also in function of the protection of environmental interests. On the contrary, art. 24 of *the African Charter expressly provides:* "the right to a satisfactory general environment favorable to their development"; such provision was applied in the well-known decision of the *Ogoni* case (African Commission on Human and Peoples' Rights, *Social and Economic Right Action Center and the Center for Economic and Social Rights c. Nigeria (Ogoni)*, Decision of October 27, 2001): cf. D. Shelton, "Decision Regarding Communication 155/96, in *American Journal of International Law* 2002, p. 937 fs. ; P. Birnie, A. Boyle, C. Redgwell, *International Law and the Environment*, Oxford, 2009, p. 273 s. Even in the system of inter-American protection of human rights, there is a similar provision in art. 11 of the *Protocollo di San Salvador* in the *ACHR* of November 17, 1988, even if the protocol itself excludes that such a norm may be the basis for individual remedies.

3 Some authors dispute the very opportunity of creating an autonomous individual right to a healthy environment, stressing in particular how the protection of some fundamental environmental goods, such as climate balance, is possible only with general regulatory instruments (cf. P. Birnie, A. Boyle, C. Redgwell, cit., P. 301 s.). Other authors, on the other hand, generally maintain that it would be opportune to include such a right in the list of human rights (cf. A. Kiss, D. Shelton, *International Environmental Law*, New York, 2000, p. 174 fs.).

4 Cf. European Court of Human Rights (GC), *Öneryıldız v. Tur quia*, resource n. 48939/99, judgment of November 30, 2004 (deadly explosion of methane due to lack of risk prevention by hazardous industrial activity); European Court of Human Rights, *LCB c. United Kingdom*, Appeal no. 23413/94, judgment of June 9, 1998 (nuclear test that had caused leukemia in an individual working for the British Royal Air Force, decided negatively); in other cases, such as the European Court of Human Rights (GC), *Guerra c. Italy*, resource n. 14967/89, judgment of February 19, 1998, the valuation according to Art. 8 ECHR absorbed the censorship profile of Art. 2. For a case faced by the Inter-American Court, referring to the murder of an environmental activist and the repercussions on freedom of association in the environmental field, Inter-American Court of Human Rights, *Kawas-Fernandez v. Honduras*, judgment of April 3, 2009.

to private and family life[5], the right to a fair trial[6], in cases where such injury affected (also) related, or fully attributable, general interests to the enjoyment of environmental goods[7]. The limit of a similar "humanitarian way" for the effective protection of the environment at the international level lies - in the ECHR and ACHR system - in the accessory and indirect character that distinguishes the search for general interests through the protection of human rights: human rights can, in fact, operate as an instrument of support of the instances of environmental protection in the face of the State only on the condition that the conduct harmful to the environment and also the individual interests of the applicants, positively qualified by the right invoked[8].

This article deals with a particular human right: the right to property, in a peculiar form of it, that of the collective property of the ancestral territories, showing how a similar right, as imagined and modeled by the creative ability of the judges of San José, may have an original

5 This is the most commonly applied law in the ECHR to react to the hypotheses of environmental damage, particularly in cases of polluting industrial activities, lacking preventive state measures. Cf. European Court of Human Rights: *Lopez Ostra c. Spain*, appeal n. 16798/90, judgment of December 9, 1994; *War c. Italy*, cit. ; *Taskin c. Turkey*, resource n. 46117/99, judgment of November 10, 2004; *Fadeyeva v. Russia*, n. 55723/00, judgment of June 9, 2005; *Băcilă c. Romany,* feature n. 19234/04, judgment of 30 March 2010. For a complete and analytical casuistry v. S. Bartole, P. De Sena, V. Zagrebelsky, *Commentary on the European Convention on Human Rights*, Padua, 2012, p. 349-352.

6 Cf. European Court of Human Rights: *Okyay v. Turkey*, resource n. 36220/97, judgment of 12 July 2005 (where the proven violation of Article 6 of the ECHR is linked to the right to a healthy environment guaranteed by the Turkish Constitution); *Gorraiz Lizarraga c. Spain*, appeal n. 62543/00, judgment of 27 April 2004. For some cases decided negatively for lack of direct link v. *infra* note 8.

7 Even other human rights were invoked (and judged wronged) in the system of the ACHR, such as the right to freedom of expression in the face of the State's release of information on a project to develop ecologically sensitive areas (Inter-American Court of Human Rights, *Claude Reyes v. Chile*, decision of September 19, 2006): on this case (and on the *Kawas-Fernandez* case, cit.) V. R. Pavoni, *Environmental Jurisprudence of the European and Inter-American Courts of Human Rights*, in *Environmental Law Dimensions of Human Rights*, B. Boer (editor), Oxford 2015, p. 69 fs., P. 72-76.

8 Cfr. European Court of Human Rights, *Kyrtatos c. Greece*, appeal n. 41666/98, judgment of 22 May 2003: the applicants lamented the damage to the surrounding natural environment as a result of urban development; the Court denies the application of art. 8 since the applicants had not proved that the environmental damage to protected species had directly concerned their proven field and since "[n] either Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such" (par. 52. The damage to the local community as a whole was not considered sufficient for the appeal, showing how art. 8, as well as the other articles, do not allow environmental *actio popularis* vis-à-vis the State (see also L. Loucaides, "Environmental Protection through the Jurisprudence of the European Court of Human Rights", in *British Yearbook of International Law* 2004, pp. 249 ss.). It is also significant that the Court did not rely on art. 3 4, accepting in the abstract the quality of awards to the applicants, thus including the lack of a direct link in the exact structure of the right invoked. For the affirmation of the same mechanism also in scope ACHR, in a controversy on the subject of property and environmental protection, v. *infra* note 17; cf. also R. Pavoni, *Public interest and registry fees individuali nella giurisprudenza ambientale Europea della Corte dei diritti umani (Public interest and individual rights in environmental jurisprudence of the European Court of Human Rights),* Naples, 2013, p. 62-69. On the other hand, in the African Charter system l ' *actio popularis* is possible under certain conditions (cf. African Commission on Human and Peoples' Rights, *Ogoni*, cit., pair. 49).

and right role in protecting the environment. It is maintained here that the right of ownership of ancestral territories has an intrinsic ecological dimension, which constitutes a real and true "character" of the law itself ('ecological function' of the collective property of the ancestral lands), with repercussions - even potentially the typical public (and sovereign) function of environmental protection. A very recent decision of the Inter-American Court, based on a controversy over an ancestral territory in the Suriname forest, provides innovative guidelines in this regard that require a comprehensive systematization under the broader perspective of the relationship between human rights and environmental protection.

1 The relationship between the right to property as a human right and environmental protection

The relationship between the right of ownership (on immovable property)[9] and protection of the environment is only partly based on the synergistic perspective of human rights - environmental protection just outlined. In fact, two different ways in which such a relation can be explained can be distinguished[10].

A) Unlike the rights indicated in the preceding paragraph, the right to property was invoked, in particular before the European Court, by individuals who invoked their injury by state measures and conduct generally aimed at protecting the environment and natural resources. The judges individuated, as a parameter of assessment, the degree of balance that the State carries out between the two interests, reaffirming, in general, the absolute importance of the social requirement of environmental preservation[11], and recognizing, however, in some cases, the infringement

9 All the decisions analyzed here refer to real rights over real estate, without this being surprising considering the casuistry between environmental protection and property.

10 Cf. In this regard, referring to the experience of the Court of Strasbourg, B. Wegener, *Property and Environmental Protection in the Jurisprudence of the ECHR*, in *Property and Environmental Protection in Europe*, G. Winter (ed.), Amsterdam 2016, P. 27 fs., P. 30. See also R. Pavoni, *Public Interest*, cit., P. 70.

11 Cf. part. European Court of Human Rights, *Hamer v. Belgium*, resource n. 21861/03, judgment of 27 November 2007: environmental protection is defined as a 'sphere in which States enjoy a wide margin of discretion ' (paragraph 78), and "l'environnement constitue une valeur dont the defense of the public opinion, and the conséquent auprès des pouvoirs publics, an intérêt constant et soutenu. Des impératifs économiques et même certains droits fondamentaux, comme le droit de propriété, ne devraient pas se voir accorder la primauté face à des considérations relatives à la protection de l'environnement" (par. 79). In the same vein, European Court of Human Rights [GC], *Depalle v. France*, feature n. 34044/02, judgment of March 29, 2010. See also, as the first decision in this regard, European Court of Human Rights, *Fredin v. Sweden*, feature n. 12033/86, judgment of February 18, 1991. In the CADH system, v. Inter-American Court of Human Rights, *Salvador Chiriboga v. 282) (ECUADOR, 2008).* Preliminary

of the right to property because of the lack of monetary compensation[12]. In this first group of cases, the environmental protection authorities, therefore, decide in a negative way, as potentially compromised with a decision in favor of the resources in defense of the property rights[13] and yet conflicting in the particular case with a guaranteed right[14].

B) On the other hand, the right to property was then invoked by modalities similar to those for the right to life and other human rights in the preceding paragraph, therefore with a favorable role for environmental protection bodies[15]. Here also the most relevant jurisprudence is that of the ECHR, based on the violation of art. 1 of Protocol 1, always connected with the injury of other rights codified in the Convention, such as the right to life[16]. It is important to note how in the ECHR there is a relevant overlap between the right to respect for one's home, ex art. 8, and the right to respect for possessions, ex art. 1 Prot. 1, which may have led to less "environmental" relevance of property in the Court's jurisprudence[17].

Objection and Merits. Judgment of May 6, 2008, par. 76.

12 European Court of Human Rights: *Papastavrou v. Greece*, resource n. 46372/99, judgment of 10 April 2003; *Turgut c. Turkey*, resource n. 1411/03, judgment of July 8, 2008.

13 It is a question of the possible repeal of the measure and in any way of the discouraging effect for the State of adopting measures of environmental protection if the payment of a consistent compensation is required. The subject goes beyond the international human rights discipline, also involving the criminal law of investments : cf. C. Pitea, "Right to Property, Investments, and Environmental Protection: The Perspectives of the European and Inter-American Courts of Human Rights", in *Foreign Investment, International Law and Common Concerns*, T. Treves, F. Seatzu, S. Trevisanut (eds), London / New York, 2013, p. 267 fs. On the subject, more broadly, v. G. Sacerdoti et al. (eds), *General Interests of Host States in International Investment Law*, Cambridge, 2014; S. Di Benedetto, *International Investment Law and the Environment*, Cheltenham, 2013.

14 In any case, the Court does not recognize the hypothesis of *de facto* expropriation in the environmental cases faced: cfr. R. Pavoni, *Public interest*, cit., P. 174.

15 It is interesting to note how in the origins of environmental stewardship at the international level, and not only in that context, is exactly one case where a State (Canada) was ordered to pay damages for emissions of pollutants that had caused damage to agricultural and industrial properties located in the United States (*Trail Smelter* Case, Award of Arbitral Tribunal, March 11, 1941, in C. Robb, *International Environmental Law Reports, Vol. 1 (Early Decisions*), Cambridge 1999, 248 ff.).

16 In the *Öneryıldız* case, the Court also recognized an *infringement of* the right to property caused by serious pollution activities not prevented by the State (European Court of Human Rights (GC), *Öneryıldız v. Turkey*, cit.). Also in the *Kolyadenko* case (severe flood due to the negligence of the State) the Court found a violation of art. 1, Prot. 1, added to the injury of the right to life (European Court of Human Rights, *Kolyadenko v. Russia*, feature n. 17423/05, judgment of 28 February 2012). In *Flamenbaum* the Court, on the contrary, denied tutelage considering that the State had achieved a legitimate balance of interests (the complainants lamented the pollution produced by the neighboring airport in an area of high ecological value close to their properties, European Court of Human Rights, *Flamenbaum c. France*, feature n. 3675/04, judgment of 13 December 2012).

17 The *right to respect for his home* dealt with in art. 8, generally translated as 'the right to respect for one's own home', could also be translated as 'the right to respect for one's own dwelling': its connection with the right to property is intimately linked. The right to respect for domicile (or housing) presupposes, in fact, that the individual is entitled to enjoyment (real or personal) over a habitable property (cf. European Court of Human Rights: [GC] *Hatton et al. United Kingdom*, Appeal no. 36022/97, judgment of July 8, 2003, para. 96; *Moreno Gomez c. Spain*, appeal n. 4143/02, judgment of

For the right to property, the effect of environmental protection also has an indirect character, being possible only under the condition that the state measures cause negative effects to the environment that directly affect (also) the property of the applicants, since, as already mentioned, in the ECHR and ACHR systems an *actio popularis* is not allowed[18]. Thinking abstractly, the possible hypotheses of relevance are important, going even beyond the cases of emissions of pollutants that are at the root of the cases discussed[19]. However, the numerous situations in which State behavior jeopardizes global assets, such as climatic balance or endangered species, as well as local goods that do not have direct contact with the right concerned, remain unprotected (eg an area of important ecological value near the property).

This synergetic role of the right to property, as it relates to the search for instances of environmental protection, resonates - in a much more intense way and with very peculiar traits - in the figure of collective property, as well as constructed by the jurisprudence of the Inter-ancestral lands of indigenous and tribal populations.

2 The model of collective ownership in the jurisprudence of the Inter-American Court of Human Rights: the peculiarity of the identity relationship between people and land.

November 16, 2004, par. 28). On the other hand, according to ECHR jurisprudence, the human right guaranteed in art. (1) of Protocol 1 extends beyond the frontiers of the right to property, to embrace - at least - all other rights of inheritance, even those derived from administrative concessions (cf. D. Harris et al., *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, Oxford, 2014, p. 863 fs. ; WA Shabas, *The European Convention on Human Rights*. *A Commentary*, Oxford, 2015, p. 496 ff.). Therefore, the connection between *right to home* and Article 1 of the Protocol is functionally necessary (if real right is harmed, the concrete right to housing will be jeopardized). However, the assessment of the damage to the right to property was substantially appreciated only in terms of a (significant) *reduction* of economic value, regardless of the injury *per se* of the faculty of enjoyment, probably due to exactly the overlap with art. 8, as will be seen better below, sub 7).

18 Exemplary is the *Metropolitan* case, decided by the Inter-American Commission on Human Rights. The Commission has declared inadmissible an action brought by an individual on behalf of Panamanian citizens for the violation of the right to property over a natural reserve created 'for all citizens of Panama', on the assumption that 'for an action to be admissible [...] there must indeed be specific, individual and identifiable victims, "while the resource referred to" abstract victims represented in an *actio popularis*, rather than specifically identified individuals "(Inter-American Commission on Human Rights, *Metropolitan Nature Reserve v. Panama*, 11,533, decision of October 22, 2003, para. 27-34). The same case *Kyrtatos* (European Court of Human Rights, *Kyrtatos c. Greece*, cit.), Referred directly to the housing owned by the applicants, even if the decision is only on art. 8. In the African Charter system, on the contrary, a form of *actio popularis* is possible (cf. African Commission on Human and Peoples' Rights, *Ogoni*, cit., Par. 49, which had also been concerned with infringement of the right to property).

19 Imagine the hypothesis of an expropriation of an area with 'change of destination' of the land involved, from an ecological vocation to an industrial or commercial use.

The American Convention on Human Rights does not contain a specific provision on the collective property, nor does it establish the prerogatives of indigenous peoples in any way, even though there are numerous indigenous and tribal peoples living in the member states. It was the Inter-American Court that imagined and shaped a *communal property*, which gave juridical form to the simple possession of the ancestral lands by Amerindian populations, for the simple base in the disposed of in the art. 21 of the ACHR, dictated according to the guarantee of the traditional right of private property.

In the leading case *Mayagna* 2001[20], the Court, therefore, proposed an extensive and evolutionary interpretation of art. 21[21], so as to understand it also the collective right of an indigenous people over the ancestral lands. The Court, recognizing the right of the Awas Tingni people, obliged Nicaragua to guarantee collective property by delimiting the lands and to refrain from injurious actions - such as the authorization to exploit the territory given to third parties.

The Court recognized and reconstituted the radical identity bond that the indigenous population has with the lands traditionally owned, thus delineating the funding ratio of the right of collective property.

> Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous peoples with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations[22].

20 Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community c. Nicaragua*, judgment of 31 August 2001. The applicants invoked an injury to Article 21 of the ACHR because of the concessions granted by the Government of Managua over the territory of the Awas Tingni. The Inter-American Commission was responsible for the protection of the Yanomami people and their native lands, threatened by the growth of economic development and infrastructure policies in the northern Brazilian Amazon (Inter-American Commission on Human Rights, *Yanomami People v. Brazil*, n. 7615, report of March 5, 1985).

21 As the Court itself acknowledges, it refers to "an evolutionary interpretation of international instruments for the protection of human rights, taking into account the relevant provisions of Article 29 (b) of the Convention - which precludes a restrictive interpretation of rights "(Inter-American Court of Human Rights, *Mayagna*, cit., par. 148).

22 Op. Cit., Par. 149.

In the radical link so delineated between indigenous peoples and ancestral lands, the essential characteristics of collective property rights are already present and will be taken up and developed by all the decisions of the Court on the collective property of indigenous peoples, with important consequences for environmental protection.

The identity dimension of the law is immediately expressed in the first subsection, where its roots are embedded in the *very existence* of the indigenous peoples as a group, and is then firmly articulated in the necessary connection between the possession of ancestral lands and culture, spiritual life, integrity of indigenous populations, to the transmission of cultural heritage to their future generations.

It is in a particular way the statement - almost a cast - of values and interests that are fundamental to these populations, which has an extraordinary interest in the systematic reconstruction of collective property rights. The right to live freely, the development of one's own culture, spiritual life, the satisfaction of economic needs, even the very integrity of the people, are all elements that go beyond an even broader dimension of ownership as understood by us, to represent the core of a charter of values of indigenous populations and their components, which finds foundation and achievement in the enjoyment of collective property. One could perhaps speak of a public coloration of such a right, which, as we shall see (6, D), would help to explain the relationship between the collective ownership of ancestral territories and the protection of the environment, as the preservation of the ecological balance of those territories.

3 The right to collective property and the protection of the environment: the *Saramaka* jurisprudence.

Among the values that are contained in the relationship between the indigenous populations and the ancestral territories, there is, almost naturally, the preservation of the natural environment, which is functional and necessary for the very lives of those populations. Moreover, in the controversies discussed before the Inter-American Court, the ancestral lands owned or claimed by the indigenous populations provided valuable natural resources for the regional and even global ecological equilibrium, often in areas covered by primary fluvial forests with a high degree of endemic biodiversity.

The *Mayagna* decision is not limited to the ecological value of the ancestral lands[23], almost as if it wanted to leave to successive case law the task of continuing to define the law based on fundamental elements outlined therein[24]. And indeed, in all successive decisions on collective property - from the 2005 *Yakye Axa* case[25] - the judges included "the use and enjoyment of natural resources" in the content of the law on ancestral lands, precisely because of the identity link between the people and the territory itself[26]. In this way it is observed, therefore, to base explicitly that the right of collective property over ancestral lands is also a right to the natural resources of such lands, opening the way to the fundamental question of how this can be reconciled with the attribution to the State of permanent sovereignty over their own natural resources, according to a consolidated principle of customary law.

The 2007 decision in the *Saramaka* case[27] confronts precisely this problem by offering decisive indications of the implications of collective

23 It was a territory covered by primary rainforest and the people Awas Tingni had reacted exactly the authorization given by the Nicaraguan government to third parties for the extraction of wood; see p. 39 of the judgment, where the opinion of a court expert on the risks to the environment by the lack of recognition and protection of the ancestral areas is reported.

24 The Court does not even refer to the natural resources present in the territory, even if the Commission in its formative phase had always used the term *lands and natural resources* as if they were correlates. It is significant that three judges in their Separate Opinion have reiterated that " [t] he concern with the element of conservation reflects a cultural manifestation of the integration of the human being with nature and the world wherein he lives. This integration, we believe, is projected into both space and time, as we relate ourselves, in space, with the natural system of which we are ought to treat with care, and, in time, with other generations (past and future), in respect of Which we have obligations opinion *"(Joint Separate Opinion* of judges Cançado Trindade, Pacheco Gomes and Abreu Burelli, Inter-American Court of human rights, *Mayagna,* cit., par. 10).

25 Inter-American Court of Human Rights, *Yakye Axa Indigenous Community c. Paraguay*, judgment of June 17, 2005.

26 *Yakye Axa*, *supra* note 25, par. 167. In the successive and homologous case *Sawhoyamaxa* the Court expressly speaks of "the right to communal property of the lands and of the natural resources" (Inter-American Court of human rights, *Sawhoyamaxa Indigenous Community c. Paraguay*, judgment of March 29, 2006, para. 143). Moreover, in both decisions allegations are made on the part of specialists of risks to the environment, especially for the rare forest of the Paraguayan Chaco. "The traditional habitat, in addition to being the traditional place of settlement of the indigenous people, must have ecological and environmental conditions that are in accordance with the traditional manner of life", *Statement by Mr. Enrique Castillo*, expert witness, Inter-American Court of human rights, *Yakye Axa*, cit., p. 10. " [T] he lands have been deforested since 1990 for growing pastures, and fenced in for intensive cattle grazing. The deforested areas cover approximately 2,000 hectares [...]. From an ecological standpoint, it is most regrettable that deforestation has done away with the integrity of the vegetation of the lands claimed, " *Statement by Mr. Andrew Leake*, expert witness, Inter-American Court of Human Rights, *Sawhoyamaxa*, cit. P. 19.

27 The Saramaka are a tribal group of *Maroons,* descendants of escaped African slaves into the forest about three centuries ago; they are therefore not an Amerindian population, as such qualifiable as indigenous, but represent in any case a tribal group protected by international norms at the same level of indigenous populations. The fundamental discipline in this matter is dictated by ILO Convention no. 169 of June 27, 1989 (*Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, in 28 *ILM* 1382).

property right for the protection of the environment, which have influenced all the Court's successive jurisprudence[28].

The Court, first of all, recognizes to the native people 'the right over the territory of the Community', as regards 'land and resources' which have always been possessed and 'necessary for their physical and cultural survival'[29]. Consequently, judges, based on the decisions of *Yakye Axa* and *Sawhoyamaxa*, contemplate the faculty "to use and enjoy the natural resources that lie within and within their traditionally owned territory that are necessary for their survival"[30] as a logical corollary of its own right over ancestral lands, and of its function of satisfying the basic needs of the people and guaranteeing their identity. If natural resources, above and below ground, were to be excluded from the content of the law - the judges reflect - the latter would be meaningless[31].

Such a reconstruction of collective property requires addressing the issue of the joint incidence of indigenous peoples' rights and state powers over natural resources. The problem is evident since a simple (simplistic) affirmation of the absolute primacy of collective law would deprive the State of its fundamental sovereign prerogative, peacefully recognized by international law. On the other hand, the supremacy of state power over property rights, according to the typical model of economic compensation of private interest, would simply signal the end of collective law as constructed by inter-American judges, with strong risks to the very survival of the population and its environment of high ecological value[32].

The solution proposed by the Court is successful in the difficult objective of reconciling the two requirements[33]. The judges of San José reject an absolute conception of collective property and therefore recognize

28 Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, judgment of November 28, 2007. The controversy had in fact arisen from the granting of permits for logging and mining in the territory of the Saramaka people, which put at risk the very rich biome of the rainforest that completely recovers that territory. The Saramaka invoke before the court the recognition and protection of collective property rights over their ancestral lands, including the natural resources found there, and underline the risks to the environment derived from exploration projects.

29 op. cit., par. 96.

30 op. cit, par. 158

31 op. cit, par. 122

32 Reaffirm this risk M. A. Orellana, "Saramaka People v. Suriname", in *American Journal of International Law* 2008, p. 441 ss., p. 446.

33 Cfr. S. Di Benedetto, "La tutela delle foreste nell'esperienza della Corte Interamericana per i diritti dell'uomo (The protection of the ICHR", in *I boschi e le foreste come frontiere del dialogo tra scienze giuridiche e scienze della vita (The florests as frontiers for the dialogue between the legal sciences and those of life)*, M. Brocca, M. Troisi (editor), Nápoles, 2014, p. 131.

the power of Suriname over natural resources. Such power is not, however, constructed and disposed of as a corollary, nor affirmed in the form of (permanent) sovereignty of the State over natural resources[34]. It qualifies as a limit for the collective property itself, which finds its legal basis in art. 21 of the Convention, which provides that domestic law may subordinate the use and enjoyment of property rights to the interests of society[35]. This lack of reference to sovereignty over natural resources and the framing of state power within the realm of the property itself seems to be a sign of the 'structural' diversity of collective ownership over ancestral lands to other property rights, relation with the public power.

And, in fact, the power of the State over natural resources is in turn circumvented by a series of assessments and limitations that strongly reduce their real reach and allow the effective and full guarantee of the use and community enjoyment by the populations indigenous, ancestral territories, including the natural resources of high ecological value found there.

First of all, judges recall the precedent jurisprudence that had outlined four requirements for the correct exercise of state power over private property: a foundation in law, necessity, proportionality, legitimate objective (in a democratic society)[36]. These four requirements, in particular, the patterns of necessity and proportionality, provide certain important elements of assurance for the enjoyment of property, especially when such standards are applied considering the *weight* of collective property, because of the identity value of ancestral lands to the indigenous people. However, the Court follows a line partially diverse and trace, *additionally,* a further requirement, this time negative, to the exercise of power. The state can not exercise its own power over natural resources in order to deny a tribal people their own survival, according to their traditions and customs[37].

It is a general limit to the power of the State, which has been

34 In the *Saramaka* decision, the terms with *sovereig* (*sovereignty*, *sovereign*) root appear only three times, all of them in paragraphs that take up the position of the State, in two cases when the State invoked the principle of sovereignty over natural resources. The judges were reluctant to rely, at least explicitly, on such a principle, which seems significant in view of the very dimension of collective property rights, as directly related to the principle of self-determination of indigenous peoples (see *infra*. 67).

35 Inter-American Court of Human Rights, *Saramaka*, cit., Par. 127.

36 *Idem*.

37 op. cit, par. 128. The passage concludes by repeating previous paragraphs 120-122, in order to delineate the characteristics of the right of collective property necessary for the very survival of the autochthonous people.

affirmed in an absolute way and therefore appears as susceptible to be in any case applied *per se*. However, judges are responsible to outline three situations in which this limit is substantiated, that is three guarantees *(safeguards)* to the right of collective ownership. It is precisely because of this "boundary system" that an environmental protection function that conveys the right of collective ownership and its exercise in relation to public authorities appears to emerge.

First, the participation of Saramaka members in any development, investment, exploration or extraction plan over their territory, 'in conformity with their customs and traditions', should be ensured[38]. Such participation of indigenous peoples translates into the duty of the State to obtain *their free, prior, and informed consent* in case of "large-scale development or investment projects that would have the greatest impact" on the ancestral territories[39], while in low-impact projects there remains a duty of prior and broad debate, always accompanied by adequate information on the consequences of the development plan, including environmental and health risks[40].

Secondly, it should be guaranteed to them a reasonable economic benefit by such plans *(benefit-sharing)*. Thirdly, any intervention authorized by the State in the territory must be preceded by an environmental and social impact assessment carried out by an independent and competent body under the supervision of the State[41], according to international standards and with respect for the traditions of the indigenous people[42].

The management model for natural and environmental resources is based on the identity-nature of the ancestral territory for indigenous populations and is strongly conditioned by the purpose of protecting their ecological value. The fundamental decisions on the economic development of the territory remain in the hands of indigenous peoples, who can block

38 op. cit, par. 129

39 Throughout the construction of the Court's reasoning, it seems that the reference (only) to development and investment projects should be understood as a synecdoche, with the exploitation and extraction projects previously mentioned. For the rest, it seems difficult to set up an extraction project that is not technically an investment.

40 Inter-American Court of Human Rights, *Saramaka*, cit., Par. 133-4.

41 op. cit. 129. In the same way v.. Inter-American Court of Human Rights, *Kichwa Indigenous People of Sarayaku c. Ecuador*, judgment of June 27, 2012. This last decision, which fully confirms the Saramaka model, is particularly significant since the Sarayaku territory had witnessed a serious deterioration of the river forest by the activity of a foreign oil company.

42 Inter-American Court of Human Rights, *Saramaka People v. Suriname*, *interpretation of the judgment on preliminary objections, merits, reparations, and costs*, judgment of August 12, 2008.

any project that endangers their own identity and survival, continuing to manage their 'habitat'[43] as they have always done through the exercise of collective property rights. In this case, there is no need to weigh the social (public) interest of economic development and the identity and survival of the indigenous people. The second prevails over the first, except if the indigenous people, according to their traditions and customs, consent to the project[44].

Interventions of limited scope (as well as large-scale correctly agreed) can be carried out when preceded by adequate information to the populations on the risks, including environmental, and by prior environmental and social impact assessment. The public authority, therefore, has some limits, which have their origin in the right of collective ownership, closely linked to the protection of the ecological value of the territory

What the *Saramaka* decision, however, only scratches (when speaking of the environmental impact assessment) is the possible overlap, even if conflicting, between the ecological dimension of collective ownership and public regulation of the environment.

4 Public protection of the environment and collective property in the *Kaliña* case: conflict or synergy?

From the analysis developed in the previous paragraph, it can be maintained that the *Saramaka* decision implies the existence of a function of environmental protection closely linked to the right of collective property. The function is deployed in several limitations to state action, because of the protection of the precious ecological balance of the ancestral territories, fundamental for the survival of the indigenous people as such. The protection of the environment through the right to common ownership thus follows a structurally homologous scheme (but functionally distinct) to that seen *above* in 2 B (and 1): the protection of property (such as human right) produces an environmental protection effect, in the face of an

43 For the specific use of the term habitat referring to the ancestral territories of indigenous peoples, cf. Inter-American Court of Human Rights: *Yakye Axa,* cit., par. 146; *Kuna Indigenous Community of Madungandí and the Emberá Indigenous Community of Bayano and their members c. Panama will,* judgment of 14 October 2014, para. 143.

44 It could be said: in the exercise of the faculty of disposition of the own right and according to the rules self-determined by the titular subject.

injurious intervention by the State[45].

If, however, the right to private property is considered, there is also another possible scheme "human right - environmental protection", that of invoking the right *in contrast* to an environmental public measure considered harmful, as seen *above* in *2A*). In the very recent case, *Kaliña*[46] such scheme was observed, since the indigenous people, in addition to requesting the recognition and delimitation of their lands, disputed exactly the existence of three natural reserves on their territory while limiting their rights[47]. However, the *sui generis* character of the collective property right, its intrinsic ecological vocation, led to a solution of the case that is not reducible - even structurally - to those seen previously in 2A)[48].

It should first be noted that the Court first of all identified the right of the Kaliña and Lokono peoples to their ancestral lands, following established case law, and thus condemned the State to recognize the right of collective property and the delimitation and demarcation of its lands, while the parts of territory held by 'non-indigenous and non-tribal third parties', provided only as an *extreme ratio*, the granting of alternative lands, homologous to the native ones, and after the participation of the peoples in their individuation[49].

45 In the next paragraph, the conclusion of the analysis of the jurisprudence of the ACHR will become broader to the direct function of environmental protection embedded in collective property, showing the differences with the model of indirect protection of the environment seen in par. 1. For R. Pavoni, *Public Interest*, cit., P. 76 s., Emphasized that for this jurisprudence it is not appropriate to speak of an indirect protection of the environment, due to the collective dimension of law and the very high biodiversity that characterizes the territories involved.

46 Inter-American Court of Human Rights, *Kaliña and Lokono Peoples c*. *Suriname*, judgment of November 25, 2015.

47 These were the remaining state-owned reserves for environmental protection. In particular, the Wane Kreek reserve - the largest of the three and whose territory was fully claimed by the two indigenous communities - was created in 1986 to protect an area that hosts nine unique ecosystems in an area close to the anthropomorphic coastal strip (idem, pair. 81). At the same time, indigenous populations proved that the reserve area was traditionally used by them for hunting and fishing, and for collecting medicines, as well as containing sacred sites. (idem, par. 84).

48 The two relationship schemes seen under sub 2) do indeed have a dichotomous function: on the one hand the environment as having an ecological value (now through the state, or indirectly through property); on the other, an economic interest in opposition to the good of the environment. The Saramaka model also has exactly this structure (collective environment vs. collective property. Economic-State Investment).

49 The Court stresses, with well-established case-law from the *Sawhoyamaxa* case, that the State must first expropriate or purchase the ancestral lands of *third* parties, and find alternative lands only for objective and justified reasons. In the case of *Kuna and Embera* the Court for the first time applied this remedy, once the original lands had been flooded, ensuring that the so constituted collective right were identical, in identity and contained meaning, to that which an indigenous people have on the actual lands (Inter-American Court of Human Rights, *Kuna and Embera*, cit., cfr. A. Caligiuri, "The contribution of the jurisprudence of the Inter-American Court of Human Rights to the topic of protection of indigenous peoples' territorial rights", in this *Journal,* 2015, p. 435 ff.).

As for the new question of the existence of three natural reserves on a relevant portion (almost half) of the ancestral lands[50], the Court clarified that its assessment did not refer to the establishment of reservations, since they existed from Suriname's accession to the ACHR (and therefore the non-participation of the two peoples in the process of constitution was not relevant)[51]. At the same time, the Court decided not to treat - for lack of data - the question of the delimitation of indigenous lands also within the park[52]. In this way, the insidious possibility of a radical conflict between reserve and ancestral lands was preliminarily resolved, and the discussion focused on the fact that the concrete modality of reserve management negatively affected the two indigenous populations, often prevented from accessing them and preventing them from developing their own traditional activities, including hunting, fishing, collecting medicinal plants and visiting sacred sites.

The court then posed the problem of assessing whether, in doing so, the State correctly "weighed the collective rights of the Kaliña and Lokono peoples against the protection of the environment as part of the public interest", and identified in the judgment itself[53]. In doing so the judges, however, followed a peculiar method, making a preliminary and general assessment of the compatibility in themselves between collective ownership of indigenous peoples and natural reserves. In that part of the decision, the environmental dimension of the collective property right is confirmed and developed. The judges, in fact, stated that:

> in principle, the protection of natural areas and the right of the

50 Diversa was the situation faced in the previous case *Xakmok Kásek* where indigenous people also claimed some land on which the law had made a reservation. However, it was a private forest reserve, and the court simply did not take into account the environmental purpose aspect, thus affirming indigenous law also on this territory and asking the State to annul the constituent law of the private protected reserve (Inter-American Court of human rights, *Xakmok Kasek Indigenous Community c. Paragua i*, sentence of August 24, 2010, par. 313). A similar case had already occurred in the African human rights system: Kenya had removed an indigenous people, the Endorois, from their ancestral lands to create a natural reserve, but with obvious tourist purposes (and there opening roads and building cottages and a hotel). With African ission of human and peoples' rights, *Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council c. Kenya*, decision of November 25, 2009, which reveals, *inter alia*, the violation of the collective property right of Endorois ex art. 14 of *the African Charter* ; cf. R. Pavoni, *Public interest*, cit. P. 103 secs.

51 Consequently, the *Saramaka* model was not in any way directly applicable to this case. Even in this there is a difference with the *Xakmok Kasek* case, in which the private nature reserve had been created when Paraguay was already part of the CADH (cf. Inter-American Court of Human Rights, *Kaliña*, cit., Par. 165) and the Court sanctioned the absence of indigenous participation in its institution.

52 op. cit, par. 166.

53 op. cit par. 168-170.

> indigenous and tribal peoples to the protection of the natural resources in their territories are compatible, and it [the Court] emphasizes that owing to their interrelationship with nature and their ways of life, the indigenous and tribal peoples can make an important contribution to such conservation[54].

The crucial point of the passage is not only in the affirmation of the compatibility between collective law and natural reserve but also and especially in its motivation. It is the lifestyles of indigenous peoples and their close interrelation with nature to allow for full coincidence between reserve and ancestral property. It is, therefore, a characteristic of the relationship between the indigenous and the territory, and therefore, they are typically referable to the possession of the ancestral lands. Collective property rights, which 'encode' a similar ownership characteristic of a symbiotic relationship with nature, therefore have as intrinsic a function of environmental protection, to the extent that native peoples, in the enjoyment of their lands, can contribute to the conservation of the environmental goods that are there.

In the argumentation of its thesis, the Court made the positions of several international organizations and NGOs, which underline the important role of environmental protection that can be developed by indigenous peoples and their relationship with the land. Thus, the meaning of protected area 'consists not only of its biological dimension but also of its socio-cultural dimension and [...] therefore, it requires an interdisciplinary, participatory approach', as underlined by the CBD Secretariat. In the same vein, the Court notes that "certain traditional uses of sustainable practices are considered essential for the effectiveness of conservation strategies", following a report by WWF[55].

In the light of all this, the Court condemned the State for not having guaranteed access and use of the territory to an "effective participation of the Kaliña and Lokono indigenous peoples in the conservation of the said nature reserves"[56].

The proposed solution was somewhat more significant since the judges could also allow the State, as an *extreme ratio*, to identify alternative lands to the reserve, considering that the public interest of the

54 op. cit par. 181.

55 op. cit., par. 173. In particular, this last statement refers directly to the use of land and natural resources and thus confirms that environmental function proper to collective property rights.

56 op. cit., par. 197.

environment was such to justify it. Moreover, a few paragraphs earlier, the Court had exactly predicted the ultimate possibility for the State to identify alternative lands if lands originating outside the reserve were owned by other private individuals on the basis of a legal title. Now, of course, for the court, the interest of private possessors could not be greater than the public interest of conservation of a fundamental ecological resource. The reason for judges' choice, therefore, lies precisely in the intrinsic structural compatibility between ancestral collective property and the protection of ecosystems in that territory. This structural compatibility is even more revealing of the direct function of environmental protection - and even before the ecological value - that characterizes the right to environmental protection - and even before the ecological value - that characterizes the collective property rights of indigenous and tribal peoples over own ancestral lands.

5 The direct function of environmental protection of the collective property right

From the *Saramaka-Kaliña* jurisprudence *it is possible* to draw some main features from the relationship between collective property rights and environmental protection, which are very peculiar in respect of the indirect protection of the environment when the international courts guarantee human rights (*supra*, 1 and 2), and which constitute a true model of management of natural and environmental resources within the framework of collective property rights.

A) The judicial protection of collective property over the ancestral territories of indigenous and tribal populations implies the effect of protection of the environment, with respect to potential, active or omissive conducts of the State that could damage the ecological balance of the territories. This effect is explained by the fact that the ecological value is included in the very well protected by law (land and natural resources, an object of collective property), until permeating it, given the symbiotic relationship between the native people and the territory itself[57].

57 Clear indications of the symbiotic relationship between indigenous peoples and ancestral lands are found throughout the jurisprudence studied here. Copies appear the words spoken by a *captain* of the Saramaka during an audience: " The forest is like our market place; it is where we get our medicines, our medicinal plants. It is where we hunt to have meat to eat. The forest is truly our entire life. When our ancestors fled into the forest they did not carry anything with them. They learned how to live, what plants to eat, how to deal with subsistence needs eleven they got to the forest. Forest is our whole life

In this sense, it is possible to qualify as an intrinsic (and therefore right) environmental protection effect, the difference between the indirect and eventual environmental protection that is obtained through the normal protection of individual human rights[58].

This effect of environmental protection is compounded by the attribution to the indigenous populations of a power of opposition to invasive interventions - even if authorized by the authorities - that can seriously alter their living environment, against inherited traditions and customs. It is, therefore, the nexus between the ecological dimension of the natural resources object of the right and the traditional, symbiotic model of the life of the native ones to allow that such function of environmental protection can develop.

B) The relationship between the spontaneous enjoyment of collective property by indigenous peoples and publicist protection of the environment comes in a synergistic way, based on the compatibility between traditional land use and ecosystem preservation. This synergistic relationship confirms the role of direct environmental protection of collective property, linked to its intrinsic ecological value, and allows to realize a model of integrated State-community management of the environmental resources locked in the ancestral territories.

In this sense, the Court foresees, firstly, that the actions of economic use of the territory authorized by the State (that is to say, those that are not very invasive), or those agreed with the indigenous peoples) must in any case be preceded by an independent impact assessment environmental (and social). The reason seems to lie in the intrinsic value of the symbiotic relationship between the people and the natural environment, which in any case deserves a tutelage as an expression of a fundamental value for the CADH system (and for the international order)

"(Inter-American Court of Human Rights, *Saramaka*, cit., Par. 82).

58 It should be noted that the intrinsic ecological value of indigenous ancestral lands (primarily connected to their own symbiotic secular relationship of populations with the lands, and variously plus the diversity and quality of ecosystems those contained) eliminating at the root of the problem of the necessity of proves that environmental protection effectively affects the personal sphere of the right holder, as seen in ECHR jurisprudence (and also ACHR). Here there is no question of *actio popularis*, since the people themselves own the right. The *actio popularis* is itself present in the law, which in turn has as object an intrinsically ecological value of well Here is the direct function of environmental protection. At most, it could be argued that there is a supervening, indirect effect of global environmental protection where the territory contains environmental goods that provide global eco-systemic services, such as rainforests. However, the intrinsic function of conservation of the traditional lifestyle, and the previous environmental impact assessment that is required for economic development projects on the ancestral territory, should lead to an evaluation in terms of direct effect even in this case.

because of the interweaving of the identity of a population with a natural environment of high ecological value[59]. There seems to be an echo of the more general need to protect particularly important ecosystems, as shown by the references in the *Kaliña* case by some international environmental protection instruments[60].

Second, when the State intends to protect the natural environment, the relationship with collective property changes. The Court does not enter into the merits of the State's decision to carry out a nature reserve (even if it is understood that, if created after the Convention has been in force, it requires at least the participation of indigenous peoples), it also defines the way in which the intervention and the use by indigenous peoples in terms of full compatibility between them. Herein lies a decisive aspect: the compatibility is not the fruit of a partial sacrifice of the publicist instance but is due precisely to the synergy between the traditional style of indigenous life and the very instance of environmental protection[61]. The State, however, maintains the general management and control role of the protected area[62], according to what could well be defined a mixed model of environmental protection.

C) The Court, from Saramaka, excludes the possibility of the State to operate a change of destination of the ancestral territory in a scale that substantially changes the symbiotic and secular relationship between the population and the surrounding environment, or that in any way collided with a previous environmental and social impact assessment. The State therefore not possessed discretion in the matter. This is another decisive difference with respect to the indirect protection of the environment, which

59 It must be said that the Court, however, leaves open the hypothesis in which the population and the government find an exploration agreement even if in the presence of a negative environmental (or social) impact assessment. Probably such an evaluation departs from the Court's own powers. However, it is always possible that such an indigenous - government agreement will be challenged before the Court by the members of the people themselves, especially if the manifestation of external consensus does not follow the internal rules of internal decision - making.

60 See in particular the direct references to the Convention on Biodiversity and the Rio Declaration (Inter-American Court of Human Rights, *Kaliña*, cit., *Para*. 176 ff.). The *Kaliña* decision in *this* way goes beyond the "almost total absence of citations of instruments and praxes in an environmental character... in the Saramaka and Sarayaku jurisprudence" (R. Pavoni, *Public Interest*, cit., 84).

61 In the *Endorois* case, the African Commission notes that the distancing of the indigenous population was not proportionate since it had become available to collaborate in the management of Game Reserve. African Commission on Human and Peoples' *Rights*, *Center for Minority Rights Development (Endorois)*, cit., Par. 215.

62 For the Court "it is also reasonable that the State retain the oversight, access and management of areas of general and strategic interest, and for safety reasons, that allow it to exercise its sovereignty, and / or protect the borders of it territory ", Inter-American Court of Human Rights, *Kaliña*, cit, par. 191.

is achieved through the normal application of human rights standards[63].

D) Finally, in signing the *Mayagna* judgment, a possible public-law coloration of the collective property had been waved[64]. This was based on the consideration that in the content of collective property rights over ancestral territories a whole range of other rights would be invoked (or even included) as if the collective property itself and its traditions were a specimen of the Charter of Human Rights of indigenous populations. The *Saramaka - Kaliña jurisprudence* seems to confirm and amplify this impression. The management of the natural resources of the region - typical sovereign prerogative - is a decisive extent left to the traditional use of indigenous people. In particular, with respect to the publicist goal of full preservation of the natural environment (through the creation of a national reserve), collective property rights continue to exist and to be exercised precisely because of the natural compatibility of the latter with the environment. The ecological function intrinsic to the law is thus further qualified in the scope of the pursuit of a pure publicist objective as the environmental protection through the creation of a reserve[65].

6 'Internal' and 'external' repercussions of the *Saramaka-Kaliña* model

Concluding, some perspectives for the development of the topic are proposed, in view of a possible future evolution of the jurisprudence of the Inter-American Court on collective property (A), and the possible repercussions of the model

Saramaka-Kaliña on the jurisprudence of the European Court of Human Rights (B).

A) Collective property rights over conquered territories can acquire later contents and characteristics precisely because of the

63 On the wide margin of appreciation that the European Court recognizes to the States for the adoption of the own policies of environmental protection,A. Saccucci, *La protezione dell'ambiente nella giurisprudenza europea della Corte dei diritti umani (Protection of the environment in the jurisprudence of the European Court of Human Rights),* in *La protection dei diritti umani in Europe (The protection of human rights in Europe)*, A. Caligiuri, G. Cataldi, N. Napoletano (editor), Padua 2010, p. 493 fs., P. 518 s.

64 *Supra*, 3.

65 It could perhaps be said - in light of both the inclusion of other rights and their ecological function - of a constitutional dimension of collective property rights over ancestral territories, linked to the particular nature of the right to self-determination of indigenous peoples. But the subject certainly requires a much broader consideration than is possible at this opportunity.

environmental protection function as outlined in *Saramaka-Kaliña jurisprudence.*

It was seen how the *Kaliña* decision *outlined* a mixed model of natural reserve management in indigenous territory, which we could define public-collective. Indigenous peoples are guaranteed access to the reserve and the use of the resources present in it, in view of the full compatibility of their traditional lifestyle with the ecological balance to be preserved. The Court, however, left open the question of the concrete relation between the traditional use of the natives of the territory (corresponding to the exercise of the right of collective ownership) and the public power over the reserve, General management and control of the reserve.

A further development of the model could be seen in the future, according to an interpretation that follows the same *rationale* of the Court's jurisprudence, whereby the concrete 'spontaneous' management of the reserve area is left to the indigenous peoples under two conditions: that their daily life does not contain ecological goods, and does not stand out from traditional practices in a way that is detrimental to the environment. In addition to the coordination and control of the scientific activities of the reserve, the State would also have the control of the respect of these conditions by the indigenous populations.

The first glimpsed condition might seem almost contradictory, because of the intrinsic compatibility between indigenous lifestyle and environmental preservation. However, in a limited case, the global context of environmental exploitation would make traditional practice dangerous, which would not be the case if the biome had been conserved in its complex. Imagine the case of an endemic species in the forest, which was threatened with extinction due to deforestation, which is traditionally hunted, fished or collected by indigenous people.

The second condition is the most delicate since it can lead to inquire into relevant aspects of the life of the indigenous community. In this sense, it should be noted that concrete situations can vary greatly from indigenous people to indigenous people, since some of these are more in touch with Western civilization and may have partially modified their relationship with the surrounding environment[66], even if maintaining that symbiotic deep link with the territory that represents the true 'title' of its

66 In the same *Kaliña* case, one realizes the existence of concessions for firewood given to members of indigenous communities Kaliña (Inter-American Court of Human Rights, *Kaliña*, cit., *Paras* 64 and 95).

collective property right.

Regarding the various concrete situations that may arise, the Court's recovery of the criteria of necessity and proportionality may, in any case, avoid a disproportionate drift in the control by the State of the compatibility of certain indigenous practices with the preservation of the environment. Thus, the requirement of necessity must be related exclusively to the purpose of ecological protection, having been excluded from the outset the possibility of a diverse use of the area, and therefore requires that the limitation to be inserted in a given indigenous activity is the only means to achieve the ecological purpose (for example, the prohibition of hunting of a species that is in danger of extinction), being used in the evaluation of technical and scientific opinions. Proportionality operates successively, in case it is possible to balance the two interests at stake (for example, by allowing the Indians to access the area of the endangered species, even with the prohibition to hunt it).

Finally, it is worth noting that in any case, the Court may always carry out an investigation on the merits of the concrete management of the reserve in the indigenous territory by the State, from the point of view of the effective pursuit of the objective of environmental protection according to the maximum possible compatibility with indigenous life.

B) Throughout the article, the confrontation between the 'traditional' model of indirect protection of the environment, as outlined in particular by the jurisprudence of the ECHR, has been proposed, and the direct function of environmental protection structurally present in the collective property right over the ancestral territories of indigenous populations, as well as progressively sculpted by the jurisprudence of the Inter-American Court of Human Rights. It is now intended to show some further points of confrontation, looking at possible influences of the jurisprudence analyzed here on environmental protection under the ECHR.

Within the Member States of the European Convention, the consistency of indigenous and tribal peoples is not comparable to that present in America. However, there are some indigenous communities in the Arctic region (Norway, Sweden, Finland, and Russia, as well as Greenland[67]), whose human rights have already received attention under

67 The case of Greenland is peculiar because it is administratively an autonomous region of Denmark which since 2009 - after a referendum - has achieved self-government. The population is constituted in great part by indigenous Inuit groups. The question of the protection of the ancestral lands of indigenous peoples (already subject to a controversy in the context of the European Court of Human

art. 27 of the Covenant on Civil and Political Rights[68] and the ECHR itself[69]. Perhaps, simply, one can imagine that, in case of supposed injuries to the environment of the ancestors themselves, one of those communities (as well as an Indian or tribal people of French Guiana)[70] may request the Court of Strasbourg to have an evolutionary interpretation of Art. 1 of Protocol 1[71], according to the model developed by CADH jurisprudence.

However, the Jurisprudence of the Inter-American Court may also provide important indications regarding the interpretation of the right of ownership in the ECHR, according to the discipline of art. 1, Protocol 1, and particularly with regard to the right to respect for one's own domicile as set forth in art. 8, as well as applied by the Court in the light of environmental protection.

If, as is well known, the right to property protection (*possessions*

Rights, *Hingitaq 53 c. D inamarca,* resource n. 18584/04, decision of 12 January 2006) could therefore overlap with that of the degree of autonomy of the region vis-à-vis Denmark, even in the perspective of the political process towards independence.

68 Human Rights Committee, *Ilmari Lansman et al. w. Finl Andia,* Communication No. 511/1992. It is interesting to note that this was an 'environmental' case, in which the complainants lamented the impact of extractive activities on reindeer life. (cf. P. Birnie, A. Boyle, C. Redgwell, *op. cit.,* P. 286).

69 These are some *land cases* in which indigenous people lamented an injury to the possession of their ancestral lands, with particular reference to reindeer pasture. In addition to the case of the Inuit population of Greenland (*supra*, note 69), there are three cases involving Sami populations: European Commission on Human Rights, *G. and E. c. Nor uega*, appeals n. 9278/81 and 9415/81, decision of October 3, 1983; European Commission on Human Rights *Konkama v. S uécia,* feature n. 27033/95, decision of November 25, 1996; European Court of Human Rights, *Handolsdalen Sami Village c. Sweden*, feature n. 39013/04, decision of February 17, 2009. In none of the four cases were raised specific questions regarding the injury of environmental goods.

70 French Guiana is a French overseas territory bordering Suriname (in addition to Bashil). Its territory is almost entirely covered by rainforest, which joins that of Suriname, and Brazil without a solution of continuity and without effective delimitations. In French Guiana, indigenous communities and tribal communities are present, and a natural park of 20,000 km² was recently established in the southern meridian. The ECHR also applies to the territory of French Guiana (while there it does not apply to the ACHR) with the only limit of *local requirements* (cf. art. 56. 3 CEDU and the *Declaration contained in the instrument of ratification*, deposited by France on May 3, 1974: "The Government of the Republic further declares that the Convention shall apply to the whole territory of the Republic, having due regard, where the overseas are referred to in Article 63, available at: www. coe. int/it/web/conventions/search-on-treaties/-/conventions/treaty/005/declarations,).

71 It is important to note that in the first three decisions in the *land cases* CEDU (*supra* note 71) the inadmissibility of the appeals, in the face of the claims based on the ancestral land ex. Art. 1 Prot. 1, has been based on procedural grounds, linked to the non-exhaustion of domestic remedies (case *L. and E., Konkama* case) or to the lack of validity of the ECHR at the time of the disputed facts (*Hingitaq* case). In the *Handolsdalen* case, on the other hand, the Court upheld the inadmissibility of the action on the basis of the specific right made by the applicants, and not excluding not only the existence of a *possession*, since under Swedish law the area covered by the alleged right required a judicial provision for individuation, but also for *legitimate expectations*, since there was no evidence of an immemorial use by the Sami of the disputed lands for reindeer pasture (European Court of Human Rights, *Handolsdalen Sami Village*, cit. 48-55).

in the English version) transcends the property right, until it understands several cases of *assets*, the tutelage offered by the jurisprudence has usually referred to cases of (sensitive) market value of the good after a state interference. This scheme was also applied in cases in which the injury of the right was invoked next to anti-environmental conduct of the State, reducing in concrete the area of relevance of the right to indirect protection of the environment. It may be considered that the substantial limitation of air application. 1 of Protocol 1 to hypotheses of a relevant decrease in the value of goods on canvas can be linked to the extension of the relevance of the *right to respect for his home* ex art. 8, in all cases of interference with the enjoyment of a right of ownership corresponding to one's own residence or habitual residence[72].

The point in question is not insignificant because, in reality, nothing excludes that rights of a patrimonial nature, such as property rights and other real rights, can be prejudiced, in their capacity of ownership, to avoid a reduction of its patrimonial value. In other words, the State may be responsible for the lack of protection - or the direct injury - of the property right for the simple lack or reduction of the enjoyment of the good, and there is no conceptual coincidence between the injury of the faculty of enjoyment (as in the case of the lack of use of a property for a given period) does not significantly affect the market value.

Now, with respect to indirect environmental protection, this consideration might seem marginal anyway, given the analogous function developed by the law with regard to one's own domicile in guaranteeing the effective and concrete enjoyment of immovable property for housing. To invoke the right of property does not serve - it could be objected - since the extensive use of art. 8. In reality, important hypotheses remain that may be outside the tutelage thus offered by art. 8, and who need the application of art. 1, Protocol 1.

Consider in fact the case where there are emissions of pollutants that reach private lands, in which there is no residence or domicile of any subject; and it is imagined that such emissions would damage the natural

72 See *supra* note 17. The overlap between the two standards would explain why the vast majority of cases of indirect environmental tutelage in the ECHR scope were based on art. 8. The confirmation comes from the ACHR, where there is no analogous formulation of the right to respect for private life. The art. 11 is in fact limited to protecting individuals from *arbitrary or abusive interference* of the State with their own private life and with their own domicile, without therefore offering the broader protection of art. 8 CED H, who is more broadly, protects the respect in itself of family life and domicile.

environment of those lands, thereby damaging their enjoyment by the possessor, without this translating into a significant diminution of the economic value of the land itself. In this case, the indirect environmental protection function can only be recognized by recognizing the possibility that the right to property may be prejudiced in its faculty of enjoyment even without a real decrease in its market value[73]. The ACH jurisprudence examined here, even in the obvious peculiarity of collective property right, can be a model for the environmental relevance of the damage of a right to immovable property, well beyond the cases of emissions at home and well beyond the hypotheses of a significant reduction of the value of the good itself.

Lastly, the hypothesis of the preceding case (damage to the environment which affects land enjoyment without appreciably reducing its market value) could occur with reference to the pollution of public lands, which are nevertheless subject to continuous use and a rural community (for example, a wood from which to extract firewood and collect fruit). In this case, the community dimension of the group of persons who appeal to the Court against the damage to the environmental good, combined with a durable property practice, may recognize aspects of similarity with the collective property right outlined in the jurisprudence of the Inter-American Court. The Strasbourg Court could use exactly the Community dimension of the group of applicants, and customary land use, to *sui generis* of enjoyment susceptible of protection by art. 1, Prot. 1, thereby overcoming the seemingly insurmountable obstacle to the ban on *actio popularis* provided for in the ECHR system.

REFERENCES

BARTOLE, S.; DE SENA, P.; ZAGREBELSKY, V. *Short comment alla Convenzione europea dei diritti dell'uomo (Short comment to the European Convention on Human Rights)*. Padova, 2012.

73 In some cases the Strasbourg Court has moved away from the rigid interpretive line of art. 1, Prot. 1, in terms of damage to the market value of the property, in order to protect hypotheses where the property damage related to the imposition of a hunting activity on the land, despite its ethical beliefs against hunting (European Court of human rights: [GC] *Herrmann c. Germany*, appeal n. 9300/07, judgment of June 26, 2012; [GC] *Chabauty c. France*, feature n. 57412/08, sentence of October 4, 2012; cf. B. Wegener, *op. cit.,* P. 38). The reimbursement granted in these *hunt cases*, precisely on the basis of non-economic considerations related to the enjoyment of the good, shows a possible relevance of the right of property for an indirect protection of the environment much broader than that hitherto granted.

BIRNIE, P.; BOYLE, A.; REDGWELL, C. *International law and the Environment*. Oxford, 2009.

DI BENEDETTO, S. *International Investment Law and the Environment*. Cheltenham, 2013.

KISS, A.; SHELTON, D. *International Environmental Law*. New York, 2000.

LOUCAIDES, L. Environmental Protection through the Jurisprudence of the European Court of Human Rights. *British Yearbook of International Law*, 2004.

ORELLANA, MA Saramaka People v. Suriname. *American Journal of International* Law, 2008.

PAVONI, R. Environmental Jurisprudence of the European and Inter-American Courts of Human Rights. *Environmental Law Dimensions of Human Rights*, Oxford, 2015.

PAVONI, R. *Public interest and individual rights in environmental jurisprudence of the European Court of Human Rights (Public interest and individual rights in environmental jurisprudence of the European Court of Human Rights)*. N apols, 2013.

PITEA, C. Right to Property, Investments, and Environmental Protection: The Perspectives of the European and Inter-American Courts of Human Rights. *Foreign Investment, International Law and Common Concerns*, London / New York, 2013.

ROBB, C. *International environmental law reports*. Cambridge, 1999, Vol.

SACERDOTI, G. et al. *General Interests of Host States in International*

Investment Law. Cambridge, 2014.

SHABAS, WA *The European Convention on Human Rights: A Commentary*. Oxford, 2015

WEGENER, B. Property and Environmental Protection in the Jurisprudence of the ECHR. *Property and Environmental Protection in Europe*, Amsterdam, 2016.

Artigo recebido em: 29/09/2017.
Artigo aceito em: 21/11/2017.

Como citar este artigo (ABNT):

BENEDOTTO, Saverio D. LA FUNZIONE ECOLOGICA DELLA PROPRIETÀ COLLETTIVA SULLE TERRE ANCESTRALI: UN NUOVO MODELLO... *Veredas do Direito*, Belo Horizonte, v. 14, n. 30, p. 11-37, set./dez. 2017. Disponível em: <http://www.domhelder.edu.br/revista/index.php/veredas/article/view/1182>. Acesso em: dia mês. ano.