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Cultural Rights and the Inter-American Court of Human Rights for Balancing the Conservation of Cities' Existing Cultural Heritage and the Integration of Indigenous Migrants' Cultural Heritage

How should we assess the importance of integrating the physical manifestation of indigenous migrants' culture into the existing cities infrastructure, knowing that the tangible and intangible aspects of culture are closely linked?

Part 1 - Identity

The significance of architectural or urban constructions and the transformation of natural landscapes through human interventions are more and more connected to questions of identity. The architecture of urban infrastructures is a significant part of the society's identity to which it is linked. Under this view, tangible cultural heritage should be understood as resources enabling cultural identification. This is especially the case when it comes to indigenous peoples. Indigenous peoples maintain a close tie with their ancestral lands (tangible heritage), which is understood as the fundamental basis of their culture, their spiritual life, their integrity, and their economic survival (intangible heritage). In that context, the right to property pursuant to Article 21 of the American Convention on Human Rights is directly related, even a pre-requisite, to enjoyment of the rights to an existence under conditions of dignity, to food, water, health, life, honor, dignity, freedom of conscience and religion, freedom of association, the rights of the family, and freedom of movement and residence. In this broad sense (supported by the interdependence of human rights principle), **all the rights of indigenous peoples are cultural rights**, and any interpretation of these rights, whether in the UNDRIP or other instruments and prescriptions recognizing rights of indigenous peoples, ought to keep this *telos* in mind.

That assumption is supported by several case laws. In the context of my presentation, I will focus on the Inter-American Court of Human Rights' jurisprudence, such as for instance the *Yakye Axa Indigenous Community v. Paraguay* case or the *Awás Tingni Community v. Nicaragua* case. That jurisprudence is based on the provisions of the American Convention on Human Rights, the American Declaration of Rights and Duties of Man, and on interpretations made in light of the ILO Convention 169 on Indigenous and Tribal Peoples, the UN Declaration on Indigenous Peoples, as well as on other international treaties and pronouncements of Treaty Bodies within and outside the framework of the Inter-American System, such as the Human Rights Committee or Committee on Economic, Social and Cultural Rights. Moreover, the importance of cultural identity for indigenous peoples as well as the strong link between tangible and intangible heritage is asserted by numerous scholars', United Nations' and NGOs' work.

Part 2 – Large-scale development projects and indigenous peoples’ migration

Due to the consolidation of market economies and the profound structural transformations within states since the end of the twentieth century, indigenous lands have fallen victim to the increasing advance of development projects. These large-scale projects result in the rural-to-urban migration of some indigenous communities. There are several past and current examples of such economic projects that strongly impact indigenous communities. For example, in the Philippines, Indigenous peoples in both the Mindanao and Caraga regions have been forcibly evicted from their lands because of Government approved logging or other development contracts or because their lands were destroyed by open-pit mining. Similarly, Indigenous peoples in Kenya, Canada, Mexico and elsewhere have been subject to forced eviction and displacement as a result of large-scale development projects including game reserves, hydroelectric dams, and natural resource exploitation. Another still ongoing example has already been given in my first abstract, that is the construction of the Nicaragua canal, of which 52% of the proposed cuts through the land of multiple indigenous territories on Nicaragua’s coasts and within its mainland. These examples can be found in UN documents (ex: “Securing Land Rights for Indigenous Peoples – Policy Guide to Secure Land for Indigenous Peoples in Cities – UN Habitat for a better urban future”) and in the jurisprudence of the Inter-American Court of Human Rights (ex: Yakye Axa Case, Awas Tingni Case).

As a result, according to data from the 2000 round, the indigenous population of Latin America stands at at least 30 million, of whom no less than 12 millions (about 40%) live in urban areas. In my work, I will mainly use the data delivered by the Del Popolo et al. in their work “Indigenous peoples and urban settlements: spatial distribution, internal migration and living conditions”. The document reveals data about census and consequences of indigenous peoples’ migration in urban areas.

Part 3 – Consequence 1: Protection of Cultural Heritage Compromised

According to Article 27 ICCPR, the states’ duty to protect the right to culture requires positive measures. However, states face a conflict of interest between economic interests on the one hand, and the preservation of cultural heritage and protection of human rights on the other hand.

Due to the fundamental holistic dimension of indigenous peoples’ rights and to the strong link between tangible and intangible cultural heritage, the respect of indigenous peoples’ right to lands must be seen as a major issue in the protection of both their human rights and their cultural heritage. Indeed, the violation of this right and the following migration of indigenous peoples in cities expose these communities to the risk that urban infrastructures do not fit to the particular customs and rituals indigenous people maintained on their ancestral territories. According to the data found in Del Popolo et al.’s work, in big metropolitan cities, indigenous peoples are found in geographical areas that have higher than average poverty levels and that do not offer them any possibility to sustain their intangible cultural heritage. Under that view, there is a strong loss of cultural heritage in favour of economic interests and a flagrant violation of indigenous peoples’ rights. Therefore, states have to find a fair balance between economic projects on the one hand, and the consequences that result of it, i.e. migration, violation of human rights and endangerment of tangible and intangible cultural heritage on the other hand. The infrastructures made available to indigenous migrants arriving in urban areas are a solid proof of how states do that fair balance.

The loss of cultural heritage that results from forced displacement and migration can be found in numerous indigenous peoples leaders' interviews and testimonies, NGOs publications, scholars' work and jurisprudence.

Part 4 – Consequence 2: Implementation of Public Policies

In order for policymakers to adopt public policies that fit to indigenous peoples' cultural rights, they have to be well aware of the concentration level of indigenous peoples in certain urban areas. By knowing the areas where there is the highest rates of indigenous peoples, they would be able to set up particular policies that would respect indigenous peoples' cultural rights while, at the same time, conserving the existing infrastructure that reflects the cultural heritage of the dominant society (the majority). I will base that argument on the data provided by Del Popolo et al.' work above-mentioned.

Part 5 – Cultural Rights and Inter-American Court of Human Rights

As mentioned above, in a broad sense, all the rights of indigenous peoples are cultural rights. The respect of these rights relies on the urban infrastructure made available to indigenous migrants that have been displaced for large-scale economic projects, and must fit with the existing urban infrastructure that reflects cultural heritage of the majority. However, governments do not have to 'make a choice' between the preservation of indigenous people's and majority's cultural heritage. My argument is based on two reasons.

The *first reason* consists of preventive elements (at the stage of consideration of large-scale projects involving indigenous peoples' land). Although a customary international legal principle that addresses indigenous peoples' full right to free, prior and informed consent does not yet exist, there is a clear consensus within international human rights jurisprudence that at a minimum States must engage in good faith consultations with indigenous peoples prior to the exploration or exploitation of resources within their lands or actions that would impact their traditionally used resources. However, if that right has not been respected, indigenous communities can bring their case in front of the Inter-American Commission of Human Rights or the Inter-American Court of Human Rights, which tend to interpret indigenous cultural rights in a broad way. There are no specific provision in the American Convention on Human Rights that specifically deals with indigenous peoples, but both institutions use other instruments – cited in the first part – as tools of interpretation in order to promote the power of cultural rights. That assumption is based on numerous scholars' work, such as Pasqualucci, Tramontana, Pentassuglia, Antowiak, etc. as well as on jurisprudence (see for example the Mayagna Community (Sumo) Awas Tingni case, the Case of the Sawhoyamaya Indigenous Community, the Yakye Axa Indigenous Community case).

In this context, the holistic dimension of indigenous peoples' cultural rights is a powerful tool for indigenous peoples to ensure the respect of their cultural heritage, tangible as intangible. If not through the respect of their right to land, they can do so through the rights to an existence under conditions of dignity, to food, water, health, life, honor, dignity, freedom of conscience and religion, freedom of association, the rights of the family, and freedom of movement and residence. That view is supported by the judiciary body, which shows a strong willingness to promote and enlarge the protection of indigenous peoples rights.

The *second reason* regards the way policymakers must think urban infrastructures respectful of both indigenous peoples' and the majority's cultural heritage. By making a census of the

concentration level of indigenous peoples in urban areas and setting up policies adapted to indigenous peoples' **and** non-indigenous peoples' cultural heritage, governments would be able to deal more appropriately with the difficult challenge caused by the new large-scale projects undertaken. Given that cultural heritage must be understood as resources enabling cultural identification, and given that the protection of cultural identification lies at the core of indigenous peoples' cultural rights, it is of primary importance for policymakers to think urban areas as places that fully enable indigenous communities to enjoy these rights.