



Organization of
American States

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS



OEA/Ser.L/V/II.
Doc. 56/09
30 December 2009
Original: Spanish

INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES

Norms and Jurisprudence of the Inter-American Human Rights System

2010

Internet: <http://www.cidh.org>

E-mail: cidhoea@oas.org


OAS Cataloging-in-Publication Data

Derechos de los pueblos indígenas y tribales sobre sus tierras ancestrales y recursos naturales: Normas y jurisprudencia del sistema interamericano de derechos humanos = Indigenous and tribal people's rights over their ancestral lands and natural resources: Norms and jurisprudence of the Inter-American human rights system / [Inter-American Commission on Human Rights.]

p. ; cm. (OEA documentos oficiales ; OEA/Ser.L)(OAS official records ; OEA/Ser.L)
ISBN 978-0-8270-5580-3

1. Human rights--America. 2. Indigenous peoples--Civil rights--America. 3. Indigenous peoples--Land tenure--America.
4. Indigenous peoples--Legal status, laws, etc.--America. 5. Natural resources--Law and legislation--America. I. Inter-American Commission on Human Rights. II Series. III. Series. OAS official records ; OEA/Ser.L.

OEA/Ser.L/V/II. Doc.56/09

Document published thanks to the financial support of Denmark and Spain
Positions herein expressed are those of the Inter-American Commission on Human Rights and do not
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Approved by the Inter-American Commission on Human Rights on December 30, 2009

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**INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR
ANCESTRAL LANDS AND NATURAL RESOURCES**
Norms and Jurisprudence of the Inter-American Human Rights System

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INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES

Norms and Jurisprudence of the Inter-American Human Rights System

I. INTRODUCTION

1. Indigenous and tribal peoples have unique ways of life, and their worldview is based on their close relationship with land. The lands they traditionally use and occupy are critical to their physical, cultural and spiritual vitality.¹ This unique relationship to traditional territory may be expressed in different ways, depending on the particular indigenous people involved and its specific circumstances; it may include traditional use or presence, maintenance of sacred or ceremonial sites, settlements or sporadic cultivation, seasonal or nomadic gathering, hunting and fishing, the customary use of natural resources or other elements characterizing indigenous or tribal culture.² As the Inter-American Court of Human Rights has pointed out, “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.”³ “[T]o guarantee the right of indigenous peoples to communal property, it is necessary to take into account that the land is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values.”⁴ The Committee for the Elimination of Racial Discrimination has also concluded that indigenous peoples’ territorial rights are unique, and encompass a tradition and a cultural identification of indigenous peoples with their lands which has been generally recognized.⁵

2. The right to property pursuant to Article 21 of the American Convention on Human Rights thus has singular importance for indigenous and tribal peoples, because the guarantee of the right to territorial property is a fundamental basis for the development of indigenous communities’ culture, spiritual life, integrity and economic survival.⁶ It is a right to territory that encompasses the use and enjoyment of its natural resources. It is directly related, even a pre-requisite, to enjoyment of the rights to an existence under conditions of dignity, to food, water, health, life,⁷ honor, dignity, freedom of conscience and religion, freedom of association, the rights of the family, and freedom of movement and residence.⁸ Throughout the Americas, indigenous and tribal peoples

¹ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 155.

² I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 131.

³ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 149. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, pars. 124, 131. I/A Court H.R., *Case of the Plan de Sánchez Massacre v. Guatemala. Reparations and Costs*. Judgment of November 19, 2004. Series C No. 116, par. 85.

⁴ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 154.

⁵ Committee for the Elimination of Racial Discrimination, Decision 2(54) on Australia, par. 4; cited in: IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 130, footnote No. 97.

⁶ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Sawhoyamaya v. Paraguay*. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 113(a).

⁷ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.LJ/V/II. Doc. 54, 30 December 2009, pars. 1076-1080.

⁸ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awás Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(f).

insist that the State “effectively guarantee their right to live in their ancestral territory and thus to not only carry out their traditional subsistence activities, but also preserve their cultural identity.”⁹

3. The organs of the Inter-American system have long paid particular attention to indigenous and tribal peoples’ right to communal property over their lands and natural resources, as a right in itself, and as a guarantee of the effective enjoyment of other basic rights. For the IACHR, “protection of the right of indigenous peoples to their ancestral territory is an especially important matter, as its enjoyment involves not only protection of an economic [unit] but also protection of the human rights of a collectivity whose economic, social and cultural development is based on its relationship with the land.”¹⁰ The Inter-American Court, for its part, has underscored that indigenous peoples’ territorial rights concern “the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations.”¹¹

4. This report compiles and discusses the scope of indigenous and tribal peoples’ rights over their territories, lands, and natural resources. It is based on the legal instruments of the Inter-American system, as interpreted by the Inter-American Commission on Human Rights [IACHR] and the Inter-American Court of Human Rights [IA Court] in the light of developments in general international human rights law. It also aims to point out specific problems, guidelines, and best practices to enhance the enjoyment of human rights by indigenous and tribal peoples across the Hemisphere.¹²

II. SOURCES OF LAW

A. Inter-American Human Rights Instruments

5. In the Inter-American human rights system, indigenous and tribal peoples’ territorial rights are encompassed mainly within Article XXIII of the American Declaration of the Rights and Duties of Man¹³ [American Declaration] and Article 21 of the American Convention on Human Rights¹⁴ [American Convention]. Although

⁹ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 157(c).

¹⁰ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 120(c).

¹¹ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 146. For the Inter-American Court, “[p]roperty of the land ensures that the members of the indigenous communities preserve their cultural heritage” [I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 146]. Indigenous and tribal peoples have a collective right to survival as organized peoples; when the ancestral rights of indigenous peoples over their territories are affected, other basic rights such as the right to cultural identity or to survival of indigenous communities and their members can be affected [I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, pars. 146, 147]. The IACHR has explained in this line that the ancestral territory claimed by indigenous communities is “the only place where they will be completely free because it is the land that belongs to them” [IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 120(g)].

¹² The present Study reflects the work of three Rapporteurs on the Rights of Indigenous Peoples of the Inter-American Commission on Human Rights. It was approved by the IACHR on December 30, 2009, having been conducted at the initiative of Rapporteur Paolo Carozza, and under the direction of the next Rapporteur, Víctor Abramovich. During its process of editing and updating prior to printing, it received an important contribution from the current Rapporteur, Dinah Shelton.

¹³ Article XXIII: “Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home”.

¹⁴ Article 21. “Right to Property. 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. // 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. // 3. Usury and any other form of exploitation of man by man shall be prohibited by law”.

neither of these articles expressly addresses the rights of indigenous or tribal peoples, the IACHR and the Inter-American Court have found that both texts protect the rights that such peoples and their members have in respect to their land and natural resources, that is, over their territories.

6. In the course of recent years, the jurisprudence of the Inter-American human rights system has contributed to developing the minimum contents of indigenous peoples' right to communal property over their lands, territories and natural resources, based on the provisions of the American Convention and the American Declaration, interpreted in light of the provisions of the International Labour Organization (ILO) Convention No. 169,¹⁵ the United Nations Declaration of the Rights of Indigenous Peoples,¹⁶ the Draft American Declaration of the Rights of Indigenous Peoples and other relevant sources, all of which compose a coherent *corpus iuris* that defines the obligations of OAS Member States with regard to the protection of indigenous property rights. The present Chapter analyzes the legal sources which have been used by the organs of the Inter-American system, and by other international human rights organs and mechanisms, in deriving the basic contents of the right to indigenous and tribal property over lands, territories and natural resources.

The American Declaration of the Rights and Duties of Man

7. The American Declaration of the Rights and Duties of Man is a source of legal obligation for member states of the OAS,¹⁷ ensuing from their human rights obligations contained in the OAS Charter (Art. 3).¹⁸ Member states have agreed that the human rights to which the Charter refers are contained and defined in the American Declaration.¹⁹ Many of the Declaration's central provisions are also binding as customary international law.²⁰

8. The American Declaration contains evolving standards that must be interpreted "in the light of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states."²¹ The IACHR thus interprets and

¹⁵ Convention No. 169 of the International Labor Organization on Indigenous and Tribal Peoples in Independent Countries (1989), adopted June 27, 1989, by the General Conference of the International Labor Organization at its 76th meeting, entered into force on September 5, 1991, in keeping with its Article 38.

¹⁶ United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly through Resolution A/61/295, 61st period of sessions (September 13, 2007).

¹⁷ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 163. I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989, Series A No. 10, pars. 34-45. IACHR, Resolution 3/87, Case 9647, James Terry Roach and Jay Pinkerton (United States), September 22, 1987, pars. 46-49. IACHR, Resolution 18/89, Case 10.116, MacLean (Suriname). IACHR, Report No. 48/01, Case 12.067, Michael Edwards *et al.* (Bahamas). IACHR, Report No. 52/01, Case 12.243, Juan Raúl Garza (United States), April 4, 2001.

¹⁸ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 163.

¹⁹ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 163. OAS General Assembly Resolution No. 371/78, AG/RES (VIII-O/78), July 1st, 1978 (reaffirming Member States' commitment to promote compliance with the American Declaration on the Rights and Duties of Man). General Assembly Resolution No. 370/78, AG/Res. 370 (VIII-O/78), July 1st, 1978 (referring to Member States' international commitment to respect the rights recognized in the Declaration).

²⁰ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 163. IACHR, Report No. 19/02, Case 12.379, Lares-Reyes *et al.* (United States), February 27, 2002, par. 46.

²¹ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 96. IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 86. I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989, Series A No. 10, par. 37. I/A Court H.R., The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16/99 of October 1st, 1999. Series A No. 16, par. 114. IACHR, Report No. 52/02, Case 11.753, Ramón Martínez Villarreal (United States). The IACHR has explained in this line that the American Declaration of the Rights and Duties of Man, which establishes the existing and evolving obligations of Member States under the OAS Charter, is not to be interpreted or applied with the content of International Law as it existed at the moment of its adoption, but in light of the continuous developments in the rights protected therein under the *corpus* of International Human Rights Law in its present state. [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 167. I/A Court H.R., Interpretation of the American

applies the pertinent provisions of the American Declaration “in light of current developments in the field of international human rights law, as evidenced by treaties, custom and other relevant sources of international law”,²² including the American Convention on Human Rights “which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration.”²³

9. The corpus of international law that is relevant in examining complaints concerning indigenous territories under the American Declaration “includes the developing norms and principles governing the human rights of indigenous peoples.”²⁴ The provisions of the American Declaration thus must be interpreted and applied “with due regard to the particular principles of international human rights law governing the individual and collective interests of indigenous peoples.”²⁵ Such norms and principles of international law include precepts on the protection of indigenous and tribal peoples’ traditional forms of ownership and cultural survival and on their right to lands, territories and natural resources.²⁶ As such, they “reflect general international legal principles developing out of and applicable inside and outside of the Inter-American system and to this extent are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples”.²⁷

The American Convention on Human Rights

10. Various articles of the American Convention on Human Rights, but mainly Article 21 (right to property), protect the territorial rights of indigenous and tribal peoples and their members. In the absence of express reference to indigenous and tribal peoples in Article 21, the IACHR and the Inter-American Court have utilized the general rules of interpretation established in Article 31 of the Vienna Convention on the Law of Treaties²⁸ and Article 29.b of the American Convention. Article 29 prohibits restrictive interpretations of the rights enshrined in the American Convention (*pro homine* principle); as a result, the IACHR and the Court have interpreted the content of Article 21 of the American Convention in the light of normative developments in international human rights law regarding the rights of indigenous peoples, including ILO Convention No. 169 and

...continuation

Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989, Series A No. 10, par. 37] The IACHR has also held that in cases where a violation of the human rights of indigenous peoples or their members by State authorities took place in the past, but such violation has had continuous effects until the present, the State is under the current obligation of solving the situation in light of its contemporary obligations under International Human Rights Law, and not in light of the obligations that were applicable at the moment in which the violation took place. [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 167].

²² IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 88. IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 96.

²³ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, pars. 97, 124. IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 87. IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*. Doc. OEA/Ser.L/V/II.106, Doc. 28, February 28, 2000, par. 38. IACHR, Report No. 52/01, Case 12.243, Juan Raúl Garza (United States), April 4, 2001, pars. 88-89.

²⁴ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 124.

²⁵ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 131.

²⁶ The rules and principles of International Law on the human rights of indigenous and tribal peoples and their members include human rights considerations related to the ownership, use and occupation of their traditional lands. [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 124].

²⁷ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 129.

²⁸ This evolutionary interpretation of the American Convention is consistent with the interpretation rules established in Article 31 of the Vienna Convention on the Law of Treaties between States of 1969, by virtue of which the Inter-American organs have applied a method of interpretation that takes the system in which the respective treaties are inscribed into account. [I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, pars. 125, 126].

the United Nations Declaration on the Rights of Indigenous Peoples, as well as the relevant jurisprudence of the United Nations treaty bodies.²⁹

11. The IACHR and Inter-American Court also apply the principle of effectiveness, establishing that the distinctive traits that differentiate the members of indigenous and tribal peoples from the general population, and which comprise their cultural identity, must be taken into consideration³⁰ in order to ensure “effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs”.³¹

B. ILO Convention No. 169

12. In respect to the indigenous right to property, the organs of the Inter-American System have expressly used the provisions of ILO Convention No. 169. As explained by the Inter-American Court, “in analyzing the content and scope of Article 21 of the Convention in relation to the communal property of the members of indigenous communities, the Court has taken into account Convention No. 169 of the ILO in the light of the general interpretation rules established under Article 29 of the Convention, in order to construe the provisions of the aforementioned Article 21 in accordance with the evolution of the Inter-American system considering the development that has taken place regarding these matters in international human rights law.”³² For the IACHR, ILO Convention No. 169 is “the international human rights instrument most relevant to the protection of indigenous rights”,³³ for which reason it is directly pertinent to the interpretation of the scope of the rights of indigenous and tribal peoples and their members, in particular under the American Declaration of the Rights and Duties of Man.³⁴

13. Most OAS member states with large indigenous populations are now parties to ILO Convention No. 169³⁵ and the Convention has been an important normative reference during their -and other countries’- processes of constitutional, legislative and institutional reform. The Convention has also served indigenous peoples, helping them to structure their claims and promote legislative changes consistent with States’ international obligations in the field of indigenous rights.

14. The IACHR considers the provisions of ILO Convention No. 169 a relevant factor in interpreting Inter-American human rights norms in respect to petitions filed against all OAS member states. As explained in the report on the *Maya Indigenous Communities of the Toledo District v. Belize*: “While the Commission acknowledges that Belize is not a state party to ILO Convention (Nº 169), it considers that the terms of that treaty provide evidence of contemporary international opinion concerning matters relating to indigenous peoples, and therefore

²⁹ In this regard, the Inter-American Court of Human Rights has stated that “human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions” [I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 146. I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1st, 1999. Series A No. 16, par. 114].

³⁰ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 51.

³¹ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 63.

³² I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 117.

³³ IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, par. 12. IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 7.

³⁴ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 127.

³⁵ The following OAS member states are parties to ILO Convention No. 169: Argentina (2000); Bolivia (1991); Brazil (2002); Chile (2008); Colombia (1991); Costa Rica (1993); Dominica (2002); Ecuador (1998); Guatemala (1996); Honduras (1995); México (1990); Nicaragua (2010); Paraguay (1993); Peru (1994) and Venezuela (2002).

that certain provisions are properly considered in interpreting and applying the articles of the American Declaration in the context of indigenous communities.”³⁶

C. Other International Treaties and Pronouncements of Treaty Bodies

15. The IACHR and the Inter-American Court may look to the provisions of other international human rights treaties in interpreting the American Declaration and the American Convention in cases that concern indigenous and tribal peoples. The IACHR has clarified that the provisions of other multilateral treaties adopted within and outside of the framework of the Inter-American system are relevant to interpreting the American Declaration of the Rights and Duties of Man.³⁷ The Inter-American Court, while analyzing the extent of Article 21 of the American Convention, has explained that it “deems it useful and appropriate to resort to other international treaties, aside from the American Convention (...) to interpret its provisions in accordance with the evolution of the Inter-American system, taking into account related developments in international human rights law.”³⁸

16. The IACHR and the Court have also had recourse to the interpretations of the United Nations human rights organs and mechanisms, in respect to the rights enshrined in the international treaties monitored by these organs and mechanisms.³⁹ Of particular relevance has been the jurisprudence crafted by the Human Rights Committee in relation to articles 27 (rights of minorities) and 1 (self-determination) of the International Covenant on Civil and Political Rights (ICCPR);⁴⁰ the Committee for the Elimination of Racial Discrimination (CERD) in relation to article 5 and other relevant provisions of the Convention for the Elimination of All Forms of Racial Discrimination;⁴¹ the Committee on Economic, Social and Cultural Rights in its general comments on several provisions of the ICESCR,⁴² and the Committee on the Rights of the Child on the Convention on the Rights of the Child.⁴³

³⁶ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, footnote No. 123.

³⁷ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 87.

³⁸ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 127.

³⁹ In the case of the Saramaka people, the Inter-American Court held that Suriname did not recognize in its internal legislation the right to communal property of the members of its tribal peoples, and that it had not ratified ILO Convention 169. However, it had ratified both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; consequently, the Court resorted to the text of these instruments, as it had been interpreted respectively by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, for purposes of establishing the content of Article 21 of the American Convention as it applied to Suriname in that case, reiterating that “pursuant to Article 29(b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants.” [I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 93] See, in general: UN – Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Mr. James Anaya), UN Doc. A/HRC/9/9 (August 11, 2008), pars. 20-30.

⁴⁰ In its General Comment on Article 27 of the ICCPR, the Human Rights Committee expressly linked States’ duty to guarantee indigenous peoples’ right to enjoy their culture to the protection of their ways of life, closely linked to territory and resource use. General Comment No. 23 (1994): Article 27 (rights of minorities), CCPR/C/21/rev.1/Add.5 (1994), par. 7.

⁴¹ In 1997 the Committee on the Elimination of Racial Discrimination adopted its General Recommendation on indigenous peoples, in which it set forth, inter alia, the obligations of States Parties in relation to the protection of indigenous lands and territories, and underscored the right of indigenous peoples to “to own, develop, control and use their communal lands, territories and resources.” General Recommendation XXIII: Indigenous Peoples, CERD/C/51/Misc. 23/rev. 1 (1997), para. 5.

⁴² Several of the general comments by the Committee on Economic, Social and Cultural Rights are of special relevance for the rights of indigenous peoples to their lands, territories, and natural resources. See, e.g., General Comment No. 7 (1997): The right to adequate housing: forced evictions (Article 11(1)), E/1998/22, annex IV, para. 10; General Comment No. 12 (1999): The right to adequate food (Article 11), E/C.12/1999/5, para. 13; General Comment No. 14 (2000), The right to the highest attainable standard of health (Article 12), E/C.12/2000/4, paras. 12(b) and 27; General Comment No. 15 (2002): The right to water (Articles 11 and 12) E/C.12/2002/11, paras. 7, 16.

⁴³ The Committee has linked the rights of indigenous children to the protection of the property rights of their communities and peoples: “the right [of the child], in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion or to use his or her own language ... may be closely associated with the use of traditional territory and the use of its resources”. General Comment No. 11 (2009): Indigenous children and their rights under the Convention, CRC/C/GC/11 (2009), par. 16.

17. Although not specifically focused on the issue, other international treaties incorporate provisions that are relevant for indigenous peoples' rights over their lands, territories and natural resources. Of particular pertinence is Article 8(j) of the Biological Diversity Convention (1992), which calls on States to respect, preserve and maintain "knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application" with the participation of these communities and for their benefit. The Biodiversity Convention's implementation process is equally relevant for the protection of rights associated to indigenous peoples' property over their lands, territories and resources. In 2004, the Conference of the Parties to the Convention adopted the "Akwé:Kon" Voluntary Guidelines for the conduction of cultural, environmental and social impact assessments in cases of projects to be developed in indigenous territories, including sacred sites.⁴⁴

D. International Customary Law

18. The Inter-American organs have also identified international customary law as a legal ground for indigenous and tribal peoples' right to territorial property. In the IACHR's opinion, there is a "customary international law norm which affirms the rights of indigenous peoples to their traditional lands."⁴⁵

E. Other International Instruments

19. The IACHR and the Inter-American Court, in their elaboration of the right to indigenous property, view as relevant and important the United Nations Declaration on the Rights of Indigenous Peoples.⁴⁶ Since its adoption by the UN General Assembly in 2007, the Declaration of the Rights of Indigenous Peoples has begun to play a role similar to that of Convention No. 169 as a guide for the adoption and implementation of norms and public policies in the countries of the Inter-American system. Its provisions, together with the System's jurisprudence, constitute a corpus iuris which is applicable in relation to indigenous peoples' rights, and specifically in relation to the recognition and protection of the right to communal property. The IACHR has appreciated, as a legislative advance, the legal incorporation of the UN Declaration of the Rights of Indigenous Peoples into domestic law, and has called upon States to provide information on its implementation.⁴⁷ The Inter-American Court has resorted to its provisions in order to construe specific rights.⁴⁸

20. Inter-American organs have also made reference to the findings of the UN Special Rapporteur on the situation of human rights and fundamental liberties of indigenous people. The Rapporteur's mandate, established in 2001,⁴⁹ infused new support for the right to indigenous collective property into the framework of the United Nations special procedures.⁵⁰ The Special Rapporteur has actively promoted indigenous territorial rights through communications with States, reports on country visits, and thematic reports.

⁴⁴ Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, COP-7 (Kuala Lumpur, February 9-20, 2004), Decision VII/16, Annex ["Akwé: Kon Guidelines"].

⁴⁵ IACHR, Arguments before the Inter-American Court of Human Rights in the case of the Awas Tingni community v. Nicaragua. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni community v. Nicaragua. Merits, Reparations and Costs*. Judgment of August 31, 2001. Series C No. 79, par. 140(d).

⁴⁶ United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly by Resolution A/61/295, 61st period of sessions (September 13, 2007).

⁴⁷ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 134.

⁴⁸ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 131.

⁴⁹ Resolution 2001/57 of the Commission on Human Rights: "Human rights and indigenous issues" (April 24, 2001).

⁵⁰ Resolution 6/12 of the Human Rights Council: "Human rights and indigenous peoples: mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people" (September 28, 2007).

21. Other United Nations mechanisms with specific mandates related to indigenous peoples' rights have also contributed to international discussions surrounding indigenous peoples' property rights over lands, territories and natural resources. It is noteworthy to mention the thematic reports of the former Working Group on Indigenous Populations⁵¹ and the diverse reports submitted annually by the members and the Secretariat of the UN Permanent Forum on Indigenous Issues.⁵²

22. Finally, indigenous property rights are part of the array of rights included in the draft American Declaration on the Rights of Indigenous Peoples. At its 95th session in February 1997, the IACHR approved a "Draft American Declaration on the Rights of Indigenous Peoples."⁵³ A meeting of governmental experts held a consultation with stakeholders at the OAS in February 1999. The experts decided to open a negotiation process to seek consensus, inviting the broad participation of indigenous peoples.⁵⁴ In 2006, the Working Group initiated a final phase for "review" of the text of the draft Declaration,⁵⁵ and negotiations on its content are currently unfolding within this phase. While the provisions of the draft American Declaration related to the rights of indigenous peoples to lands, territories and natural resources are pending final approval,⁵⁶ the IACHR and individual members of the Inter-American Court have drawn on these provisions as an expression of an emerging normative consensus around the content of those rights in the context of the Inter-American system.⁵⁷

F. Domestic Law

23. The IACHR and the Court have looked to the constitutional and legislative developments of specific countries, because "the right to property embodied in the American Convention cannot be interpreted in isolation, but rather taking into account the overall legal system in which it exists, bearing in mind both domestic and international law, in light of Article 29 of the Convention."⁵⁸ The Inter-American Court of Human Rights considers that "Article 29(b) of the Convention ... prohibits an interpretation of any provision of the Convention in a manner that restricts its enjoyment to a lesser degree than what is recognized in the domestic laws of the State

⁵¹ See e.g. Indigenous peoples and their relationship to land: Final working paper prepared by the Special Rapporteur Mrs. Erica-Irene Daes, E/CN.4/Sub.2/2001/21 (June 11, 2001); Indigenous peoples' permanent sovereignty over natural resources: Final report of the Special Rapporteur, Mrs. Erica-Irene Daes, E/CN.4/Sub.2/2004/30 (July 13, 2004). Legal commentary on the concept of free, prior and informed consent: Expanded working paper submitted by Ms. Antoanella-Julia Motoc and the Tebtebba Foundation offering guidelines to govern the practice of implementation of the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources, E/CN.4/Sub.2/AC.4/2005/WP.1 (July 14, 2005).

⁵² See, e.g. Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, E/C.19/2005/3 (February 17, 2005).

⁵³ Proposed American Declaration on the Rights of Indigenous Peoples, adopted by the Inter-American Commission on Human Rights, February 26, 1997, at its 133rd session, 95th regular session, CP/doc.2878/97 corr. 1.

⁵⁴ Resolution of the General Assembly of the OAS AG/RES. 1610 (XXIX-O/99): "Proposed American Declaration on the Rights of Indigenous Peoples" (June 7, 1999).

⁵⁵ Procedure for promptly concluding negotiations in the quest for points of consensus of the Working Group to prepare the draft American Declaration on the Rights of Indigenous Peoples, OEA/Ser.K/XVI, GT/DADIN/doc.246/06 rev. 7 (November 27, 2006).

⁵⁶ As of the writing of this report, the articles of the draft American Declaration on the rights of indigenous peoples to the land, territories, and natural resources are still pending approval. See more information at: http://www.oas.org/dil/indigenous_peoples_preparing_draft_american_declaration.htm.

⁵⁷ Separate opinion of Judge Sergio García Ramírez in Case of the Mayagna (Sumo) Awas Tingni Community, August 31, 2001, para. 8. Dann case, para. 129; Case of Maya Communities, para. 118.

⁵⁸ IACHR, Arguments before the Inter-American Court of Human Rights in the case of the Yakye Axa community v. Paraguay. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 120(a).

in question or in another treaty to which the State is a party.”⁵⁹ Accordingly, the Court has interpreted Article 21 of the Convention in light of the domestic law pertaining to indigenous peoples’ rights.⁶⁰

III. DEFINITIONS

A. Indigenous Peoples; Tribal Peoples

24. In addition to the full panoply of national and international rights accorded all individuals,⁶¹ international human rights law establishes a set of specific individual and collective rights for indigenous peoples and their members.⁶² In most domestic legal systems, as well, the category “indigenous peoples” is distinguished from others such as “peasant communities,”⁶³ or “minorities”. For this reason, it is necessary to identify the criteria under which a given group can be so designated.

Indigenous peoples

25. There is no precise definition of “indigenous peoples” in international law, and the prevailing position is that such a definition is not necessary for purposes of protecting their human rights.⁶⁴ Given the immense diversity of the indigenous peoples of the Americas and the rest of the world, a strict and closed definition will always risk being over- or under-inclusive. International law does provide some useful criteria to determine when a given human group can be considered as an “indigenous people.” Such a determination has critical importance in international law.

26. While neither the Inter-American human rights instruments, nor the jurisprudence of the Inter-American protection organs, have determined exactly the criteria for constituting an “indigenous people,” relevant criteria have been established in other international instruments, such as ILO Convention No. 169, the United Nations Declaration on the Rights of Indigenous Peoples, and others.⁶⁵

27. Article 1.1 (b) of ILO Convention No. 169 states that the treaty shall apply to

“peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”

⁵⁹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 92.

⁶⁰ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 92.

⁶¹ In this sense, Article 1 of the United Nations Declaration on the Rights of Indigenous Peoples establishes that “[i]ndigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.” Likewise, Article 3.1 of ILO Convention No. 169 provides that “[i]ndigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.”

⁶² I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 96.

⁶³ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 216.

⁶⁴ ILO, “Indigenous & Tribal peoples’ rights in practice – A guide to ILO Convention No. 169.” Programme to Promote ILO Convention No. 169 (PRO 169), International Labour Standards Department, 2009, p. 9.

⁶⁵ United Nations Development Group – Guidelines on Indigenous Peoples’ Issues. February 2008, p. 8. Available at: <http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf>

28. Article 1.2 of the same Covenant establishes that “self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”

29. In the Convention No. 169 Application Guide, the ILO explains that the elements that define an indigenous people are both objective and subjective; objective elements include: (i) historical continuity, i.e. they are societies that descend from groups that preceded conquest or colonization; (ii) territorial connection, in the sense that their ancestors inhabited that country or region; and (iii) distinctive and specific social, economic, cultural and political institutions, which are their own and are totally or partially retained. The subjective element corresponds to collective self-identification as an indigenous people.⁶⁶

30. Other international bodies apply similar criteria. A study of the UN Working Group on Indigenous Populations concluded that the factors relevant to understand the notion of “indigenous” include: (i) priority in time, with regard to the occupation and use of a specific territory; (ii) voluntary perpetuation of cultural specificity, which can include aspects of their language, social organization, religion and spiritual values, modes of production, legal forms and institutions; (iii) self-identification, as well as recognition by other groups, or by State authorities, as differentiated collectives; and (iv) an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether these conditions persist or not. These factors, warns the study, do not constitute, nor can they constitute, an inclusive or comprehensive definition; they are, rather, factors which can be present to a greater or lesser degree in different regions and national or local contexts, for which reason they can provide general guidelines for the adoption of reasonable decisions in practice.⁶⁷ The United Nations Declaration on the Rights of Indigenous Peoples, in turn, opts for not defining the indigenous peoples who are the beneficiaries of its provisions; nonetheless, Article 33.1 establishes that “indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.”

31. Taking ILO Convention No. 169 into account, the IACHR has also underscored that “the criterion of self-identification is the principal one for determining the condition of indigenous people, both individually and collectively.”⁶⁸ In this respect, regarding individual self-identification, the IACHR highlighted as a positive advance the fact that the 2001 Bolivian population census utilized the criterion of self-identification in order to establish the country’s percentage of indigenous inhabitants who were above the age of 15.⁶⁹ As for collective self-identification, the Inter-American Court considers that the identification of each indigenous community is a social-historical fact that forms part of its autonomy,⁷⁰ for which reason it is up to the corresponding community to identify its own name, composition and ethnic affiliation, without having the State or other external entities do it or contest it – the Inter-American bodies and the State must respect the determinations presented in this sense by each community, that is to say, its own self-identification.⁷¹

⁶⁶ According to article 1.2 of ILO Convention No. 169, the subjective element is a fundamental criterion for the classification of a group as indigenous. The Convention combines both sets of elements in order to arrive at a determination in concrete cases. ILO, “Indigenous & Tribal peoples’ rights in practice – A guide to ILO Convention No. 169.” Programme to Promote ILO Convention No. 169 (PRO 169), International Labour Standards Department, 2009, p. 9.

⁶⁷ UN – Economic and Social Council – Commission on Human Rights – Sub-commission on Prevention of Discrimination and Protection of Minorities – Working Group on Indigenous Populations: “Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of ‘indigenous people.’” UN Document E/CN.4/Sub.2/AC.4/1996/2, June 10, 1996, pars. 69-70.

⁶⁸ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 216.

⁶⁹ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 217.

⁷⁰ I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 37.

⁷¹ I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 37.

Tribal peoples

32. Tribal peoples are peoples who are “not indigenous to the region [they inhabit], but that share similar characteristics with indigenous peoples, such as having social, cultural and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions”.⁷² This definition is in accordance with the provisions of Article 1.1.(a) of ILO Convention No. 169.

33. As happens with indigenous peoples, the determination of whether or not a given group can be considered as “tribal” depends on a combination of objective and subjective factors. According to the ILO, the objective elements of tribal peoples include (i) a culture, social organization, economic conditions and way of life that are different from those of other segments of the national population, for example their livelihoods, language, etc.; and (ii) distinctive traditions and customs, and/or special legal recognition. The subjective element consists of the self-identification of these groups and their members as tribal. Thus, a fundamental element for the determination of a tribal people is collective and individual self-identification as such. The fundamental criterion of self-identification, according to Article 1.2 of ILO Convention No. 169, is equally applicable to tribal peoples.⁷³

34. Tribal peoples and their members have the same rights as indigenous peoples and their members. For the IACHR, “international human rights law imposes an obligation on the State to adopt special measures to guarantee the recognition of tribal peoples’ rights, including the right to collectively own property.”⁷⁴ The jurisprudence of the Inter-American Court of Human Rights in relation to the right to collective property applies not only to indigenous peoples, but also to tribal peoples who preserve their traditional ways of life based on a special link to their lands and territories. Thus, in the *Aleoboetoe*,⁷⁵ *Moiwana Community*⁷⁶ and *Saramaka* cases, the victims belonged to different communities or peoples who form part of the Maroon population of Suriname, descending from self-emancipated slaves that settled in their territories since the colonial period and are therefore not regarded, *stricto sensu*, as “indigenous.” The Court considers the Maroon to be “tribal” peoples and communities.⁷⁷

The relevance of History to identifying indigenous and tribal peoples

35. A key element in the determination of when a given group can be regarded as indigenous or tribal is the historical continuity of its presence in a given territory, and, for indigenous peoples, an ancestral relationship with the societies that pre-existed a period of colonization or conquest. This does not imply, however, that indigenous or tribal peoples are static societies that remain identical to their predecessors. On the contrary, as human groups, indigenous and tribal peoples have their own social trajectory that adapts to changing times, maintaining in whole or in part the cultural legacy of their ancestors. Indigenous cultures evolve over time.⁷⁸ The

⁷² I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 79.

⁷³ ILO, “Indigenous & Tribal peoples’ rights in practice – A guide to ILO Convention No. 169.” Programme to Promote ILO Convention No. 169 (PRO 169), International Labour Standards Department, 2009, p. 9.

⁷⁴ IACHR, Arguments before the Inter-American Court of Human Rights in the case of the Saramaka people v. Suriname. Cited in: I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 78.

⁷⁵ I/A Court H.R., *Case of Aloeboetoe et al. v. Suriname. Reparations and Costs*. Judgment of September 10, 1993. Series C No. 15.

⁷⁶ I/A Court H.R., *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 15, 2005. Series C No. 124.

⁷⁷ Likewise, the IACHR has considered the situation of the Garifuna people of Central America and the Caribbean from the perspective of the standards applicable to indigenous peoples.

⁷⁸ Just like any human society, indigenous peoples –and the communities that compose them– have their own history. They are dynamic human groups, who reconfigure themselves over the course of time on the grounds of the cultural traits that distinguish them. Indeed, indigenous and tribal peoples’ culture is continually adapting to historical changes; indigenous and tribal peoples develop their cultural identity

indigenous communities of the present are the *descendants* of inhabitants of the pre-Columbian Americas; over the centuries they have experienced specific events which have shaped their distinctive social structures, spirituality and ritual practices, language, art, folklore, memory and identity – in sum, their culture. It is on the basis of that individual and dynamic history that the relationship of each indigenous people and community with its territory is built, a relationship from which their physical and cultural subsistence emerges, and to which international law has given a privileged level of protection.⁷⁹

36. The history of indigenous peoples and their cultural adaptations over time, as constitutive elements of their contemporary structural configuration, are consistent with the preservation of a fundamental relationship to their territory. In the case of *Yakye Axa v. Paraguay*, the Inter-American Court described the history of the affected community as follows:

“...it is necessary to consider that the victims of the instant case have to date an awareness of an exclusive common history; they are the sedentary expression of one of the bands of the Chanawatsan indigenous peoples (...). Possession of their traditional territory is indelibly recorded in their historical memory, and their relationship with the land is such that severing that tie entails the certain risk of an irreparable ethnic and cultural loss, with the ensuing loss of diversity. In the process of sedentarization, the Yakye Axa Community took on an identity of its own that is connected to a physically and culturally determined geographic space, which is a specific part of what was the vast Chanawatsan territory”⁸⁰.

37. It is also important to understand that the cultural identity of indigenous and tribal peoples is shared by their members, but it is inevitable that some members of each group will live with less attachment to the corresponding cultural traditions than others. This fact does not lead to the conclusion that indigenous or tribal peoples lose their identity or the rights conferred upon them by international law. As the Inter-American Court of Human Rights said in the case of the *Saramaka people v. Suriname*: “The fact that some individual members of the Saramaka people may live outside of the traditional Saramaka territory and in a way that may differ from other Saramakas who live within the traditional territory and in accordance with Saramaka customs does not affect the distinctiveness of this tribal group nor its communal use and enjoyment of their property.”⁸¹ Insofar as they continue preserving and living their own cultural traditions, indigenous and tribal peoples and their members continue to have the individual and collective rights recognized by the Inter-American system.

38. Likewise, indigenous communities may be composed of persons and families that belong to more than one ethnic group, but regard and identify themselves as a single community. This multiethnic composition of some indigenous communities, which responds to their position as historical subjects, is consistent with the protection and exercise of their full range of entitlements under international human rights law.⁸²

...continuation

over time. In this sense, the IACHR has recognized, for example, that the Guatemalan indigenous peoples, in spite of the ethnic discrimination to which they have historically been subjected, “whether they live in rural or urban areas, they maintain an intense level of activity and social organization, a rich culture, and are continuously adapting to situations imposed by the exigencies of historical change, while protecting and developing their cultural identity” [IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, par. 4].

⁷⁹ IACHR, Arguments before the Inter-American Court of Human Rights in the case of the *Xákmok-Kásek community v. Paraguay*. Cited in: I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 35.

⁸⁰ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 216. In the same sense, see: I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, pars. 37-43.

⁸¹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 164.

⁸² I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, pars. 39-43. In this case, the petitioner community was composed mostly of members of two distinct ethnic groups, the Enxet-Sur and the Sanapana.

B. Lands and Territories

39. The territorial rights of indigenous and tribal peoples and their members extend over the Earth's surface, and over the natural resources that are located on the surface and in the subsoil – with due regard for the specificities of water and subsoil resources, as explained in Chapter VIII. Holistically, the lands and the natural resources they contain comprise the legal notion of “territory”, as confirmed by the Inter-American Court.⁸³ ILO Convention No. 169 in its Article 13.2, similarly provides that “the use of the term lands (...) shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.”

40. The IACHR has acknowledged the value of the legislative incorporation of “a broad concept of indigenous land and territories, wherein the latter category includes not only physically occup[ie]d spaces but also those used for their cultural or subsistence activities, such as routes of access,”⁸⁴ finding “this approach to be compatible with the cultural reality of indigenous peoples and their special relationship with the land and territory, as well as with natural resources and the environment in general.”⁸⁵ The occupation of a territory by an indigenous people or community is thus not restricted to the nucleus of houses where its members live; “rather, the territory includes a physical area constituted by a core area of dwellings, natural resources, crops, plantations and their milieu, linked insofar as possible to their cultural tradition.”⁸⁶ In this same sense, the relationship between indigenous peoples and their territories is not limited to specific villages or settlements; territorial use and occupation by indigenous and tribal peoples “extend beyond the settlement of specific villages to include lands that are used for agriculture, hunting, fishing, gathering, transportation, cultural and other purposes”;⁸⁷ therefore indigenous and tribal peoples' rights encompass the territory as a whole.⁸⁸

C. Natural Resources

41. Natural resources are substances that exist naturally in the Earth. Natural resources are valuable in manufacturing products, supplying human necessities or comforts, and providing ecosystem services that maintain the health of the biosphere. Natural resources include air, land, water, natural gas, coal, oil, petroleum, minerals, wood, topsoil, fauna, flora, forests and wildlife. Renewable natural resources are those that reproduce or renew and include animal life, plants, trees, water, and wind. Nonrenewable resources are irreplaceable once extracted from water or soil and include gold, silver, fossil fuels, diamonds, natural gas, copper and ore.

⁸³ For the Inter-American Court, the term “territory” refers to the totality of the lands and natural resources that indigenous and tribal peoples have traditionally used. I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, footnote No. 63.

⁸⁴ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 160.

⁸⁵ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 160.

⁸⁶ IACHR, Arguments before the Inter-American Court of Human Rights in the case of the Yakye Axa community v. Paraguay. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 120(h).

⁸⁷ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 129.

⁸⁸ The Inter-American Court has explained in this regard that “the scope of ‘respect’ afforded to the members of [an indigenous or tribal people’s] territory [is not limited] solely to ‘villages, settlements and agricultural plots’. Such limitation fails to take into account the all-encompassing relationship that members of indigenous and tribal peoples have with their territory as a whole, not just with their villages, settlements, and agricultural plots”. [I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 114].

IV. STATE OBLIGATIONS TOWARDS INDIGENOUS AND TRIBAL PEOPLES AND THEIR MEMBERS

A. Respect and Ensure Rights

42. The duty of OAS member States to promote and protect human rights stems from the human rights obligations established in the OAS Charter. In addition, the American Convention and the American Declaration establish a series of State obligations to promote and secure the effective enjoyment of human rights. Articles 1.1 and 2 of the Convention expressly demand that States Parties “respect” and “ensure” the “free and full exercise” of the rights recognized therein, including through the adoption of “such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

43. Article 2 of the American Convention places States parties under the general obligation to adjust their domestic legislation to the standards of the Convention so as to ensure the enjoyment of the rights it embodies. The obligation of adapting internal legislation to the American Convention under Article 2 “is, by its very nature, one that must be reflected in actual results.”⁸⁹ States must, therefore, review their legislation, procedures and practices so as to ensure that indigenous and tribal peoples’ and persons’ territorial rights are defined and determined in accordance with the rights established in Inter-American human rights instruments.⁹⁰ As a corollary, States are under the obligation to abstain from adopting legislative or administrative measures of a regressive nature, which can hinder the enjoyment of indigenous peoples’ territorial rights.⁹¹

44. The IACHR has deemed it a good practice for states to adopt and promulgate rules in their domestic legal systems that recognize and protect the rights of indigenous peoples and their members,⁹² but juridically beneficial laws “cannot by themselves guarantee the rights of such peoples.”⁹³ States must effectively implement and enforce the constitutional, legislative and regulatory provisions of their internal law that enshrine the rights of indigenous and tribal peoples and their members, so as to ensure the real and effective enjoyment of such rights.⁹⁴ Domestic legal provisions for this purpose must be effective (principle of *effet utile*).⁹⁵ A favorable legal framework is “insufficient for due protection of their rights if it does not go hand in hand with policies and actions by the State to ensure application of and effective compliance with the provisions which the sovereign

⁸⁹ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 100. I/A Court H.R., *Case of Caesar v. Trinidad and Tobago. Merits, Reparations and Costs*. Judgment of March 11, 2005. Series C No. 123, par. 93.

⁹⁰ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 173, Recommendations 1 and 2.

⁹¹ In case of adopting such regressive provisions, States are in the obligation of voiding them or refraining from their application. IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, par. 49, 50 – Recommendation 4.

⁹² The IACHR has positively valued the adoption of legal provisions on the collective rights of indigenous peoples, but at the same time it has forcefully called upon States to submit information about their implementation. See, *inter alia*: IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1052-1061. IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, pars. 218, 219. IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 134, and footnote No. 147.

⁹³ IACHR, Arguments before the Inter-American Court of Human Rights in the case of Sawhoyamaya v. Paraguay. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 113(b).

⁹⁴ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1062. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, pars. 220, 297 – Recommendation 4. IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, pars. 134, 149.

⁹⁵ “Effectiveness” of the domestic legal provisions means that the State must take such measures as may be necessary to actually comply with the provisions of the Convention. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 101. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 110.

State has undertaken to apply.”⁹⁶ The Inter-American Court of Human Rights has similarly insisted that the governments “ensure the actual existence of an efficient guarantee of the free and full exercise of human rights.”⁹⁷ Indigenous and tribal peoples have a right to see the law implemented and applied in practice,⁹⁸ specifically in relation to their territorial rights.⁹⁹

⁹⁶ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 120(b). See also: IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, par. 36. IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser.L/VII.110, Doc. 52, March 9, 2001, Chapter IX, par. 28.

⁹⁷ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29th, 2006. Series C No. 146, par. 167. I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs*. Judgment of January 31, 2006. Series C No. 140, par. 142.

⁹⁸ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1062. Only a sustained implementation of constitutional and legal advances that are pertinent for the legal force of indigenous and tribal peoples’ rights can mark and advance in their real situation; referring to the Guatemalan legal system, the IACHR has held that “these very important provisions enshrine principles that can be developed in the legislative sphere, and which, if implemented on a sustained basis, can lead to improvement in the situation of indigenous populations” [IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, par. 35]. In the same line, the Inter-American Court of Human Rights has explained that “legislation alone is not enough to guarantee the full effectiveness of the rights protected by the Convention, but rather, such guarantee implies certain governmental conducts to ensure the actual existence of an efficient guarantee of the free and full exercise of human rights” [I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 167. I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs*. Judgment of January 31, 2006. Series C No. 140, par. 142]. The UN Special Rapporteur has also signaled the lack of application of the legal provisions that enshrine indigenous peoples’ rights, describing it as a “gap in implementation between, on the one hand, the advances made by many countries in their domestic legislation, which recognizes indigenous peoples and their rights, and, on the other, the daily reality in which many obstacles to the effective enforcement of those legislative measures are encountered.” UN – Commission on Human Rights – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, UN Doc. E/CN.4/2006/78, Summary. The Special Rapporteur has explained that obstacles to implementation include: (i) inconsistencies between international standards and principles and domestic legislation, the lack of incorporation of such standards into domestic law, or their disregard by judges and public officials; (ii) inconsistencies between sectoral legislations, or the lack of application of the existing sectoral legislation; (iii) the bureaucratic or rigid structure of public administration, and the lack of mechanisms to follow up implementation of the law; (iv) different interpretations of legal standards by different state authorities; or (v) the blocking of protective constitutional provisions through regressive legal and regulatory standards. UN – Commission on Human Rights – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, UN Doc. E/CN.4/2006/78, pars. 18, 19, 26, 33. See also: UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, UN Doc. A/HRC/4/32, 27 February 2007, pars. 5-13.

⁹⁹ With regard to the right to property, formal recognition of indigenous and tribal peoples’ right to communal property in domestic law must be accompanied by concrete measures to make the right effective. [I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 141] “Merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established.” [I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 143]. For the IACHR and the Inter-American Court, it is necessary that the legally guaranteed territorial rights of indigenous peoples are coupled with the adoption of the legislative and administrative measures and mechanisms to ensure the enjoyment of said rights in reality. Under Article 21, it is necessary for the legal and constitutional provisions that enshrine the right of members of indigenous communities to the property of their ancestral territory to be translated into the effective restitution and protection of such territories. [IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Sawhoyamaya v. Paraguay*. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 113(b). IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser.L/VII.110, Doc. 52, March 9, 2001, Chapter IX, par. 50, Recommendation 1] Even if there is a formal affirmation of the territorial and other rights of indigenous and tribal peoples, States’ failure to adopt the measures required to recognize and guarantee said rights generates situations of uncertainty among the members of the communities. [IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 170] The UN Special Rapporteur has denounced the lack of implementation of the legislation that protects indigenous peoples’ territorial rights as part of the current trend towards territorial dispossession, as follows: “The trend towards the depletion of the natural resources of the indigenous people is continuing, mainly through expropriation of their lands. Although in recent years many countries have adopted laws recognizing the indigenous communities’ collective and inalienable right to ownership of their lands, land-titling procedures have been slow and complex and, in many cases, the titles awarded to the communities are not respected in practice. At the same time, privatization of traditional lands is on the increase. This measure is claimed to benefit indigenous owners in that it provides legal certainty. The Special Rapporteur has, however, observed that in the long run the indigenous communities tend to lose their traditional lands and territories to the various private economic interests of either firms or individual invaders and settlers who have managed to install themselves in traditional indigenous areas.” UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, UN Doc. A/HRC/4/32, 27 February 2007, par. 14.

45. Similarly, the ratification of international treaties or the approval of international instruments that protect indigenous and tribal peoples' rights are often insufficient to guarantee effective enjoyment of the rights they contain.¹⁰⁰ The IACHR has reacted positively to the acceptance of ILO Convention No. 169 by OAS member states,¹⁰¹ while emphasizing that once member states become party to the Convention, they are bound to "take special measures to guarantee indigenous peoples the effective enjoyment of human rights and fundamental freedoms, without restrictions, and to include measures that promote the full effectiveness of their social, economic, and cultural rights, respecting their social and cultural identity, and their customs, traditions, and institutions."¹⁰² The IACHR has also indicated that states must develop adequate compliance mechanisms to monitor the performance of state authorities and ensure the effective enjoyment of the rights and guarantees that they pledged to respect upon becoming party to ILO Convention No. 169.¹⁰³ The lack of regulation does not excuse failure to comply with the application of Convention No. 169.¹⁰⁴

46. Applying these rules in the *Awas Tingni* case the Inter-American Court held that it "believes it necessary to make the rights recognized by the Nicaraguan Constitution and legislation effective, in accordance with the American Convention. Therefore, pursuant to article 2 of the American Convention, the State must adopt in its domestic law the necessary legislative, administrative, or other measures to create an effective mechanism for delimitation and titling of the property of the members of the *Awas Tingni Mayagna Community*, in accordance with the customary law, values, customs and mores of that Community."¹⁰⁵ In the case of the *Sawhoyamaxa v. Paraguay*, the Inter-American Court insisted that "merely abstract or legal recognition becomes meaningless in practice if the lands have not been physically delimited and surrendered because the adequate domestic measures necessary to secure effective use and enjoyment of said right by the members of the *Sawhoyamaxa Community* are lacking."¹⁰⁶

47. The IACHR has equally valued the establishment of public policies and governmental plans of action for the recognition of indigenous peoples' territorial rights, expressing that it "hopes that these initiatives contribute to the demarcation and titling of indigenous peoples' lands and ancestral territories and that their results are quantifiable in the short term."¹⁰⁷ Likewise, the IACHR has highlighted, as an advance, efforts to

¹⁰⁰ The UN Special Rapporteur has pointed out the inconsistency between international law on indigenous human rights and States' domestic legislation as one of the obstacles for implementation of the legal provisions that protect indigenous peoples: "It has been pointed out that in many countries there is a gap between international standards and principles regarding the human rights of indigenous people and domestic legislation. International standards, even when ratified, do not always and automatically become part of domestic law. They are sometimes ignored by public officials as well as in the case law of the courts." UN – Commission on Human Rights – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, UN Doc. E/CN.4/2006/78, par. 18.

¹⁰¹ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 218.

¹⁰² IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, par. 13. Thus, for example, in its 2000 *Report on the Human Rights situation in Peru*, the IACHR recalled that "on ratifying this instrument, the Peruvian State undertook to take special measures to guarantee the indigenous peoples of Peru the effective enjoyment of human rights and fundamental freedoms, without restrictions, and to make efforts to improve living conditions, participation, and development in the context of respect for their cultural and religious values." IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 7.

¹⁰³ IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 39 – Recommendation 3.

¹⁰⁴ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 255.

¹⁰⁵ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 138.

¹⁰⁶ I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 143.

¹⁰⁷ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II.135, Doc. 40, August 7, 2009, par. 149.

“establish policies in favor of indigenous peoples (...) through the creation of ministries, vice ministries, and specific entities focused directly on their needs”,¹⁰⁸ but it has recalled that such State institutions must provide an “effective response for the exercise of their human rights, and in particular their economic, social and cultural rights, on equality”.¹⁰⁹

B. Specific Obligations Owed Indigenous and Tribal Peoples

48. Each state must ensure that the members of indigenous and tribal peoples effectively enjoy all human rights in equality with other persons.¹¹⁰ Article 1.1 of the American Convention establishes the obligation of the State to respect and ensure “the full enjoyment of human rights by the persons under its jurisdiction.”¹¹¹ Failure to comply with that obligation due to the actions or omissions of any public authority can generate international responsibility for the state.¹¹²

49. The State’s general obligation acquires additional content in the case of indigenous and tribal peoples and their members. The IACHR has recognized that States must adopt special and specific measures aimed at protecting, favoring and improving the exercise of human rights by indigenous and tribal peoples and their members.¹¹³ The need for special protection arises from the greater vulnerability of these populations, their historical conditions of marginalization and discrimination, and the deeper impact on them of human rights violations.¹¹⁴ This positive State duty of adopting special measures is enhanced when it comes to indigenous children and women, given that their level of vulnerability is even greater.¹¹⁵

50. The duty of States to afford special protection to indigenous and tribal peoples has been underscored by the IACHR from its early decisions. In its 1972 Resolution on “Special Protection for Indigenous Populations: Action to combat racism and racial discrimination,” the IACHR held that “for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states.”¹¹⁶ For the IACHR, “this notion of special protection has since been considered in numerous country and individual reports adopted by the Commission and (...) has been recognized and applied in

¹⁰⁸ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 221.

¹⁰⁹ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 223. The UN Special Rapporteur has called for coordination in the actions undertaken by the different State authorities responsible for protecting indigenous rights: “One aspect of the [implementation gap] is the lack of a coordinated or systematic policy –with the participation of the indigenous peoples- that plays a cross-cutting role in the various ministries and organs of State regarding indigenous issues, such as ministries of agriculture, energy, mines and natural resources, education and health, to name but a few, in order to guarantee the rights of the indigenous peoples. The existence of human rights commissions or ombudsmen is not enough if the ministries with responsibilities in sensitive areas for the indigenous peoples do not take coordinated action.” UN – Commission on Human Rights – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, UN Doc. E/CN.4/2006/78, par. 86.

¹¹⁰ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1072.

¹¹¹ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31st, 2001. Series C No. 79, par. 154.

¹¹² I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31st, 2001. Series C No. 79, par. 154.

¹¹³ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1072. IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 169.

¹¹⁴ IACHR, *Preliminary observations of the Inter-American Commission on Human Rights on its Visit to Honduras*, May 15 to 18, 2010. Doc. OEA/Ser.L/V/II., Doc. 68, 3 June 2010, par. 26, Recommendation 11.

¹¹⁵ IACHR, *Preliminary observations of the Inter-American Commission on Human Rights on its Visit to Honduras*, May 15 to 18, 2010. Doc. OEA/Ser.L/V/II., Doc. 68, 3 June 2010, par. 26, Recommendation 11; par. 87.

¹¹⁶ Cited in: IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 126. IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 96.

the context of numerous rights and freedoms under both the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights, including the right to life, the right to humane treatment, the right to judicial protection and to a fair trial, and the right to property.”¹¹⁷ The IACHR has explained that a central element underlying the relevant norms and principles of international law “is a recognition that ensuring the full and effective enjoyment of human rights by indigenous peoples requires consideration of their particular historical, cultural, social and economic situation and experience. In most instances, this has included identification of the need for special measures by states to compensate for the exploitation and discrimination to which these societies have been subjected at the hands of the non-indigenous.”¹¹⁸ In deciding complaints presented against States, the IACHR has thus afforded “due consideration to the particular norms and principles of international human rights law governing the individual and collective interests of indigenous peoples, including consideration of any special measures that may be appropriate and necessary in giving proper effect to these rights and interests.”¹¹⁹

51. The obligation to adopt special and specific protective measures is inherent in ILO Convention No. 169; the IACHR has highlighted the need for its States parties to “take special measures to guarantee indigenous peoples the effective enjoyment of human rights and fundamental freedoms, without restrictions, and to include measures that promote the full effectiveness of their social, economic, and cultural rights, respecting their social and cultural identity, and their customs, traditions, and institutions.”¹²⁰ The Inter-American Court of Human Rights has similarly held, based on Article 1.1 of the American Convention,¹²¹ that “members of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regards to their enjoyment of property rights, in order to safeguard their physical and cultural survival.”¹²² Other international bodies¹²³ have also established that the members of indigenous and tribal peoples require special measures to secure the full exercise of their rights.¹²⁴

52. As explained in detail below, this obligation includes the State duty to adopt special, effective measures to ensure indigenous communities’ property rights over their ancestral lands and natural resources;¹²⁵ consequently, the general State duty to give special protection to indigenous peoples is specifically applicable in

¹¹⁷ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 126.

¹¹⁸ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 125. IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 95.

¹¹⁹ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 98.

¹²⁰ IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, par. 13.

¹²¹ As the Inter-American Court of Human Rights has explained on this same point, “within the framework of the American Convention, the international responsibility of States arises at the moment of the violation of the general obligations embodied in Articles 1(1) and 2 of such treaty. (...) From these general obligations special duties are derived that can be determined according to the particular needs of protection of the legal persons, whether due to their personal conditions or because of the specific situation they have to face [Cf. *Case of the Pueblo Bello Massacre*, *supra* note 3, 111 and 112; *Case of the ‘Mapiripán Massacre’*, *supra* note 3, paras. 108 and 110, and *Case of the Gómez-Paquiyaury Brothers*. Judgment of July 8, 2004. Series C No. 110, para. 71], such as extreme poverty, exclusion or childhood.” [I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 154].

¹²² I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 85.

¹²³ CERD, General Recommendation 23, Indigenous Peoples, U.N. Doc. A/52/18, Annex V (1997), par. 5. European Court of Human Rights, case of *Connors v. United Kingdom*, May 27, 2004, par. 84.

¹²⁴ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 85.

¹²⁵ IACHR, Arguments before the Inter-American Court of Human Rights in the Case of *Awás Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(e).

relation to their right to territorial property.¹²⁶ As the Inter-American Court has clearly established, the “protection of property under Article 21 of the Convention, read in conjunction with Articles 1(1) and 2 of said instrument, places upon States a positive obligation to adopt special measures that guarantee members of indigenous and tribal peoples the full and equal exercise of their right to the territories they have traditionally used and occupied”.¹²⁷

53. Such special measures are not discriminatory against the rest of the population¹²⁸ because “[i]t is a well established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination. (...) Legislation that recognizes said differences is therefore not necessarily discriminatory. In the context of members of indigenous and tribal peoples, this Court has already stated that special measures are necessary in order to ensure their survival in accordance with their traditions and customs.”¹²⁹

54. The unique indigenous way of life has to be taken into account by the State in adopting special measures aimed at protecting their human rights:¹³⁰ “as regards indigenous peoples, it is essential for the States to grant effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs.”¹³¹ This obligation applies in regard to the implementation of domestic laws and to the implementation of the Inter-American human rights instruments.¹³² This duty of specificity also entails that State measures aimed at protecting the human rights of indigenous peoples and promoting their social inclusion must start off from their recognition as historically excluded groups,¹³³ keeping in mind that “the complexity of the matter is no excuse for the State not to fulfill its obligations.”¹³⁴

¹²⁶ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 126.

¹²⁷ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 91.

¹²⁸ Cfr. I/A Court H.R., Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, pars. 57-60; I/A Court H.R., Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, par. 55.

¹²⁹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 103.

¹³⁰ In addition to adopting special measures to guarantee the exercise of human Rights by indigenous and tribal peoples and their members, States must make sure that they interpret and comply with their international obligations with due consideration for the socio-cultural specificity of these populations. Articles 24 and 1.1 of the American Convention on Human Rights bind States to guarantee, in conditions of equality, the full exercise and enjoyment of the human rights of persons under their jurisdiction, including the members of indigenous communities; “however, it is necessary to emphasize that to effectively ensure those rights, when they interpret and apply their domestic legislation, the States must take into account the specific characteristics that differentiate the members of the indigenous peoples from the general population and that constitute their cultural identity” [I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 51. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 59].

¹³¹ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 63.

¹³² I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 51.

¹³³ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 229.

¹³⁴ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awes Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awes Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(I).

V. INDIGENOUS AND TRIBAL PROPERTY RIGHTS: GENERAL CONSIDERATIONS

A. The Special Relationship between Indigenous and Tribal Peoples and their Territories

55. The unique relationship between indigenous and tribal peoples and their territories has been broadly recognized in international human rights law. Article 21 of the American Convention and Article XXIII of the American Declaration protect this close bond with the land, as well as with the natural resources of the ancestral territories,¹³⁵ a bond of fundamental importance for the enjoyment of other human rights of indigenous and tribal peoples.¹³⁶ As reiterated by the IACHR and the Inter-American Court, preserving the particular connection between indigenous communities and their lands and resources is linked to these peoples' very existence and thus "warrants special measures of protection."¹³⁷ The Inter-American Court has insisted that "States must respect the special relationship that members of indigenous and tribal peoples have with their territory in a way that guarantees their social, cultural, and economic survival."¹³⁸ For the IACHR, the special relationship between indigenous and tribal peoples and their territories means that "the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly."¹³⁹

¹³⁵ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II.135, Doc. 40, August 7, 2009, par. 156. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 148. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 137. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 118, 121. This unique relationship to the traditional territory may be expressed in different ways, depending on the particular indigenous people involved and its specific circumstances. It may include traditional use or presence, such as maintenance of sacred or ceremonial sites; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of natural resources associated with their customs or other elements characterizing their culture. [I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 131] These cultural manifestations are protected as part of the right to property in Inter-American human rights instruments.

¹³⁶ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1054. The right to territory and to the use and enjoyment of its natural resources, is directly related to the rights to an existence under conditions of dignity, to food, water, health and life, because its effective enjoyment is a precondition for access to nutritional and water sources, as well as the traditional healthcare systems [IACHR, *Democracy and Human Rights in Venezuela*, 2009, Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, pars. 1076-1080] and other aspects of culture; for this same reason, "[each community's] relations to its land and resources are protected by other rights set forth in the American Convention, such as the right to life, honor, and dignity, freedom of conscience and religion, freedom of association, rights of the family, and freedom of movement and residence." [IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awes Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awes Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(f)].

¹³⁷ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 128.

¹³⁸ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 91. The Inter-American Court has reiterated that "the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival" [I/A Court H.R., *Case of the Mayagna (Sumo) Awes Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 149].

¹³⁹ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 114. The Inter-American Court of Human Rights "has taken a similar approach to the right to property in the context of indigenous peoples, by recognizing the communal form of indigenous land tenure as well as the distinctive relationship that indigenous peoples maintain with their land" [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 116. I/A Court H.R., *Case of the Mayagna (Sumo) Awes Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 149].

56. This special relationship is fundamental both for the material subsistence¹⁴⁰ and for the cultural integrity¹⁴¹ of indigenous and tribal peoples.¹⁴² The IACHR has emphatically explained, in this line, that “the indigenous population is structured on the basis of its profound relationship with the land”;¹⁴³ that “land, for the indigenous peoples, is a condition of individual security and liaison with the group”;¹⁴⁴ and that “the recovery, recognition, demarcation, and registration of the lands represents essential rights for cultural survival and for maintaining the community's integrity”.¹⁴⁵ Likewise, the Inter-American Court has pointed out that “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”;¹⁴⁶ that “the culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their [religiousness], and therefore, of their cultural identity”;¹⁴⁷ and that “to guarantee the right of indigenous peoples to communal property, it is necessary to take into account that the land is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values. In connection with their milieu, their integration with nature and their history, the members of the indigenous communities transmit this nonmaterial cultural heritage from one generation to the next, and it is constantly recreated by the members of the indigenous groups and communities”.¹⁴⁸

¹⁴⁰ The protection of indigenous peoples' culture encompasses the preservation of aspects linked to their productive organization, which includes, among other elements, the issue of ancestral and communal lands [[IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 120]. The control of the land protected by Article 21 “refers both its capacity for providing the resources which sustain life, and to the geographic space necessary for the cultural and social reproduction of the group” [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 128].

¹⁴¹ The notions of family and religion are intimately connected to traditional territory, where the ancestral cemeteries, places of religious meaning and importance and kinship patterns are linked to the occupation and use of physical territories [[IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 155]. Therefore, given that territory and natural resources are substantial elements of the worldview, spiritual life and forms of subsistence of indigenous and tribal peoples, they form an intrinsic part of their members' right to cultural identity [IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1054].

¹⁴² The special relationship between indigenous or tribal peoples and their ancestral territories has additional legal relevance in specific aspects. Recognition of the close material and cultural link between indigenous peoples and their traditional territories is a fundamental factor for the determination of rights in cases of property conflicts with third parties, in which States must consider the implications of indigenous peoples' territorial rights for their cultural identity and material survival. The special relationship that indigenous and tribal peoples keep with their traditional territories has also been taken into account by the Inter-American Court at the moment of determining the reparations in cases in which specific communities have been forcibly dispossessed of their territories. Thus, in the *Moiwana* case, the Court held that the community's forced displacement had hurt its members in emotional, spiritual, cultural and economic terms, and considered this fact relevant for the calculation of the indemnity for the immaterial damage that the State had to repair. [I/A Court H.R., *Moiwana Case*, par. 145(c)].

¹⁴³ IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, par. 56.

¹⁴⁴ IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 16.

¹⁴⁵ IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 16.

¹⁴⁶ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 149. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, pars. 124, 131. I/A Court H.R., *Case of the Plan de Sánchez Massacre v. Guatemala. Reparations and Costs*. Judgment of November 19, 2004. Series C No. 116, par. 85.

¹⁴⁷ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 135. I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 118.

¹⁴⁸ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 154.

57. The lack of access to land and natural resources can produce conditions of extreme poverty for the affected indigenous communities, given that the lack of possession of, and access to, their territories prevents them from using and enjoying the natural resources that they need to obtain the goods necessary for their subsistence, develop their traditional cultivation, hunting, fishing or gathering activities,¹⁴⁹ access traditional health systems,¹⁵⁰ and other key socio-cultural functions. Therefore, the lack of access to ancestral territories, and the lack of State action in this regard, expose indigenous and tribal peoples to precarious or sub-human living conditions in the fields of access to food, water, dignified housing, basic utilities and health,¹⁵¹ and consequently bear an impact –inter alia- upon higher rates of child and infant mortality and malnutrition, and higher vulnerability to illnesses and epidemics.¹⁵² To that extent, the State's lack of guarantee of indigenous and tribal peoples' right to live in their ancestral territory may imply subjecting them to situations of extreme unprotectedness, which entail violations of their rights to life,¹⁵³ to personal integrity, to a dignified existence, to food, to water, to health, to education and children's rights,¹⁵⁴ among others. In addition, disregard for the rights of the members of indigenous communities over their ancestral territories can affect, for the same causes, other basic rights, such as the right to cultural identity, the collective right to cultural integrity, or the right to collective survival of communities and their members.¹⁵⁵ The extreme living conditions borne by the members of indigenous communities that lack access to their ancestral territory cause them to suffer,¹⁵⁶ and undermine the preservation of their way of life, customs and language.¹⁵⁷

B. The Right to Indigenous Territorial Property in Inter-American Human Rights Instruments

58. Although neither the American Declaration of the Rights and Duties of Man nor the American Convention on Human Rights expressly recognize indigenous peoples' rights over their territories, the organs of the Inter-American protection system have concluded that these rights are protected by the right to property in the Declaration Article XXIII and Convention Article 21.¹⁵⁸

¹⁴⁹ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 164.

¹⁵⁰ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1076-1080.

¹⁵¹ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, pars. 257-268, 297 – Recommendation 8.

¹⁵² IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, par. 37.

¹⁵³ IACHR, Arguments before the Inter-American Court of Human Rights in the case of Yakye Axa v. Paraguay. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 157(d). IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1076-1080. IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, pars. 44-48.

¹⁵⁴ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1076-1080. IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, pars. 44-48.

¹⁵⁵ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 241. See also: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 147.

¹⁵⁶ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 73-75.

¹⁵⁷ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 73-75.

¹⁵⁸ Indigenous and tribal peoples' right to territorial property is not a mere internal affair of States. The rules and principles of International Law on indigenous peoples include human rights considerations related to the property, use and occupation by indigenous peoples of their traditional lands. On account of these considerations, it is not valid for States to argue that indigenous peoples' territorial disputes refer solely to internal agrarian controversies over land titles or use; these disputes imply internationally protected human rights aspects [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 124].

59. Consistent with its evolutionary interpretation of human rights guarantees in Inter-American instruments, the IACHR has held that “Article 21 of the American Convention recognizes the right to property of members of indigenous communities within the framework of communal property,”¹⁵⁹ and that the right to property under Article XXIII of the American Declaration “must be interpreted and applied in the context of indigenous communities with due consideration of principles relating to the protection of traditional forms of ownership and cultural survival and rights to land, territories and resources.”¹⁶⁰

60. The Inter-American Court has recalled that “the terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law.”¹⁶¹ Thus, the right to property may encompass property interests in addition to those that are already recognized by states or defined by their internal legislation.¹⁶² The Inter-American Court has underscored that “both the private property of individuals and communal property of the members of the indigenous communities are protected by Article 21 of the American Convention.”¹⁶³

61. Indigenous and tribal peoples’ property rights over their territories are legally equivalent to non-indigenous private property rights,¹⁶⁴ an aspect mandated by the duty of non-discrimination established in the American Declaration of the Rights and Duties of Man and in the American Convention on Human Rights.¹⁶⁵ The rights to equality before the law, equality of treatment and non-discrimination mean that states must establish the legal mechanisms which are necessary to clarify and protect indigenous and tribal peoples’ right to communal property, in the same way that property rights in general are protected in the domestic legal system.¹⁶⁶ States violate the rights to equality before the law, equal protection of the law and non-discrimination when they fail to grant indigenous peoples “the protections necessary to exercise their right to property fully and equally with other members of the population.”¹⁶⁷ Applying this rule, in the case of Mary and Carrie Dann the IACHR found a violation of Article II, in addition to a violation of the right to property (Article XXIII), insofar as the facts of the case revealed that the Western Shoshone people, to which the co-plaintiffs belonged, had historically experienced

¹⁵⁹ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 156.

¹⁶⁰ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 115.

¹⁶¹ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community (Nicaragua)*. *Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 146.

¹⁶² IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 131. The organs of the Inter-American system have acknowledged that the property rights protected by the system are not only those that are already recognized by States or defined by their internal legislation; the right of indigenous and tribal peoples and their members to property has an autonomous meaning in International Human Rights Law, and an autonomous foundation in the context of International Law. Therefore, it does not depend on particular interpretations made in domestic judicial decisions dealing with the possible existence of aboriginal rights according to the internal legal system. [IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, pars. 117, 131] As a safeguard for a human right protected by the Inter-American provisions and other international instruments, the State duty to guarantee the right to indigenous communal property is autonomous from domestic legal provisions, and operates even in the absence of recognition of the right in States’ domestic legal systems.

¹⁶³ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. *Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 143.

¹⁶⁴ Thus, any legal distinction that privileges the property rights of third parties over the property rights of indigenous and tribal peoples is incompatible with Articles 21 and 2 of the American Convention; for example, the Inter-American Court concluded that such was the case in Suriname, where the legal system used the term “factual rights” or “de facto rights” to distinguish indigenous rights from the “de jure” rights of the bearers of real title and other property rights subject to registration, recognition and issuance by the State: “This limitation on the recognition of the legal right of the members of the Saramaka people to fully enjoy the territory they have traditionally owned and occupied is incompatible with the State’s obligations under Article 2 of the Convention to give legal effect to the rights recognized under Article 21 of such instrument.” I/A Court H.R., *Case of the Saramaka People v. Suriname*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 110.

¹⁶⁵ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 119.

¹⁶⁶ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 155.

¹⁶⁷ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 171.

forced expropriation of their lands without benefiting from the application of guarantees established in the United States Constitution to protect persons from arbitrary takings of property.¹⁶⁸

62. The Inter-American Court of Human Rights has repeatedly characterized the right to territorial property as a right whose bearers are the individual persons that make up indigenous or tribal peoples, and whose exercise takes place within collective property systems. At the same time, the IACHR has reiterated that indigenous and tribal peoples' right to property is also a collective right, whose bearer is the corresponding people.¹⁶⁹ This collective dimension coexists with the individual dimension of the right.¹⁷⁰ For the organs of the system, there is no contradiction between the protection of the individual and collective dimensions of the territorial property rights of indigenous peoples and their members.¹⁷¹

¹⁶⁸ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, pars. 142-145.

¹⁶⁹ According to the characterization of the right to indigenous communal property advanced by the IACHR and the Inter-American Court, one of the fundamental elements of this right is its communal or collective nature. Both organs have recognized the collective aspect of indigenous and tribal peoples' rights, "in the sense of rights that are realized in part or in whole through their guarantee to groups or organizations of people" [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 128]. In ruling on the complaints presented against States in the context of indigenous peoples, the IACHR has explained that the provisions of the American Declaration of the Rights and Duties of Man must be interpreted and applied "with due regard to the particular principles of international human rights law governing the individual and collective interests of indigenous peoples" [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 131. IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 98]. In the same sense, applying Article 29 of the American Convention, in cases concerning indigenous and tribal peoples the IACHR has stated that "the American Convention must be interpreted including the principles pertaining to collective rights of indigenous peoples" [IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31st, 2001. Series C No. 79, pars. 140(ñ)]. The right to territorial property has been identified by the IACHR as one of the rights of indigenous and tribal peoples with a collective aspect [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 113]: "the rights of the Community are protected by the American Convention and by provisions set forth in other international conventions" [IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(c)]. Indigenous peoples' right to recognition, titling and/or restitution of their ancestral lands and territories is, thus, a collective right, which is protected by the right to property established in the American Convention on Human Rights [IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 244. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 149. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 137. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 118]; for the IACHR, "Article 21 of the American Convention recognizes the right to property of members of indigenous communities within the framework of communal property" [IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II.135, Doc. 40, August 7, 2009, par. 156].

¹⁷⁰ The Inter-American Court of Human Rights, in turn, "has taken a similar approach to the right to property in the context of indigenous peoples, by recognizing the communal form of indigenous land tenure as well as the distinctive relationship that indigenous people maintain with their land" [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 116. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79] – even though, as explained above, the Inter-American Court has consistently held that territorial property rights are rights of the members of indigenous peoples, individually considered. In the Court's words, "through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention -which precludes a restrictive interpretation of rights-, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property" [I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 148].

¹⁷¹ It is precisely on account of the collective dimension of indigenous and tribal peoples' right to property, that the organs of the Inter-American system have acknowledged that indigenous peoples have a distinctive relationship with the lands and resources they have traditionally occupied and used, by virtue of which said lands and resources are considered to be under the property and enjoyment of indigenous communities as a whole [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 114. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79]; recognition of the collective aspect of indigenous and tribal peoples' rights that "has extended to acknowledgement of a particular connection between communities of indigenous peoples and the lands and resources that they have traditionally occupied and used" [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 128].

63. The collective dimension refers to the “particular connection between communities of indigenous peoples and the lands and resources that they have traditionally occupied and used, the preservation of which is fundamental to the effective realization of the human rights of indigenous peoples more generally and therefore warrants special measures of protection.”¹⁷² The IACHR has explained that indigenous rights and liberties are frequently exercised and enjoyed in a collective manner, in the sense that they can only be properly ensured through their guarantee to an indigenous community as a whole.¹⁷³ In that sense, the American Convention on Human Rights protects modalities of indigenous property in which “the overall territory of the Community is possessed collectively, and the individuals and families enjoy subsidiary rights of use and occupation.”¹⁷⁴ In general, the legal regime on the distribution and use of communal lands must be in accordance with the customary law, values, uses and customs of indigenous peoples and communities.

64. The Inter-American Court has noted that “among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community.”¹⁷⁵ For the Court, “[t]his notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention. Disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons.”¹⁷⁶

65. The IACHR has held that respect for indigenous peoples’ collective rights to property and possession of their ancestral lands and territories is an obligation of OAS member States. Non-compliance with this obligation incurs a State’s international responsibility.¹⁷⁷ The collective right to property in indigenous lands also implies the recognition of a collective property title over such lands. This obligation, as discussed below, has been reiterated in a number of contentious cases decided by the Inter-American Court.

66. The collective nature of indigenous and tribal peoples’ right to territorial property bears a direct incidence upon the content of other rights protected by the American Convention and the American Declaration, giving them a collective dimension. Such is the case of the right to juridical personality,¹⁷⁸ or of the right to effective judicial protection.¹⁷⁹

¹⁷² IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 128.

¹⁷³ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 113. IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 128. IACHR, Resolution No. 12/85, Case No. 7.615, *Yanomami People (Brazil)*, March 5, 1985. The IACHR has underlined that “by interpreting the American Declaration so as to safeguard the integrity, livelihood and culture of indigenous peoples through the effective protection of their individual and collective human rights, the Commission is respecting the very purposes underlying the Declaration which, as expressed in its Preamble, include recognition that [s]ince culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power.” IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 131.

¹⁷⁴ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(a).

¹⁷⁵ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 149.

¹⁷⁶ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 120. I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 87.

¹⁷⁷ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 115.

¹⁷⁸ Lacking the legal capacity to collectively enjoy the right to property and resort to domestic courts to claim its violation, indigenous and tribal peoples are in a situation of vulnerability towards both the State and private third parties [I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 174]. The State must recognize such capacity to the members of the people, in order for them to fully exercise these rights in a collective manner [I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007.

67. The persons who belong to indigenous and tribal groups are guaranteed the totality of human rights protected by international law, and consequently they may exercise an individual right to private property, striving as they do so to avoid entering into conflict with the collective rights of the people.

C. Foundations of the Right to Territorial Property

68. Inter-American jurisprudence has characterized indigenous territorial property as a form of property whose foundation lies not in official state recognition, but in the traditional use and possession of land and resources; indigenous and tribal peoples' territories "are theirs by right of their ancestral use or occupancy."¹⁸⁰ The right to indigenous communal property is also grounded in indigenous legal cultures, and in their ancestral ownership systems, independent of state recognition;¹⁸¹ the origin of indigenous and tribal peoples' property rights is, therefore, also found in the customary system of land tenure that has traditionally existed among the communities.¹⁸² In the case of the *Maya Communities of the Toledo District*, for example, the IACHR concluded that the communities had proved their communal property rights over the lands they inhabited, rights that had arisen "from the longstanding use and occupancy of the territory by the Maya people, which the parties have agreed pre-dated European colonization, and have extended to the use of the land and its resources for purposes relating to the physical and cultural survival of the Maya communities."¹⁸³ The Inter-American Court, for

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Series C No. 172, par. 174]. Recognition of collective juridical capacity "may be achieved by implementing legislative or other measures that recognize and take into account the particular way in which the [respective] people view themselves as a collectivity capable of exercising and enjoying the right to property." [I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 174].

¹⁷⁹ In its judgment in the *Saramaka v. Suriname* case, the Inter-American Court explained that judicial recourses that are only available to individual persons who claim the violation of their individual rights to private property are not adequate or effective to repair alleged violations of the right to communal property of indigenous and tribal peoples and their members; it is necessary for indigenous and tribal peoples, as collective entities, to use such recourses as communities, in order to affirm their members' right to communal property [I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 179]. For the Inter-American Court, it is also necessary for the State to recognize the right to communal property of the members of indigenous and tribal peoples in order for judicial remedies to be effective; a judicial recourse that requires proof of the violation of a right that is not recognized by the State would not be adequate for these types of claims [I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 182]. For these reasons, in its judgment in the *Saramaka People* case, the Inter-American Court ordered Suriname, as a measure of reparation: "grant the members of the Saramaka people legal recognition of their collective juridical capacity, pertaining to the community to which they belong, with the purpose of ensuring the full exercise and enjoyment of their right to communal property, as well as collective access to justice, in accordance with their communal system, customary laws, and traditions" [I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 194(b)].

¹⁸⁰ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 231.

¹⁸¹ Indeed, the right to communal property is derived in the first place from the traditional use and occupation of the land and resources necessary for the physical and cultural subsistence of indigenous and tribal peoples and their members [I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 96], and in the second place from the customary property systems that stem therefrom. As the IACHR has explained, indigenous communities have "communal property rights to land and natural resources based on traditional patterns of use and occupation of ancestral territory" [IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awat Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awat Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(a)]. Indigenous and tribal peoples have, therefore, rights of property, possession and ownership over the lands, territories and resources they have historically occupied [IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 115].

¹⁸² IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awat Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awat Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(c).

¹⁸³ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 127.

its part, has explained that “as a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.”¹⁸⁴ As clarified below, however, indigenous peoples who have been deprived of the possession of the territory they have traditionally occupied preserve their property rights, and have the right to restitution of their lands.¹⁸⁵

69. Given that the foundation of territorial property lies in the historical use and occupation which gave rise to customary land tenure systems, indigenous and tribal peoples’ territorial rights “exist even without State actions which specify them”¹⁸⁶ or without a formal title to property.¹⁸⁷ Official recognition “should be seen as a process of ‘production of evidence establishing the prior ownership of the communities’”¹⁸⁸ and not as a grant of new rights. Territorial titling and demarcation are thus complex acts that do not constitute rights, but merely recognize and guarantee rights that appertain to indigenous peoples on account of their customary use.¹⁸⁹ The organs of the Inter-American system have held that the American Convention is violated when indigenous lands are considered to be state lands because the communities lack a formal title of ownership or are not registered under such title.¹⁹⁰ A legal system which subjects the exercise and defense of the property rights of indigenous and tribal peoples’ members to the existence of a title of private, personal or real ownership over ancestral territories, is inadequate to make such rights effective.¹⁹¹

70. On the other hand, regarding indigenous and tribal peoples’ rights over lands and natural resources, “traditional land tenure is linked to a historical continuity, but not necessarily to a single place and to a single social conformation throughout the centuries”.¹⁹² For such reason, the specific location of settlements within ancestral territory does not determine the existence of the rights; there may have been movements of the places of settlement along history, without hindrance to the American Convention’s protection of the corresponding property rights.¹⁹³ Ultimately, as explained above, the history of indigenous peoples and their

¹⁸⁴ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 151. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 127.

¹⁸⁵ For the Inter-American Court, “possession is not a requisite conditioning the existence of indigenous land restitution rights” [I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 128].

¹⁸⁶ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(a).

¹⁸⁷ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 128.

¹⁸⁸ IACHR, *Third Report on the Human Rights Situation in Colombia*. Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, par. 19.

¹⁸⁹ The exercise of indigenous and tribal peoples’ territorial rights is not conditioned to their express recognition by the State, and the existence of a formal title to property is not a requirement for the existence of the right to indigenous territorial property under Article 21 of the Convention [I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 128]. The dissociation between the customary right to indigenous property and the existence, or lack thereof, of a formal title to property, implies that the act of granting title by States is an act of official recognition and protection of rights, not an act of constitution of rights. Consequently, customary possession and use by indigenous peoples must be the guiding principle for the identification and guarantee of these rights through titling.

¹⁹⁰ IACHR, Arguments before the Inter-American Court of Human Rights in the Case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(j).

¹⁹¹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 111.

¹⁹² IACHR, Arguments before the Inter-American Court of Human Rights in the Case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(a).

¹⁹³ Thus, the IACHR argued before the Inter-American Court in the *Awas Tingni v. Nicaragua* case that the historical relocation of
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cultural adaptations along time are not obstacles for preserving their fundamental relationship with their territory, and the rights that stem from it.

71. Indigenous property rights based on customary use or possession, regardless of the existence of state recognition, exist not only in cases of state claims to property, but also in relation to third parties who purport to hold real property titles over the same areas. The recognition of the normative value of customary indigenous law as the foundation of the right to property also implies that claims to property by indigenous communities who lack a formal title over their lands must be fully taken into account for all legal purposes, most significantly in relation to compliance with State duties related to investment, development or extractive projects,¹⁹⁴ as discussed in further detail below.

D. Land Management and Rights over Natural Resources

72. Indigenous peoples have the right to legal recognition of their diverse and specific forms and modalities of control, ownership, use and enjoyment of their territories,¹⁹⁵ “springing from the culture, uses,

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settlements within ancestral territory did not affect the existence of the territorial rights of which the community was the bearer: “most inhabitants of Awas Tingni arrived during the 1940s to the place where they have their main residence, having come from their former ancestral place: Tuburús. There was a movement from one place to another within their ancestral territory; the Mayagna ancestors were here since immemorial times” [IACHR, Arguments before the Inter-American Court of Human Rights in the Case of Awas Tingni v. Nicaragua. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(h)]. The occupation of a territory by an indigenous people or community is not restricted to the nucleus of houses where its members live; “rather, the territory includes a physical area constituted by a core area of dwellings, natural resources, crops, plantations and their milieu, linked insofar as possible to their cultural tradition” [IACHR, Arguments before the Inter-American Court of Human Rights in the case of the Yakye Axa community v. Paraguay. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 120(h)]. To that same extent, the relationship between indigenous peoples and their territories is not limited to specific villages or settlements; territorial use and occupation by indigenous and tribal peoples “extend beyond the settlement of specific villages to include lands that are used for agriculture, hunting, fishing, gathering, transportation, cultural and other purposes” [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 129]. Hence in the case of the Maya Communities of the Toledo District, the State of Belize had contested the continuity of Maya occupancy of the territory, on the grounds of the dates of establishment of 13 of the 38 villages to which the petition referred; however, the IACHR held that in its opinion, there is significant evidence that the Maya people, through their traditional agriculture, hunting, fishing and other land and resource use practices, have occupied significant areas of land in the Toledo District beyond particular villages since pre-colonial times and that the dates of establishment of particular Maya villages, in and of themselves, are not determinative of or fatal to the existence of Maya communal property rights in these lands”. [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 130].

¹⁹⁴ The State may not liberate itself from its obligation of recognizing the right of the members of indigenous and tribal groups to the use and enjoyment of their system of communal property over territory, arguing that there is a lack of clarity about the ancestral systems of property and possession; thus, in the Saramaka case, the Court held that “the alleged lack of clarity as to the land tenure system of the Saramakas does not present an insurmountable obstacle for the State, which has the duty to consult with the members of the Saramaka people and seek clarification of this issue (...), in order to comply with its obligations under Article 21 of the Convention, in conjunction with Article 2 of such instrument” [I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 101].

¹⁹⁵ This right is included among the principles and rights that must be considered in interpreting and applying the right to property under the Inter-American human rights instruments. IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 115. As clarified by the IACHR, the general international legal principles applicable in the context of indigenous human rights include “the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property” [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130]; indigenous and tribal peoples have a right to communal property over the lands they have traditionally used and occupied, and “the character of these rights is a function of [the respective people’s] customary land use patterns and tenure” [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 151]. For the Inter-American Court, “disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons” [I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 120]. The notion of current use of indigenous territory is understood by the Court in a broad sense, which encompasses not only permanent occupation of such territory, but also an entire array of activities, both permanent and seasonal, aimed at the use of land and natural resources for subsistence purposes, and also at other uses related to the exercise of indigenous culture and spirituality. To this extent, the IACHR has positively valued the legislative incorporation of

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customs, and beliefs of each people”.¹⁹⁶ Their unique relationship to traditional territory may be expressed in different ways, depending on the particular indigenous people involved and their specific circumstances. “[I]t may include the traditional use or presence, be it through spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of natural resources associated with their customs and any other element characterizing their culture.”¹⁹⁷ These modes of using territory are protected by the right to property.¹⁹⁸

73. For this reason,¹⁹⁹ states must recognize and protect productive systems based on extensive use of territory, on temporary use of crops, along with crop rotation and leaving fields fallow – among many other

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“a broad concept of indigenous land and territories, wherein the latter category includes not only physically occup[ie]d spaces but also those used for their cultural or subsistence activities” [IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 160]; the IACHR “finds this approach to be compatible with the cultural reality of indigenous peoples and their special relationship with the land and territory, as well as with natural resources and the environment in general” [IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 160]. The right to property under Inter-American instruments “must be interpreted and applied in the context of indigenous communities with due consideration of principles relating to the protection of traditional forms of ownership and cultural survival and rights to land, territories and resources. These have been held to include the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property, and the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied” [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 115]. Likewise, for the IACHR “the concept of property can consist of co-ownership or in access and use rights, according to the customs of indigenous communities” [IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awat Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awat Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(i)]. In this line, the Inter-American system’s jurisprudence has acknowledged that indigenous peoples’ property rights are not defined exclusively by their rights or titles within States’ formal legal systems, but also include the forms of indigenous communal property that stem from, are derived from or are grounded upon indigenous custom and tradition [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 117].

¹⁹⁶ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 120.

¹⁹⁷ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 131.

¹⁹⁸ There is not just one form of using and enjoying property protected under the American Declaration or the American Convention; both the property and the possession of territories by indigenous and tribal peoples can differ from the classic notion of ownership, and in that sense they are protected by the right to property. [I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 120].

¹⁹⁹ As clarified by the IACHR, the general international legal principles applicable in the context of indigenous human rights include “the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property” [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130]; indigenous and tribal peoples have a right to communal property over the lands they have traditionally used and occupied, and “the character of these rights is a function of [the respective people’s] customary land use patterns and tenure” [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 151]. For the Inter-American Court, “disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons” [I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 120]. The notion of use of indigenous territory is understood by the Court in a broad sense, which encompasses not only permanent occupation of such territory, but also an entire array of activities, both permanent and seasonal, aimed at the use of land and natural resources for subsistence purposes, and also at other uses related to the exercise of indigenous culture and spirituality. To this extent, the IACHR has positively valued the legislative incorporation of “a broad concept of indigenous land and territories, wherein the latter category includes not only physically occup[ie]d spaces but also those used for their cultural or subsistence activities” [IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 160]; the IACHR “finds this approach to be compatible with the cultural reality of indigenous peoples and their special relationship with the land and territory, as well as with natural resources and the environment in general” [IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 160]. The right to property under inter-American instruments “must be interpreted and applied in the context of indigenous communities with due consideration of principles relating to the protection of traditional forms of ownership and cultural survival and rights to land, territories and resources. These have been held to include the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property, and the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied” [IACHR, Report No. 40/04, Case

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examples. Disregarding these systems, or considering that they are tantamount to abandonment of the land, deprives the communities of effective security and legal stability in respect to their property rights.²⁰⁰ Such traditional systems for the control and use of territory “are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples,”²⁰¹ given that “control over the land refers both its capacity for providing the resources which sustain life”²⁰² and to “the geographic space necessary for the cultural and social reproduction of the group.”²⁰³

74. The Inter-American system’s jurisprudence is supported by the terms of other international instruments; ILO Convention No. 169 expressly establishes the state duty to “safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.”²⁰⁴ Article 27 of the International Covenant on Civil and Political Rights similarly establishes the right of persons who belong to ethnic, religious or linguistic minorities to enjoy their own culture together with other members of the group.²⁰⁵ The right to culture includes distinctive forms and modalities of using territories such as traditional fishing, hunting²⁰⁶ and gathering as essential elements of indigenous culture.²⁰⁷ This complex notion of the right to indigenous property is also reflected in the United Nations Declaration on the Rights of Indigenous Peoples, by which “indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired”.²⁰⁸

75. Distinctive modalities of relationship to the ancestral territory generate, in turn, customary systems of land tenure that must be recognized and protected by the State, as the very foundation of indigenous and tribal peoples’ territorial rights.²⁰⁹ Recognition of indigenous customary law by the authorities, and

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12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 115]. Likewise, for the IACHR “the concept of property can consist of co-ownership or in access and use rights, according to the customs of indigenous communities” [IACHR, *Arguments before the Inter-American Court of Human Rights in the case of Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(i)]. In this line, the Inter-American system’s jurisprudence has acknowledged that indigenous peoples’ property rights are not defined exclusively by their rights or titles within States’ formal legal systems, but also include the forms of indigenous communal property that stem from, are derived from or are grounded upon indigenous custom and tradition [IACHR, Report No. 40/04, *Case 12.053, Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 117].

²⁰⁰ IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 19.

²⁰¹ IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 128.

²⁰² IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 128.

²⁰³ IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 128.

²⁰⁴ ILO Convention 169, art. 14.1.

²⁰⁵ IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 130, footnote No. 97. The Human Rights Committee has explained that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples” [Human Rights Committee, General Comment No. 23 (1994): Article 27 (rights of minorities), CCPR/C/21/rev.1/Add.5 (1994), par. 7; cited in IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 130, footnote No. 97]

²⁰⁶ Human Rights Committee, General Comment No. 23 (1994): Article 27 (rights of minorities), CCPR/C/21/rev.1/Add.5 (1994), par. 7; cited in IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 130, footnote No. 97.

²⁰⁷ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 140.

²⁰⁸ United Nations Declaration on the Rights of Indigenous Peoples, Article 26.2.

²⁰⁹ The IACHR has explained, in this line, that the relationship between historic tradition, customary law and territorial property is protected by the American Convention: “traditional patterns of use and occupation of territory by the indigenous communities (...) generate

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particularly by the courts, is necessary for indigenous and tribal peoples to be able to claim and obtain respect for their rights over their territory and natural resources.²¹⁰

76. The Court has reiterated that the right of indigenous peoples to administer, distribute and effectively control their ancestral territory, in accordance with their customary law and communal property systems, forms part of the scope of the right to property encompassed by Article 21 of the American Convention.²¹¹

VI. THE SPECIFIC CONTENT OF INDIGENOUS PROPERTY RIGHTS OVER TERRITORIES

77. Failure to adopt measures to guarantee indigenous peoples' and communities' rights over lands and natural resources in accordance with their traditional patterns of use and occupation is a violation of Articles 1.1 and 2 of the American Convention on Human Rights.²¹²

A. The Geographic Scope of Indigenous Property Rights

78. Indigenous property rights over territory extend in principle over all of those lands and resources that indigenous peoples currently use, and over those lands and resources that they possessed and of which they were deprived, with which they preserve their internationally protected special relationship – i.e. a cultural bond of collective memory and awareness of their rights of access or ownership, in accordance with their own cultural and spiritual rules. Since the *Awat Tingni* case, the Inter-American Court described the extent of the community's right to property, which the State had to protect through delimitation, demarcation and titling, as "the geographical area where the members of the Community live and carry out their activities".²¹³ In similar terms, in *Yakye Axa*, the Court elucidated that the community's right to property extended over "their traditional territories and the resources therein."²¹⁴

79. In order to identify the traditional territory of a given community or people in specific cases, the organs of the Inter-American system have looked to evidence of the historical occupation and use of the lands and

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customary law property systems, they are property rights created by indigenous customary law norms and practices which must be protected, and they qualify as property rights protected by article 21 of the Convention" [IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awat Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awat Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(b)]. Indigenous and tribal peoples have historically suffered racial discrimination, and "one of the greatest manifestations of this discrimination has been the failure of state authorities to recognize indigenous customary forms of possession and use of lands" [IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 167]. Recognition of indigenous customary law by the authorities, and particularly by the courts, is also necessary for recognition of ancestral possession [IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, par. 57], without discrimination. In the IACHR's terms, "non-recognition of the equality of property rights based on indigenous tradition is contrary to the principle of non-discrimination set forth in article 1(1) of the Convention" [IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awat Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awat Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(b)].

²¹⁰ IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, par. 57.

²¹¹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 48.

²¹² IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awat Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awat Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 104(ñ).

²¹³ I/A Court H.R., *Case of the Mayagna (Sumo) Awat Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 153(b).

²¹⁴ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 135.

resources by members of the community, of the development of traditional subsistence, ritual and healing practices therein, of the names given to the area in the community's language, and also to technical studies and documentation, as well as to evidence of the adequacy of the claimed territory for the development of the corresponding community²¹⁵ – always bearing in mind that the relevant traditional territory, for purposes of the protection of the right to communal property, is that of the community itself, and not that of its historical ancestors.²¹⁶

80. It has also been held by the IACHR that States are under a duty to grant to indigenous and tribal peoples "lands, at no cost, of sufficient extent and quality to conserve and develop their ways of life."²¹⁷ The test to determine whether the lands are sufficient in size and quality is whether the members of the community living in that area are or will be guaranteed the continuous exercise of the activities from which they derive their livelihood, and on which the preservation of their culture depends.²¹⁸ The right to a territory of sufficient quality and extent is particularly relevant for certain types of indigenous and tribal peoples whose sociocultural specificity, and whose concrete situations, require a special level of protection. Hence, in the case of hunter-gatherer indigenous communities, who are characterized by itinerant residence patterns, "the area transferred must be sufficient for conservation of their form of life, to ensure their cultural and economic viability, as well as their own expansion".²¹⁹

81. Likewise, special care must be taken in adopting measures to guarantee territories of sufficient extent and quality to peoples in voluntary isolation,²²⁰ peoples in initial contact, binational or plurinational

²¹⁵ I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, pars. 93-107.

²¹⁶ I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 95.

²¹⁷ IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, par. 50, Recommendation 1.

²¹⁸ The IACHR has recommended States, in this sense, to "promptly adopt any such measures as may be necessary to enforce the right to property and possession of the ancestral territory of [indigenous communities] and [their] members, specifically to (...) guarantee the members of the Community the exercise of their traditional subsistence activities" [IACHR, Report No. 73/04, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, October 19, 2004, Recommendation 1. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 8].

²¹⁹ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 120(i).

²²⁰ The IACHR has granted precautionary measures on different occasions to protect the rights of indigenous peoples in voluntary isolation, emphasizing the need to protect their territory for purposes of effectively safeguarding the rights to life and integrity of their members, inter alia. Thus, on May 10th, 2006, the IACHR granted precautionary measures in favor of the Tagaeri and Taromenani indigenous peoples in voluntary isolation in the Amazon forest of Ecuador, who were directly threatened in their very existence as groups by the actors who carried out illegal logging in their territories, and had suffered several murders in the course of said conflict. The IACHR requested the State of Ecuador to adopt the necessary measures to protect these peoples' ancestral territory from the presence and activities of third parties. On March 22, 2007, the IACHR granted precautionary measures in favor of the Mashco Piro, Yora and Amahuaca indigenous peoples, in voluntary isolation in the Department of Madre de Dios, in Peru, threatened in their life and personal integrity, and at risk of disappearance, because of the illegal logging activities carried out in their territory. The IACHR requested the Peruvian State to adopt all the necessary measures to guarantee the life and personal integrity of the members of these three groups, in particular that it adopt measures to prevent irreparable harm resulting from the activities of third parties in their territory. For more information, see: <http://www.iachr.oas.org>. Under the auspices of the UN, a process of formulation of protective guidelines for indigenous peoples in voluntary isolation and initial contact is currently underway. The corresponding report, prepared by the Secretariat of the UN Expert Mechanism on the Rights of Indigenous Peoples, explains that "[p]eoples in isolation are indigenous peoples or subgroups thereof that do not maintain regular contact with the majority population and tend to shun any type of contact with outsiders. Most isolated peoples live in tropical forests and/or in remote, untravelled areas, which in many cases are rich in natural resources. For these peoples, isolation is not a voluntary choice but a survival strategy. (...) Despite their great diversity, these peoples share some general features that are common to all of them: (a) They are highly integrated into the ecosystems which they inhabit and of which they are a part, maintaining a closely interdependent relationship with the environment in which they live their lives and develop their culture. Their intimate knowledge of their environment enables them to maintain a self-sufficient lifestyle generation after generation, meaning that the retention of their territories is vitally important for all of them; (b) They are unfamiliar with the ways in which mainstream society functions, and are thus defenceless and extremely vulnerable in relation to the various actors that attempt to approach them or to observe their process of developing relations with the rest of society (...); (c) They are highly vulnerable and, in most cases, at high

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peoples, peoples at risk of disappearance, peoples in reconstitution processes, shifting cultivators or pastoralist peoples, nomadic or semi-nomadic peoples, peoples displaced from their territories, or peoples whose territory has been fragmented, *inter alia*.

B. Legal Title and Registration

82. By virtue of Article 21 of the American Convention and Article XXIII of the American Declaration, indigenous and tribal peoples are bearers of the rights to property and ownership over the lands and resources they have historically occupied,²²¹ and therefore they have the right to be recognized as the legal owners of their territories,²²² to obtain a formal legal title to property over their lands,²²³ and to the due registration of said

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risk of extinction. Their extreme vulnerability is worsened by threats and encroachments on their territories, which directly jeopardize the preservation of their cultures and ways of life. (...) Their vulnerability is even further aggravated by the human rights violations which they often suffer at the hands of those who seek to exploit the natural resources in their territories and by the fact that aggression against these peoples and their ecosystems generally goes unpunished. (...) Their right to territory is essential, as indigenous peoples in isolation and in initial contact are totally dependent on their environment and their lives revolve around a near-perfect symbiosis with that environment, which enables them to sustain their lives and cultures through the profound knowledge they have of the uses, applications and care of their surroundings. This means that it is impossible to respect their decision to remain in isolation without guaranteeing and respecting the exercise of their territorial rights, as any attack on their environment would amount to an attack on their culture and would jeopardize the maintenance of their isolation.” UN – Human Rights Council – Expert Mechanism on the Rights of Indigenous Peoples: Draft Guidelines on the Protection of Indigenous Peoples in Voluntary Isolation and in Initial Contact of the Amazon Basin and El Chaco – Report prepared by the Secretariat. UN Doc. A/HRC/EMRIP/2009/6, 30 June 2009, pars. 7, 13, 23. On indigenous peoples in voluntary isolation, the UN Special Rapporteur has explained: “Small indigenous communities that shun all contact with modern society and prefer to live in isolation and devote themselves to their traditional subsistence economy are to be found in different parts of the equatorial forests that still exist in the world. Contrary to the image portrayed by some media, these groups are not the original settlers ‘who have never had contact with civilization’, but population groups that for generations have been avoiding contacts that have been extremely violent and deadly for them, leading them to seek refuge in forests. Many of these communities are now on the brink of what some describe as genocide, owing to oil exploration, timber extraction, the introduction of vast commercial plantations, infrastructure works, missionary activity, drug trafficking and international tourism. The few contacts that may take place can turn violent and the diseases carried by the new settlers continue to wipe out a large number of these population groups. (...) The Special Rapporteur recommends that States should undertake to put into effect the necessary mechanisms to protect the lives and integrity of isolated peoples in order to ensure their survival with respect for their human rights.” UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, UN Doc. A/HRC/4/32, 27 February 2007, pars. 42, 48.

²²¹ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 115.

²²² Official recognition of indigenous peoples’ ownership of their territories is not an act of the free will and discretion of States, but an obligation [IACHR, *Third Report on the Human Rights Situation in Colombia*. Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter IX, par. 19]; moreover, States are bound to adopt effective measures to recognize indigenous peoples’ right to communal property over the lands they have traditionally occupied and used [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 193]. The State obligation to recognize and guarantee the exercise of the right to communal property by indigenous peoples necessarily demands that the State “take the appropriate measures to protect the right of the [corresponding indigenous or tribal] people in their territory, including official recognition of that right” [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 132]. By virtue of Article XXIII of the American Declaration of the Rights and Duties of Man, the State is bound to “delimit, title or otherwise [establish] the legal mechanisms necessary to clarify and protect the territory on which their right exists” [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, pars. 193 and 197 – Recommendation 1]; therefore, States violate indigenous peoples’ right to property, established in Article XXIII of the American Declaration of the Rights and Duties of Man, “by failing to take effective measures to recognize their communal property right to the lands that they have traditionally occupied and used, and to delimit, demarcate and title or otherwise establish the legal mechanisms necessary to clarify and protect the territory on which their right exists” [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 152]. In not doing so, States also violate Articles 25, 1.1 and 2 of the American Convention to the detriment of the members of said communities [I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. *Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 137].

²²³ States are under the obligation of securing the right to property of indigenous and tribal peoples and their members over their ancestral lands [IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Sawhoyamaya v. Paraguay*. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. *Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 113(a). IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 115]. Indigenous and tribal peoples, therefore, have the right to enjoy formal title, or other instruments that recognize their property over the lands where they live and develop their cultural and subsistence activities [IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awes Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awes Tingni Community v. Nicaragua*.

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title.²²⁴ Additionally, indigenous and tribal peoples have the right to permanent use and enjoyment of their ancestral territory, to secure which they must obtain legal title.²²⁵ The collective right to property of indigenous lands implies a collective title to territory, that is, the recognition of an equally collective title to property over such lands that reflects the community property of the land,²²⁶ with due respect for indigenous peoples' forms of internal organization with regard to land tenure.²²⁷ In cases of land purchase, the titles must be allocated to the community, and not to the State.²²⁸ The complexity of the matter is no excuse for the State to consider or administer untitled indigenous lands as State lands.²²⁹

83. The issue of title to territory was a central axis of the *Awas Tingni* case, in which the Inter-American Court expressly found that the recognition of indigenous rights to communal property must be secured through the granting of a formal title to property or another similar form of State recognition, which grants legal certainty to indigenous land tenure *vis-à-vis* the acts of third parties or, as in the *Awas Tingni* case, of State agents.²³⁰ In the case of this community, a prolonged lack of title to their lands entailed a clear limitation of their right to property when confronted with concurrent property claims by third parties or by the State itself.²³¹ The Court considered that the repeated failure to respond to *Awas Tingni's* requests for granting of title was a violation of the community's right to property under Article 21 of the American Convention, in connection with Articles 1

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Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 79, par. 104(l). The general international legal principles applicable in the context of indigenous peoples' human rights include "the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied" [IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 130], and "recognition by that State of the permanent and inalienable title of indigenous peoples relative thereto" [IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 130]. The recognition and titling of indigenous and tribal property rights over their territories, as well as due registration of the corresponding titles, "represent essential rights for cultural survival and for maintaining the community's integrity" [IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 16]. Lack of State recognition of indigenous communities' territorial rights violates articles 1 and 2 of the American Convention on Human Rights [IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. *Merits, Reparations and Costs*. Judgment of January 31st, 2001. Series C No. 79, par. 109].

²²⁴ IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, pars. 23-25. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. *Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 153-1.

²²⁵ I/A Court H.R., *Case of the Saramaka People v. Suriname*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 115.

²²⁶ In its judgment in the *Saramaka* case, the Inter-American Court ordered Suriname, as a measure of reparation: "delimit, demarcate, and grant collective title over the territory of the members of the *Saramaka* people, in accordance with their customary laws, and through previous, effective and fully informed consultations with the *Saramaka* people, without prejudice to other tribal and indigenous communities" [I/A Court H.R., *Case of the Saramaka People v. Suriname*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 194(a)]. The IACHR has held that States must adopt "appropriate measures to guarantee the process of legal demarcation, recognition, and issuance to the indigenous communities of land titles, and to ensure that this process not prejudice the normal development of property and community life" [IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 39 – Recommendation 4]. See also: IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, pars. 45, 50 – Recommendation 4.

²²⁷ ILO Convention No. 169, art. 17.1 ("Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected"); United Nations Declaration, Art. 26.3 ("States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.")

²²⁸ IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, pars. 45, 50 – Recommendation 4.

²²⁹ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. *Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, pars. 104(i) and 140(l).

²³⁰ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. *Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, pars. 152-154.

²³¹ *Id.*, par. 141(i).

and 2. The Court's judgment imposed upon Nicaragua the duty to grant title to the community's lands as a form of reparation for the violation of its rights, in accordance with its customary law, values, uses and customs, and with its full participation.²³²

84. Likewise, in the Saramaka case, the Inter-American Court ordered Suriname, as a measure of reparation, to "remove or amend the legal provisions that impede protection of the right to property of the members of the Saramaka people and adopt, in its domestic legislation, and through prior, effective and fully informed consultations with the Saramaka people, legislative, administrative, and other measures as may be required to recognize, protect, guarantee and give legal effect to the right of the members of the Saramaka people to hold collective title of the territory they have traditionally used and occupied, which includes the lands and natural resources necessary for their social, cultural and economic survival."²³³

Example: granting of collective title as a consequence of a friendly settlement agreement

On March 25, 1998, in the framework of a petition against the State of Paraguay concerning the territorial claims of the Lamexay and Kayleyphapopyet (Riachito) indigenous communities of the Enxet and Sanapaná peoples, the State and the communities signed a friendly settlement agreement promoted by the IACHR. In said agreement, "the Paraguayan State agreed to acquire a 21,884.44-hectare tract of land in Pozo Colorado district, Presidente Hayes department, in the Paraguayan Chaco, hand it over to the aforesaid indigenous communities, and register it with the competent authorities as belonging to them" [par. 1] The State effectively complied with the Agreement: it purchased the lands, gave them to the communities, issued legal title to the communities in July 1999, and the corresponding titles were given to the community representatives by the President of the Republic in the presence of the IACHR.

In its report on the friendly settlement, the IACHR "reiterate[d] its appreciation of the Paraguayan State's willingness to settle this case by means of reparations, including the measures needed to reclaim the land and hand it over to the Lamexay and Kayleyphapopyet (Riachito) indigenous communities and to provide them with the requisite social assistance" [par. 22]; it expressed its appreciation of the petitioners and other parties who were affected for having accepted the terms of the agreement; and it held that it would "continue to monitor the ongoing commitments assumed by Paraguay dealing with the sanitary, medical, and educational assistance to be given to the Enxet-Lamexay and Kayleyphapopyet (Riachito) communities in their new settlements and with the upkeep of the access roads leading to their property" [par. 23].

85. The procedures for granting title over indigenous or tribal communal lands must be effective,²³⁴ taking into account the respective people's distinctive traits.²³⁵ The lack of effective, specific and regulated procedures for the granting of title to indigenous communal lands causes a general uncertainty that does not conform to the standards imposed by Article 25 of the American Convention.²³⁶ The lack of internal legislation to obtain title to indigenous ancestral lands is not redressed by the mere availability of judicial recourses that can potentially recognize those rights; the mere possibility of judicial recognition is not a substitute for the real recognition and the granting of title thereof: "a distinction should be made between the State's duty under Article 2 of the Convention to give domestic legal effect to the rights recognized therein, and the duty under Article 25 to provide adequate and effective recourses to remedy alleged violations of those rights. (...) The Court observes that although so-called judge-made law may certainly be a means for the recognition of the rights of individuals, particularly under common-law legal systems, the availability of such a procedure does not, in and of itself, comply with the State's obligation to give legal effect to the rights recognized in the American Convention. That is, the mere possibility of recognition of rights through a certain judicial process is no substitute for the actual recognition of such rights. The judicial process mentioned by the State is thus to be understood as a means by which said

²³² *Id.*, pars. 153(1), 164, 173(3).

²³³ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 194(c).

²³⁴ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 127.

²³⁵ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, pars. 122, 123.

²³⁶ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 124.

rights might be given domestic legal effect at some point in the future, but that has not yet effectively recognized the rights in question.”²³⁷

Example: legal obstacles to obtaining legal title to ancestral territory

In its 1997 report on the situation of human rights in Ecuador, the IACHR identified some legal barriers to the full and effective enjoyment of the right to obtain legal title of property over ancestral territory. The IACHR explained that in Ecuador, “the Civil Code establishes that registered title is required to prove ownership of land, and any land which is not registered is deemed to belong to the State. The system of attributing title provides for the communal holding of real property; however, indigenous leaders complain of encountering consistent barriers to gaining communal title.”

The first barrier was lack of full recognition of indigenous peoples’ organizational units. The IACHR explained that “communities and cooperatives are recognized in Article 46(3) of the Constitution as one of the basic sectors of the economy, and such groups are authorized to hold property communally. Indigenous communal ownership of land is specifically recognized under the Law of ‘*Comunas*.’ However, while the *Comuna* (administered by an elected ‘*cabildo*’) is very popular in the Highlands, the Amazonian indigenous peoples utilize other forms of internal administration.” Thus, the legal system did not recognize the distinctive forms of organization of the country’s different indigenous peoples, preventing some of them from acquiring property titles.

The second barrier consisted of failure to recognize indigenous peoples’ traditional cultivation methods, which made it possible to expropriate communal lands under certain circumstances. The IACHR reported that “the Law of Agrarian Development permits the State to expropriate land that has been left fallow for more than two years. This requirement is inconsistent with indigenous land use systems in some regions of the country. For example, Amazonian forest-dwelling indigenous peoples clear and cultivate small gardens on a rotating basis to maximize the productivity of the shallow top soil. Their methods of managing and harvesting the resources of the forest are consistent with their needs, and with the characteristics of the forest topsoil, which is shallow and poorly suited for the intensive cultivation models contemplated in the Law of Agrarian Development.”

A third limitation identified by the IACHR was “the provision of the Forestry Law which specifies that all land within the borders of legally designated natural reserves must be appropriated by or reverted back to the State. The law does not take into account that a number of these protected areas include lands traditionally inhabited by and of special importance to indigenous peoples.”

The IACHR pointed to other difficulties for territorial legalization including “the continuing designation of traditionally indigenous lands as ‘*tierras baldías*’ [unclaimed lands]”, as well as “bureaucratic obstacles which continue to hinder claimants seeking action or redress.”

C. Legal Certainty of Title to Property

86. Ensuring the effective enjoyment of territorial property by indigenous or tribal peoples and their members is one of the ultimate objectives of this right’s legal protection. As established in the foregoing sections, States have the obligation to adopt special measures to secure the real and effective enjoyment of indigenous peoples’ rights to territorial property. For this reason, the IACHR has emphasized that “demarcation and legal registry of the indigenous lands is in fact only the first step in the establishment and real defense of those areas,”²³⁸ given that the ownership and effective possession are constantly being threatened, usurped or eroded by various *de facto* or legal acts.

87. Indigenous and tribal peoples’ right to territorial property must have legal certainty.²³⁹ The legal framework must provide indigenous communities with effective security and legal stability for their lands.²⁴⁰ This implies that indigenous and tribal peoples’ legal title to property over land “must be recognized and respected, not only in practice, but also in law, in order to ensure its legal certainty”.²⁴¹ Legal uncertainty in respect to these

²³⁷ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, pars. 104, 105.

²³⁸ IACHR, *Report on the Situation of Human Rights in Brazil*, Doc. OEA/Ser.L/V/II.97, Doc. 29 rev. 1, September 29, 1997, par. 33.

²³⁹ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1137 – Recommendation 3.

²⁴⁰ IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 19.

²⁴¹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 115.

rights makes indigenous and tribal peoples “especially vulnerable and open to conflicts and violation of rights.”²⁴² Factors that cause legal uncertainty include: the possession of titles to property that are not recognized by common law; titles to property that are in conflict with other titles; titles that are not fully registered; unrecognized titles. In some cases they also include lack of knowledge by the courts of the rights that stem from ancestral use and possession, or lack of recognition of indigenous customary law, which “blocks or considerably limits their ability to assert these rights, as well as recognition of ancestral possession of their lands.”²⁴³

88. The right to legal certainty of territorial property requires the existence of special, prompt and effective mechanisms to resolve existing legal conflicts over the ownership of indigenous lands.²⁴⁴ States are, consequently, bound to adopt measures to establish such mechanisms²⁴⁵ including protection from attacks by third parties.²⁴⁶ Part of the legal certainty to which indigenous and tribal peoples are entitled consists in having their territorial claims receive a final solution. That is to say, once the claims procedures over their ancestral territories have been initiated, be it before administrative authorities or before the Courts, their claim should be given a final solution within a reasonable time, without unjustified delays.²⁴⁷

89. Effective security and legal stability of lands are affected whenever the law fails to guarantee the inalienability of communal lands and instead allows communities to freely dispose of them, to establish liens, mortgages or other encumbrances, or to lease them.²⁴⁸ To avoid this, some of the OAS member states have crafted special legal mechanisms for the protection of indigenous lands and territories, such as the recognition of legal guarantees of indivisibility, inalienability, and non-subjection to adverse possession or to liens of the lands titled in favor of indigenous peoples. These mechanisms may be adequate to guarantee the legal certainty of indigenous territorial property rights.

90. Legal certainty also requires that indigenous peoples’ titles to property be protected against arbitrary extinction or reduction by the State, and against trumping by third parties’ property rights.²⁴⁹ Prior consultation with, and the consent of, the relevant indigenous people are required for the adoption of any State decision that can legally affect, modify, reduce or extinguish indigenous property rights; in the IACHR’s opinion, “Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of

²⁴² IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, par. 57.

²⁴³ IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, par. 57.

²⁴⁴ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1137 – Recommendation 3.

²⁴⁵ IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, par. 66 – Recommendation 4.

²⁴⁶ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1065, 1071, 1137 – Recommendation 2.

²⁴⁷ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, pars. 52(c) and 52(e). I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, pars. 85, 103. IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Sawhoyamaya v. Paraguay*. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, pars. 74(a) and 74(e).

²⁴⁸ IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 18.

²⁴⁹ I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, par. 115.

the indigenous community as a whole.”²⁵⁰ For the IACHR, the general international legal principles applicable in the context of indigenous peoples’ human rights include the right to have their legal title to the property and use of territories and resources “changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.”²⁵¹ If such consent is obtained, and an indigenous people’s title to property is consequently to be extinguished or reduced, the state must secure its members equality of treatment *vis-à-vis* non-indigenous persons, and comply with the general requirements established in international law for an expropriation,²⁵² including fair compensation²⁵³ - and respecting all of the additional guarantees and safeguards of indigenous and tribal peoples’ territorial property provided by International Law, as explained in the present Study.²⁵⁴ In this same fashion, the IACHR has explained that the State may not justify the extinction of indigenous ancestral title to property over territory based on a desire or policy to promote settlements or agricultural development, especially when there is continuity in the occupation and use of that territory by the corresponding indigenous or tribal people’s members, even if such occupation and use are partial.²⁵⁵

91. Legal certainty for indigenous and tribal peoples’ titles to territorial property also requires State authorities to abstain from affecting such titles by means of legal or socio-political strategies, such as the creation of non-indigenous municipalities inside indigenous territories,²⁵⁶ the adoption of judicial decisions which are arbitrarily contrary to their rights,²⁵⁷ or the deployment of legal or political attacks aimed at undermining the stability of the rights which have already been established, or the consolidation of those which are in the process of establishment.²⁵⁸

92. The legal certainty of title to territorial property also has practical manifestations which have been highlighted by the Inter-American protection system. The lack of effective delimitation and demarcation of indigenous territories, even if there exists a formal recognition of their members’ right to communal property, causes “a climate of constant uncertainty” in which the members of the communities “do not know for certain how far their communal property extends geographically and, therefore, they do not know until where they can freely use and enjoy their respective property”.²⁵⁹

²⁵⁰ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 142.

²⁵¹ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130.

²⁵² Giving indigenous peoples a different treatment as regards compliance with these requirements of expropriation, without an objective and reasonable justification based on a legitimate purpose, is a violation of the right to equality in the determination of their property rights over their ancestral territories [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, pars. 143, 144, 145].

²⁵³ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, pars. 143, 144, 145.

²⁵⁴ By virtue of Articles II (right to equality), XVIII (right to due process and to a fair trial) and XXIII (right to property) of the American Declaration of the Rights and Duties of Man, States are in the obligation of adopting “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation” [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 131].

²⁵⁵ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 145.

²⁵⁶ IACHR, *Report on the Situation of Human Rights in Brazil*, Doc. OEA/Ser.L/V/II.97, Doc. 29 rev. 1, September 29, 1997, pars. 40-43, 83-Recommendation 5.

²⁵⁷ IACHR, *Report on the Situation of Human Rights in Brazil*, Doc. OEA/Ser.L/V/II.97, Doc. 29 rev. 1, September 29, 1997, pars. 34, 82(a), 82(d).

²⁵⁸ IACHR, *Report on the Situation of Human Rights in Brazil*, Doc. OEA/Ser.L/V/II.97, Doc. 29 rev. 1, September 29, 1997, pars. 33-39, 82(a), 82(d).

²⁵⁹ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 153.

93. The Inter-American Court has also explained that recognition of indigenous and tribal peoples' right to property must be made in full, and have legal certainty as to its stability; it does not satisfy the American Convention to substitute it for other legal devices, such as forestry concessions, which grant limited rights and are subject to revocation.²⁶⁰ The Inter-American Court has held that Articles 21, 2 and 1.1 of the American Convention are not fulfilled by a legal framework that grants the members of indigenous and tribal peoples a mere privilege to use the land, instead of securing them the permanent use and enjoyment of their territory: "The Court has held that, rather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment".²⁶¹ According to the Court, it is not sufficient to comply with the American Convention for the domestic legislation to recognize indigenous and tribal peoples certain interests, not rights, in relation to lands: "an alleged recognition and respect in practice of 'legitimate interests' ... cannot be understood to satisfy the State's obligations under Article 2 of the Convention with regards to Article 21 of such instrument."²⁶² A legal system that does not recognize the right to territorial property of the members of indigenous and tribal peoples through the granting of full ownership titles, but which recognizes instead simple interests, privileges or permits of use and occupation of the lands at the State's discretion, places the corresponding State in a situation of non-compliance with its duty to make that right effective in its domestic system under Article 21 of the Convention, in connection with Articles 1.1 and 2.²⁶³

Example: State actions that undermine the legal certainty of indigenous and tribal peoples' title to territorial property and territorial rights

In its 1997 report on the situation of human rights in Brazil, the IACHR identified several types of State actions that undermined the legal certainty of the territorial rights of the country's indigenous peoples. For the Commission, these actions proved that "demarcation and legal registry of the indigenous lands is in fact only the first step in the establishment and real defense of those areas," given that such "ownership and effective possession is constantly being threatened, usurped or eroded by various acts", which included "judicial and political attacks on the permanent status of rights that have already been established, or the consolidation of those in process." [par. 33]

The IACHR pointed out that since 1993, the courts of some federal States had adopted decisions that were contrary to indigenous peoples' rights. In second place, the IACHR reported that some non-indigenous persons who were occupying ancestral territories resorted to a legal strategy, namely, "to attack Decree 22/91--which established the procedures for demarcation and registry of indigenous lands--on the grounds that it did not grant the right of defense to possible occupants or holders of rights in the face of administrative acts of the Government that had recognized the indigenous rights", taking into account that the National Constitution establishes the right to review of the State's administrative acts. In order to respond to this legal attack, the Government issued Decree 1775/96, which established a summary procedure that added one recourse avenue to the process for the determination of indigenous peoples' territorial rights: "Through this recourse, private parties and local or State governmental authorities were enabled to contest the creation or demarcation of indigenous areas, through the provision of evidence which denied prior occupation by the indigenous, or which proved third party rights over those lands." The Government argued that the aim of this procedure was "to avoid this putative judicial threat to the juridical clarity of indigenous titles", and that the recourse "was necessary to guarantee due process to third parties and government agencies, so that any subsequent recognition of indigenous territories would be immune to unconstitutional remedies; and that this would imbue the process with transparency." Decree 1775/96 was the target of several lawsuits, in spite of which, by the expiration of the term for filing claims in April 1996, over 545 claims by occupants were presented with regard to 45 indigenous territories, affecting nearly 35% of the lands that were demarcated or undergoing demarcation. As explained by the IACHR, "the greatest number of land claims from non-indigenous persons under Decree 1775 occurred in the State of Roraima. The ones about land in the Indian area of San Marcos alone were the subject of 573 claims. The Legislative Assembly of Roraima itself offered free legal advice to the claimants, and presented its own claim to indigenous lands." Finally, in July 1996, the FUNAI finished examining the claims and deciding on their merits; it rejected most of the non-indigenous claims. [pars. 35-39]

In third place, the IACHR referred to the process of establishment of new municipalities, located totally or partially in lands that were being claimed or even demarcated as indigenous areas, by decision of State authorities. The IACHR explained that the creation of these municipalities

²⁶⁰ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 113.

²⁶¹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 115.

²⁶² I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 106.

²⁶³ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 116.

“results in the establishment of a new jurisdiction, which not only erodes the limited indigenous sovereignty recognized by the Constitution, but also becomes a source of friction between the indigenous authorities and the municipal officials, since the latter are dependent on the state political system.” The creation of these new municipalities also entailed serious additional problems for the indigenous or tribal peoples who inhabited the respective territory; the IACHR explained that the “creation of new municipalities in fact serves as a tool for dividing the local indigenous peoples, since it provides a means of attracting or bribing some local leader to take part in the municipal government ignoring the internal structure of the indigenous government, and thus provoking the excision thereof. At the same time, the municipality's structure and its power relations tend to favor the settlement of nonindigenous persons--along with public services and authorities which compete with the ones already provided by or accepted by the indigenous authorities--in those areas.” [pars. 42-43] Bearing the above in mind, the IACHR recommended the State “to suspend all decisions on municipalization that have an effect on Indian lands, including those for which demarcation and official sanction are underway; and to establish procedures aimed at maintaining their integrity and autonomy in conformity with the constitutional provisions in force.” [Recommendation (c)].

In general terms, the IACHR classified these State actions as “obstacles which thwart firm application of the constitutional and legal precepts regarding indigenous lands” [par. 40]. It thereby concluded that “over the past decade, the Indian peoples of Brazil have made major strides, insofar as their rights --including the demarcation and ownership of their lands--are concerned. Their cultural and physical integrity, as well as the integrity of their lands are, however, under constant threat and attack by both individuals and private groups who disrupt their lives and usurp their possessions. What is more, there have been attempts by the authorities of several States to erode their political, civil and economic rights”; and that “significant progress has been made in recognizing, demarcating, and granting territorial lands to the Indian peoples. Nonetheless, there are some cases, especially in the State of Roraima, where the Commission was able to confirm that action had been taken by the state to erode the human rights of the Indian population.” [par. 82, (a) and (d)]

D. Delimitation and Demarcation of Ancestral Territory

94. Indigenous peoples and their members have the right under Article XXIII of the American Declaration of the Rights and Duties of Man²⁶⁴ and under Article 21 of the American Convention on Human Rights²⁶⁵ to delimitation and demarcation of their territory by the State.²⁶⁶ Indeed, the main mechanism the organs of the system have identified²⁶⁷ to guarantee indigenous territorial property rights is the delimitation and demarcation of the lands that belong to indigenous peoples.²⁶⁸ The Inter-American Court has explained that it is necessary to materialize the territorial rights of indigenous peoples through the adoption of the legislative and administrative measures necessary to create an effective delimitation and demarcation mechanism, which recognizes such rights in practice.²⁶⁹ In fact, “merely abstract or juridical recognition of indigenous lands,

²⁶⁴ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, pars. 134, 193.

²⁶⁵ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(n).

²⁶⁶ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 153-1.

²⁶⁷ In the Inter-American sphere, the issue of demarcation of indigenous lands and territories was first examined in 1985, in the context of the IACHR Report on the situation of the Yanomami people, in the Brazilian states of Mato Grosso and Roraima. In this case, the Commission studied the situation of the Yanomami people as a consequence of the devastating effects that they had borne on account of the construction of a highway in their ancestral territory, which spurred access and invasion by settlers and illegal gold miners (*garimpeiros*), identifying a violation of the basic human rights of that people's members, including the rights to life and security (Art. I of the American Declaration), to residence and circulation (Art. VIII) and to preservation of health and welfare (Art. IX). Among the corrective measures requested, the IACHR recommended Brazil to proceed with the delimitation and demarcation of the Yanomami Park, following an initial Government plan that, as a whole, spanned over 9 million hectares.

²⁶⁸ In practice, the Inter-American Court has explained that before proceeding to the granting of title, it is necessary to demarcate and delimit the territory, in consultation with the respective people and with its neighbours: “In order to obtain such title, the territory traditionally used and occupied by the members of the Saramaka people must first be delimited and demarcated, in consultation with such people and other neighboring peoples” [I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 115]. Merely legal or abstract recognition of lands, territories and resources, even if they have been titled, loses meaning if the property has not been physically established or delimited [I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 115].

²⁶⁹ Delimitation and demarcation of indigenous territories are preconditions of their effective enjoyment in practice: “The Court believes it necessary to make the rights recognized by the Nicaraguan Constitution and legislation effective, in accordance with the American Convention. Therefore, pursuant to article 2 of the American Convention, the State must adopt in its domestic law the necessary legislative, administrative, or other measures to create an effective mechanism for delimitation and titling of the property of the members of the Awas

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territories, or resources, is practically meaningless if the property is not physically delimited and established.”²⁷⁰ The IACHR has generally held that the State obligation to recognize and guarantee the exercise of the right to communal property by indigenous peoples “necessarily requires the State to effectively delimit and demarcate the territory to which the people’s property right extends and to take the appropriate measures to protect the right of the [corresponding] people in their territory, including official recognition of that right”.²⁷¹

95. The lack of demarcation and granting of title over ancestral lands, in preventing or hampering access by indigenous and tribal peoples to their territories, and the use and enjoyment of the natural resources that are located therein, places them in a situation of extreme vulnerability that bears a direct impact upon their other human rights, including the rights to food, safe drinking water and health.²⁷² To the same extent, “the recovery, recognition, demarcation, and registration of the lands represents essential rights for cultural survival and for maintaining the community’s integrity”.²⁷³ The absence or tardiness of granting of title and demarcation of indigenous and tribal peoples’ ancestral territories can also heighten the impact of projects for the exploration and exploitation of natural resources in said territories, and generate violent conflicts between such peoples and third parties around those extractive projects.²⁷⁴ The lack of demarcation of the ancestral lands of indigenous communities constitutes, consequently, a violation of Articles 21, 1 and 2 of the American Convention on Human Rights.²⁷⁵

96. Indigenous and tribal peoples have a right to special, adequate and effective²⁷⁶ procedures for the delimitation, demarcation and granting of title of their territories.²⁷⁷ Owing to the specific traits of indigenous communal property, these procedures must be different from the general mechanisms for granting of title over agrarian property that are available to other sectors of society. The mere adoption of legislative or administrative mechanisms that are adjusted to these standards is insufficient if they do not lead, in practice, to guaranteeing the right to communal property within a reasonable time.²⁷⁸ The Inter-American Court will examine procedures for

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Tingni Mayagna Community, in accordance with the customary law, values, customs and mores of that Community” [I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 79, par. 138].

²⁷⁰ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of June 17, 2005. Series C No. 125, par. 143.

²⁷¹ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 132.

²⁷² IACHR, *Democracy and Human Rights in Venezuela.* Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1076-1080.

²⁷³ IACHR, *Second Report on the Situation of Human Rights in Peru.* Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 16.

²⁷⁴ IACHR, *Democracy and Human Rights in Venezuela.* Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1066.

²⁷⁵ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua.* Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 79, par. 109.

²⁷⁶ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 79, par. 127. IACHR, *Democracy and Human Rights in Venezuela.* Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1071, 1137 – Recommendation 1.

²⁷⁷ Indigenous and tribal peoples are entitled to have access to expeditious procedures for the granting of title, delimitation and demarcation of communal lands, which are free from excessive legal rigors or high costs, and to obtain effective title over their lands without delays, so as to prevent conflicts and attacks caused by the territorial claims processes [IACHR, *Democracy and Human Rights in Venezuela.* Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1063, 1071]. Procedures which are long, repetitive, delayed, costly or formalistic, cause detriment to the communities’ rights [IACHR, *Second Report on the Situation of Human Rights in Peru.* Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 21]. States must also abstain from acting in a negligent or arbitrary manner in relation to requests for granting of title or territorial demarcation by indigenous communities [IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua.* Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 79, par. 104(l)].

land titling, demarcation and delimitation to ensure conformity with the requirements of effectiveness and reasonable time established in Article 25 of the American Convention.²⁷⁹

97. In the *Awás Tingni* case, the Nicaraguan Constitution and legislation recognized indigenous peoples' right to property over their lands and natural resources, but there did not exist a specific procedure to make such right effective through territorial demarcation. Consequently, the demarcation of indigenous communities' territories had to be carried out in the framework of the existing agrarian legislation, one that promoted land distribution in accordance with criteria of proportionality and economic profit.²⁸⁰ According to the Court, the absence of special demarcation mechanisms was a violation of Article 25 of the Convention.²⁸¹ Said mechanisms must also be effective, in the sense that has been broadly elaborated by the jurisprudence of the system.²⁸² States violate the right of the members of indigenous communities to use and enjoyment of their territory when they fail to delimit and demarcate their communal property, as required by Article 21 of the American Convention.²⁸³

98. The international obligation to define and demarcate the precise territory encompassed by indigenous and tribal peoples' property rights must be carried out by States in full collaboration with the respective peoples.²⁸⁴ In more general terms, the State mechanisms to demarcate indigenous lands must involve the peoples' full participation.²⁸⁵ All of the phases of the procedure to delimit and demarcate indigenous and

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²⁷⁸ In order to comply with the requirements established in Article 25, it is not sufficient for there to be legal provisions that recognize and protect indigenous property; it is necessary for there to exist specific and clearly regulated procedures for the granting of title to the lands occupied by indigenous groups [I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 79, pars. 122, 123].

²⁷⁹ I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 79, par. 115. The Inter-American Court has examined, in light of the requirements of effectiveness and reasonable time established in Article 25 of the American Convention, whether there exist in the domestic legal systems procedures for the granting of title, delimitation and demarcation of lands, and if they do, whether they comply with said requirements [I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 79, par. 115]. Non-existence of effective procedures or mechanisms to grant title to, delimit and demarcate indigenous lands may not be excused because of the complexity of the matter, given that it is a State duty under the American Convention on Human Rights [IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awás Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 79, par. 104(i)].

²⁸⁰ I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 79, par. 122 (referring to Law No. 14 on Agrarian Reform, of January 11, 1986).

²⁸¹ I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 79, par. 139. The lack of effective, specific and regulated procedures for the granting of title, delimitation and demarcation of indigenous communal lands causes general confusion, lack of certainty as to what should be done and before whom a petition for demarcation and titling should be filed [I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 79, par. 124].

²⁸² Cfr. I/A Court H.R., *Case of the Constitutional Court v. Peru. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 71, par. 90; I/A Court H.R., *Case of Bámaca-Velásquez v. Guatemala. Merits.* Judgment of November 25, 2000. Series C No. 70, par. 191; I/A Court H.R., *Case of Cesti-Hurtado v. Peru. Merits.* Judgment of September 29, 1999. Series C No. 56, par. 125.

²⁸³ I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 79, par. 153.

²⁸⁴ States have the international legal obligation to define and demarcate the territory of indigenous peoples in accordance with their own traditions and cultures; this obligation must be carried out with the full collaboration of each people in accordance with its customary land use practices. IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 130. In other words, States must "adopt in domestic law, and through fully informed consultations with the [respective] people, the legislative, administrative, and any other measures necessary to delimit, demarcate and title or otherwise clarify and protect the territory in which the [indigenous] people have a communal property right, in accordance with their customary land use practices, and without detriment to other indigenous communities." [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 197 – Recommendation 1].

²⁸⁵ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awás Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 79, par. 140(g).

tribal territories, including the very creation of the mechanisms and procedures, must be carried out with the full participation of the directly affected peoples, as bearers of the right to communal property.²⁸⁶

99. The IACHR has reiterated that the State obligation to effectively delimit and demarcate indigenous peoples' ancestral territory "necessarily includes engaging in effective and informed consultations with the [respective] people concerning the boundaries of their territory,"²⁸⁷ taking into account their traditional land use practices and customary land tenure system.²⁸⁸

100. The demarcation of their lands should be carried out without delays,²⁸⁹ and States must abstain from acting in a negligent or arbitrary manner in relation to indigenous communities' requests for territorial demarcation.²⁹⁰ Nonetheless, territorial demarcation procedures must fulfill the ultimate objective of guaranteeing effective use and enjoyment, by indigenous communities, of their right to communal property, with the complexities that are inherent to this type of procedures. In this sense, the Court has applied flexible criteria in establishing time limits to carry out territorial demarcation, in relation to specific cases where it has identified a violation of the right to property. For example, in the *Awas Tingni* case, the Court ordered Nicaragua to grant title over the community lands within a term of 12 months starting on the date of publication of the judgment.²⁹¹ In the *Yakye Axa and Sawhoyamaya* cases, which involved the resolution of a property conflict with third parties in possession of the lands, that term was broadened to three years.²⁹² Despite this temporal flexibility, prolonged and unjustified tardiness in attending demarcation claims has been regarded by the Court as a violation of Article 25 of the Convention.²⁹³

101. Indigenous and tribal peoples have a right to the prevention of conflicts with third parties caused by land property, particularly in cases where tardiness in demarcation, or the lack thereof, have the potential to cause conflicts;²⁹⁴ to that extent, indigenous and tribal peoples have the right to a prompt granting of title, delimitation and demarcation of their lands without delays, so as to prevent conflicts and attacks caused by the territorial claim processes.²⁹⁵ Indeed, the lack of demarcation of ancestral lands, or delay in demarcation, can cause serious territorial conflicts between indigenous and tribal peoples and third parties – often violent ones. Indigenous and tribal peoples, in these cases, have the right to obtain an urgent demarcation through procedures which are adequate and effective to conduct the process; to have the effective enjoyment of their right to property secured; to the prevention of the occurrence of such conflicts; to protection from attacks by the third parties with whom they have entered into conflicts; to an effective investigation and sanction of those responsible for the attacks; and to the establishment of special, prompt and effective mechanisms to solve legal conflicts over

²⁸⁶ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 132.

²⁸⁷ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 132.

²⁸⁸ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 132.

²⁸⁹ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1060, 1071, 1137 – Recommendation 1.

²⁹⁰ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 104(I).

²⁹¹ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, pars.164, 173.4

²⁹² I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 210-215, 248; I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, pars. 211-217.

²⁹³ See, e.g. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, pars. 113-138.

²⁹⁴ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1137 – Recommendation 2.

²⁹⁵ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1063, 1071.

ownership of their lands.²⁹⁶ To that same extent, States must adopt “appropriate measures to guarantee the process of legal demarcation, recognition, and issuance to the indigenous communities of land titles, and to ensure that this process not prejudice the normal development of property and community life”.²⁹⁷

102. The content of the different stages of delimitation, demarcation and granting of title has not been developed by the Inter-American jurisprudence. This content must be regulated by States in accordance with their own specificities and legal traditions, but the measures taken must nonetheless conform to the above-described Inter-American guidelines.

Interim Territorial Protection Pending Delimitation, Demarcation and Titling

103. The protective safeguards of the right to property under the Inter-American human rights instruments can be invoked by indigenous peoples in relation to territories that belong to them, but have not yet been formally titled, delimited or demarcated by the State. One of the main implications of this norm is that States cannot grant concessions for the exploration or exploitation of natural resources that are located in territories which have not been delimited, demarcated or titled, without effective consultations with and the informed consent of the people.²⁹⁸ Consequently, States violate Article XXIII of the American Declaration and Article 21 of the American Convention, unless they abstain from “granting logging and oil concessions to third parties to utilize the property and resources that could fall within the lands which must be delimited, demarcated and titled or otherwise clarified and protected, in the absence of effective consultations with and the informed consent of the [respective] people.”²⁹⁹ Following this line, the IACHR has established that until indigenous and tribal lands have been demarcated, delimited and titled, States must abstain from “any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the [respective] people.”³⁰⁰

104. The Inter-American Court has adopted a similar position, in explaining the State must “abstain from carrying out, until that delimitation, demarcation, and titling have been done, actions that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out their activities”.³⁰¹ The Court has demanded the same in subsequent cases.³⁰² In the Saramaka case, the Court added that with regard to concessions already granted within traditional Saramaka territory without consulting the affected people, “the State must review them, in light of the present Judgment and the

²⁹⁶ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1062-1066; 1071; 1137 – Recommendations 1 to 4.

²⁹⁷ IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 39 – Recommendation 4.

²⁹⁸ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 153.

²⁹⁹ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 194.

³⁰⁰ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 197 – Recommendation 2.

³⁰¹ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 153(b).

³⁰² I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, pars. 211-217, 242.6; I/A Court H.R., *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 15, 2005. Series C No. 124, pars. 209-211; I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 210-215, 248(6); I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, pars. 194.5 and 214.5.

Court's jurisprudence, in order to evaluate whether a modification of the rights of the concessionaires is necessary in order to preserve the survival of the Saramaka people."³⁰³

105. In connection with the above, the IACHR has underscored that the absence or tardiness of granting of title and demarcation of indigenous and tribal peoples' ancestral territories can heighten the impact of projects for the exploration and exploitation of natural resources in said territories, as well as cause violent conflicts between said peoples and third parties on account of such projects.³⁰⁴

106. In sum, as the Court held in the *Awas Tingni* and subsequent cases, States may not design or implement development or investment plans or programs, nor grant concessions for the exploitation of natural resources, which can affect indigenous communities until their communal property rights have been fully identified and secured through the granting of title, delimitation and demarcation.³⁰⁵

E. Possession and Use of Territory

107. As part of the right to property protected under Inter-American human rights instruments, indigenous and tribal peoples have the right to possession, use, occupation and inhabitation of their ancestral territories. This right is, moreover, the ultimate objective of the protection of indigenous or tribal territorial property: for the IACHR, the guarantee of the right to territorial property is a means to allow members of indigenous communities to possess their lands.³⁰⁶ This implies, in clear terms, that indigenous and tribal peoples have the right to live in their ancestral territories,³⁰⁷ a right which is protected by Article 21 of the American Convention³⁰⁸ and Article XXIII of the American Declaration,³⁰⁹ and affirmed by the Inter-American Court: "Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory."³¹⁰ This also implies that OAS member States are under an obligation to respect and protect the collective right to possession of indigenous and tribal peoples' ancestral territories through the adoption of "special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources."³¹¹ Non-compliance with this obligation engages the State's international responsibility.³¹²

³⁰³ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 194(a).

³⁰⁴ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1066.

³⁰⁵ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, pars. 153, 164, 174.4; I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, pars. 194.5, 214.5.

³⁰⁶ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Sawhoyamaxa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 113(a).

³⁰⁷ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Sawhoyamaxa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 113(c).

³⁰⁸ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 120(f).

³⁰⁹ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 115.

³¹⁰ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31st, 2001. Series C No. 79, par. 149.

³¹¹ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 131. The Inter-American Court has also held that the right to possession can have a collective understanding protected by the American Convention [I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 89]. In its judgment on the case of the Saramaka people, the Inter-American Court ordered Suriname, as a reparation measure, to "adopt legislative, administrative and other measures necessary to provide the members of the Saramaka people with adequate and effective recourses against acts that violate their right to the use and enjoyment of property in accordance with their communal

108. As explained by the IACHR, general international legal principles applicable to indigenous and tribal peoples' human rights include the recognition of their right to the possession of the lands and resources they have historically held,³¹³ as well as recognition by States of the permanent and inalienable user rights.³¹⁴ The IACHR has also established that indigenous and tribal peoples' right to the possession of ancestral lands is directly linked to indigenous persons' right to cultural identity, insofar as culture is a way of life intrinsically associated to traditional territory;³¹⁵ and that by virtue of Articles II (right to equality), XVIII (rights to due process and fair trial) and XXIII (right to property) of the American Declaration of the Rights and Duties of Man, States are obliged to take "special measures to ensure recognition of indigenous peoples' right to the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation".³¹⁶

109. The Inter-American Court has associated indigenous and tribal peoples' right to possession, use, inhabitation and occupation of ancestral territory to the very core of the right to property protected by Article 21 of the Convention. The Court has pointed out that Article 21 of the American Convention recognizes the right to property, understood as the use and enjoyment of property,³¹⁷ and that precisely during the Convention's *travaux préparatoires*, the expression "private property" was replaced for "use and enjoyment of his property."³¹⁸ In this regard, the Court also clarified that "Property" can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value³¹⁹ -- a definition that is applicable, with due regard for the corresponding specificities, to the relationship established between indigenous and tribal peoples and their territories, with all of the elements that they comprise.

110. Indigenous and tribal peoples have the right to possession and control their territory without any type of external interference³²⁰, given that territorial control by indigenous and tribal peoples is a necessary condition for the maintenance of their culture³²¹. Article 21 of the Convention, in this sense, recognizes the members of indigenous and tribal peoples the right to freely enjoy their property, in accordance with their community tradition.³²²

...continuation

land tenure system. The State must comply with this reparation measure within a reasonable time" [I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 194(f)].

³¹² IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 115.

³¹³ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130.

³¹⁴ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130.

³¹⁵ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1050.

³¹⁶ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 131.

³¹⁷ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 143.

³¹⁸ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 145.

³¹⁹ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 144. I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment February 6, 2001. Series C No. 74, par. 122.

³²⁰ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 115.

³²¹ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 146.

³²² I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 95.

111. Traditional possession of ancestral territories has effects equivalent to those of State-issued full ownership property titles, and gives indigenous and tribal peoples the right to official recognition of their property.³²³ The Inter-American Court has explained that “as a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.”³²⁴ At the same time, it must be emphasized that possession of ancestral territories is not a pre-condition for the existence, recognition or restitution of the right to property of an indigenous or tribal people; indeed, indigenous peoples or communities who have been deprived of possession of their territories in whole or in part, preserve their full property rights over them, and have the right to claim and obtain their effective restitution.³²⁵ In the Moiwana village case, “the Court considered that the members of the N’djuka people were the ‘legitimate owners of their traditional lands’ although they did not have possession thereof, because they left them as a result of the acts of violence perpetrated against them.”³²⁶

112. Indigenous and tribal peoples have the right to administer and exploit their territory in accordance with their own traditional patterns. The Committee for the Elimination of Racial Discrimination has called on States Parties to the Convention, in its General Recommendation 23, to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.”³²⁷ In application of this norm, the Inter-American Court ordered the Government of Suriname to respect and guarantee the right of the members of the Saramaka people to “manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system, and without prejudice to other tribal and indigenous communities.”³²⁸ Inter-American jurisprudence may not be interpreted to “impose an additional burden on the members of the Saramaka people by making them seek concessions from the State to continue to access the natural resources they have traditionally used, such as timber and non-timber forest products.”³²⁹

³²³ The Inter-American Court has explained that “traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title” [I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 128]; and that “traditional possession entitles indigenous people to demand official recognition and registration of property title” [I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 128]. See also: I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 109. The Court has also clarified that domestic legislation which conditions the exercise and defense of indigenous and tribal rights to the existence of a title to private property over ancestral territories, is not adequate to make such rights effective [I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 111].

³²⁴ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 151.

³²⁵ The Court has asked itself “whether possession of the lands by the indigenous people is a requisite for official recognition of property title thereto” [I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 126], and it has answered this question in the negative: possession is not a condition to access territorial property rights; and moreover, neither the possession nor the legal title condition the rights to property or restitution of ancestral lands. See also: I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 109.

³²⁶ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 127.

³²⁷ CERD, General Recommendation 23, Indigenous Peoples, U.N. Doc. A/52/18, Annex V (1997), par. 5. Cited in: IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130, footnote No. 97.

³²⁸ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 194(c).

³²⁹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 45.

F. Effective Security against Third Party Acts and Claims

113. Indigenous and tribal peoples have a right to be protected from conflicts with third parties over land,³³⁰ by acquiring prompt title, delimitation and demarcation of their lands without delays, so as to prevent conflicts and attacks by others. When conflicts arise, indigenous and tribal peoples have the right to obtain protection and redress through procedures which are adequate and effective; to have the effective enjoyment of their right to property secured; to an effective investigation and sanction of those responsible for the attacks; and to the establishment of special, prompt and effective mechanisms to solve legal conflicts over ownership.³³¹

Example of Application

In its 2009 report on the situation of human rights in Venezuela, the IACHR referred to the situation of the Yukpa people of the Sierra del Perijá. Because of the lack of effective granting of title and the delay in the demarcation of the titled lands, violent conflicts had erupted between several Yukpa communities and local cattle-ranchers and landowners; in the framework of such conflicts, Yukpa persons and communities had suffered constant harassment aimed at expelling them from the ancestral lands they had been claiming, through intimidation and physical and verbal violence. It was argued that in some cases, these attacks had been supported by members of the National Guard. Other conflicts had erupted with third parties who were interested in the development of projects for coal exploration and exploitation, the impact of which had been heightened because of the absence or delay of the processes of territorial granting of title and demarcation.

The IACHR found that the underlying problem was one of lack of implementation of the domestic constitutional and legal provisions that establish indigenous peoples' territorial rights. Accordingly, the Commission called on the State to take the necessary measures to give immediate effect to settled constitutional and international norms recognizing this right of indigenous peoples [par. 1066]. The IACHR recommended that the State:

- (1) "Adopt urgent measures to meet the State's obligation to demarcate and delimit the ancestral lands of Venezuelan indigenous peoples, based on appropriate and effective procedures to that end, as well as to grant property title to the respective peoples". [par. 1141 – Recommendation 1]
- (2) "Adopt measures to prevent conflicts generated by the lack of land demarcation and protect the population from such occurrences". [par. 1141 – Recommendation 2]
- (3) "Establish special fast and effective mechanisms to resolve existing disputes over land possession with a view to affording guarantees and legal certainty in respect of indigenous peoples' titles over their own property". [par. 1141 – Recommendation 3]
- (4) "Fully investigate acts of violence arising from the absence of demarcation of ancestral indigenous lands in Venezuela, and duly sanction the responsible parties". [par. 1141 – Recommendation 4]

114. In this same field, indigenous and tribal peoples and their members have a right to have their territory reserved for them, and to be free from settlements or presence of third parties or non-indigenous colonizers within their territories. The State has a corresponding obligation to prevent the invasion or colonization of indigenous or tribal territory by other persons, and to carry out the necessary actions to relocate those non-

³³⁰ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1137 – Recommendation 2.

³³¹ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1062-1066; 1071; 1137 – Recommendations 1 to 4. Indigenous peoples have the right to have an effective granting of title to their lands, that is to say, one that allows them to enjoy in reality of the property of their ancestral territories [IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1062, 1071, 1137 – Recommendation 1]. As a specific manifestation of this guarantee, indigenous and tribal peoples have the right to enjoy the effective control of their lands and to be free from interference by persons who seek to hold or keep control of such territories through violence or by any other means, to the detriment of indigenous peoples' rights [IACHR, *Third Report on the Human Rights Situation in Colombia*. Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter IX, pars. 21-27 and Recommendation 3], and States are under the obligation of adopting measures to secure such effective control and protect indigenous peoples from acts of violence or harassment. In this same sense, indigenous and tribal peoples have a right to the prevention of conflicts with third parties caused by land property, particularly in cases where the delay in demarcation, or the lack of demarcation, have the potential to create conflicts [IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1137 – Recommendation 2]. In particular, indigenous and tribal peoples have the right to be protected by the State from attacks by third parties, inter alia when such attacks take place in the framework of conflicts over land property [IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1065, 1071, 1137 – Recommendation 2]. The lack of demarcation of ancestral lands, or delay in demarcation, can cause serious territorial conflicts between indigenous and tribal peoples and third parties, frequently of a violent sort. Likewise, the absence or delay in granting of title and demarcation of indigenous and tribal peoples' ancestral territories can heighten the impact of projects for the exploration and exploitation of natural resources in said territories, as well as generate violent conflicts between said peoples and third parties on account of such projects [IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1066].

indigenous inhabitants of the territory who have settled there. The IACHR has regarded illegal invasions and intrusions of non-indigenous settlers as threats, usurpations and reductions of the effective rights to property and possession of territory by indigenous and tribal peoples, which the State is in the obligation of controlling and preventing.³³² In the same sense, Article 18 of ILO Convention No. 169 establishes that “[a]dequate penalties shall be established by law for unauthorized intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.”

Example: difficulties for the eviction of non-indigenous occupiers of ancestral territories

In its 1997 report on the situation of human rights in Brazil, the IACHR described some legal difficulties encountered by State authorities in evicting intruding occupiers of indigenous territories, noting that said obstacles hampered the application of the constitutional and legal provisions to protect indigenous territories. The IACHR explained that squatters had moved into most of the indigenous areas “to grow crops or to raise livestock or to exploit the mineral resources;” and it clarified that “such encroachment takes place with the support and connivance of the local civil authorities.” In addition to occupying and using the land unlawfully, the intruders were a source of conflict and armed confrontation. [par. 44]

In the case of the Guaraní-Kaiowah people, of the Matto Grosso do Sul State, the indigenous areas recognized by the State as Guaraní territory were heavily overpopulated and there had been an ongoing series of suicides at a rate 30 times greater than among the rest of Brazil’s population. A seminal factor in those suicides was the claims of private citizens who obtained judicial support in their quest for title to the indigenous lands. “The lack of legal security triggered by this situation is aggravated by the violent evictions that take place when the Indians reoccupy the lands which have been recognized as belonging to them”. [par. 46]

The IACHR concluded that these acts of private parties usurped territorial possession by the indigenous communities and constituted a threat against the life and cultural, physical and territorial integrity of indigenous peoples. It recommended that the State “institute federal protection measures with regard to Indian lands threatened by invaders, with particular attention to those of the Yanomami, and in Amazônia in general, including an increase in controlling, prosecuting and imposing severe punishment on the actual perpetrators and architects of such crimes, as well as the state agents who are active or passive accomplices”. [par. 82 – Recommendation (e)]

115. In some cases, the demarcation of indigenous territories has led to conflicts, occasionally of a large scale, with other indigenous communities who claim property over areas of traditionally shared use (such as forests or waters). The resolution of these conflicts demands flexibility in the specific legal forms recognizing communal property, responding to the *sui generis* nature of communal property without ceasing to guarantee indigenous patterns of territorial use and occupation in accordance with the American Convention and the American Declaration. Possible alternatives include recognition of the rights of access to and use by indigenous peoples of areas not exclusively possessed by them, including the use of spaces of a cultural or spiritual significance for them, and the quest for formulae of common use and management of natural resources in specific areas. Accommodating the regime of indigenous communal property in the framework of domestic legal systems demands a consensual investigation into flexible models, which are able to grant juridical protection to the different indigenous forms of possession and use of their ancestral territories. Whatever the specific formulae used for formal recognition of the right to communal property, said formulae must guarantee continuity of the different uses of territory by indigenous peoples, in all their complexity.

Example: violent conflicts over land

In its 1999 report on the situation of human rights in Colombia, the IACHR referred to the problem of lands claimed by indigenous peoples as their property being occupied by non-indigenous settlers or purported owners. These outsiders engaged in *de facto* occupations, through legal titles that were forged or had been obtained in an irregular manner. In many cases, the resulting land conflicts were associated with paramilitary groups who sought to appropriate the lands located inside the reservations or in process of being claimed. The IACHR pointed out that “while some 30 million hectares of indigenous lands have been recognized, these claims and even the possession of lands already recognized are hindered and opposed in some cases by threats, harassment, and violence” [par. 23]. It also explained that “the penetration of indigenous lands by landowners or peasants from outside is aggravated by the fumigation of the coca crops, which leads growers to leave their lands and penetrate indigenous lands” [par. 22].

³³² IACHR, *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97, Doc. 29 rev. 1, September 29, 1997, pars. 33, 40.

The IACHR referred to the specific case of the Zenú indigenous community of San Andrés de Sotavento, which had been struggling for over 70 years for its right to an 83,000-hectare territory. The Colombian Institute of Agrarian Reform had purchased 15,000 hectares from the land-owners, but the latter “have sought to maintain control over the land through violent attacks. Paramilitary groups are often utilized to carry out these aggressions. According to members of the indigenous community, the attacks by the paramilitaries are often permitted by the security forces in the area.” [par. 24] Seven leaders and members of that community had been assassinated, and several others had received death threats. In response to this situation, the IACHR requested the Colombian Government to adopt precautionary measures to protect the leaders of this Zenú community, in spite of which the murders, attacks and threats continued, both by presumptive paramilitaries and by members of the State armed forces. As a consequence, the IACHR requested the Inter-American Court of Human Rights to adopt provisional measures in order for the State to protect the leaders of the community, and on June 19, 1998, the Court did so.

In its country report, the IACHR recommended the Colombian State to “continue to take special measures to protect the life and physical integrity of indigenous persons. These measures should include the investigation and sanction of the perpetrators of acts of violence against indigenous persons” [Recommendation 1]; and to “ensure that indigenous communities enjoy effective control over lands and territories designated as indigenous territories, *resguardos* or other community lands without interference by individuals who seek to maintain or to take control over these territories through violence or any other means in detriment of the rights of the indigenous peoples” [Recommendation 3].

G. Legal Conflicts over Territorial Property with Third Parties

116. The effective recognition of indigenous communal property rights, including their rights over lands or territories that they do not effectively use or occupy but over which they claim restitution, may come into conflict with third parties’ property claims. The Court has made clear that “the private property of individuals” and “communal property of the members of the indigenous communities,” are both protected by the American Convention,³³³ and when these rights conflict, the issue must be resolved in accordance with the principles that govern limitations of human rights.³³⁴

117. The Inter-American Court provides some guidelines for States to apply to resolve conflicts between indigenous territorial property and individual private property. In all cases admissible restrictions to the enjoyment and exercise of property rights must be a) established by law; b) necessary; c) proportional, and d) their purpose must be to attain a legitimate goal in a democratic society.³³⁵

- Article 21.1 of the American Convention states that the law may subordinate the use and enjoyment of property to the interests of society. “The necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest; it is insufficient to prove, for example, that the law fulfills a useful or timely purpose. Proportionality is based on the restriction being closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right. Finally, for the restrictions to be compatible with the

³³³ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 143.

³³⁴ According to the American Convention, the rights of each person are limited by “the rights of others,” “the security of all,” and “the just demands of the general welfare, in a democratic society.” American Convention on Human Rights, *supra* note 40, Article 32(2). For its part, Article 21 of the Convention allows limitations on the right to property “upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.” *Id.*, Article 21(2). Based on these provisions, as well as on the practice of other international courts, the case-law of the Court allows limitations on the exercise of the human rights recognized in the Convention if these requirements are met: “(a) they must be established by law; (b) they must be necessary; (c) they must be proportional, and (d) their purpose must be to attain a legitimate goal in a democratic society.” I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, pars. 144-145 [citing, *mutatis mutandi*, I/A Court H.R., *Case of Ricardo Canese v. Paraguay (Merits, Reparations and Costs)*. Judgment of August 31, 2004. Series C No. 111, par. 96.] See I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74, par. 155; I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica (Preliminary Objections, Merits, Reparations and Costs)*. Judgment of July 2, 2004. Series C No. 107 (2004), par. 127; I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29th, 2006. Series C No. 146, par. 137; I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 122.

³³⁵ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 144.

Convention, they must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right.”³³⁶

- “[T]he States must assess, on a case by case basis, the restrictions that would result from recognizing one right over the other. Thus, for example, the States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations. Property of the land ensures that the members of the indigenous communities preserve their cultural heritage.”³³⁷
- “Disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members.”³³⁸
- “On the other hand, restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society, in the sense given to this by the American Convention; and it could be proportional, if fair compensation is paid to those affected pursuant to Article 21(2) of the Convention.”³³⁹
- “This does not mean that every time there is a conflict between the territorial interests of private individuals or of the State and those of the members of the indigenous communities, the latter must prevail over the former. When States are unable, for concrete and justified reasons, to adopt measures to return the traditional territory and communal resources to indigenous populations, the compensation granted must be guided primarily by the meaning of the land for them”.³⁴⁰

118. One frequent source of conflict between the property rights of indigenous or tribal peoples and third parties arises when possession of indigenous territory has been lost by a given indigenous group and the legal title to the property has been conferred on third-party owners. In such cases, the Court has explained that “the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality.”³⁴¹ The preferential option for recovery of ancestral lands in favor of the corresponding indigenous or tribal group must be the starting point. It is a right of indigenous and tribal peoples for their territorial property not to be trumped, on principle, by third parties’ property rights.³⁴² Implicit in this approach is

³³⁶ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June, 2005. Series C No. 125, par. 145. I/A Court H.R., *Case of Ricardo Canese v. Paraguay (Merits, Reparations and Costs)*. Judgment of August, 2004. Series C No. 111, par. 96. I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica (Preliminary Objections, Merits, Reparations and Costs)*. Judgment of July 2, 2004. Series C No. 107 (2004), par. 127. I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment February 6, 2001. Series C No. 74, par. 155.

³³⁷ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 146. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 241.

³³⁸ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June, 2005. Series C No. 125, par. 147.

³³⁹ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 148. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 241.

³⁴⁰ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 149.

³⁴¹ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29th, 2006. Series C No. 146, par. 128.

³⁴² I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 115.

the corollary that third parties who do not hold title in good faith have no legitimate expectations or bona fide property rights. Such is the case, for example, of settlements or land grants made to individuals without regard to the indigenous peoples who have always lived there.

119. It must be borne in mind that, according to the Inter-American Court, the fact that the claimed lands have been transferred from one owner to another over a long period of time and are duly registered is not a sufficient motive to justify the lack of recognition of indigenous or tribal peoples' right to property and restitution, nor does it exempt States from international responsibility for such lack of recognition.³⁴³ Indigenous and tribal peoples' right to property and restitution subsists even though the claimed lands are in private hands, and it is not acceptable for indigenous territorial claims to be denied automatically due to that fact – in each case, a balancing must be carried out in order to establish limitations on one or the other property rights in conflict, in light of the standards of legality, necessity, proportionality and a legitimate purpose in a democratic society, taking into account the specificities of the respective indigenous people.³⁴⁴ The will of the current owners of ancestral lands cannot, per se, prevent effective enjoyment of the right to territorial restitution.³⁴⁵

120. It must also be taken into account that indigenous and tribal peoples' right to territorial property and restitution persists even though the lands may be productively exploited by their current owners.³⁴⁶ It is unacceptable for indigenous territorial claims to be denied automatically because of that fact, because the right to restitution would become meaningless. In each case, the required balancing must be carried out without privileging the productivity of the land or the agrarian regime.³⁴⁷ Regulations that favor productive exploitation of the land, and that visualize indigenous issues through that lens, do not afford a real possibility of restitution of ancestral lands.³⁴⁸ For the Inter-American Court, the fact that the claimed lands are being exploited productively is not a sufficient reason to deny indigenous and tribal peoples' right to territorial property and restitution, and is insufficient justification to relieve the State of international responsibility³⁴⁹ because "it fails to address the distinctive characteristics of such peoples."³⁵⁰ Following a similar logic, in the Dann case, the IACHR rejected the argument that the Western Shoshone's rights over their traditional territory could be legitimately extinguished based on "the need to encourage settlement and agricultural developments in the western United States".³⁵¹

121. Likewise it must be recalled that, according to the Inter-American Court, the existence of bilateral investment treaties in force which protect the owners of the claimed lands does not justify the lack of enforcement or materialization of indigenous and tribal peoples' right to territorial property and restitution, because the enforcement of bilateral commercial treaties must be made compatible with the American Convention, all the more so if they contain clauses that allow for the expropriation of the investments of nationals

³⁴³ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 136, 137.

³⁴⁴ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 138.

³⁴⁵ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 138.

³⁴⁶ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 138, 139.

³⁴⁷ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 138, 139.

³⁴⁸ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 138, 139.

³⁴⁹ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 136, 137.

³⁵⁰ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 139.

³⁵¹ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 145.

of one of the contracting parties for reasons of public interest or utility, “which could justify land restitution to indigenous people.”³⁵² For the Inter-American Court, the enforcement of bilateral commercial treaties “should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.”³⁵³

122. The foregoing considerations may be interpreted as a State duty to prioritize, in general terms, indigenous peoples’ rights in cases of conflict with third party property rights, insofar as the former are linked to indigenous and tribal peoples’ cultural and material survival. This does not imply disregard for the right to fair compensation in favor of bona fide third party owners as a consequence of the limitation of their legitimate right to property in favor of communal property under Article 21 of the American Convention. In relation to third parties who do not possess the property in good faith, it is the State’s responsibility to secure indigenous peoples’ enjoyment of the right to communal property, including the right to restitution.

H. The Right to Restitution of Ancestral Territory

123. Indigenous or tribal peoples who lose total or partial possession of their territories preserve their property rights over such territories, and have a preferential right to recover them, even when they are in hands of third parties. The IACHR has highlighted the need for States to adopt measures aimed at restoring the rights of indigenous peoples over their ancestral territories,³⁵⁴ and it has pointed out that restitution of lands is an essential right for cultural survival and to maintain community integrity.³⁵⁵ The IACHR considers the right to restitution of the lands and territories of which peoples have been deprived without their consent as one of the international principles appertaining to indigenous peoples’ rights over their lands, territories and natural resources.

124. According to the Inter-American Court, “the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith”³⁵⁶ – case in which the indigenous have the right to recover them,³⁵⁷ as a preferential option even in relation to innocent third parties.³⁵⁸ In instances where governments have made large land grants or sold indigenous territory, often with the people still living on the land, the recipients are unlikely to qualify as good faith innocent purchasers, because of their knowledge of existence and claims of the indigenous communities. Indeed, such non-indigenous settlers often made use of members of the communities as low-paid or forced laborers. The validity of such “titles” is thus questionable at best.

³⁵² I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 140.

³⁵³ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 140. I/A Court H.R., *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*. Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, par. 29.

³⁵⁴ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 115.

³⁵⁵ IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 16.

³⁵⁶ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 128.

³⁵⁷ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 128.

³⁵⁸ Only in case that the restitution is not materially possible due to objective and justified reasons, they have the right to obtain other lands of equal extension and quality. [*Id.*]

125. For the Court, “possession is not a requisite conditioning the existence of indigenous land restitution rights;”³⁵⁹ neither material possession nor the existence of a formal title to property are conditions for the indigenous right to territorial property, nor do they condition the right to restitution of ancestral lands, under Article 21 of the Convention.³⁶⁰

126. Indigenous peoples’ right to restitution of their traditional lands has also been confirmed by the Committee for the Elimination of Racial Discrimination. According to its General Recommendation No. XXIII on indigenous peoples, “where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, [States should] take steps to return those lands and territories”.³⁶¹

127. The application of this rule will vary. When the indigenous special relationship to land cannot be carried out because the members “have been prevented from doing so for reasons beyond their control, which actually hinder them from keeping up such relationship, such as acts of violence or threats against them, restitution rights shall be deemed to survive until said hindrances disappear.”³⁶² In cases in which the relationship with the land is manifest through, *inter alia*, traditional hunting, fishing or gathering activities, if the indigenous carry out few or none of these activities inside the lands they have lost, due to causes that are beyond their will which have prevented them from doing so, the right to restitution persists, until such causes disappear and the exercise of that right has been made possible.³⁶³ Consequently, neither the loss of material possession, nor prohibitions on access to traditional territory by the formal owners are obstacles to the continuous territorial rights of indigenous communities. In sum, neither the loss of possession nor the reduction or elimination of access to the land will void the right to restitution of the lost ancestral lands.³⁶⁴

128. The Inter-American Court has questioned whether the right to restitution of lands has a temporal limit, or if it “lasts indefinitely in time.” It has concluded that the right will last for as long as the fundamental relationship with ancestral territory subsists.³⁶⁵ The Court takes into consideration that the spiritual and material basis for indigenous identity is mainly supported by their unique relationship with their traditional lands: “As long as said relationship exists, the right to claim lands is enforceable, otherwise, it will lapse.”³⁶⁶ Following this rule, the IACHR has recognized safeguards for indigenous or tribal property rights in situations where, as in the Dann case, indigenous peoples were deprived of their territory in the past, insofar as the material, cultural or spiritual link with these territories is still in existence, and to the extent that the title to historic property can be documented³⁶⁷ or otherwise proven. The unique relationship to traditional territory “may be expressed in

³⁵⁹ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 128.

³⁶⁰ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 128.

³⁶¹ CERD, General Recommendation 23, Indigenous Peoples, U.N. Doc. A/52/18, Annex V (1997), par. 5.

³⁶² I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 132.

³⁶³ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 132.

³⁶⁴ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 133, 134.

³⁶⁵ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 126-131.

³⁶⁶ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 131. In the same sense, see: I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 112.

³⁶⁷ In the Dann Case, the legal dispossession of the traditional lands of the Western Shoshone people, recognized in the Treaty of Ruby Valley of 1863, signed by this people and the Government of the United States, was alleged to have occurred on the theory that their

different ways, depending on the particular indigenous people involved and the specific circumstances surrounding it, and it may include the traditional use or presence, be it through spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of natural resources associated with their customs and any other element characterizing their culture".³⁶⁸ Any one of these modalities is secured by the right to property protected by the Inter-American human rights instruments, and grants the corresponding indigenous or tribal groups the right to territorial restitution.

129. The Inter-American Court addressed the issue of restitution of indigenous lands in the case of *Yakye Axa*, in which "the court considered that the members of the Community were empowered, even under domestic law, to file claims for traditional lands and ordered the State, as measure of reparation, to individualize those lands and transfer them on a [gratuitous] basis".³⁶⁹

130. There are situations in which indigenous peoples are not occupying or using their traditional lands for reasons of *force majeure*, whether because of the forced relocation of such peoples -including relocations for reasons of health, humanitarian or food crises-, or because of situations, generally associated to internal armed conflicts, which have forced indigenous peoples to abandon their lands because of a founded fear of being victims of violence. In the case of the *Moiwana Community v. Suriname*, the Court held that the members of the community could be considered "the legitimate owners of their traditional lands; as a consequence, they have the right to the use and enjoyment of that territory [in spite of the fact] that they have been deprived of this right to the present day as a result of the [massacre of] 1986 and the State's subsequent failure to investigate those occurrences adequately."³⁷⁰ In a subsequent case, *Sawhoyamaxa*, the Court reaffirmed its prior jurisprudence, clarifying that indigenous title to communal property must be made "possible", in the sense that it shall not be considered extinguished if the community has been unable to occupy or use its traditional lands "because they have been prevented from doing so for reasons beyond their control, which actually hinder them from keeping up such relationship."³⁷¹

131. According to the judgment of the Inter-American Court in *Sawhoyamaxa*, "once it has been proved that land restitution rights are still current, the State must take the necessary actions to return them to the members of the indigenous people claiming them".³⁷² The State has the obligation to take "actions to enforce the

...continuation

rights had "expired" due to the "gradual encroachment" of non-indigenous third persons. *Id.*, para. 69. The Commission considered that the determination "as to whether and to what extent Western Shoshone title may have been extinguished was not based upon a judicial evaluation of pertinent evidence, but rather was based upon apparently arbitrary stipulations." *Id.*,137. Similarly, in the cases regarding the Enxet (Lengua) people of Paraguay, the situation of forced displacement from their lands had a remote origin, when, beginning in the late 19th century, the Paraguayan State sold large tracts in the Chaco, including a considerable part of the ancestral territory of the Enxet people, on the London stock exchange, whereupon it passed into the hands of private entrepreneurs and religious missions. I/A Court H.R., *Case of the Yakye Axa Indigenous Community*, par. 50.10; I/A Court H.R., *Case of Sawhoyamaxa Indigenous Community*, par. 73.1. In both cases, though, the relationship with ancestral territory was proven to be alive, and therefore the corresponding property rights were protected.

³⁶⁸ I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 131.

³⁶⁹ I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 127.

³⁷⁰ I/A Court H.R., *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 15, 2005. Series C No. 124, par. 134.

³⁷¹ I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 132. In the same sense, see: I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, pars. 113-116.

³⁷² I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29th, 2006. Series C No. 146, par. 135. I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 122.

rights of the community members over their traditional lands.”³⁷³ In order to make the right to territorial restitution effective, States must provide indigenous and tribal peoples effective and adequate administrative and judicial recourses, which present them with a real possibility of material restitution of their ancestral territories. The IACHR has indicated that by virtue of Articles 25 and 8.1 of the American Convention on Human Rights, and of ILO Convention No. 169, “the State has the obligation to provide [indigenous communities] with an effective remedy for their territorial claim, to ensure that the Community is heard with due guarantees, and to establish a reasonable term to ensure the rights and obligations under its jurisdiction.”³⁷⁴ In turn, the Inter-American Court has clarified that by virtue of ILO Convention No. 169 – Art. 14.3, read in conjunction with Articles 8 and 25 of the American Convention, States have an “obligation to provide an effective means with due process guarantees to the members of the indigenous communities for them to claim traditional lands, as a guarantee of their right to communal property”.³⁷⁵ For the Court, “non-existence of an effective remedy against the violations of basic rights recognized by the Convention constitutes in itself an abridgment of this treaty by the State Party in which there is such a situation.”³⁷⁶

132. In relation to mechanisms for restitution, the IACHR has clarified that indigenous and tribal peoples have a right to legally established administrative mechanisms which are effective to solve definitively their territorial claims.³⁷⁷ The Inter-American Court has pointed out that indigenous and tribal peoples have a right not to be subjected to unreasonable delays in reaching a final solution of their claim;³⁷⁸ that administrative procedures for the restitution of lands must be effective, and offer a real possibility for the members of indigenous and tribal peoples to recover their territories.³⁷⁹ Further, the general obligation to respect rights set forth in Article 1(1) of the American Convention places the States under the obligation to “ensure that said procedures are accessible and simple and that the bodies in charge of them have the necessary technical and material conditions to provide a timely response to the requests made in the framework of said procedures.”³⁸⁰

133. As to judicial recourse for land restitution, the IACHR has clarified that States’ domestic legislation must provide, in addition to administrative mechanisms, an effective judicial process aimed at protecting indigenous peoples’ legitimate territorial claims and other rights, and that the absence of such recourse constitutes, *per se*, a violation of the American Convention, Articles 8, 25, 2 and 1.1.³⁸¹ In this sense the IACHR has

³⁷³ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 135 – subtítulo (iii).

³⁷⁴ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 52(a).

³⁷⁵ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 96.

³⁷⁶ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 52(b).

³⁷⁷ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 52(e).

³⁷⁸ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 85.

³⁷⁹ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 108.

³⁸⁰ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 102.

³⁸¹ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 52(f). IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Sawhoyamaya v. Paraguay*. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 74(b).

recommended States “to establish an effective and simple court remedy to protect the right of the Indigenous Peoples (...) to claim and access their traditional territories”.³⁸²

134. The Court and the Commission have actively promoted respect for traditional authorities, leaders and other individual members of indigenous and tribal peoples and communities who undertake and head the initiatives, processes and actions of reclamation and recovery of ancestral territories. On numerous occasions, the IACHR has adopted precautionary measures and the Inter-American Court has adopted provisional measures to protect these indigenous leaders and persons. In a high number of these cases, the threats against the life or personal integrity of the members of indigenous communities are closely linked to their activities in defense of these communities’ territorial rights, particularly in relation to the exploitation of the natural resources that exist in their territory. The IACHR has also pointed out that the lack of resolution of indigenous communities’ claims for territorial restitution puts the integrity of their members in danger³⁸³.

135. The IACHR has also explained that during the procedures to resolve land claims, the integrity of the claimed territory and its material possession by the claimants must be respected – hence the IACHR has held that evictions before the conclusion of indigenous peoples or communities’ territorial claims processes constitutes an obstacle to the effective enjoyment of their right to land and territory³⁸⁴.

136. In connection with this, IACHR also considers that the promotion of settlement agreements by State authorities to solve indigenous and tribal peoples’ territorial complaints and claims can actually constitute an obstacle to the effective enjoyment of their territorial property rights, because in the course of the settlement negotiations, the precarious conditions of life of indigenous and tribal peoples may lead them to reduce or, in the worst cases, cede their territorial rights³⁸⁵ in exchange for immediate material benefits to which they are entitled in any case.

137. The IACHR and Court recognize that the right to restitution of traditional territories is not an absolute right, and it finds a limit in those exceptional cases in which there exist objective and justified reasons which make it impossible for the State to restore the territorial rights of indigenous or tribal peoples and the communities that constitute them. The peoples and communities are nonetheless entitled to redress. This has been explained by the Inter-American Court: “when a State is unable, on objective and reasoned grounds, to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures.”³⁸⁶ The State has the burden to prove, with sufficient arguments, that there exist objective and prevalent grounds that justify the failure to afford restitution of indigenous and tribal peoples’ property and territory.³⁸⁷

138. Indigenous and tribal peoples’ right to restitution subsists even when the claimed lands are in private hands. It is not acceptable for indigenous territorial claims to be denied automatically because of the fact

³⁸² IACHR, Report No. 73/04, case of the Sawhoyamaya Indigenous Community v. Paraguay, October 19, 2004, Recommendation 4. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 8.

³⁸³ IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, par. 44.

³⁸⁴ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, pars. 235, 238, 244, 297 – Recommendation 3.

³⁸⁵ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, pars. 235, 239, 244, 297 – Recommendation 3.

³⁸⁶ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 135.

³⁸⁷ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 136.

that the claimed lands are in the hands of private owners; in each case, a balancing must be carried out in order to determine the limitation of one or the other property rights in conflict, in light of the standards of legality, necessity, proportionality and legitimate objective in a democratic society, bearing in mind the special obligations owed indigenous peoples³⁸⁸ and the above-explained factors and criteria. In this regard, it must be underscored that the transfer of claimed lands from one owner to another over a long time, even if duly registered, is not a sufficient motive to justify the lack of concretion or materialization of indigenous and tribal peoples' right to property and territorial restitution, nor to relieve States from international responsibility for such lack of materialization.³⁸⁹

139. The right to devolution of lands must be regulated in such a way as to offer a real possibility of recovering the traditional lands; no such real possibility is offered by regulations that restrict all possibilities to awaiting the will of the current holders of the land, forcing the indigenous to accept alternative lands or monetary compensations.³⁹⁰ "Otherwise, restitution rights become meaningless and would not entail an actual possibility of recovering traditional lands, as it would be exclusively limited to an expectation on the will of the current holders, forcing indigenous communities to accept alternative lands or economic compensations. In this respect, the Court has pointed out that, when there be conflicting interests in indigenous claims, it must assess in each case the legality, necessity, proportionality and fulfillment of a lawful purpose in a democratic society (public purposes and public benefit), to impose restrictions on the right to property, on the one hand, or the right to traditional lands, on the other".³⁹¹ The will of the current owners of ancestral lands cannot, *per se*, prevent the effective enjoyment of the right to territorial restitution; the conflicts must be solved by the authorities carrying out the corresponding balancing between the rights and interest in conflict in each case of indigenous territorial claims.³⁹²

140. Indigenous and tribal peoples' rights to territorial property and restitution persist even when the lands are being exploited in a productive manner by their current owners.³⁹³ The fact that the claimed lands are being productively exploited by their owners does not constitute a sufficient motive to justify the lack of restitution of the territory of indigenous and tribal peoples, nor does it liberate the State from international responsibility.³⁹⁴ Regulations that privilege criteria of productive exploitation of the land, and which approach indigenous issues from that perspective, do not offer a real possibility of restitution of ancestral lands.³⁹⁵ In the words of the Inter-American Court, "in cases of exploited and productive lands it is a responsibility of the State, through the competent national organs, to determine and take into account the special relationship of the plaintiff indigenous community with such lands, at the moment of deciding among the two rights. Otherwise, the right to restitution would lack meaning and would not afford a real possibility of recovering the traditional lands. Limiting in this way the effective realization of the right to property of the members of indigenous communities not only violates the State's obligations under the provisions of the Convention related to the right to property, but also

³⁸⁸ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 138.

³⁸⁹ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 136, 137.

³⁹⁰ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 138.

³⁹¹ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 138.

³⁹² I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 138.

³⁹³ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 138, 139.

³⁹⁴ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 136, 137.

³⁹⁵ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 138, 139.

compromises the State's responsibility in relation to the guarantee of an effective remedy and constitutes a discriminatory treatment that produces social exclusion."³⁹⁶

141. For the Inter-American Court an bilateral international investment treaty in force, which protects the private owners of the claimed lands, is also a legally insufficient reason to deny indigenous and tribal peoples' right to territorial property and restitution, because the enforcement of bilateral commercial treaties "should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States".³⁹⁷ The application of these treaties must and may be made compatible with the American Convention, because they often contain clauses which allow for the expropriation of the investments made by nationals of one of the contracting parties for reasons of public purpose or interest, "which could justify land restitution to indigenous people."³⁹⁸

Alternative lands

142. Only "when a State is unable, on objective and reasoned grounds, to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures."³⁹⁹ This is a last resort alternative, that is, it only constitutes a legally acceptable hypothesis when all possible means to obtain the restitution of each people's specific ancestral territory have been exhausted, and such restitution has not been possible because of objective and justified reasons, in the terms established by the Inter-American jurisprudence and described in the foregoing section on territorial restitution.

143. In this regard, it is worthwhile recalling that according to the Inter-American Court, the State has the burden of proving, with sufficient arguments, that there exist objective motives which justify the lack of materialization of indigenous and tribal peoples' right to property and territorial restitution;⁴⁰⁰ that the fact that the claimed lands have been transferred from one owner to another for a long time and are duly registered as private property is not a sufficient motive to justify the lack of materialization of indigenous and tribal peoples' right to property and territorial restitution, nor does it relieve the State of international responsibility for said lack of materialization;⁴⁰¹ and that the fact that the claimed lands are being duly exploited by their owners in a productive manner is not a sufficient motive either to justify the failure to reconstitute the ancestral territory.⁴⁰²

144. The provision of different lands as a residual last measure has been confirmed by the Committee on the Elimination of Racial Discrimination, which has especially called upon States parties to the Convention, in its General Recommendation No. 23, "where they have been deprived of their lands and territories traditionally

³⁹⁶ I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 149 [informal translation from Spanish].

³⁹⁷ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 140.

³⁹⁸ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 140.

³⁹⁹ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 135.

⁴⁰⁰ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 136.

⁴⁰¹ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 136, 137.

⁴⁰² I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 136, 137.

owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.”⁴⁰³

145. The Inter-American Court, in turn, has explained that if there is no restitution, the alternative lands to be provided must be “of sufficient extent and quality to conserve and develop their ways of life,”⁴⁰⁴ meaning that they have “capacity for providing the resources which sustain life, and (...) the geographic space necessary for the cultural and social reproduction of the group”.⁴⁰⁵ In other words, it is not sufficient for there to be other properties available; in order to grant alternative lands, they must have, at least, certain minimum agro-ecological capacities, and be submitted to an assessment which determines their potential for development by the Community.⁴⁰⁶

146. The Inter-American Court has also taken into consideration,⁴⁰⁷ in this regard, Article 16.4 of ILO Convention No. 169, according to which “when such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.”

147. The remedy of alternative lands and/or an indemnity in cases where restitution is an objective impossibility must secure the effective participation of the affected indigenous or tribal people. According to the Inter-American Court, “selection and delivery of alternative lands, payment of fair compensation, or both, are not subject to purely discretionary criteria of the State, but rather, pursuant to a comprehensive interpretation of ILO Convention No. 169 and of the American Convention, there must be a consensus with the peoples involved, in accordance with their own mechanism of consultation, values, customs and customary law.”⁴⁰⁸

148. The United Nations Declaration on the Rights of Indigenous Peoples also leaves this possibility expressly open. As established in Article 28, “1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. // 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.”

I. Right to Basic Services and Development

149. As explained by the IACHR, the process of guaranteeing land and resource rights for indigenous and tribal peoples is not finalized when the lands are demarcated and property title is granted; it must be

⁴⁰³ CERD, General Recommendation 23, Indigenous Peoples, U.N. Doc. A/52/18, Annex V (1997), par. 5. Cited in: IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 130, footnote No. 97.

⁴⁰⁴ IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, par. 50, Recommendation 1.

⁴⁰⁵ IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 128.

⁴⁰⁶ I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. *Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 118.

⁴⁰⁷ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. *Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 150.

⁴⁰⁸ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. *Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 151.

accompanied by the installation of basic services and utilities for the communities, and assistance with development.⁴⁰⁹ “While the territory is fundamental for development of the indigenous populations in community, it must be accompanied by health, education, and sanitary services, and the protection of their labor and social security rights, and, especially, the protection of their habitat.”⁴¹⁰ This obligation is also deduced from the right to live in conditions of dignity, protected by the American Declaration and the American Convention on Human Rights,⁴¹¹ as well as from States’ general duty to guarantee the members of indigenous and tribal communities access to dignified living conditions in the fields of sanitation, food and housing, *inter alia* by virtue of the provisions of Article 26 of the American Convention on Human Rights, which binds them to adopt appropriate measures to achieve full realization of social rights.⁴¹²

J. Exercise of the Spiritual Relation to Territory and Access to Sacred Sites

150. Ancestral territories have a deep spiritual value for indigenous and tribal peoples. In addition, indigenous and tribal peoples consider that certain places, phenomena or natural resources are especially sacred in accordance with their tradition, and require special protection. Indigenous and tribal peoples’ territories and natural resources are a constitutive element of their worldview and religiousness,⁴¹³ given that for them, the notions of family and of religion are intimately connected to the places where ancestral burial grounds, places of religious significance and importance, and kinship patterns have developed from their occupation and use of their physical territories.⁴¹⁴

151. Inter-American human rights instruments protect the right of the members of indigenous and tribal peoples to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied.⁴¹⁵ States have an obligation to protect that territory, and the relationship between indigenous or tribal peoples and their lands and natural resources, as a means to allow for the exercise of their spiritual life.⁴¹⁶ Consequently, limitations on the right to indigenous property can also affect the right to the exercise of one’s own religion, spirituality or beliefs, a right recognized by Article 12 of the American Convention and Article III of the American Declaration. States are under the obligation to secure indigenous peoples’ freedom to preserve their

⁴⁰⁹ IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, par. 46.

⁴¹⁰ IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, par. 47.

⁴¹¹ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. *Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 161. I/A Court H.R., *Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala*. *Merits*. Judgment of November 19, 1999. Series C No. 63, par. 144. I/A Court H.R., *Case of the “Juvenile Reeducation Institute” v. Paraguay*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 2, 2004. Series C No. 112, par. 156.

⁴¹² IACHR, Arguments before the Inter-American Court of Human Rights in the case of Yakye Axa v. Paraguay. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. *Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 157(e).

⁴¹³ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1054.

⁴¹⁴ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 155.

⁴¹⁵ I/A Court H.R., *Case of the Saramaka People v. Suriname*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 95.

⁴¹⁶ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. *Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, pars. 131, 135, 137. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. *Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 118, 121. I/A Court H.R., *Case of the Plan de Sánchez Massacre v. Guatemala*. *Reparations and Costs*. Judgment of November 19, 2004. Series C No. 116, par. 85. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. *Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 149. IACHR, Arguments before the Inter-American Court of Human Rights in the case of Yakye Axa v. Paraguay. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. *Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 120(j). IACHR, Arguments before the Inter-American Court of Human Rights in the case of Sawhoyamaya v. Paraguay. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. *Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 113(a).

own forms of religiousness or spirituality, including the public expression of this right and access to sacred sites whether or not on public or private property.

K. Protection from Forced Displacement

152. Indigenous peoples and their members have the right to be protected from forced displacement from their territories caused by violence. In case of being displaced by violence, they have the right to receive special attention by the State while they are displaced. The forced displacement of indigenous or tribal villages, groups of families, communities or peoples from their lands due to armed violence, implies in many cases the loss of their socio-cultural integrity and their habitat.⁴¹⁷ In the Inter-American Court's words, "conforming to the constant jurisprudence on indigenous matters, through which the relationship of the indigenous groups with their territory has been recognized as crucial for their cultural structures and their ethnic and material survival,"⁴¹⁸ the Tribunal considers that the forced displacement of the indigenous peoples out of their community (...) 'can place them in a special situation of vulnerability, that for its destructive consequences regarding their ethnic and cultural fabric, generates a clear risk of extinction and cultural or physical rootlessness of the indigenous groups,'⁴¹⁹ for which it is indispensable that the States adopt specific measures of protection⁴²⁰ considering the [particular traits] of the indigenous peoples, as well as their customary law, values, uses, and customs, in order to prevent and revert the effects of said situation."⁴²¹ This must be understood to be so regardless of the State responsibility to adopt all necessary measures to allow the return of indigenous peoples to their traditional territories securely and with dignity, which, in the case of forced displacements caused by contexts of violence, includes the State duty to adopt measures to overcome the impunity of actors responsible for such violence.⁴²²

Example of good practice in the recognition of indigenous peoples' rights over their territory

In its 2001 report on the situation of human rights in Guatemala, the IACHR described the content of the Peace Agreements that ended the armed conflict, especially the Agreement on Identity and Rights of Indigenous Peoples of 1995, in which the State made commitments based on internationally recognized territorial rights of indigenous and tribal peoples. Against the backdrop of the historical dispossession of Guatemalan indigenous territories, and extreme socio-economic problems of the indigenous populations, the State agreed to develop legislative and administrative measures to recognize, grant title to, protect, restitute and compensate indigenous peoples' rights over land and territories and, specifically, to:

- Apply Constitutional guarantees, by which "lands held cooperatively by the indigenous communities or any other form of communal or collective land holding by farmers, as well as family property and communal dwellings shall receive special protection from the State, which shall provide assistance in the form of credit and preferential technologies that protect their ownership and development, in order to guarantee all inhabitants a better quality of life. // Indigenous and other communities that own lands which, historically, have belonged to them and traditionally have been subject to a special form of administration shall maintain that system". In addition, "by means of special programs and appropriate legislation, the State shall provide state lands to the indigenous communities that need such lands for their development", taking measures in order to avoid affecting small peasant property in complying with that mandate [pars. 58, 61].
- Recognize that "the rights relating to the land of the indigenous peoples include both communal or collective and individual land tenure, rights of ownership and possession and other real rights, and the use of natural resources for the benefit of the communities without

⁴¹⁷ IACHR, *Third Report on the Human Rights Situation in Colombia*. Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter IX, par. 37.

⁴¹⁸ The Court has determined that the culture of the members of the indigenous communities corresponds to a particular form of life, of being, seeing, and acting in the world, constituted from their close link with their traditional lands and natural resources, not only because they provide their means of subsistence, but also because they constitute an element part of their cosmivision, [religiousness] and, therefore, of their cultural identity. Cf. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. *Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 135; I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. *Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 118.

⁴¹⁹ Cf. Order 004/009 rendered on 26 January 2009, Constitutional Court of Colombia, part 4, page 11. Available at: <http://www.acnur.org/biblioteca/pdf/6981.pdf>.

⁴²⁰ Cf. Guiding Principles on Internal Displacement, Principle 9.

⁴²¹ I/A Court H.R., *Case of Chitay Nech et al. v. Guatemala*. *Preliminary Objections, Merits, Reparations, and Costs*. Judgment of May 25, 2010. Series C No. 212, par. 147.

⁴²² I/A Court H.R., *Case of the Moiwana Community v. Suriname*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 15, 2005. Series C No. 124, par. 120.

detriment to their habitat” [par. 59]; for that purpose, “legislative and administrative measures must be developed to ensure recognition, the awarding of titles, protection, recovery, restitution and compensation for those rights” [par. 59].

- Adopt or promote “measures to regularize the legal situation with regard to the communal possession of lands by communities which do not have the title deeds to those lands, including measures to award title to municipal or national lands with a clear communal tradition” [par. 59], for which purpose “an inventory of the land tenure situation shall be drawn up in each municipality”.
- Recognize and guarantee access to lands and resources that are not exclusively occupied by the communities but to which they have traditionally had access for their traditional activities and used for subsistence purposes (easements, passage, grazing, spring water access, etc., and use of natural resources) and for their spiritual activities [par. 60], in consultation and coordination with the communities concerned.
- Recognize and guarantee the right of communities to participate in the use, management, and conservation of the natural resources on their lands [par. 60].
- Obtain the approval of the indigenous communities before undertaking any project involving natural resource exploration that can affect the subsistence and way of life of the communities [par. 60].
- Grant the communities affected equitable compensation for any damages that they may suffer as a result of these activities [par. 60].
- Adopt, in conjunction with the communities, the measures necessary to protect and preserve the environment [par. 60].
- Institute proceedings to settle the communal land claims of communities, to return these lands to them or to provide them with compensation [par. 61].
- To develop legal provisions permitting indigenous communities to administer their lands in accordance with their custom-based practices [par. 62].
- Strive to increase the number of courts that can handle land matters and to streamline procedures for settling these cases [par. 62].
- Urge the faculties of law and social sciences to strengthen the agrarian law component of their curricula, including information on custom-based provisions in this area [par. 62].
- Establish the pertinent legal advisory services to settle land claims [par. 62].
- Provide, free of cost, the services of interpreters to the indigenous communities for legal matters [par. 62].
- Make an effort to circulate, as widely as possible, information within the indigenous communities on agrarian rights and available legal resources [par. 62].
- Eliminate all forms of de facto or de jure discrimination against women in terms of access to land, housing, and credit, and participation in development projects [par. 62].

The IACHR recognized these important State commitments and their harmony with international human rights law, but noted that most of them remained unfulfilled. The IACHR recommended that the State of Guatemala comply with all of the commitments it made in the Peace Agreements in favor of indigenous communities and their members, and that it should “take the necessary steps and establish rapid and effective special mechanisms for settling conflicts related to ownership, and provide guarantees and legal security to the indigenous communities regarding the ownership of their properties, and provide state lands to the communities that need them for their development, as set forth in Article 68 of the Guatemalan Constitution” [par. 66, Recommendation 4].

VII. HOW FAILURE TO SECURE PROPERTY RIGHTS IMPAIRS THE ENJOYMENT OF OTHER HUMAN RIGHTS

153. The lack of granting of title, delimitation, demarcation and possession of ancestral territory, hampering or preventing access to land and natural resources by indigenous and tribal peoples, is directly and causally linked to situations of poverty and extreme poverty among families, communities and peoples.⁴²³ In turn, the typical circumstances of poverty trigger cross-cutting violations of human rights, including violations of their rights to life,⁴²⁴ to personal integrity, to a dignified existence, to food, to water, to health, to education and the rights of children.⁴²⁵

⁴²³ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1076-1080.

⁴²⁴ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 157(d). IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1076-1080. IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, pars. 44-48.

⁴²⁵ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1076-1080. IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, pars. 44-48.

A. The Right to Life

154. The life of members of indigenous and tribal communities “fundamentally depends” on the subsistence activities – agriculture, hunting, fishing, gathering – that they carry out in their territories⁴²⁶ including continued utilization of traditional collective systems that “are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples.”⁴²⁷ The failure of the State to guarantee indigenous communities’ right to ancestral territory can imply a failure to comply with the duty to secure the life of their members; such was the case of the Yakye Axa community: “the State, by not ensuring the right of the Community to its ancestral territory, has failed to comply with its duty to guarantee the life of its members, as it has deprived the Community of its traditional means of subsistence, forcing it to survive under appalling conditions and leaving it at the mercy of State assistance.”⁴²⁸ The State violates article 4.1 of the American Convention in relation to article 1.1, when it does not adopt “the necessary positive measures within its powers, which could reasonably be expected to prevent or avoid risking the right to life of the members of [an indigenous community]”.⁴²⁹

Example

In its 2009 report on the situation of human rights in Venezuela, the IACHR noted with extreme concern that, according to a report of the Office of the Human Rights Ombudsman, nine children of between 6 and 11 years of age from the Warao people had died in the second semester of 2007, as a consequence of their state of nutritional deterioration and lack of access to drinking water. The IACHR expressed its opinion that “the precarious state of health and nutrition that afflicted this community is not necessarily unrelated to the failure to demarcate indigenous ancestral lands (...)” [par. 1078]. Noting that access by indigenous peoples to their ancestral territories, and the use and enjoyment of the natural resources present therein, are directly related to access to food and clean water, the IACHR held that the failure to effectively enforce indigenous peoples’ right to their ancestral lands in Venezuela, left them “utterly without protection, a circumstance already responsible for the deaths of various community members and which might have been avoided given proper nutrition and timely medical intervention” [par. 1079]. Consequently, the State must “take immediate steps to ensure their access to the lands and natural resources on which they depend, thereby preventing an erosion of their other rights, such as the right to health and the right to life” [par. 1080].

155. In this regard it must be recalled that the right to life is fundamental in the American Convention on Human Rights, because the realization of the remaining human rights depends on its safeguard: “The right to life is a fundamental human right, [the] full enjoyment [of which] is a prerequisite for the enjoyment of the other human rights”;⁴³⁰ “if this right is not respected, all other rights do not have sense. Having such nature, no restrictive approach of the same is admissible”.⁴³¹ For the Court, “essentially, this right includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated”.⁴³² By virtue of this fundamental right, the State is

⁴²⁶ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awás Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(f).

⁴²⁷ IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 128.

⁴²⁸ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 157(b).

⁴²⁹ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 178.

⁴³⁰ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 150.

⁴³¹ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 150.

⁴³² I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 161. I/A Court H.R., *Case of the Gómez-Paquiyaúri Brothers v. Peru*. Judgment of July 8, 2004. Series C No. 110, para. 128. I/A Court H.R., *Case of the “Juvenile Reeducation Institute” v. Paraguay*. Judgment of September 2, 2004. Series C No. 112, para. 156. I/A Court H.R., *Case of Myrna Mack Chang Vs. Guatemala*. Judgment of November 25, 2003. Series C No. 101, par. 152. I/A Court H.R., *Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63, par. 144.

under the triple obligation of generating dignified living conditions, not producing conditions that hamper persons' minimum dignity, and adopting positive measures to satisfy the right to a dignified life in situations of vulnerability and risk that gain priority: "One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person⁴³³ and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority".⁴³⁴ Thus, "by virtue of this fundamental role that the Convention assigns to [the right to life], the States have the duty to guarantee the creation of the conditions that may be necessary in order to prevent violations of such inalienable right."⁴³⁵ For the Court, "regarding the compliance with the obligations imposed by Article 4 of the American Convention, as regards to Article 1(1) thereof, it is not only presumed that no person shall be deprived of his life arbitrarily (negative obligation), but also that, in the light of its obligation to secure the full and free enjoyment of human rights, the States shall adopt all appropriate measures (...) to protect and preserve the right to life (positive obligation)".⁴³⁶ Consequently, States "States must adopt any measures that may be necessary to create an adequate statutory framework to discourage any threat to the right to life; (...)and to protect the right of not being prevented from access to conditions that may guarantee a decent life,⁴³⁷ which entails the adoption of positive measures to prevent the breach of such right".⁴³⁸

156. In application of these rules, in cases of indigenous communities in extreme conditions of vulnerability due to lack of access to their ancestral territory, the Court evaluates whether the State caused conditions that prevented their access to a life in dignified conditions, and if that happened, whether it complied with its international obligations to adopt positive, qualified and urgent measures: "In the instant case, the Court must establish whether the State generated conditions that worsened the difficulties of access to a decent life for the members of the Yakye Axa Community and whether, in that context, it took appropriate positive measures to fulfill that obligation, taking into account the especially vulnerable situation in which they were placed, given their different manner of life (different worldview systems than those of Western culture, including their close relationship with the land) and their life aspirations, both individual and collective, in light of the existing international corpus juris regarding the special protection required by the members of the indigenous communities, in view of the provisions set forth in Article 4 of the Convention, in combination with the general duty to respect rights, embodied in Article 1(1) and with the duty of progressive development set forth in Article 26 of that same Convention, and with Articles 10 (Right to Health); 11 (Right to a Healthy Environment); 12 (Right to Food); 13 (Right to Education) and 14 (Right to the Benefits of Culture) of the Additional Protocol to the American Convention, regarding economic, social, and cultural rights, and the pertinent provisions ILO Convention No. 169".⁴³⁹

⁴³³ I/A Court H.R., *Case of the "Juvenile Reeducation Institute" v. Paraguay*. Judgment of September 2, 2004. Series C No. 112, par. 159.

⁴³⁴ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 162.

⁴³⁵ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 151. I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs*. Judgment of January 31, 2006. Series C No. 140, par. 120.

⁴³⁶ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 152.

⁴³⁷ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 161; I/A Court H.R., *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, par. 144, and I/A Court H.R., *Case of the "Juvenile Reeducation Institute" vs. Paraguay*. Judgment of September 2, 2004. Series C No. 112, par. 156.

⁴³⁸ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 153.

⁴³⁹ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 163.

B. The Right to Health

157. The Inter-American Court has recalled that indigenous and tribal peoples have the right to access their territory and the natural resources necessary “to practice traditional medicine to prevent and cure illnesses.”⁴⁴⁰ On this point, the Inter-American Court has quoted General Comment 14 of the UN Committee on Economic, Social and Cultural Rights, on the right to the enjoyment of the highest attainable standard of health. General Comment 14 specifies that “[i]ndigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines [...]. [I]n indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this regard, the Committee considers that [...] denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.”⁴⁴¹

158. More generally, indigenous communities experience conditions of extreme misery due to the lack of access to land and natural resources that are necessary for their subsistence.⁴⁴² In cases in which indigenous and tribal peoples are deprived of nutrition, health and access to clean water because of such lack of access to ancestral territories, States have an obligation to “take immediate steps to ensure their access to the lands and natural resources on which they depend,” in order to prevent an erosion of the right to health and the right to life.⁴⁴³

C. Economic and Social Rights

159. The lack of access to lands and resources also limits the enjoyment of other economic and social rights. The UN Committee on Economic, Social and Cultural Rights’ General Comments on the rights to adequate food and water specify that point: “In the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. In this regard, said Committee on Economic, Social and Cultural Rights has highlighted the special vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of obtaining food and clean water.”⁴⁴⁴ For the Inter-American Court, in the case of indigenous peoples, “special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity.”⁴⁴⁵

D. The Right to Cultural Identity and Religious Freedom

160. The perpetuation of indigenous and tribal peoples’ cultural identity also depends on recognition of ancestral lands and territories.⁴⁴⁶ The close relationship between indigenous and tribal peoples and their

⁴⁴⁰ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 168.

⁴⁴¹ UN Committee on Economic, Social and Cultural Rights, General Comment 14, par. 27, cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 166.

⁴⁴² IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1076-1080.

⁴⁴³ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1080.

⁴⁴⁴ Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 166.

⁴⁴⁵ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 167.

⁴⁴⁶ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 3.

traditional territories and natural resources is a constitutive element of their culture, understood as a particular way of life.⁴⁴⁷ Ancestral cemeteries, places of religious meaning and importance, and ceremonial or ritual sites linked to the occupation and use of physical territories⁴⁴⁸ constitute an intrinsic part of the right to cultural identity.⁴⁴⁹ Failure to guarantee the right to communal property thus impairs the preservation of the ways of life, customs and language of indigenous and tribal communities.⁴⁵⁰ For indigenous and tribal peoples, “possession of their traditional territory is indelibly recorded in their historical memory, and their relationship with the land is such that severing that tie entails the certain risk of an irreparable ethnic and cultural loss, with the ensuing loss of diversity.”⁴⁵¹

161. Indigenous and tribal peoples are thus entitled to effective guarantee of their right to live in their ancestral territory and preserve their cultural identity.⁴⁵² If the State fails to secure the right to territorial property of indigenous communities and their members, they are deprived “not only of material possession of their territory but also of the basic foundation for the development of their culture, their spiritual life, their wholeness and their economic survival.”⁴⁵³ Therefore, by virtue of Article 21 of the American Convention, the protection of the right to territorial property is a means to preserve the fundamental basis for the development of the culture, spiritual life, integrity and economic survival of indigenous communities.⁴⁵⁴ Limitations on the right to indigenous property can also affect the right to the exercise of one’s own religion, spirituality or beliefs, a right recognized by Article 12 of the American Convention and Article III of the American Declaration. States are under the obligation to secure indigenous peoples’ freedom to preserve their own forms of religiousness or spirituality, including the public expression of this right and access to sacred sites.

162. The loss of cultural identity because of the lack of access to ancestral territory has a direct impact upon the rights of the children of the dispossessed communities. The Inter-American Court has explained: “Regarding the cultural identity of the boys and girls of indigenous communities, the Court notes that Article 30 of the Convention on the Rights of the Child establishes an additional and complementary obligation which gives content to Article 19 of the American Convention, namely the obligation to promote and protect indigenous children’s right to live in accordance with their own culture, their own religion and their own language. // Likewise, this Court considers that from the States’ general obligation to promote and protect cultural diversity, is derived a special obligation to guarantee indigenous children’s right to cultural life. // In this sense, the Court considers that the loss of traditional practices, such as the feminine or masculine initiation rituals and the Community’s languages, and the damages derived from the lack of territory, affect in a particular way the development and cultural identity of the Community’s boys and girls, who will not even be able to develop that special relationship

⁴⁴⁷ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 155.

⁴⁴⁸ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 155.

⁴⁴⁹ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1054.

⁴⁵⁰ I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 73-75.

⁴⁵¹ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 216.

⁴⁵² IACHR, Arguments before the Inter-American Court of Human Rights in the case of Yakye Axa v. Paraguay. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 157(c). I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, pars. 171-182.

⁴⁵³ IACHR, Arguments before the Inter-American Court of Human Rights in the case of Yakye Axa v. Paraguay. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 120(j).

⁴⁵⁴ IACHR, Arguments before the Inter-American Court of Human Rights in the case of Sawhoyamaxa v. Paraguay. Cited in: I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 113(a).

with their traditional territory and that particular form of life that appertains to their culture, if the measures necessary to guarantee the enjoyment of those rights are not implemented.”⁴⁵⁵

E. Labor Rights

163. The IACHR has also proven that the occupation and restriction of indigenous territories, insofar as they prevent indigenous and tribal peoples from access to their traditional subsistence activities, expose their members to situations of work exploitation (marked by bad working conditions, low salaries and lack of social security), and even to practices such as forced labor or servitude for debts, analogous to slavery.⁴⁵⁶

164. In its 2009 report on “Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco”, the IACHR verified the direct causal link that exists between the territorial dispossession and forced labor of the members of the Guaraní indigenous communities of the Bolivian Chaco. In such report, the IACHR “finds the existence of debt bondage and forced labor, which are practices that constitute contemporary forms of slavery. Guaraní families and communities clearly are subjected to a labor regime in which they do not have the right to define the conditions of employment, such as the working hours and wages; they work excessive hours for meager pay, in violation of the domestic labor laws; and they live under the threat of violence, which also leads to a situation of fear and absolute dependency on the employer. The Commission highlights the importance of the fact that these are individuals, families, and communities who belong to an indigenous people, who find themselves in those deplorable conditions due to the involuntary loss of their ancestral lands, as a result of actions and policies taken by the State over more than a century, and who at present find it impossible to enjoy their fundamental rights, as an indigenous people, to collective communal property, access to justice, a dignified life, and the development of their own self-government and their own social, cultural, and political institutions.”⁴⁵⁷ Therefore it concluded that “[t]he problem of bondage and forced labor in the Bolivian Chaco has its origins in the dispossession of their territory suffered by the Guaraní indigenous people over more than a century, which resulted in the subjugation of its members to conditions of slavery, bondage, and forced labor. The solution to this problem lies not only in the elimination of contemporary forms of slavery on the estates of the Chaco, but also in measures of reparation including the restitution of the ancestral territory of the Guaraní people and integral measures that solve their needs in health, housing, education, and technical training that would arise after the ‘emancipation’ of the Guaraní captive communities.”⁴⁵⁸

Example of application

In its 2001 report on the human rights situation in Guatemala, the IACHR referred to the direct link between lack of access to territorial property and generalized poverty and indigence among indigenous peoples, noting the labor exploitation of the indigenous population. The Commission pointed out that “[v]irtually all indigenous peoples live below the poverty line, a situation that has an impact on educational services, health, literacy, sanitation services, employment, and the status of women and children” [par. 44]. In terms of the right to health, the IACHR found that “insufficient food, abject poverty, and the absence of preventive health policies are the cause of health problems among the indigenous population in Guatemala.” [par. 48] As to the indigenous population’s higher vulnerability to labor exploitation, the Commission explained that as a consequence of extreme necessity, sectors of the indigenous population had to migrate temporarily to work in the lowlands with agricultural exports companies. “Each year, during the harvesting period, several hundred thousand indigenous workers go to those areas, where they generally toil in working conditions that are illegal and receive salaries that are below the legal minimum wage. Living and housing conditions are abysmal, and their attempts to join unions are attacked.” [par. 46].

⁴⁵⁵ I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, pars. 261-263 [informal translation from Spanish; footnotes omitted].

⁴⁵⁶ IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, pars. 35, 37, 40. IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, pars. 257-268, 297 – Recommendation 8.

⁴⁵⁷ IACHR, *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco*. Doc. OEA/Ser.L/V/II, Doc. 58, 24 December 2009, par. 166.

⁴⁵⁸ IACHR, *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco*. Doc. OEA/Ser.L/V/II, Doc. 58, 24 December 2009, par. 216.

The IACHR recommended that the State “adopt, as soon as possible, the measures and policies necessary to establish and maintain an effective preventive health and medical care system, to which all members of the different indigenous communities have access, take advantage of the medicinal and health resources of indigenous cultures, and provide these communities with resources to improve their environmental health conditions, including drinking water and sewage services” [par. 66, Recommendation 6]. It also recommended the State to “develop policies aimed at the qualitative improvement of and social investment in rural areas in order to guarantee indigenous peoples equal opportunities (...)” [par. 66, Recommendation 7]. Finally, with regard to the situation of indigenous migrant workers, the IACHR recommended the promotion of respect for their rights as workers, taking into account ILO Convention No. 169 and its domestic legislation, punishing those responsible for violations of the Law.

F. Right to Self-determination

165. The lack of access to ancestral territory prevents the exercise of indigenous and tribal peoples’ right to self-determination. The U.N. Declaration on the Rights of Indigenous Peoples explicitly recognizes indigenous peoples’ right to self-determination.⁴⁵⁹ ILO Convention No. 169 also recognizes the aspirations of indigenous peoples to control their own institutions, ways of life and economic development “within the framework of the state in which they live.”⁴⁶⁰ There is a direct relation between self-determination and land and resource rights.

166. In the case of the *Saramaka People v. Suriname* the Court referred to the right of self-determination in its interpretation of indigenous land and resource rights under American Convention Article 21. It noted that the Committee on Economic, Social, and Cultural Rights has interpreted common Article 1 of the Covenants as being applicable to indigenous peoples.⁴⁶¹ Accordingly, by virtue of the right of indigenous peoples to self-determination recognized under said Article 1, they may “freely pursue their economic, social and cultural development”, and may “freely dispose of their natural wealth and resources” so as not to be “deprived of [their] own means of subsistence.”⁴⁶² The Court considered that the rules of interpretation contained in Article 29(b) of the American Convention, precluded it “from interpreting the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized”⁴⁶³ in the UN Covenants. Accordingly, the Court concluded that Article 21 of the American Convention calls for the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied. As a corollary, the State has an obligation to adopt special measures to recognize, respect, protect and guarantee the communal property right of the members of indigenous and tribal communities to such territory.

G. Right to Psychological and Moral Integrity

167. The lack of access to ancestral territory also causes suffering to the members of the dispossessed indigenous communities, which constitutes a violation of their right to psychological and moral integrity. In the case of the *Xákmok-Kásek community v. Paraguay*, the Inter-American Court explained that “several of the alleged victims who declared before the Court expressed the sadness that they, and the members of the Community, feel because of the lack of restitution of their traditional lands, the progressive loss of their culture and the long wait they have had to bear in the course of the inefficient administrative procedure. In addition, the miserable living

⁴⁵⁹ Article 3 of the UN Declaration provides as follows: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

⁴⁶⁰ ILO Convention No. 169, Preamble.

⁴⁶¹ Cf. UNCESCR, Consideration of Reports submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations on Russian Federation (Thirty-first session), U.N. Doc. E/C.12/1/Add.94, December 12, 2003, para. 11, in which the Committee expressed concern for the “precarious situation of indigenous communities in the State party, affecting their right to self-determination under article 1 of the Covenant.”

⁴⁶² ICESCR, Article 1.

⁴⁶³ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 93.

conditions experienced by the members of the Community, the death of several of its members and the general state of abandonment in which they are generate sufferings that necessarily affect the psychological and moral integrity of all of the members of the Community. All of this constitutes a violation of Article 5.1 of the Convention, to the detriment of the members of the Xákmok-Kásek Community.”⁴⁶⁴

H. Corresponding State Obligations

168. In relation to indigenous communities who have been dispossessed of their territories and are consequently placed in vulnerable and extreme situations, the State must:

1. adopt urgent measures to guarantee effective access by the communities to the territories that belong to them;
2. strive to guarantee the members of these communities dignified living conditions, through the immediate provision of the goods and services they require in the fields of food, water, dignified housing, health and education;
3. adopt precautionary measures to protect their ancestral territories from any act that can entail a loss of their value while their restitution is carried out; and
4. promote access to justice by the community members, as victims of serious human rights violations.⁴⁶⁵

Restitution of ancestral territory

169. The precarious socioeconomic conditions of these indigenous communities make compliance with the State duty to solve their territorial claims more urgent.⁴⁶⁶ The main means available to the State to improve the situation of indigenous communities in extreme socioeconomic distress is the restitution of their traditional lands; thus, in the case of the Sawhoyamaya community, the Inter-American Court ruled that “although the State did not take them to the side of the road, it is also true it did not adopt the adequate measures, through a quick and efficient administrative proceeding, to take them away and relocate them within their ancestral lands, where they could have used and enjoyed their natural resources, which resources are directly related to their survival capacity and the preservation of their ways of life.”⁴⁶⁷ In this case, therefore, the State had “not adopted the necessary measures for the members of the Community to leave the roadside, and thus, abandon the inadequate conditions that endangered, and continue endangering, their right to life.”⁴⁶⁸

Immediate provision of the basic goods and services required for a dignified subsistence

170. Indigenous communities who lack access to ancestral territory often live a situation of extreme vulnerability because of the lack of access to subsistence resources. In such circumstances they have a right to immediate and priority provision by the State of food, water, health care and educational attention which are

⁴⁶⁴ I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of August 24, 2010. Series C No. 214, par. 244 [informal translation from Spanish].

⁴⁶⁵ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of March 29, 2006. Series C No. 146, par. 163.

⁴⁶⁶ IACHR, *Third Report on the Situation of Human Rights in Paraguay.* Doc. OEA/Ser./L/VII.110, Doc. 52, March 9th, 2001, Chapter IX, par. 48.

⁴⁶⁷ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of March 29, 2006. Series C No. 146, par. 164.

⁴⁶⁸ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of March 29, 2006. Series C No. 146, par. 166.

adequate, regular and sufficient⁴⁶⁹ in terms of the periodicity, quantity and quality, to reverse and solve the situation of risk and vulnerability in the areas of food, water, health, sanitation and housing, taking into account the seriousness of each case.⁴⁷⁰ The State must adopt the positive measures that are necessary to ensure that the members of such indigenous communities, during the period in which they remain without territory, can live in conditions which are compatible with their dignity.⁴⁷¹ The State must also adopt measures which can enable the members of those indigenous communities to live in a healthy environment, to prevent or avoid illnesses, especially among their children.⁴⁷²

171. The essential content of the State duties towards communities deprived of access to their ancestral land is summarized in the reparations ordered by the Court in the *Yakye Axa* and *Sawhoyamaxa* cases: in addition to delimiting, demarcating, granting legal title and materially handing them their ancestral territories or alternative lands that satisfy the jurisprudential criteria,⁴⁷³ “as long as the Community remains landless, given its special state of vulnerability and the impossibility of resorting to its traditional subsistence mechanisms, the State must supply, immediately and on a regular basis, sufficient drinking water for consumption and personal hygiene of the members of the Community; it must provide regular medical care and appropriate medicine to protect the health of all persons, especially children, the elderly and pregnant women, including medicine and adequate treatment for worming of all members of the Community; it must supply food in quantities, variety and quality that are sufficient for the members of the Community to have the minimum conditions for a decent life; it must provide latrines or any other type of appropriate toilets for effective and healthy management of the biological waste of the Community; and it must supply sufficient bilingual material for appropriate education of the students at the school in the current settlement of the Community”.⁴⁷⁴

172. The measures that the State must adopt to attend these communities must be prioritized and special, with the aim of achieving an effective provision and supply of such goods and services; these measures differ, because of their urgent character, from those that the state must adopt to guarantee the rights of the population and of indigenous communities in general.⁴⁷⁵

173. The state obligations of priority attention become yet more pressing when it comes to the children or the pregnant women of these communities: “As regards to the right to life of children, the State has, in addition to the duties regarding any person, the additional obligation to promote the protective measures referred

⁴⁶⁹ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, pars. 157(d), 157(f). IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Sawhoyamaxa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 145(b).

⁴⁷⁰ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 169. I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 167-170. IACHR, Report No. 73/04, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, October 19, 2004, Recommendation 2. Cited in: I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 8.

⁴⁷¹ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 168.

⁴⁷² IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Sawhoyamaxa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 145(c).

⁴⁷³ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 274.

⁴⁷⁴ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 221. I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146.

⁴⁷⁵ I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 173.

to in Article 19 of the American Convention (...). Thus, on the one hand, the State must undertake more carefully and responsibly its special position as guarantor, and must adopt special measures based on the best interest of the child.⁴⁷⁶ The aforesaid cannot be separated from the likewise vulnerable situation of the pregnant women of the Community. States must devote special attention and care to protect this group and must adopt special measures to secure women, specially during pregnancy, delivery and lactation, access to adequate medical care services".⁴⁷⁷ The extreme vulnerability of the children of indigenous communities due to lack of territory is particularly serious;⁴⁷⁸ in particular, the state has the duty, *inter alia*, of providing these children with their basic needs, "to ensure that the situation of vulnerability of their Community due to lack of territory will not limit their development or destroy their life aspirations."^{479, 480}

174. If the State fails to act to prevent the deaths of children who are members of communities at risk due to lack of access to territory, it can become internationally responsible for violation of articles 4 and 19 of the American Convention,⁴⁸¹ when "said deaths are attributable to the lack of adequate prevention and to the failure by the State to adopt sufficient positive measures, considering that the State had knowledge of the situation of the Community and that action by the State could be reasonably expected."⁴⁸² It must be determined that at the moment the events occurred, "the authorities knew or should have known about the existence of a situation posing an immediate and certain risk to the life of an individual or of a group of individuals, and that the necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such risk."⁴⁸³

175. The situation of the elderly members of indigenous communities that lack access to their territory is comparably serious: "As regards the special consideration required by the elderly, it is important for the State to take measures to ensure their continuing functionality and autonomy, guaranteeing their right to adequate food, access to clean water and health care. Specifically, the State must provide care for the elderly with chronic diseases and in terminal stages, to help them avoid unnecessary suffering."⁴⁸⁴ It is necessary to take into account that in many indigenous communities oral transmission of the culture to the younger generations is primarily entrusted to the elderly.

⁴⁷⁶ Cf. *Case of the "Mapiripán Massacre"*, *supra* note 9, para. 152; *Case of the Indigenous Community of Yakye Axa*, *supra* note 1, para. 172, and *Case of "Juvenile Reeducation Institute"* *supra* note 211, para. 160. In that sense, also, Cf. *Juridical Condition and Human Rights of Children*. Advisory Opinion AO-17/02 of August 28, 2002. Series A No. 17, pars. 56 and 60.

⁴⁷⁷ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 177.

⁴⁷⁸ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 172.

⁴⁷⁹ I/A Court H. R., "*Juvenile Reeducation Institute*" *v. Paraguay Case*. Judgment of September 2, 2004. Series C No. 112, par. 160; I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, pars. 80-81, 84, and 86-88, and I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.)*. Judgment of November 19, 1999. Series C No. 63, par. 196.

⁴⁸⁰ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 172.

⁴⁸¹ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 179 .

⁴⁸² I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 172.

⁴⁸³ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 155. In the same sense: I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 188.

⁴⁸⁴ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 175.

176. In addition, State obligations under articles 4, 5, 21 and 24 of the American Convention and the duties of protection and guarantee that stem from articles 1 and 2 of the Convention, require the State to provide, in an exceptional manner, the basic goods and services necessary for indigenous communities' subsistence, in a range of situations in which, due to reasons of *force majeure*, indigenous peoples are deprived of access to their lands and resources, such as food crises, relocation caused by development projects, internal displacement caused by environmental crises and cases of armed conflict, and other humanitarian emergency situations, which trigger the aforementioned State duties of special attention.⁴⁸⁵

177. The fact that the State is not responsible for depriving the members of the communities of their lands, does not relieve the State from its duties from the moment it has knowledge of the situation.⁴⁸⁶

Interim protection of the ancestral territory pending restitution

178. As for the interim protection of the ancestral territories pending their restitution to the dispossessed communities, the Court has explained that until it is effectively returned, "the State must guarantee that such territory will not be damaged by acts of the State itself or of private third parties. Thus, it must ensure that the area will not be deforested, that sites which are culturally important for the community will not be destroyed, that the lands will not be transferred and that the territory will not be exploited in such a manner as to cause irreparable harm to the area or to the natural resources present therein."⁴⁸⁷

Example

In its 2001 report on the human rights situation in Paraguay, the IACHR described the situation of lack of access to territorial property and ecological deterioration of the territories of the country's indigenous peoples, as well as its repercussions upon the effective enjoyment of other individual and collective human rights. The IACHR explained that "the process of sorting out territorial claims, to which the Paraguayan State committed itself more than 20 years ago, to benefit the indigenous communities, is still pending" [par. 47], and in many of the cases the process of territorial adjudication had not been coupled with the installation of basic utilities and services for the communities.

The IACHR pointed out that "most of the indigenous communities obtained the animals and fruits necessary for their food from the forests; nonetheless, the process of agrarian colonization led to the dispossession of their territories and the ecological degradation of their lands" [par. 40]. It also indicated that "the contamination of the communities' water reserves is a public health problem. To date the State has yet to perform the pertinent studies for evaluating the harm and possible mitigation measures" [par. 43]. As a consequence of this situation, the IACHR explained that "during the last quarter century, as the territory came to be occupied by colonization and migratory flows, the traditional indigenous habitat was encroached upon, with a negative impact on infant mortality and infant malnutrition for indigenous children, which are several times higher than the national average" [par. 36]; that "by virtue of the precarious conditions in which the indigenous people live in Paraguay, they are more vulnerable to diseases and epidemics, particular Chagas' disease, tuberculosis, and malaria" [par. 35]; and that as an effect of the restriction of traditional habitats "indigenous communities have suffered intensive deterioration and community disintegration." [par. 4].

VIII. INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER NATURAL RESOURCES

179. Many indigenous and tribal peoples live in areas rich in living and non-living resources, including forests that contain abundant biodiversity, water, and minerals. Historically, the desire of non-indigenous society for such resources has resulted in the removal, decimation or extermination of many indigenous communities. Today, the survival and integrity of the Hemisphere's remaining indigenous and tribal peoples requires recognition

⁴⁸⁵ See UN – Commission on Human Rights. Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39 – Addendum: Guiding Principles on Internal Displacement. UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998, par. 9; UN – Commission on Human Rights. Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Miloon Kothari. Appendix: Basic principles and guidelines on development-based evictions and displacement, pars. 2, 7, 38, 56(b), (h).

⁴⁸⁶ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29th, 2006. Series C No. 146, par. 163.

⁴⁸⁷ I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 291 [informal translation from Spanish].

of their rights to the resources found on their lands and territories on which they depend for their economic, spiritual, cultural, and physical well-being.

180. In several countries of the region, constitutional or legislative provisions assign ownership of sub-surface mineral and water rights to the State. The Inter-American human rights system does not preclude this type of measure; it is legitimate, in principle, for States to formally reserve for themselves the resources of the subsoil and water. This does not imply, however, that indigenous or tribal peoples do not have rights that must be respected in relation to the process of mineral exploration and extraction, nor does it imply that State authorities have freedom to dispose of said resources at their discretion. On the contrary, Inter-American jurisprudence has identified rights of indigenous and tribal peoples that States must respect and protect when they plan to extract subsoil resources or exploit water resources; such rights include the right to a safe and healthy environment, the right to prior consultation and, in some cases, informed consent, the right to participation in the benefits of the project, and the right of access to justice and reparation. In the following sections, their content and modes of application are explained in detail.

A. General Considerations

181. Indigenous and tribal peoples have property rights over the natural resources which are present in their territories. The Inter-American human rights system's jurisprudence on indigenous peoples' right to communal property has explicitly incorporated, within the material scope of this right, the natural resources traditionally used by indigenous peoples and linked to their cultures, including uses which are both strictly material and other uses of a spiritual or cultural character. For the Inter-American human rights system, this is a necessary consequence of the right to territorial property: from the right to use and enjoy territory in accordance with indigenous and tribal peoples' traditions and customs, the right to the natural resources which are both in and within the ancestral lands is a necessary derivation,⁴⁸⁸ including the specific rights of indigenous peoples over the natural resources of the subsoil which will be explained in detail below. For the Inter-American Court, indigenous peoples' members' "right to use and enjoy their traditionally owned lands necessarily implies a similar right with regards to the natural resources that are necessary for their survival".⁴⁸⁹ In general terms, by virtue of their right to property, indigenous and tribal peoples and their members have the right "to use and enjoy the natural resources that lie on and within their traditionally owned territory".⁴⁹⁰

182. The property rights of indigenous and tribal peoples thus extend to the natural resources which are present in their territories, resources traditionally used and necessary for the survival, development and continuation of the peoples' way of life.⁴⁹¹ For the Inter-American human rights system, resource rights are a necessary consequence of the right to territorial property.⁴⁹² According to the Inter-American Court, "members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and

⁴⁸⁸ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 118.

⁴⁸⁹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 141.

⁴⁹⁰ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, subtitle D.

⁴⁹¹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 122. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, pars. 124, 137. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29th, 2006. Series C No. 146, pars. 118, 121.

⁴⁹² I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, subtitle D.

occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake.^{493,494} Hence the need to protect indigenous and tribal peoples' rights over the natural resources they have traditionally used; that is, "the aim and purpose of the special measures required on behalf of the members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States."⁴⁹⁵ States must take into consideration that "the culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview (...), and therefore, of their cultural identity."⁴⁹⁶ This corresponds to the notion of indigenous territoriality elaborated by ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples, by which indigenous rights to property extend to the natural resources that indigenous peoples use as part of their traditional economies or which have cultural, spiritual or ceremonial uses.

183. As explained by the Inter-American Court, "due to the inextricable connection members of indigenous and tribal peoples have with their territory, the protection of their right to property over such territory, in accordance with Article 21 of the Convention, is necessary to guarantee their very survival. Accordingly, the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. That is, the demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life. This connectedness between the territory and the natural resources necessary for their physical and cultural survival is precisely what needs to be protected under Article 21 of the Convention in order to guarantee the members of indigenous and tribal communities' right to the use and enjoyment of their property. From this analysis, it follows that the natural resources found on and within indigenous and tribal people's territories that are protected under Article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life."⁴⁹⁷ The Court has identified in concrete cases the natural resources present within ancestral territory that are important to the traditional way of life, and therefore protected by the right to property.⁴⁹⁸

184. In connection with this, the cultural rights of an indigenous people may encompass traditional activities related to natural resources, such as fishing or hunting.⁴⁹⁹ The IACHR has also noted that among indigenous communities, the life of their members "fundamentally depends" on the subsistence activities –

⁴⁹³ Cf. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 137, and I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 118.

⁴⁹⁴ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, pars. 120, 121.

⁴⁹⁵ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, pars. 120, 121.

⁴⁹⁶ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 135.

⁴⁹⁷ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 122. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, pars. 124, 137. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 118, 121.

⁴⁹⁸ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 123.

⁴⁹⁹ Human Rights Committee, General Comment No. 23 (1994): Article 27 (rights of minorities), CCPR/C/21/rev.1/Add.5 (1994), par. 7; cited in: IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130, footnote No. 97.

agriculture, hunting, fishing, gathering – that they carry out in their territories,⁵⁰⁰ and that therefore, an indigenous community's "relations to its land and resources are protected by other rights set forth in the American Convention, such as the right to life, honor, and dignity, freedom of conscience and religion, freedom of association, rights of the family, and freedom of movement and residence."⁵⁰¹ The preservation of the distinctive connection between indigenous and tribal peoples and the natural resources they have traditionally used and are linked to their culture "is fundamental to the effective realization of the human rights of indigenous peoples more generally and therefore warrants special measures of protection."⁵⁰²

185. Insofar as indigenous and tribal peoples have property rights over the natural resources present in their ancestral territories, States must adopt effective measures to secure those rights,⁵⁰³ measures which must be adequate for their full guarantee, in accordance with the traditional use and occupation patterns. Recognition of indigenous customary law by State authorities in general, and in particular by the Courts, is therefore necessary for indigenous and tribal peoples to be able to claim their rights over natural resources, and for recognition of their ancestral possession.⁵⁰⁴ The State's failure to adopt such measures violates articles 1 and 2 of the American Convention.⁵⁰⁵

186. As with the right to territorial property in general, indigenous and tribal peoples' right to property over the natural resources may not be legally extinguished or altered by State authorities without the peoples' full and informed consultation and consent, or without complying with the general requirements established for cases of expropriation,⁵⁰⁶ and with the other legal safeguards of indigenous territorial property. Compliance with the requirements for carrying out expropriations is one of the elements that must be applied

⁵⁰⁰ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awás Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(f).

⁵⁰¹ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awás Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(f).

⁵⁰² IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 128. Because of their crucial importance, "the close ties of indigenous peoples with their traditional territories and the natural resources therein associated with their culture, as well as the components derived from them, must be safeguarded by Article 21 of the American Convention." [I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 137. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 118, 121. I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 85] The Inter-American Court considers that indigenous and tribal peoples' rights over natural resources require attention "regarding the inextricable relationship between both land and the natural resources that lie therein, as well as between the territory (understood as encompassing both land and natural resources) and the economic, social, and cultural survival of indigenous and tribal peoples, and thus, of their members." [I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 120] Indeed, indigenous and tribal peoples' right to property, as protected by the Inter-American human rights instruments, encompasses the close bond that they have with the natural resources linked to their culture which are present in their territories, as well as the incorporeal elements that are derived from such resources [IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II.135, Doc. 40, August 7, 2009, par. 156. I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 148. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 137. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 118].

⁵⁰³ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awás Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(e).

⁵⁰⁴ IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, par. 57.

⁵⁰⁵ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awás Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, pars. 140(n), 140(o).

⁵⁰⁶ IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 131.

whenever the State decides to evaluate undertaking development or investment plans or projects, or granting concessions for the exploration or exploitation of natural resources in indigenous territories, as explained below.

187. Rights over natural resources are not conditioned on the existence of formal title to property, nor to the finalization of the delimitation or demarcation procedures, but instead “exist even without State actions which specify them,”⁵⁰⁷ given that such peoples have “communal property rights to land and natural resources based on traditional patterns of use and occupation of ancestral territory.”⁵⁰⁸ This entails the application of the natural resource property safeguards to the communities that lack a real property title. States violate indigenous peoples’ right to property when they grant concessions for the exploration or exploitation of the natural resources present in ancestral territories which have not been titled, delimited or demarcated.⁵⁰⁹ Consequently, States are bound, by virtue of Article XXIII of the American Declaration of the Rights and Duties of Man, to abstain from “granting logging and oil concessions to third parties to utilize the property and resources that could fall within the lands which must be delimited, demarcated and titled or otherwise clarified and protected, in the absence of effective consultations with and the informed consent of the [respective] people,”⁵¹⁰ an identical obligation is imposed by Article 21 of the American Convention.⁵¹¹

188. Indeed, one of the problems which has recurred in the individual case mechanism before the organs of the Inter-American system is that of indigenous communities who, lacking a real title to property over their traditional lands and territories, are adversely affected by the implementation of plans for investment or natural resource development on their ancestral lands and territories. As already indicated, the Inter-American system’s jurisprudence deems the procedures for delimitation, demarcation and granting of title over indigenous lands a merely formal recognition of pre-existing property rights for purposes of guaranteeing their effective protection from third parties. Given that indigenous property rights pre-exist their formalization through the State mechanisms for granting of title, the implementation of plans for the investment or development of natural resources which are likely to directly or indirectly affect said land and resources must comply with the procedural and substantive safeguards respecting property rights. Indigenous and tribal peoples also have the right to be protected by the State from conflicts with third parties over projects for the exploration and exploitation of natural resources in their ancestral territories, particularly when such conflicts have been caused by the delay or absence of territorial titling and demarcation.⁵¹²

189. As discussed in detail below, States have the obligation of attending indigenous and tribal peoples’ land claims, through the granting of title or other mechanisms to recognize communal property, before authorizing any development or investment plan which can affect these peoples’ property rights over natural resources. In the *Saramaka* case, the Inter-American Court ordered the State to delimit, demarcate and grant title over the people’s traditional territory before authorizing new plans for investment or development of natural resources which can affect such territory.⁵¹³ The IACHR has also held that States are obliged to “abstain from any

⁵⁰⁷ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(a).

⁵⁰⁸ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(a).

⁵⁰⁹ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 153.

⁵¹⁰ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 194.

⁵¹¹ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(j).

⁵¹² IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1066, 1071, 1137 – Recommendations 1 to 4.

⁵¹³ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 194(a) (“Until said delimitation, demarcation, and titling of the Saramaka territory has been carried

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acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the [respective] people,”⁵¹⁴ until such time as title is granted. The IACHR has also held that failure to adopt State measures to guarantee indigenous communities’ rights over natural resources in accordance with their traditional use and occupation patterns is a violation of Articles 1.1 and 2 of the American Convention on Human Rights.⁵¹⁵ Granting concessions for the exploration or exploitation of natural resources in indigenous territories that have not been titled, demarcated or protected by the State, without complying with the requirements of prior consultation and other applicable safeguards, violates Articles 1 and 2 of the American Convention on Human Rights.⁵¹⁶

B. The Right to Environmental Integrity

190. Although neither the American Declaration of the Rights and Duties of Man, nor the American Convention on Human Rights, contain express references to the protection of the environment, several fundamental rights require, as a necessary precondition for their enjoyment, a minimum environmental quality, and are profoundly affected by the degradation of natural resources. The IACHR has emphasized that there is a direct relationship between the physical environment in which persons live, and the rights to life, security and physical integrity: “The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one’s physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.”⁵¹⁷

191. Both the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights reflect a priority concern with the preservation of individual health and welfare, legal interests which are protected by the interrelation between the rights to life, security of person, physical, psychological and moral integrity, and health,⁵¹⁸ and thereby refer to the right to a healthy environment.

192. As explained by the IACHR,⁵¹⁹ the critical link between human beings’ subsistence and the environment has been recognized in other international treaties and instruments that bind several States of the Americas, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; the Amazon Cooperation Treaty; the World Charter for Nature; the Convention for the Protection of Flora, Fauna and Natural Scenic Beauties of America; the Rio Declaration on Environment and Development; and the Convention on Biological Diversity. Both ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples incorporate specific provisions on the protection of the environment of indigenous territories.⁵²⁰ At the Inter-American Level, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San

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out, Suriname must abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the territory to which the members of the Saramaka people are entitled, unless the State obtains the free, informed and prior consent of the Saramaka people.”)

⁵¹⁴ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 197 – Recommendation 2.

⁵¹⁵ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awás Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 104(ñ).

⁵¹⁶ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awás Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 104(ñ).

⁵¹⁷ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁵¹⁸ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁵¹⁹ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁵²⁰ United Nations Declaration on the Rights of Indigenous Peoples, Article 29; ILO Convention No. 169, Arts. 4.1, 7.3-7.4.

Salvador), which has been signed or ratified by several countries in the region⁵²¹ and entered into force in November 1999, states in Article 11, on the right to a healthy environment: “1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. // 2. The States Parties shall promote the protection, preservation, and improvement of the environment.”

193. These provisions are directly relevant for the interpretation of the Inter-American human rights instruments, by virtue of the evolutionary and systematic interpretive approach which applies to the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. Thus, both the IACHR and the Inter-American Court have articulated a set of State obligations related to the preservation of an environmental quality which allows for the enjoyment of human rights. State members of the OAS must prevent the degradation of the environment in order to comply with their human rights obligations in the framework of the Inter-American system.

194. In relation to indigenous and tribal peoples, the protection of the natural resources that are present in ancestral territories, and of such territories’ environmental integrity, is necessary to secure certain fundamental rights of their members, such as life, dignity, personal integrity, health, property, and privacy or information. These rights are directly affected whenever pollution, deforestation, contamination of waters, or other significant environmental damage occurs in ancestral territories. This implies that the State must undertake preventive and positive action aimed at guaranteeing an environment that does not compromise indigenous persons’ capacity to exercise their most basic human rights. In this line, the IACHR has explained that the right to life protected by both the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights “is not (...) limited to protection against arbitrary killing. States Parties are required to take certain positive measures to safeguard life and physical integrity. Severe environmental pollution may pose a threat to human life and health, and in the appropriate case give rise to an obligation on the part of a state to take reasonable measures to prevent such risk, or the necessary measures to respond when persons have suffered injury.”⁵²²

195. The link between the protection of the environment and respect for human dignity has also been emphasized by the IACHR: “The American Convention on Human Rights is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.”⁵²³ The IACHR has also underlined the direct link between the preservation of environmental integrity and access to livelihood sources; citing the World Charter for Nature, it has held that “mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients.”⁵²⁴

196. The IACHR has further recognized the link between the protection of the environment and the right to health. In 1983, in its report on the situation of human rights in Cuba, the IACHR recommended that the State adopt specific measures to protect the environment in order to comply with its obligations appurtenant to the right to health, explaining that a healthy environment is essential for a healthy population, and noting that factors such as water provision, basic sanitation and hygiene services, and waste management bear an important impact in this regard.⁵²⁵

⁵²¹ As of 2010, the Protocol had been ratified or adhered to by Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay; and it had been signed by Chile, Dominican Republic, Haiti, and Venezuela.

⁵²² IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁵²³ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁵²⁴ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁵²⁵ IACHR, *The Situation of Human Rights in Cuba – Seventh Report*. Doc. OEA/Ser.L/V/II.61, Doc. 29 - rev. 1, 4 October, 1983, pars. 1, 2, 41, 60, 61.

197. Effective protection of the natural resources present in indigenous and tribal territories requires that States guarantee their members the exercise of certain human rights of a procedural nature, most importantly, access to information, participation in decision-making, and access to justice. As explained by the IACHR, in contexts of harm or threat to the environment, “protection of the right to life and physical integrity may best be advanced through measures to support and enhance the ability of individuals to safeguard and vindicate those rights. The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.”⁵²⁶ From this perspective, the guarantee and exercise of the human rights to participation, information and access to justice constitute necessary means to attain the ultimate objective of environmental preservation. As explained in the following sections, the scope of each one of these three rights in relation to the protection of the natural resources of indigenous or tribal territories has been developed in detail by Inter-American jurisprudence, in such a way that they constitute, in themselves, mandatory requirements for States.

C. The right to effective implementation of the existing legal standards

198. Authorities have the duty, as part of the rule of law, to implement the national and international environmental protection standards that the State has enacted or accepted; this positive obligation of States is part of their general obligation to implement and enforce their own laws in order to protect the human rights of all persons, including indigenous or tribal peoples and their members. States must adopt measures to ensure that recognition of indigenous and tribal peoples’ territorial rights in their constitutions and in the international treaties to which they are parties, is incorporated in a cross-cutting manner in their domestic law, including in relation to development projects.⁵²⁷ At the same time they have the obligation to secure the effective implementation and enforcement of the provisions they adopt, and of the international human rights law provisions that bind them.

199. In its country reports, the IACHR has celebrated some legal advances in the constitutional recognition and legislative development of the right to prior consultation, in the process of socio-environmental monitoring of extractive activities, and in the sustainable development of industries such as the oil and gas sector. In this regard, it has expressed that it “hopes to obtain information on the implementation mechanisms for this legal framework and on their results in effectively safeguarding the right to prior consultation.”⁵²⁸

200. As part of the generic obligation to implement and enforce legal measures, States must ensure compliance with their environmental and criminal law and regulations in relation to projects for the exploration and exploitation of natural resources in indigenous and tribal peoples’ territories, and impose the sanctions foreseen in cases of non-compliance.⁵²⁹ The IACHR has explained that, in the context of environmental pollution resulting from extractive activities, “the right to life and the protection of the physical integrity of the individual are norms of an imperative nature. Article 2 of the American Convention requires that where these rights are not adequately ensured through legislative and other means, the State must take the necessary corrective measures. Where the right to life, to health and to live in a healthy environment is already protected by law, the Convention requires that the law be effectively applied and enforced.”⁵³⁰

⁵²⁶ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁵²⁷ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, pars. 220, 297 – Recommendation 4.

⁵²⁸ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II.135, Doc. 40, August 7, 2009, par. 160.

⁵²⁹ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 254.

⁵³⁰ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

201. Compliance with the State duty to implement and enforce existing environmental standards is required in order for extractive projects not to compromise the exercise of human rights: “The Commission recognizes that the right to development implies that each state has the freedom to exploit its natural resources, including through the granting of concessions and acceptance of international investment. However, the Commission considers that the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention.”⁵³¹ An integral part of the process of effective enforcement of the law in this context, is for the State “to take the measures necessary to ensure that the acts of its agents (...) conform to its domestic and Inter-American legal obligations.”⁵³²

202. Likewise, the IACHR has underscored that States who ratify ILO Convention No. 169 must guarantee its cross-cutting incorporation into the legislation that regulates the entire process of design, concession and implementation of projects for the exploration and exploitation of natural resources in indigenous territories; and at the same time must adopt measures to guarantee the effective application of such legislation, taking into account that the lack of regulatory development is not an excuse for failure to comply with the application of Convention No. 169.⁵³³ States must apply adequate mechanisms to follow-up and control compliance, by the authorities, with the rights and guarantees they agreed to respect upon ratification of Convention No. 169.⁵³⁴

203. The State duty to apply the environmental protection provisions in force gains special importance vis-a-vis non-State actors whose conduct that is harmful for natural resources. State authorities have clear international obligations to enforce their own standards and regulations, non-compliance with which may incur their international responsibility. In practice, States have resorted to different instruments, including the establishment of quality, production or emissions standards; licensing or regulation of dangerous activities; the provision of economic incentives or disincentives; the sanction of particularly harmful activities through criminal law; or the creation of private liability regimes to disincentivate and compensate environmental damage.⁵³⁵ Whichever options are chosen, enforcement of the environmental protection measures in relation to private parties, in particular of extractive companies and industries, is required to avoid the State’s international responsibility for violating the human rights of indigenous or tribal populations affected by environmentally destructive activities.⁵³⁶

D. State Obligations in the Context of Development and Investment Projects and Extractive Concessions over Natural Resources that Affect Ancestral Territories

204. The States of the Americas, and the populations that compose them, have the right to development. Such right to development “implies that each State has the freedom to exploit its natural resources, including through the granting of concessions and acceptance of international investment,”⁵³⁷ but development must necessarily be compatible with human rights, and specifically with the rights of indigenous and tribal peoples and their members. There is no development as such without full respect for human rights. This imposes mandatory limitations and duties on State authorities. In particular, development must be managed in a

⁵³¹ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁵³² IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁵³³ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 255.

⁵³⁴ IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 39 – Recommendation 3.

⁵³⁵ See, in this regard: SHELTON, Dinah. “Environmental rights and Brazil’s obligations in the Inter-American Human Rights System”. *The George Washington International Law Review*, Volume 40 No. 3, 2008-2009, p. 736.

⁵³⁶ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997. See also: IACHR, Resolution No. 12/85, Case No. 7.615, Yanomami People (Brazil), March 5, 1985.

⁵³⁷ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

sustainable manner, which requires that States ensure protection of the environment, and specifically of the environment of indigenous and tribal ancestral territories. As the IACHR has explained, “the norms of the Inter-American human rights system neither prevent nor discourage development; rather, they require that development take place under conditions that respect and ensure the human rights of the individuals affected. As set forth in the Declaration of Principles of the Summit of the Americas: ‘Social progress and economic prosperity can be sustained only if our people live in a healthy environment and our ecosystems and natural resources are managed carefully and responsibly.’”⁵³⁸

1. Impact of Development and Investment Plans or Projects, and of Extractive Concessions that Affect the Environment

205. Infrastructure or development mega-projects, such as roads, canals, dams, ports or the like, as well as concessions for the exploration or exploitation of natural resources in ancestral territories, may affect indigenous populations with particularly serious consequences, given that they imperil their territories and the ecosystems within, for which reason they represent a mortal danger to their survival as peoples, especially in cases where the ecological fragility of their territories coincides with demographic weakness.⁵³⁹ The impact of these activities upon indigenous or tribal peoples’ socio-cultural integrity has also been broadly documented by the IACHR.

206. Thus, extractive concessions in indigenous territories, in having the potential of causing ecological damage, endanger the economic interests, survival, and cultural integrity of the indigenous communities and their members, in addition to affecting the exercise of their property rights over lands and natural resources. The activities of logging companies in indigenous or tribal peoples’ territories, for example, are highly destructive and produce massive damage to the forest and its ecological and cultural functions, causing water pollution, loss of biodiversity, and the spiritual disruption of the forest⁵⁴⁰ to the detriment of indigenous and tribal peoples.⁵⁴¹

207. International human rights organs pay specific attention to the consequences to indigenous peoples’ rights of environmental contamination caused by extractive activities and other development or investment projects.⁵⁴² In recent years, the organs of the Inter-American system have witnessed an exponential

⁵³⁸ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁵³⁹ IACHR, *Third Report on the Human Rights Situation in Colombia*. Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter IX, pars. 33-35.

⁵⁴⁰ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 150.

⁵⁴¹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 153. The UN Special Rapporteur has expressed his alarm on the special vulnerability of the forest-dwelling indigenous peoples: “The reduction of the indigenous people’s territorial base is only a small part of a broader phenomenon: the progressive and accelerated loss of control over their natural resources, in which the forest resources situation is particularly dire. In recent years the forests of the indigenous people have been systematically affected by the activities of large forestry corporations and of legal and illegal logging, leading to the progressive destruction of their traditional means of subsistence. This process not only leads to the deforestation and desertification of large tracts of the planet, but also accelerates the gradual destruction of the indigenous people’s lifestyle and culture. This process affects the living conditions of a multitude of indigenous communities in the equatorial forests of Central Africa, the Amazon basin, the boreal forests of Siberia and America, the Andean range and South-East Asia, as well as the Pacific islands. (...) Some 60 million indigenous people in the world depend almost entirely on the forests for their survival. Hiding behind forest legislation, the authorities tend to sacrifice the rights of local communities to the interests of commercial firms, and resources are often utilized for illegal activities protected by corrupt officials and entrepreneurs. In many countries, eviction of indigenous people from their traditional forests as a result of such activities is one of the essential causes of their impoverishment. (...) The Special Rapporteur recommends that States and multilateral agencies should respect the traditional rights of the forest peoples and include the indigenous people affected in all forest-resource management projects, ensuring that such projects have their full consent and that they share in any profits deriving from them.” UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, UN Doc. A/HRC/4/32, 27 February 2007, pars. 25, 26, 37.

⁵⁴² The UN Special Rapporteur has held, in this sense, that “[e]xtractive activities, cash crops and unsustainable consumer patterns have generated climate change, widespread pollution and environmental degradation. These phenomena have had a particularly serious impact on indigenous people, whose way of life is closely linked to their traditional relationship with their lands and natural resources, and has

growth in petitions alleging violations of indigenous peoples' rights as a consequence of the implementation of development or investment plans or projects or exploration and exploitation of natural resources in their territories.

208. The losses caused indigenous peoples' traditional territories as a result of colonization and the extension of economic exploitation (agricultural, cattle growing, timber and others) result in major processes of environmental deterioration and disintegration of the communities of affected peoples⁵⁴³ as they prevent the members of indigenous communities from carrying out their traditional livelihood activities. Among the members of the indigenous and tribal peoples affected in their health, basic subsistence activities and environment as a consequence of development projects, special attention must be paid to especially vulnerable persons, including children, women of fertile age and the elderly.⁵⁴⁴

209. An important gap exists in the regulation of key aspects of the protection of indigenous property rights in the context of exploitation of natural resources in indigenous territories. A series of structural barriers also impede effective implementation of the existing legal provisions. As a result, development and investment plans and projects in indigenous or tribal territories, and concessions for the exploration and exploitation of natural resources, have been found to result in multiple violations of individual and collective human rights, including the right to life in conditions of dignity (violated whenever development projects cause environmental contamination, generate noxious effects upon basic subsistence activities and affect the health of the indigenous and tribal peoples who live in the territories where they are implemented).⁵⁴⁵ The IACHR and Court have also found violations stemming from "adverse effects on health and production systems; changes in domestic migration patterns; a decline in the quantity and quality of water sources; impoverishment of soils for farming; a reduction in fishing, animal life, plant life, and biodiversity in general, and disruption of the balance that forms the basis of ethnic and cultural reproduction," all taking place where the mining, timber or oil industries develop their projects.⁵⁴⁶ Concessions, together with the State acts that relate to them, have been considered violations of the right to property protected by the American Convention,⁵⁴⁷ and other human rights.⁵⁴⁸

...continuation

become a new form of forced eviction of indigenous peoples from their ancestral territories, while increasing the levels of poverty and disease. (...) The indigenous populations have also been affected by the diminution of water reserves throughout the world. There are numerous populations whose subsistence depends on their close link with rivers and lakes and the regularity of rains, or, when it comes to herdsmen or nomads, to the aquifers in desert or semi-desert areas. The frequent droughts and famines in some indigenous regions are the result of human activity and could be avoided with appropriate policies. (...) Extraction of natural resources from the subsoil has had a highly discriminatory impact on the indigenous populations (...) who have witnessed the destruction of their traditional territories as a result of highly polluting technologies and disregard of local communities' right to the environment." UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, UN Doc. A/HRC/4/32, 27 February 2007, pars. 49, 51, 52. See also: UN – Commission on Human Rights - Sub-Commission on Prevention of Discrimination and Protection of Minorities: "Human Rights and the Environment". Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur. UN Doc. E/CN.4/Sub.2/1994/9, July 6, 1994, par. 77.

⁵⁴³ IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, par. 4.

⁵⁴⁴ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 253.

⁵⁴⁵ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 250.

⁵⁴⁶ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II.135, Doc. 40, August 7, 2009, par. 158.

⁵⁴⁷ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(k).

⁵⁴⁸ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 140(o).

210. In this regard, the IACHR has reiterated that it “acknowledges the importance of economic development for the prosperity of the populations of this Hemisphere;”⁵⁴⁹ but “at the same time, development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.”⁵⁵⁰

211. The environmental harm from which indigenous and tribal peoples have a right to be protected is that which is caused directly in their territory, or derived from the impact of other concessions.⁵⁵¹ The Inter-American Court has established that there is a violation of Article 21 of the Convention, in conjunction with Article 1.1, whenever the State grants concessions that damage the environment, and such deterioration has a negative impact on the lands and natural resources that indigenous and tribal peoples have traditionally utilized, which are located in whole or in part within the limits of the territory over which they have a right as communal property.⁵⁵² Other types of concessions affect not only the natural resources over which they were granted, but also other resources used by indigenous and tribal peoples for subsistence and trade; such is the case, for example, of some forestry and timber concessions, as explained by the Inter-American Court in the Saramaka case: “when a logging concession is granted, a variety of nontimber forest products, which are used by the members of the Saramaka people for subsistence and commercial purposes, are also affected.”⁵⁵³

Example: the environmental impact of projects for the extraction of natural resources in ancestral territories, and its serious implications for human rights. The case of the Ecuadorean Amazon

In its 1997 report on the situation of human rights in Ecuador, the IACHR described the situation of the indigenous inhabitants of the forested regions of the country's Interior, which had suffered from development and oil production activities for decades, affecting their capacity to exercise their rights to life and physical security because of grave environmental contamination by the extractive industry. The IACHR made an on-site verification of the conditions under which the oil extraction operations were being carried out, and explained that “oil development and exploitation do, in fact, alter the physical environment and generate a substantial quantity of toxic byproducts and waste. Oil development activities include the cutting of trails through the jungle and seismic blasting. Substantial tracts of land must be deforested in order to construct roads and build landing facilities to bring in workers and equipment. Installations are built, and exploratory and production wells drilled. Oil exploitation then generates byproducts and toxic wastes through each stage of operations: exploratory drilling, production, transportation and refining.” These toxic by-products had been discharged for decades in open or ill-constructed pits, overflowing and spilling into the rivers, streams and groundwater, or seeping into the soil; they had been buried, without properly sealing or lining the pits, causing lixiviation to the environment; they had been burned, without controls over temperature, emissions or other environmental protection measures; they had accidentally spilled; or they had been directly discharged into the waters or soils of the region. The Government conceded that the environment had been damaged by deforestation, erosion, the over-exploitation of resources, and high levels of contamination from oil exploitation and mining.

The impact of this situation on human health was documented by the IACHR, which identified serious consequences of the pollution on the health and subsistence of the indigenous population of the Amazon region. Based on scientific data and other relevant documentation, the IACHR verified that exposure to oil and associated chemical compounds through the skin, by ingestion in food or water, or absorption by the respiratory system, generate noxious effects for human life and health, posing a considerable risk. The IACHR reported that a survey of 21 communities along the Napo and Quinchiyacu Rivers affected by oil development activities, “had found that roughly three fourths of the community members complained of gastro-intestinal problems; half, of frequent headaches; a third of skin problems; and just under a third of other body aches and fevers. It was also noted that various studies done on the effects of oil contamination indicated that affected populations are at a greatly increased risk of cancer and other grave illnesses. The Director of the Coca Hospital has been cited as indicating an increase in

⁵⁴⁹ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 150.

⁵⁵⁰ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 150.

⁵⁵¹ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, pars. 145-148.

⁵⁵² I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 154.

⁵⁵³ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 148.

infant mortality due to water contamination and accidents related to petroleum, and local health workers have reported a rise in birth defects, juvenile illnesses and skin infections.” The IACHR verified that in general terms “oil development activities have also been linked, directly and indirectly, with problems in food supply and malnutrition”, a situation illustrated by the fact that “the sectors of Orellana, Shushufindi and Sacha, which are centers of petroleum development activity, register the highest indicators of malnutrition in Ecuador.”

The IACHR recalled that the Ecuadorean state is obligated to implement its internal legislation and its international commitments in the field of environmental protection; it indicated that although the right to development implies that the State is free to exploit its natural resources and grant the corresponding concessions, the authorities are under the correlative obligation to apply and enforce the legal provisions that protect the rights to life, health and to live in a healthy environment. The lack of regulation, inappropriate regulations or the lack of supervision in the application of the law, can cause serious impacts upon the environment which eventually translate into human rights violations. Therefore, for the IACHR, the Ecuadorean State had the double duty of adopting measures aimed at preventing environmental contamination, and acting in an immediate manner to repair the damages caused to natural resources by extractive and development activities. Likewise, a necessary component in protecting the rights to life and physical integrity of persons is the adoption of measures aimed at increasing their capacity to safeguard and claim their rights, which include access to information, participation in the pertinent decision-making processes, and access to justice through judicial recourses.

The IACHR also clarified that its considerations on the impact of oil-extraction activities were equally applicable to other types of extractive activities with noxious effects upon the environment: “While the Commission has analyzed the human rights situation in the Oriente through the example of oil exploitation activities, it must be noted that other types of development activities raise similar factual and legal concerns. One pertinent example concerns the effects of gold mining in the interior. The processes employed involve various types of chemicals, including cyanide and mercury, which may be emitted into streams and rivers. The toxicity of these substances to humans has been thoroughly documented.”

2. State Duty to Prevent Environmental Damage

212. States have an obligation to prevent damage to the environment in indigenous or tribal territories that would affect the enjoyment of their human rights. Fulfillment of this obligation requires adopting the necessary measures to protect indigenous communities’ habitat from ecological deterioration as a consequence of extractive, cattle-raising, agricultural, timber and other economic activities, as well as from the consequences of infrastructural projects, given that such deterioration reduces their traditional capacities and strategies in terms of food, water and economic, spiritual or cultural activities. In adopting these measures, States must place “special emphasis on protecting the forests and waters, which are fundamental for their health and survival as communities.”⁵⁵⁴ In other words, States must “ensure that major development projects in or near indigenous lands or areas of indigenous population, carried out after complying with the requirements of the law, do not cause irreparable harm to the religious, economic or cultural identity and rights of indigenous communities.”⁵⁵⁵ This also applies to projects for the exploitation of natural resources.⁵⁵⁶

213. In more specific terms, the IACHR has demanded that States establish adequate safeguards and mechanisms to ensure that concessions for the exploitation of natural resources do not cause environmental damages that affect the lands or the indigenous communities;⁵⁵⁷ and it has prompted them to “take steps to prevent harm to affected individuals through the conduct of its licensees and private actors (...) [and to] ensure that measures are in place to prevent and protect against the occurrence of environmental contamination which threatens the lives of the inhabitants of development sectors.”⁵⁵⁸

214. Within the practice of the organs of the Inter-American system, the IACHR first referred to environmental degradation as a form of violation of indigenous peoples’ collective rights, and to the state duty to

⁵⁵⁴ IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, pars. 38, 50 – Recommendation 8.

⁵⁵⁵ IACHR, *Third Report on the Human Rights Situation in Colombia*. Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter IX, Recommendation 5.

⁵⁵⁶ IACHR, *Third Report on the Human Rights Situation in Colombia*. Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter IX, pars. 29-31 and Recommendation 4.

⁵⁵⁷ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 147.

⁵⁵⁸ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

prevent such degradation, in its 1997 report on Ecuador. In such report, the IACHR paid particular attention to the situation of the Huaorani, the Cofán, the Siona, the Achuar, the Shuar, the Quichua of Sucumbíos and Pastaza, and other indigenous peoples of the Ecuadorean interior as a consequence of the exploitation of oil and other development activities in their traditional territories, recommending the State to put in place adequate measures or protection before the environmental damage is caused.⁵⁵⁹

215. The need to protect indigenous peoples' environment has also been taken into account by the organs of the Inter-American system in granting provisional or precautionary measures, thereby assuming that the potentially noxious effects of certain activities (such as illegal logging or the deposit of toxic wastes or dangerous materials) pose serious threats that simultaneously affect the life and physical integrity of the members of the communities, and their collective survival, associated to the effective exercise of their right to property over lands and natural resources.

3. State Duties of Immediate Action: Suspension, Reparation, and Prevention of Further Damages

216. Whenever significant ecological or other harm is being caused to indigenous or tribal territories as a consequence of development or investment projects or plans or extractive concessions, these projects, plans or concessions become illegal and States have a duty to suspend them, repair the environmental damage, and investigate and sanction those responsible for the harm.

217. The IACHR has established that priority must be given to the rights to life and integrity of indigenous and tribal peoples in these cases. As a consequence, they are entitled to immediate suspension of the execution of the development or investment plans or projects or of projects for the exploration and exploitation of natural resources which threaten these rights.⁵⁶⁰ The IACHR has also underscored the State obligation to implement, in the framework of projects for the exploration or exploitation of natural resources in indigenous or tribal peoples' territories, participation mechanisms for determining the environmental damages which have been caused and their impact upon such peoples' basic subsistence activities. Said participation mechanisms must allow for the immediate suspension of the execution of the projects that bear an impact upon life or personal integrity; they must guarantee the imposition of the pertinent administrative or criminal sanctions, and they must allow for the determination and materialization of indemnities for any damages to the environment and basic subsistence activities which are being caused.⁵⁶¹ Chapters IX and X of the present Study detail the participatory and remedial rights in this context.

218. In connection with the obligation to repair the environmental damages which have been caused, the IACHR has indicated that indigenous and tribal peoples whose members are affected by environmental contamination, lack of access to drinking water or exposure to toxic agents derived from projects for the exploration or exploitation of natural resources in their territories, have the right to access the healthcare system

⁵⁵⁹ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997, Chapter IX.

⁵⁶⁰ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1141, Recommendation 6. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 6.

⁵⁶¹ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1141, Recommendation 6. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 6.

without discrimination.⁵⁶² Correlatively, States are obliged to “minimize the adverse effects of development projects on indigenous peoples,”⁵⁶³ and mitigate the damages caused.⁵⁶⁴

219. Finally, the IACHR has explained that a constitutive part of the State’s duties of immediate action in these cases is the obligation of carrying out the necessary investigations to identify those responsible for environmental harm, impose the corresponding sanctions, and proceed to the appropriate measures of reparation: “Where the right to life (...) has been infringed upon by environmental contamination, the Government is obliged to respond with appropriate measures of investigation and redress”.⁵⁶⁵ States that have knowledge of the situation of persons affected in their health, subsistence activities or environment as a consequence of development projects, have the duty to impose the corresponding sanctions for non-compliance with the corresponding environmental and/or criminal legal provisions.⁵⁶⁶ In this regard, it must be borne in mind that, according to the IACHR, indigenous and tribal peoples have the right to participate in the determination of the environmental damages caused by projects for the exploration or exploitation of natural resources that are in course of being implemented, as well as in the determination of the impact upon their basic subsistence activities,⁵⁶⁷ they also have the right to participate in the process of determining the indemnity for the damages caused by such exploration or exploitation of natural resources projects in their territories, according to their own development priorities.⁵⁶⁸

4. Special Requirements for the Implementation of Development or Investment Plans or Projects and the Granting of Extractive Concessions by the State in Ancestral Territories

220. In evaluating proposed development or investment plans or projects, or the granting of extractive concessions, States must take into account, as a primary consideration, the indigenous communities that inhabit the respective territories, and their traditional modes of land tenure.⁵⁶⁹ For the Inter-American Court, the term “development or investment plan” refers to “any proposed activity that may affect the integrity of the lands and natural resources within the territory of the [...] people, particularly any proposal to grant logging or mining concessions.”⁵⁷⁰

⁵⁶² IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 224.

⁵⁶³ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II.135, Doc. 40, August 7, 2009, par. 165.

⁵⁶⁴ For example, in its judgment on the case of the Saramaka people, the Court “ordered the State to ‘implement adequate safeguards and mechanisms in order to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Saramaka people.’” I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 39.

⁵⁶⁵ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁵⁶⁶ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 251.

⁵⁶⁷ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1141, Recommendation 6. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 6.

⁵⁶⁸ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1141, Recommendation 5. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 5.

⁵⁶⁹ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awat Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awat Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 104(k).

⁵⁷⁰ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 129, footnote No. 127.

221. The language used by the Inter-American Court refers to limitations caused by “development or investment” plans or projects, category that encompasses those which are aimed at increasing or improving the productive or public utilities infrastructure, including the construction of routes for transportation and communication of persons, merchandise, goods and services (i.e. the construction of pipelines); the construction of dams or of educational, sanitation or military infrastructure, *inter alia*; as well as the extraction of natural resources.

222. In addition, other modes of affecting the right to property trigger these special safeguards and the State’s protective obligations, such as the establishment of protected natural areas over indigenous territories. Indeed, in some cases the establishment of protected natural areas can be a form of limitation or deprivation of indigenous peoples’ right to the use and enjoyment of their lands and natural resources, derived from the State’s unilateral imposition of regulations, limitations, conditions and restrictions upon said use and enjoyment for reasons of public interest, in this case the conservation of nature.⁵⁷¹

223. The approval by States of plans for development or investment or exploitation of natural resources often affects indigenous peoples’ capacity to use and enjoy their lands and other natural resources present in their traditional territories. The organs of the system have been particularly careful to seek a balance between the right to indigenous communal property and States’ legitimate interest in the sustainable exploitation of the natural resources of their property. In fact, both the American Convention and the American Declaration clearly visualize the right to property not as an absolute one, but as a right that may be limited for reasons of public utility or social interest.

224. In effect, “Article 21 of the Convention does not *per se* preclude the issuance of concessions for the exploration and exploitation of natural resources in indigenous or tribal territories.”⁵⁷² For the Inter-American Court, while it is true that all exploration and extraction activity in indigenous or tribal territory could affect, to a greater or lesser degree, the use and enjoyment of some natural resources traditionally used for the people’s subsistence, “it is also true that Article 21 of the Convention should not be interpreted in a way that prevents the State from granting any type of concession for the exploration and extraction of natural resources within [indigenous or tribal] territory.”⁵⁷³ The right to property is not absolute, but “may be restricted by the State under very specific, exceptional circumstances.”⁵⁷⁴

225. In accordance with the above, the American Convention establishes safeguards and limitations regarding the State’s right to award extractive concessions or approve development or investment plans or

⁵⁷¹ On this point, the UN Special Rapporteur has explained: “The establishment of protected areas such as national parks and nature reserves often involves eviction of indigenous people from large tracts of indigenous lands, the collapse of traditional forms of land tenure, and their impoverishment, which has led to many social conflicts. (...) At recent world congresses on parks and conservation (held, respectively, in Durban, South Africa, in 2003 and Bangkok in 2004), attention was drawn to the need for new paradigms for protected areas in order to ensure that violated indigenous rights are restored and are respected in the future.” UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, UN Doc. A/HRC/4/32, 27 February 2007, pars. 22-23. In the case of the Xákmok-Kásek community v. Paraguay, the Inter-American Court of Human Rights analyzed the establishment of a protected natural area over the ancestral territory of the petitioner community, without having taken into account or consulted such community, as a factor that contributed to the violation of its territorial property rights under Article 21 of the American Convention, given that it implied serious restrictions to the development of basic livelihood activities and the impossibility of expropriating such lands to give them to the indigenous. See: I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, pars. 80-82, 115, 157-158, 169-170.

⁵⁷² I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 143.

⁵⁷³ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 126.

⁵⁷⁴ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 49.

projects that restrict the use and enjoyment of indigenous peoples' natural resources or affect their territory.⁵⁷⁵ For purposes of granting extractive concessions or undertaking development or investment plans or projects over natural resources in indigenous or tribal territories, the Inter-American Court has identified three mandatory conditions that apply when States are considering approval of such plans or projects: (a) compliance with the international law of expropriation, as reflected in Convention Article 21; (b) non-approval of any project that would threaten the physical or cultural survival of the group; and (c) approval only after good faith consultations –and, where applicable, consent-, a prior environmental and social impact assessment conducted with indigenous participation, and reasonable benefit sharing. These requirements “are consistent with the observations of the Human Rights Committee, the text of several international instruments, and the practice in several States Parties to the Convention.”⁵⁷⁶ They are equally consistent with the United Nations Declaration on the Rights of Indigenous Peoples.⁵⁷⁷

226. These requirements apply in several circumstances. Firstly, when the “natural resource is one that has been traditionally used by the members of the [corresponding] people in a manner inextricably related to their survival”.⁵⁷⁸ Secondly, when the project may affect other natural resources that are critical for their physical and cultural survival.⁵⁷⁹

227. Compliance with these requirements is mandatory, even if domestic constitutional or legislative provisions reserve for the State ownership of the living, water, and subsoil resources in indigenous territories.⁵⁸⁰ Compliance with these requirements is indispensable, even in the exceptional cases of commercial exploitation concessions granted to individual members of the indigenous or tribal people,⁵⁸¹ although neither indigenous or tribal peoples or their members require State concessions or authorizations for traditional use and exploitation of their resources.

Example: The special requirements in cases of concessions for exploration or exploitation of natural resources, or development or investment plans or projects on indigenous lands

In the case of the *Saramaka People v. Suriname*, the Inter-American Court of Human Rights established the criteria that must be applied under Article 21 of the American Convention before granting concessions for the exploration and exploitation of natural resources, or of implementation of development or investment plans or projects on indigenous or tribal lands, in order to determine whether such concessions, plans or projects will affect natural resources linked to the indigenous culture or way of life, and therefore, whether the State duties to comply with the three requirements of participation, environmental and social impact assessment, and benefit sharing, are triggered.

First, it must be determined “whether this natural resource is one that has been traditionally used by the members of the Saramaka people in a manner inextricably related to their survival” [par. 144]. In regard to the forest, the Court took into consideration:

- The Saramaka people’s knowledge of the forests, that is, of the location and variety of the trees they use for different purposes. [par. 144]
- The Saramaka people’s use of certain types of trees for different purposes: construction of boats and canoes for transportation; roofs for the houses; fruits for consumption; use of trees for other subsistence purposes. [par. 144]

⁵⁷⁵ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 141.

⁵⁷⁶ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 130. At this point, the Inter-American Court cites: ILO Convention No. 169; the World Bank’s Operational Policy OP/BP 4.10; the Human Rights Committee’s General Comment No. 23, paragraph 7; and CERD General Recommendation 23, paragraph 4(d).

⁵⁷⁷ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 131.

⁵⁷⁸ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 144.

⁵⁷⁹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 155.

⁵⁸⁰ IACHR, *Third Report on the Human Rights Situation in Colombia*. Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, pars. 29-31 and Recommendation 4.

⁵⁸¹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 157.

- The way in which the members of the Saramaka people respect and care for the forest. The Court established that they enter the forest to obtain the wood they need for their purposes without destroying the environment. [par. 144]
- The fact that the Saramaka also depend on the extraction of wood as part of their economic structure and for subsistence purposes. [par. 145]

Based on these findings, the Court held: “This evidence shows that the members of the Saramaka people have traditionally harvested, used, traded and sold timber and non-timber forest products, and continue to do so until the present day. Thus, in accordance with the above analysis regarding the extraction of natural resources that are necessary for the survival of the Saramaka people, and consequently, its members, the State should not have granted logging concessions within Saramaka territory unless and until the three safeguards of effective participation, benefit-sharing, and prior environmental and social impact assessments were complied with” [par. 146]. In addition, the conditions set forth in Article 21 of the Convention for cases of expropriation, and the requirement of not affecting the subsistence of the group and its members, had to be complied with.

Second, regarding the gold mining concessions granted in Saramaka territory by the State, the Court analyzed whether they “have affected natural resources that have been traditionally used and are necessary for the survival of the members of the Saramaka people.” [par. 155] It found that, according to the evidence, “the members of the Saramaka people have not traditionally used gold as part of their cultural identity or economic system. Despite possible individual exceptions, members of the Saramaka people do not identify themselves with gold nor have demonstrated a particular relationship with this natural resource, other than claiming a general right to ‘own everything, from the very top of the trees to the very deepest place that you could go under the ground.’” [par. 155] Even though gold is not a resource of traditional use, the Court explained that its extraction would affect other natural resources which are critical for the physical and cultural survival of the Saramaka people. Therefore, the requirements of Convention Article 21 had to be complied with before granting such a concession: “the State has a duty to consult with them, in conformity with their traditions and customs, regarding any proposed mining concession within Saramaka territory, as well as allow the members of the community to reasonably participate in the benefits derived from any such possible concession, and perform or supervise an assessment on the environmental and social impact prior to the commencement of the project” [par. 155].

228. With regard to concessions which have effectively been granted to third parties within ancestral territory without complying with the requirements derived from Article 21 of the Convention, States must evaluate whether it is necessary to restrict such third parties’ contractual or legal rights in order to preserve the physical and cultural survival of the corresponding people, in light of the Inter-American jurisprudence.⁵⁸²

a. Apply the International Law of Expropriation

229. In the first place, States must comply with the requirements established in Article 21 of the American Convention on Human Rights for cases of expropriation. Every limitation of the content of indigenous peoples’ right to property over their natural resources must respect the general provisions that regulate legal limitations of property for reasons of public interest, that is to say, expropriations.

230. As explained by the Court, “Article 21 of the Convention states that the ‘law may subordinate [the] use and enjoyment [of property] to the interest of society.’ Thus, the Court has previously held that, in accordance with Article 21 of the Convention, a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society.”⁵⁸³ In accordance with this Article, and the Court’s jurisprudence, the State will be able to restrict, under certain circumstances, the Saramakas’ property rights, including their rights to natural resources found on and within the territory.”⁵⁸⁴ Article 21.2 provides that “[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”

⁵⁸² I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 157.

⁵⁸³ Cf. *Case of the Indigenous Community Yakye Axa*, paras. 144-145 citing (*mutatis mutandi*) *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111, para. 96; *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 127, and *Case of Ivcher Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 155. Cf., also, *Case of the Indigenous Community Sawhoyamaxa*, para. 137.

⁵⁸⁴ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 127.

231. It is pertinent to recall at this point the clarification made by the Court, in the sense that “the right to obtain compensation under Article 21(2) of the Convention extends not only to the total deprivation of property title by way of expropriation by the State, for example, but also to the deprivation of the regular use and enjoyment of such property.”⁵⁸⁵

b. No Approval of Projects that Threaten the Physical or Cultural Survival of the People

232. The State may not grant a concession or approve a development or investment plan or project that could affect the survival of the corresponding indigenous or tribal people, in accordance with its ancestral ways of life. In the Inter-American Court’s terms: “[I]n analyzing whether restrictions on the property right of members of indigenous and tribal peoples are permissible, especially regarding the use and enjoyment of their traditionally owned lands and natural resources, another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members.”⁵⁸⁶ Under Article 21 of the American Convention, the State may restrict an indigenous or tribal people’s right to use and enjoy their traditionally owned lands and natural resources only when such restriction complies with all the requirements established therein, and when it does not deny their survival as an indigenous or tribal people.⁵⁸⁷ The Human Rights committee in the case of *Länsman and other v. Finland*,⁵⁸⁸ supports this norm: “allowing States to pursue development activities that limit the rights of a minority culture as long as the activity does not fully extinguish the indigenous people’s way of life.”⁵⁸⁹

233. The notion of “survival” is not tantamount to mere physical existence: “The Court emphasized in the *Saramaka* judgment that the phrase ‘survival as a tribal people’ must be understood as the ability of the people to ‘preserve, protect and guarantee the special relationship that [they] have with their territory’, so that ‘they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected [...]’. That is, the term ‘survival’ in this context signifies much more than physical survival.”⁵⁹⁰ In similar terms, for the Court, “the term ‘survival’ (...) does not refer only to the obligation of the State to ensure the right to life of the victims, but rather to take all the appropriate measures to ensure the continuance of the relationship of the *Saramaka* People with their land or their culture.”⁵⁹¹

⁵⁸⁵ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 139.

⁵⁸⁶ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 128.

⁵⁸⁷ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 128.

⁵⁸⁸ UNHRC, *Länsman et al. v. Finland* (Fifty-second session, 1994), Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1994, November 8, 1994, para. 9.4.

⁵⁸⁹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 128, footnote No. 123.

⁵⁹⁰ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 37 [footnotes omitted].

⁵⁹¹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 29.

**Example: environmental, epidemiological and socio-cultural sequels of economic development processes in indigenous territories.
The case of the Ecuadorean Amazon.**

In its 1997 report on the situation of human rights in Ecuador, the IACHR described the impact that development activities had had upon the human rights and the physical and cultural survival of the indigenous peoples of the interior of the country.

In the first place, the IACHR described the situation of serious environmental contamination caused by decades of extractive activities, particularly by the oil industry, whose repercussions upon the enjoyment of human rights were referred above. But as the IACHR was informed, the "indigenous peoples of the Ecuadorean Amazon maintain that the effects of oil development and exploitation in the Oriente have not only damaged the environment, but have directly impaired their right to physically and culturally survive as a people."

Thus, the IACHR identified some additional sequels of the oil industry development process which had taken place in the foregoing decades, explaining that "the opening of the traditional lands of Ecuador's Amazonian indigenous peoples to oil exploitation and other development activities has resulted in a number of directly attributable consequences."

First, this process brought along an influx of outsiders and transportation infrastructure to the Amazonian indigenous peoples' territories: "The oil boom initiated in the interior in late 1960's led to the construction of a network of roads, used to bring in workers and equipment, as well as to construct and service production sites and other facilities, into the heart of what had traditionally been indigenous territory. In this way, oil development opened and exposed the interior in a way that previous development and outside contact had not." This process was accompanied by a strong colonization initiative promoted by the Government itself: "In addition to the non-native workers brought in to build roads and construct and operate facilities, the opening of roads funneled colonists, land speculators, and loggers into indigenous homelands. In the case of the Oriente, this colonization was encouraged by the State, and in fact deemed a national priority. Settlers typically colonize the initial kilometers fronting both sides of a road. In most cases, controls on spontaneous colonization were either non-existent or ineffectual, leading to the result that wide swaths of non-indigenous settlement now divide blocks of previously indigenous territory. Under the *Ley de Colonización de la Región Amazónica*, enacted to encourage the settlement and productive use of the Oriente, settlers began moving into a territory much of which was deemed to be "tierras baldías" or unoccupied lands. Legislation to encourage the colonization of the Oriente offered title to settlers who demonstrated their domain over these lands by clearing forest for agricultural uses. Estimates of the number of settlers in the Oriente vary, but appear to be at least 250,000 to 300,000."

Second, as an immediate effect of the entry of non-native inhabitants to indigenous territories, the aboriginal inhabitants of those territories were exposed to illnesses and epidemics that were unknown to them, and for which they lacked immunological defenses or resistance: "The encroachment of colonists, speculators and non-native company workers into previously isolated areas introduced such illnesses as the 'common cold' and influenza. Viral diseases have taken a harsh toll, and continue to do so in the case of the individuals and communities who have had less contact with outsiders, such as the Huaorani. Oil company workers with colds enter such areas and infect local inhabitants, who can easily develop pneumonia and die. In other cases, men from indigenous communities work for the oil companies, contract unimported illnesses, and import them back into their communities when they return home. While the indigenous peoples of the Amazonian interior have very sophisticated systems for the preservation of their health and well-being, they lack experience with these new diseases." The IACHR was informed of numerous deaths caused by previously unknown diseases, a result that was also prompted by the lack of accessible medical attention.

Third, the process of development of the region caused the displacement of entire indigenous communities: "Oil exploitation activities have proceeded through traditional indigenous territory with little attention to the placement of facilities in relation to existing communities: production sites and waste pits have been placed immediately adjacent to some communities; roads have been built through traditional indigenous territory; seismic blasts have been detonated in areas of special importance such as hunting grounds; and areas regarded as sacred, such as certain lakes, have been trespassed. Many indigenous inhabitants responded to the initial years of development activity by retreating away from development and further into their traditional areas. It is reported that, pursuant to the initial introduction of oil exploitation activities in the area now called Lago Agrio, the last of the indigenous Tetetes were driven away, a circumstance believed to have hastened their extinction as a people." The Cofán were equally affected: "The Cofán, who now number only a few hundred members, were displaced from their traditional homelands and most now occupy a handful of non-contiguous communities in a portion of their former territory. Development came to their traditional territory, the Upper Aguarico River, in 1970, when the Texaco-Gulf Consortium established a base camp at Santa Cecilia. Roads, production areas, landing strips and the pipeline cut their territory "into ribbons of nationalized infrastructure," and colonists followed. Although the Cofán had been granted title to some 9000 acres in this zone, demarcated accordingly, a road was constructed right through the titled lands."

Finally, the process of development had also been the cause of tensions between the settlers and the indigenous inhabitants of the region: "The pressures resulting from the influx of settlers, and the displacement of a number of communities continues to generate tension and sometimes violent conflict. At the time of the Commission's observation *in situ*, recent reports received by CONFENIAE indicated that the Siona, the Quichua of Sucumbios and Pastaza, and the Achuar and Shuar had all been experiencing some level of conflict with colonists. The Huaorani and settlers along the local oil road live in close proximity, also with periodic episodes of tension."

The IACHR underscored, as a form of initiating the process of resolution of these problems, the Government's efforts to grant title to property of some ancestral territories in the region, as well as the pilot project carried out with the Cofán people in the sense of assigning them the management of a portion of their ancestral territory declared as a natural protected area. In spite of this, it also emphasized that many indigenous communities and groups of the interior continued to undergo difficulties in the legalization of their ancestral territories.

As a conclusion of its analysis, the IACHR held that “the situation of indigenous peoples in the Oriente illustrates, on the one hand, the essential connection they maintain to their traditional territories, and on the other hand, the human rights violations which threaten when these lands are invaded and when the land itself is degraded. (...) For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers both to its capacity for providing the resources which sustain life, and to ‘the geographical space necessary for the cultural and social reproduction of the group.’”. It therefore recalled that “within international law generally, and Inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival -- a right protected in a range of international instruments and conventions.”

On the grounds of the foregoing considerations, the IACHR recommended the State, *inter alia*, to adopt the necessary measures to “restrict settlers to areas which do not infringe upon the ability of indigenous peoples to preserve their traditional culture”; to take the measures required to guarantee a significant and effective participation of indigenous representatives in the decision-making processes on issues which, like development, affected their cultural survival; and to take the necessary steps to solve the pending indigenous territorial claims.

c. Participation, Benefit-sharing, and Prior Environmental and Social Impact Assessment

234. A third set of obligatory conditions needed to ensure consistency between development or investment plans or projects or extractive activities, on the one hand, and indigenous natural resource rights, on the other, has three mandatory elements. According to the Court, “in accordance with Article 1(1) of the Convention, in order to guarantee that restrictions to the property rights of the members of [indigenous or tribal peoples] by the issuance of concessions within their territory does not amount to a denial of their survival as [an indigenous or] tribal people, the State must abide by the following three safeguards: First, the State must ensure the effective participation of the members of the [corresponding] people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (...) within [ancestral] territory. Second, the State must guarantee that the [members of the people] will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within [ancestral] territory unless and until independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the [respective] community have with their territory, which in turn ensures their survival as a tribal people.”⁵⁹² These three conditions are complementary and concurrent requirements, aimed at guaranteeing survival as indigenous or tribal peoples: “In order to guarantee their survival as a tribal people, the Court established a series of complementary requirements applicable to the Saramaka in particular, and indigenous and tribal peoples in general.”⁵⁹³

235. The triple standard set by the Inter-American Court in the Saramaka case (consultation and consent; impact assessment; and benefit sharing) is applicable, in the Court’s terms, to “any development, investment, exploration or extraction plan”⁵⁹⁴ which can directly or indirectly affect indigenous peoples’ capacity to effectively use and enjoy their lands, territories and natural resources, in such a way as to entail, in fact, a deprivation or limitation of their right to property.

236. The requirement of consultation and participation is considered in Chapter IX, as it reflects a general duty that applies to all issues concerning indigenous and tribal land and resource rights.

⁵⁹² I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 129.

⁵⁹³ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 38.

⁵⁹⁴ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 129.

Benefit-Sharing

237. Indigenous and tribal peoples have the right to participate in the benefits derived from projects for the exploration and exploitation of natural resources or from development or investment plans or projects in their territories,⁵⁹⁵ as well as from commercial application of their traditional knowledge about the use of such resources. In the Court's terms, "the second safeguard the State must ensure when considering development or investment plans within [indigenous or tribal] territory is that of reasonably sharing the benefits of the project with the [respective] people."⁵⁹⁶ Consequently, "the State must guarantee that the [members of the affected indigenous or tribal communities] will receive a reasonable benefit from any such plan within their territory."⁵⁹⁷

238. Reasonable participation of indigenous peoples in the benefits derived from the exploitation of natural resources or the implementation of development or investment plans or projects in their traditional territories is a requirement confirmed by ILO Convention No. 169,⁵⁹⁸ and it has also been incorporated into the policies of international financial institutions that relate to indigenous peoples.⁵⁹⁹ The IACHR has emphasized that according to ILO Convention No. 169, indigenous and tribal peoples have a right to participate in the benefits of activities of utilization of their natural resources;⁶⁰⁰ States must "ensure, consistent with ILO Convention No. 169, that all projects to build infrastructure or exploit natural resources in the indigenous area or that affect their *habitat* or culture is processed and decided on with the participation of and in consultation with the peoples interested, with a view to obtaining their consent and possible participation in the benefits."⁶⁰¹

239. States have an international obligation to guarantee the participation of indigenous communities in the determination of the benefits to be produced by the proposed plans or projects,⁶⁰² through appropriate procedures. Therefore, States must "ensure that such procedures will establish the benefits that the affected indigenous peoples are to receive, and compensation for any environmental damages, in a manner consistent with their own development priorities."⁶⁰³

240. The determination of the beneficiaries must be made in consultation with the corresponding people, and not unilaterally by the State.⁶⁰⁴ In case an internal conflict arises between the members of the corresponding indigenous or tribal people over who can benefit from the development or investment projects, it must be resolved by the people themselves in accordance with their own traditional norms and customs, and not

⁵⁹⁵ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1141, Recommendation 6. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 6.

⁵⁹⁶ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 138.

⁵⁹⁷ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 129.

⁵⁹⁸ ILO Convention No. 169, art. 15.2.

⁵⁹⁹ World Bank, Operational Policy 4.10, pars 18-19; IADB, Operational Policy OP-765, pp. 5-6.

⁶⁰⁰ IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 26.

⁶⁰¹ IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 39 – Recommendation 5.

⁶⁰² IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1141, Recommendation 5. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 5.

⁶⁰³ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 248.

⁶⁰⁴ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 25.

by the State.⁶⁰⁵ In general, as stated by the Court in the Saramaka case, “all issues related to the consultation process with the Saramaka people, as well as those concerning the beneficiaries of the ‘just compensation’ that must be shared, must be determined and resolved by the Saramaka people in accordance with their traditional customs and norms, and as ordered by the Court in its Judgment.”⁶⁰⁶

241. Article 21.2 of the American Convention establishes that the right to property can only be limited, in whole or in part, for reasons of public utility or social interest and “upon payment of just compensation”. As explained above, this provision refers to the legal institution of forced expropriation and the safeguards that must surround the process. In the Saramaka case, the Court identified participation in the benefits as a specific form of fair compensation stemming from the limitation or deprivation of the right to indigenous communal property: “the Court considers that the right to obtain compensation under Article 21(2) of the Convention extends not only to the total deprivation of property title by way of expropriation by the State, for example, but also to the deprivation of the regular use and enjoyment of such property”,⁶⁰⁷ for which reason “in the present context, the right to obtain ‘just compensation’ pursuant to Article 21(2) of the Convention translates into a right of the members of the Saramaka people to reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival.”⁶⁰⁸

242. The Court also emphasized that participation in the benefits is inherent to the right to fair compensation in Article 21: “The concept of benefit-sharing, which can be found in various international instruments regarding indigenous and tribal peoples’ rights, [United Nations Declaration of the Rights of Indigenous Peoples, Art. 32.2; ILO Convention No. 169, Art. 15(2)] can be said to be inherent to the right of compensation recognized under Article 21(2) of the Convention”.⁶⁰⁹

243. Participation in the benefits of a project must not be confused with the provision of basic social services that the State is bound to provide in any case by virtue of its obligations in the field of economic, social and cultural rights.

244. The Inter-American Court has resorted, in this point, to the pronouncements of the Committee on Elimination of Racial Discrimination and the UN Special Rapporteur on the Rights of Indigenous Peoples, with regard to the right to participate in the benefits: “In this sense, the Committee on the Elimination of Racial Discrimination has recommended not only that the prior informed consent of communities must be sought when major exploitation activities are planned in indigenous territories, but also ‘that the equitable sharing of benefits to be derived from such exploitation be ensured.’⁶¹⁰ Similarly, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples has suggested that, in order to guarantee ‘the human rights of indigenous peoples in relation to major development projects, [States should ensure] mutually acceptable benefit sharing [...]’. In this context, pursuant to Article 21(2) of the Convention, benefit sharing may be

⁶⁰⁵ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 12, 2008. Series C No. 185, par. 26.

⁶⁰⁶ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 12, 2008. Series C No. 185, par. 27.

⁶⁰⁷ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 28, 2007. Series C No. 172, par. 139.

⁶⁰⁸ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 28, 2007. Series C No. 172, par. 139.

⁶⁰⁹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 28, 2007. Series C No. 172, par. 138.

⁶¹⁰ UNCERD, Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador, (...) par. 16.

understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the Saramaka people.”⁶¹¹

Prior Environmental and Social Impact Assessments

245. A “prior environmental and social impact assessment” [ESIA] must be carried out by “independent and technically capable entities, with the State’s supervision”⁶¹² in the context of investment and development projects and extractive activities in indigenous territories. The ultimate purpose of environmental and social impact assessments is “to preserve, protect and guarantee the special relationship” of indigenous peoples with their territories, and guaranteeing their subsistence as peoples.⁶¹³

246. In general terms, “ESIAs serve to assess the possible damage or impact a proposed development or investment project may have on the property in question and on the community.”⁶¹⁴ States must guarantee that the sustainability of investment or development plans or projects and natural resource exploration and exploitation projects in indigenous and tribal peoples’ territories is “measured in advance, using effective mechanisms of participation for the persons and groups affected, regardless of whether the State has recognized their ownership”.⁶¹⁵ Consequently, as stated by the Inter-American Court in its Saramaka judgment, “the purpose of ESIAs is not only to have some objective measure of such possible impact on the land and the people, but also (...) to ‘ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily’.”⁶¹⁶

247. Impact assessments are also prescribed by the provisions of ILO Convention No. 169, Article 7 of which states that “Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.”⁶¹⁷

248. Environmental and social impact assessments are not only project planning instruments that must be taken into account to minimize the negative impacts of development or investment projects in indigenous territories –and, in given cases, for the identification of alternatives–, but they also serve to identify which communal property rights will be affected, and how, by the proposed project. Indeed, the ultimate objective of the process of impact assessments is no other than to identify which are the potential negative impacts of the plan or project in question over indigenous peoples’ capacity to use and enjoy their lands and other resources present in their territories which they have traditionally used for economic, social, cultural or spiritual purposes; in other words: the possible impact upon their right to communal property. From this perspective, an additional objective of impact assessments is precisely the identification of the rights that correspond, or that might correspond, to

⁶¹¹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 140 [footnotes omitted].

⁶¹² I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 129.

⁶¹³ *Ibidem*.

⁶¹⁴ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 40.

⁶¹⁵ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 254.

⁶¹⁶ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 40.

⁶¹⁷ ILO Convention No. 169, Article 7.3.

indigenous peoples over the lands and natural resources that will be directly or indirectly affected by the investment or development projects at hand.⁶¹⁸

249. This way, if environmental and social impact assessments identify claims to indigenous communal property that have not been previously registered by the State, the execution of the project should be suspended until said claims have been duly determined through adequate procedures.

250. For the Inter-American Court, Article 21 of the American Convention, in connection with Article 1.1, is violated when the State fails to carry out or supervise environmental and social impact assessments prior to granting the concessions.⁶¹⁹

When to conduct impact assessments

251. The Inter-American Court's judgment in the Saramaka case establishes that social and environmental impact assessments must be carried out prior to the approval of the respective plans. As explained by the Court, "ESIAs must be completed prior to the granting of the concession, as one of the objectives for requiring such studies is to guarantee the [corresponding people's] right to be informed about all the proposed projects in their territory. Hence, the State's obligation to supervise the ESIAs coincides with its duty to guarantee the effective participation of the [respective] people in the process of granting concessions."⁶²⁰

Who is responsible for conducting impact assessments

252. The process of environmental and social impact assessments is an obligation of the State, which must carry them out or supervise their realization before emitting the concessions or approving the plans or projects.⁶²¹ Nonetheless, the State may commission said studies to "independent and technically capable entities, with the State's supervision."⁶²² This line of reasoning is fully compatible with the justification of this type of studies, which is none other than to ensure an objective, impartial and technically verifiable assessment, aimed at providing factual data from which a set of consequences may emerge for the approval and, in a given case, the execution of the corresponding plan. For these purposes, it would not be in accordance with the criteria established by the Court, for example, for the process of environmental and social impact assessments to be carried out by the staff or contractors of the concessionary company. Likewise, it stems from the Court's jurisprudence that the selection of the actors responsible for conducting impact assessments must be made in accordance with technical expertise criteria.

253. Insofar as the process of impact assessments is a State obligation linked to the duty to protect indigenous property, said assessments must be conducted by the State, or under the State's supervision.⁶²³ The State authorities' supervisory task must ensure compliance with the criteria established in the pertinent legal provisions in relation to the contents and conditions of impact assessments.

⁶¹⁸ World Bank, Operational Policy 4.10, par. 9 and Annex A.

⁶¹⁹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 154.

⁶²⁰ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 41.

⁶²¹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 148.

⁶²² I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 41.

⁶²³ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 129.

The content of impact assessments

254. Referring to the contents of impact assessments, the Inter-American Court has specified that such studies must be of a “social and environmental” nature. The inclusion of these two elements in its characterization reveals that the type of assessments required by the Court must go further than the strictly environmental impact studies normally required in order to evaluate and mitigate the possible negative impacts upon the natural environment, making it necessary to incorporate the identification of the direct or indirect impact upon the ways of life of the indigenous peoples who depend on those territories and the resources present therein for their subsistence.

255. The term “social”, as a component of impact assessments, must be interpreted in a broad manner, which takes into account the general jurisprudence of the Inter-American system on the right to indigenous property, as well as other applicable international standards. Insofar as the realization of development or investment plans is conceived as a limitation of the right to indigenous communal property, impact assessments should establish the precise incidence such plans will have upon indigenous peoples’ capacity to use and enjoy their lands and natural resources, in accordance with their own customary law, values, usages and customs. From this perspective, therefore, the content of ESIA’s must refer not only to the impact upon the natural habitat of indigenous peoples’ traditional territories, but also to the impact upon the special relationship that links these peoples to their territories, including their distinct forms of economic subsistence, their identities and cultures, and their forms of spirituality.

256. In this sense, in relation to the content of prior impact assessments, ILO Convention No. 169 establishes that such studies must “assess the social, spiritual, cultural and environmental impact on [the peoples concerned] of planned development activities”.⁶²⁴

257. In the first place, the content of environmental impact assessments as such is already considerably standardized in international practice. According to the broadly accepted definition of environmental assessment incorporated into the World Bank Operational Policy OP 4.01, EIAs must “identify and assess the potential environmental impacts of a proposed project, evaluate alternatives, and design appropriate mitigation, management, and monitoring measures.”⁶²⁵

258. For the Inter-American Court, “in order to comply with the Court’s orders, the ESIA’s must conform to the relevant international standards and best practices”.⁶²⁶ In a footnote, the Court holds that “one of the most comprehensive and used standards for ESIA’s in the context of indigenous and tribal peoples is known as the *Akwé:Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*”.⁶²⁷ The process of implementation of the Biodiversity Convention is therefore particularly relevant for the protection of the rights associated to indigenous property over lands, territories and resources. In 2004, the Conference of the Parties of the Convention adopted the *Akwé:Kon Voluntary Guidelines*,⁶²⁸ which reflect the broad content of impact assessments in relation to projects which can affect indigenous peoples.

⁶²⁴ ILO Convention No. 169, Article 7.3.

⁶²⁵ World Bank, Operational Policy 4.10, Annex A: Definitions, par. 2.

⁶²⁶ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 41.

⁶²⁷ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 41, footnote No. 23.

⁶²⁸ Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, COP-7 (Kuala Lumpur, February 9-20, 2004), Decision VII/16, Annex.

259. According to the Guidelines, environmental impact assessments must evaluate “the likely environmental impacts of, and [propose] appropriate mitigation measures for, a proposed development, taking into account interrelated socio-economic, cultural and human health impacts, both beneficial and adverse”.⁶²⁹

260. In second place, the evaluation of social impacts encompasses an assessment of “the likely impacts, both beneficial and adverse, of a proposed development that may affect the rights, which have an economic, social, cultural, civic and political dimension, as well as the well-being, vitality and viability, of an affected community - that is, the quality of life of a community as measured in terms of various socio-economic indicators, such as income distribution, physical and social integrity and protection of individuals and communities, employment levels and opportunities, health and welfare, education, and availability and standards of housing and accommodation, infrastructure, services”.⁶³⁰

261. The assessment of cultural impact includes an evaluation of “the likely impacts of a proposed development on the way of life of a particular group or community of people, with full involvement of this group or community of people and possibly undertaken by this group or community of people”. In the course of said evaluation, attention must be paid to “the impacts, both beneficial and adverse, of a proposed development that may affect, for example, the values, belief systems, customary laws, language(s), customs, economy, relationships with the local environment and particular species, social organization and traditions of the affected community”, as well as the impacts on the “community's cultural heritage including sites, structures, and remains of archaeological, architectural, historical, religious, spiritual, cultural, ecological or aesthetic value or significance”.⁶³¹

262. ESIA's must also address the cumulative impact of the existing projects; for the Court, “one of the factors the environmental and social impact assessment should address is the cumulative impact of existing and proposed projects. This allows for a more accurate assessment on whether the individual and cumulative effects of existing and future activities could jeopardize the survival of the indigenous or tribal people.”⁶³²

Identification of alternatives and impact mitigation measures

263. Likewise, ESIA's must identify possible alternatives or, failing such alternatives, measures to mitigate the negative impacts of the investment or development plan.

264. As for the permissible level of impact, the Inter-American Court has held that “what constitutes an acceptable level of impact may differ in each case. Nonetheless, the guiding principle with which to analyze the results of ESIA's should be that the level of impact does not deny the ability of the members of the [corresponding] people to survive as [an indigenous or] tribal people”.⁶³³

265. The obligation of conducting ESIA's in relation to development or investment plans in indigenous territories evidently responds to a logic of guaranteeing indigenous property rights. Therefore, these studies must not constitute merely formal procedures, but they must lead, insofar as it is technically possible, to specific changes in the design of the development or investment plans whenever the assessments have identified possible negative impacts upon indigenous peoples' property rights, in the terms described above. In this sense, Article 7.3

⁶²⁹ Akwé:Kon Voluntary Guidelines, par. 6(d).

⁶³⁰ Akwé:Kon Voluntary Guidelines, par. 6(f).

⁶³¹ Akwé:Kon Voluntary Guidelines, par. 6(a)-(b).

⁶³² I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 41.

⁶³³ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 42.

of ILO Convention No. 169 provides that “[t]he results of these studies shall be considered as fundamental criteria for the implementation of these activities.”

Indigenous peoples’ participation in the process of impact assessments

266. The Court’s judgment in the Saramaka case requires states to secure indigenous peoples’ participation in the process of prior environmental and social impact assessments.⁶³⁴ This requirement is also included in ILO Convention No. 169, by which impact or incidence studies must be carried out “in co-operation with the peoples concerned”.⁶³⁵ In general terms, ESIs “must respect the [corresponding] people’s traditions and culture”.⁶³⁶

267. Indigenous peoples’ participation in activities related to the process of ESIs is a requirement that stems from these assessments’ very nature and content. Insofar as ESIs are aimed at documenting the possible negative impacts of development or investment plans upon the relationship between indigenous peoples and their traditional territories, the knowledge of the members of indigenous peoples is necessarily required to identify said impacts, as well as for the identification of possible alternatives and mitigation measures.

E. Control and Prevention of Illegal Extractive Activities in Indigenous Territories

268. States are under the obligation to control and prevent illegal extractive activities, such as illegal mining, logging or fishing in ancestral indigenous or tribal territories, and of investigating and sanctioning those responsible for them. On different occasions, the IACHR has described situations where illegal extraction of natural resources in indigenous territories is taking place, explaining that such activities constitute threats to and usurpations of the effective property and possession of indigenous territories,⁶³⁷ and that they imperil said peoples’ survival, especially because of their impact upon the rivers, soils and other resources that constitute the main sources of their livelihood.⁶³⁸

269. As discussed in Chapter X, indigenous peoples have the right, in conditions of equality, to effective judicial protection from violations of their right to communal property over natural resources. The right of indigenous and tribal peoples and their members to have access to justice in such cases is fully applicable in all of its dimensions whenever the natural resources that are present in their territories are affected.

270. As happens with the other safeguards applicable to the protection of the right to indigenous communal property, in relation to illegal extraction of natural resources in their territories, it is not necessary for indigenous peoples to have a formal title to property in order to be able to have access to the courts to claim the protection of their rights, including reparation for harms suffered.

⁶³⁴ Cf. I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 16.

⁶³⁵ ILO Convention No. 169, Article 7.3.

⁶³⁶ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 41.

⁶³⁷ IACHR, *Report on the Situation of Human Rights in Brazil*, Doc. OEA/Ser.L/V/II.97, Doc. 29 rev. 1, September 29, 1997, par. 33.

⁶³⁸ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009.

Example of application: impacts of extractive activities upon the rights of indigenous peoples in Venezuela

In its 2009 Report on the situation of human rights in Venezuela, the IACHR referred to the development of mining exploitation activities, both legal and illegal, in the south of the country, and expressed its concern over the effects that such activities had upon the indigenous groups of the region, in particular because of their impact upon the rivers and soils, which were the main sources of subsistence of those peoples. The Commission described the information it had received on the granting of concessions to mining companies without consulting the indigenous peoples that inhabit the project areas, in spite of the environmental impact that such projects would have upon their territory; it also reported it had been informed of the practice of illegal mining, and the manner in which it was undermining the survival of the indigenous peoples of the south of Venezuela.

Given this state of affairs, the IACHR reminded the State of “its obligation to ensure consultation with and the participation of indigenous peoples when considering any measure that affects their territories” [par. 1058], and recommended that it:

(a) promote “participation by indigenous peoples and communities affected by projects for the exploration and exploitation of natural resources by means of prior and informed consultation aimed at garnering their voluntary consent to the design, implementation, and evaluation of such projects, as well as to the determination of benefits and indemnization for damages according to their own development priorities” [par. 1137, Recommendation 5];

(b) implement, in the framework of natural resource prospecting and exploitation projects, “participatory mechanisms to assess the extent of environmental damage caused and the impact on basic subsistence activities among indigenous peoples (...) living where such projects unfold. This aims to ensure immediate project suspension when the lives and/or personal security of such individuals are at risk, and to level administrative and criminal sanctions as appropriate” [par. 1137, Recommendation 6];

(c) in case projects proceed, “guarantee that those affected will share in the benefits derived” [par. 1137, Recommendation 6];

(d) assess and enforce compensation for the environmental damages and the impacts on the basic subsistence activities of the affected indigenous peoples [par. 1137, Recommendation 6]; and

(e) “guarantee access to an adequate and effective judicial remedy to address environmental damage collectively, such that, aside from criminal action, mechanisms of a legal nature are available for immediate attention to be focused on circumstances that may cause irreparable damage to groups of individuals.” [par. 137, Recommendation 7]

F. Prevention of the Epidemiological and Socio-cultural Consequences of Development Activities

271. Long-standing historical experiences in the Americas prove that the lack of protection of indigenous peoples’ territorial rights, and the resulting penetration of settlers and infrastructural or extractive projects in their territories, bring about extremely serious consequences in the field of health, given that the entry of inhabitants who are alien to their territories entails the entry of illnesses for which aboriginal populations lack developed immunological defenses.⁶³⁹ The epidemics which have been unleashed in this manner among different indigenous peoples of the continent have decimated their population, and in some cases they have brought the corresponding ethnic groups to the point of being at risk of disappearance.

272. The state has the duty to prevent the occurrence of these comprehensive situations of human rights violations, so as to preserve the life and physical integrity of the members of indigenous and tribal peoples, through the adoption of the public health preventive measures which are pertinent in each case. These safeguards are particularly important for indigenous peoples in voluntary isolation or initial contact.

**Example: the epidemiological and socio-cultural consequences of the lack of protection of indigenous territorial rights.
The case of the Yanomami people of Brazil.**

The Yanomami indigenous people have inhabited the Orinoco River Basin, in the territories of Venezuela and Brazil, since time immemorial. In the IACHR’s view, the Yanomami’s fight for individual and collective survival is an illustrative example of the complex problems borne by aboriginal populations in the defense and exercise of the most basic rights, especially because their very existence has been affected by the successive penetrations of institutions, projects and alien persons, which have ravaged their life, survival, physical and cultural integrity and environment.

⁶³⁹ IACHR, *Report on the Situation of Human Rights in Brazil*, Doc. OEA/Ser.L/V/II.97, Doc. 29 rev. 1, September 29, 1997, par. 47.

The IACHR has issued pronouncements on the situation of the Yanomami people of Brazil on two opportunities. The first one was in 1985, in Resolution 12/85, adopted to decide on a petition filed against the Brazilian State on account of its alleged international responsibility for the people's situation. The second one was in its 1997 report on the situation of human rights in Brazil. On both occasions, the IACHR described complex patterns of structural violations of human rights, derived from multiple causal factors whose common essence was the lack of protection of the Yanomami's territorial rights.

In its Resolution No. 12/85, the IACHR examined a petition presented by several persons and organizations on behalf of the Yanomami people of Brazil. The IACHR deduced from the evidence it had available: "(a) That on account of the beginning, in 1973, of the construction of highway BR-210 (the Northern Circumferential Highway), the territory occupied for ages beyond memory by the Yanomami Indians was invaded by highway construction workers, geologists, mining prospectors, and farm workers desiring to settle in that territory; (b) That those invasions were carried out without prior and adequate protection for the safety and health of the Yanomami Indians, which resulted in a considerable number of deaths caused by epidemics of influenza, tuberculosis, measles, venereal diseases, and others; (c) That Indian inhabitants of various villages near the route of highway BR-210 (the Northern Circumferential Highway) abandoned their villages and were changed into beggars or prostitutes, without the Government of Brazil's taking the necessary measures to prevent this; and (d) That after the discovery in 1976 of ores of tin and other metals in the region where the Yanomamis live, serious conflicts arose that led to acts of violence between prospectors and miners of those minerals, on one side, and the Indians, on the other. Such conflicts, which occurred especially in the areas of the Serra dos Surucucus, Couto de Magalhães, and Furo de Santa Rosa, affected the lives, security, health, and cultural integrity of the Yanomamis." [par. 10] For the IACHR, from these facts "a liability of the Brazilian Government arises for having failed to take timely and effective measures to protect the human rights of the Yanomamis." [par. 11] However, the IACHR noted that the Government of Brazil had adopted several measures in the previous years aimed at overcoming and alleviating the Yanomami's problems and protecting their security, health, integrity and territory. Therefore, the IACHR decided to "declare that there is sufficient background information and evidence to conclude that, by reason of the failure of the Government of Brazil to take timely and effective measures in behalf of the Yanomami Indians, a situation has been produced that has resulted in the violation, injury to them, of the following rights recognized in the American Declaration of the Rights and Duties of Man: the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and to well-being (Article XI)." [decision 1] It consequently recommended: "(a) That the Government of Brazil continue to take preventive and curative health measures to protect the lives and health of Indians exposed to infectious or contagious diseases; (b) That the Government of Brazil, through the FUNAI and in conformity with its laws, proceed to set and demarcate the boundaries of the Yanomami Park, in the manner that the FUNAI proposed to the inter ministerial working group on September 12, 1984; (c) That the programs of education, medical protection, and social integration of the Yanomamis be carried out in consultation with the indigenous population affected and with the advisory service of competent scientific, medical, and anthropological personnel; and (d) That the Government of Brazil inform the Commission of the measures taken to implement these recommendations." [decision 3]

In its 1997 Report on the situation of human Rights in Brazil, the IACHR referred again to the situation of the Yanomami. It noted in the first place that the Yanomami territory of Brazil, spanning approximately 9.4 million hectares, had already been demarcated and homologated in a final manner, but continued to be incessantly invaded by illegal miners (garimpeiros).

The IACHR pointed out that after the adoption of its Resolution 12/85, between 1987 and 1990, "in the context of the Calha Norte project's execution, the ancestral Amazonian territory of the Yanomami--which had consisted of 23.5 Million acres--was reduced by 70% and divided into 19 isolated areas. Two thirds of the original territory was opened up to mining exploitation--especially gold. Thousands of 'garimpeiros' penetrated their land in search of gold and precious metals. In 1987 their number was estimated as roughly 45,000." [par. 68] Since 1988, however, some Federal courts adopted a number of protective measures, invalidating the disintegration of their continuous area into separate territorial reserves, and ordering the eviction of illegal miners and loggers. But it was especially after the adoption of the new Constitution in 1988, with its guarantees of indigenous rights, that federal organs began to reduce the presence of intruders in ancestral territories, decreasing their number to a few thousands at the beginning of the nineties decade.

In its visit, the IACHR verified that the final demarcation and homologation of the Yanomami area had been completed, that there existed healthcare posts and federal authorities' vigilance in the territory, and that the National Federal Police carried out efficient actions to protect such territory and defend it from clandestine incursions by garimpeiros. [pars. 68-72] Nonetheless, the IACHR noted that "the vigilance performed by FUNAI and federal agencies in the Yanomami was plagued by a series of ongoing changes. Early in March 1996, the helicopter watch performed by the Federal Police was suspended. As a result, a new shipment of garimpeiros and machinery was brought into the area by plane. It is estimated that some 2,000 garimpeiros have now settled there, and that 24 secret landing strips resulted from that operation." [par. 73]

The IACHR emphasized with special concern the health situation in the Yanomami area, in particular regarding malaria. It explained that "the introduction of malaria and other diseases, in particular by the garimpeiros, has had adverse effects on the general situation of the Yanomami's health. The most widely prevalent is malaria which, together with pulmonary disorders, has virtually decimated the Yanomami population and continues to exist on an epidemic scale today. According to official figures, the incidence of malaria among the Yanomami rose by 44% during 1995. That number is consistent with the upturn of malaria in the general population of the State of Roraima, which reached 52% in that year." Nonetheless, the IACHR also noted that in a Yanomami area where a project promoted by a non-governmental organization was being developed, the incidence of malaria had decreased by 14% in 1995, and the population had increased by 10.3% in the previous four years. [pars. 74-75].

The Commission recorded the expressions of some of the Yanomami people's members about the dangers they felt for their individual and collective survival as a consequence of the entry of garimpeiros, mega-projects and other structural factors of human rights violations: "The Commission (...) heard frequent statements of fear at the introduction of elements from the outside world without due care to protect the

fragility of Yanomami culture and proper attention to their health. // In particular, the leaders cite the continuous pressure exercised by the garimpeiros with their sequels of sickness, friction and the poisoning of streams. But they also refer to the access roads to the Yanomami area being built on their lands, which in their experience serves only to introduce disease, intruders (the garimpeiros and other sorts) and the unlawful exploitation of the timber resources or customs which disorganize community life." [pars. 76-77]

On the grounds of its observations, the IACHR concluded that "the Yanomami people have obtained full recognition of their right to ownership of their land. Their integrity as a people and as individuals is under constant attack by both invading prospectors and the environmental pollution they create. State protection against these constant pressures and invasions is irregular and feeble, so that they are constantly in danger and their environment is suffering constant deterioration." [par. 82(f)] Therefore, it recommended the state of Brazil to "institute federal protection measures with regard to Indian lands threatened by invaders, with particular attention to those of the Yanomami, and in Amazônia in general, including an increase in controlling, prosecuting and imposing severe punishment on the actual perpetrators and architects of such crimes, as well as the state agents who are active or passive accomplices." [par. 82, Recommendation (e)] Likewise, it recommended the establishment of "procedures to promote compensatory measures in the areas of education and health, with the full participation and control of the Indian peoples concerned, in accordance with their own traditions and leadership." [par. 82, Recommendation (a)]

IX. RIGHTS OF PARTICIPATION, CONSULTATION AND CONSENT

A. The General Obligation

273. States are under the obligation to consult with indigenous peoples and guarantee their participation in decisions regarding any measure that affects their territory,⁶⁴⁰ taking into consideration the special relationship between indigenous and tribal peoples and land and natural resources.⁶⁴¹ This is a concrete manifestation of the general rule according to which the State must guarantee that "indigenous peoples be consulted on any matters that might affect them,"⁶⁴² taking into account that "the purpose of such consultations should be to obtain their free and informed consent,"⁶⁴³ as provided in ILO Convention No. 169⁶⁴⁴ and in the UN Declaration on the Rights of Indigenous Peoples.⁶⁴⁵ Consultation and consent are not limited to matters affecting indigenous property rights, but are also applicable to other state administrative or legislative activity that has an impact on the rights or interests of indigenous peoples.⁶⁴⁶

⁶⁴⁰ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1058.

⁶⁴¹ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1071.

⁶⁴² IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II.135, Doc. 40, August 7, 2009, par. 157.

⁶⁴³ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II.135, Doc. 40, August 7, 2009, par. 157.

⁶⁴⁴ ILO Convention No. 169 binds states to consult with indigenous peoples, in good faith and with the objective of reaching an agreement or obtaining their consent, on matters that affect them in different contexts; see Arts. 6.1, 6.2, 15.2, 22.3, 27.3 and 28 of the Convention. In the words of a tripartite committee of the ILO Governing Body, "the spirit of consultation and participation constitutes the cornerstone of Convention No. 169 on which all its provisions are based" [Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), par. 31. Cited in: UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, par. 39].

⁶⁴⁵ See, *inter alia*, Articles 10, 11, 15, 17, 19, 28, 29, 30, 32, 36 and 38 of the UN Declaration.

⁶⁴⁶ The UN Special Rapporteur has phrased the general obligation of consultation in the following terms: "In accordance with the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169, States have a duty to consult with indigenous peoples through special, differentiated procedures in matters affecting them, with the objective of obtaining their free, prior and informed consent. Premised on an understanding of indigenous peoples' relative marginalization and disadvantaged conditions in regard to normal democratic processes, this duty derives from the overarching right of indigenous peoples to self-determination and from principles of popular sovereignty and government by consent; and it is a corollary of related human rights principles. // The duty to consult applies whenever a legislative or administrative decision may affect indigenous peoples in ways not felt by the State's general population, and in such cases the duty applies in regard to those indigenous groups that are particularly affected and in regard to their particular interests. The duty to consult does not only apply when substantive rights that are already recognized under domestic law, such as legal entitlements to land, are implicated in the proposed measure." UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, pars. 62-63.

274. The right to consultation, and the corresponding state duty, are linked to several human rights,⁶⁴⁷ and in particular they connect to the right of participation established in Article 23 of the American Convention, as interpreted by the Inter-American Court in the case of *YATAMA v. Nicaragua*.⁶⁴⁸ Article 23 recognizes the right of every citizen “to take part in the conduct of public affairs, directly or through freely chosen representatives.” In the context of indigenous peoples, the right to political participation includes the right to “participate (...) in decision-making on matters and policies that affect or could affect their rights (...) from within their own institutions and according to their values, practices, customs and forms of organization”.⁶⁴⁹

275. In addition to the Article 23 right to participation, the right to be consulted is fundamental to indigenous and tribal peoples’ communal property right over the lands they have traditionally used and occupied.⁶⁵⁰ For the IACHR, “one of the central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories.”⁶⁵¹

276. Indigenous peoples’ right to be consulted about decisions that may affect them is directly related to the right to cultural identity, insofar as culture may be affected by such decisions.⁶⁵² The State must respect, protect and promote indigenous and tribal peoples’ traditions and customs, because they are an intrinsic component of the cultural identity of the persons who form part of said peoples.⁶⁵³ The State duty to develop consultation procedures in relation to decisions that affect their territory, is thus directly linked to the State obligation to adopt special measures to protect the right to cultural identity, based on a way of life intrinsically linked to territory.⁶⁵⁴

277. Any administrative decision which can legally affect indigenous and tribal peoples’ rights or interests over their territories must be based on a process of full participation: “Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole. This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.”⁶⁵⁵

⁶⁴⁷ The UN Special Rapporteur has explained that “[t]his duty is a corollary of a myriad of universally accepted human rights, including the right to cultural integrity, the right to equality and the right to property (...). More fundamentally, it derives from the overarching right of indigenous peoples to self-determination and from related principles of democracy and popular sovereignty. (...) Consistent with these principles, the duty of States to consult with indigenous peoples in decisions affecting them is aimed at reversing the historical pattern of exclusion from decision-making, in order to avoid the future imposition of important decisions on indigenous peoples, and to allow them to flourish as distinct communities on lands to which their cultures remain attached.” UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, July 15, 2009, par. 41.

⁶⁴⁸ I/A Court H.R., *Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 23, 2005. Series C No. 127.

⁶⁴⁹ I/A Court H.R., *Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 23, 2005. Series C No. 127, par. 225.

⁶⁵⁰ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 155.

⁶⁵¹ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 142.

⁶⁵² IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1050.

⁶⁵³ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1050.

⁶⁵⁴ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1050.

⁶⁵⁵ IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 140.

278. There are multiple decisions that relate to ancestral territories and thus require that the State consult with the affected indigenous or tribal peoples; given the multiplicity of matters that can directly affect ancestral territories, there will be an equal diversity of practical application modalities.

279. In the Saramaka case, the Court provided examples of the range of State measures that require prior consultation, when it ordered the State of Suriname to consult with the Saramaka people “regarding at least the following six issues:”

1. the process of delimiting, demarcating and granting collective title over the territory of the Saramaka people;
2. the process of granting the members of the Saramaka people legal recognition of their collective juridical capacity, pertaining to the community to which they belong;
3. the process of adopting legislative, administrative, and other measures as may be required to recognize, protect, guarantee, and give legal effect to the right of the members of the Saramaka people to the territory they have traditionally used and occupied;
4. the process of adopting legislative, administrative and other measures necessary to recognize and ensure the right of the Saramaka people to be effectively consulted, in accordance with their traditions and customs;
5. regarding the prior environmental and social impact assessments, and
6. regarding any proposed restrictions of the Saramaka people’s property rights, particularly regarding proposed development or investment plans in or affecting Saramaka territory.⁶⁵⁶

280. In other cases, the IACHR has clarified that measures concerning access to and effective enjoyment of ancestral territory are subject to prior, effective and informed consultation,⁶⁵⁷ as is the establishment of the frontiers of indigenous territory through the processes of effective delimitation and demarcation.⁶⁵⁸ The adoption in domestic law of legislative, administrative, and any other measures necessary to delimit, demarcate and title or otherwise clarify and protect the territory in which indigenous people have a communal property right must also be done by fully informed consultations, in accordance with their customary land use practices, and without detriment to other indigenous communities.⁶⁵⁹ The Inter-American Court has demanded prior consultation and the achievement of a consensus with indigenous or tribal peoples in cases of “selection and delivery of alternative lands, payment of fair compensation, or both,” which “are not subject to purely discretionary criteria of the State, but rather, pursuant to a comprehensive interpretation of ILO Convention No. 169 and of the American Convention, there must be a consensus with the peoples involved, in accordance with their own mechanism of consultation, values, customs and customary law.”⁶⁶⁰

281. Prior consultation and consent are required for the adoption of any decision that can affect, modify, reduce or extinguish indigenous property rights; in the IACHR’s opinion, “Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied

⁶⁵⁶ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 12, 2008. Series C No. 185, par. 16 [footnotes omitted]. See also I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 28, 2007. Series C No. 172, par. 194(c).

⁶⁵⁷ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia.* Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 240.

⁶⁵⁸ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 132.

⁶⁵⁹ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 197 – Recommendation 1.

⁶⁶⁰ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of June 17, 2005. Series C No. 125, par. 151. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of March 29, 2006. Series C No. 146, par. 135.

and used is based upon a process of fully informed consent on the part of the indigenous community as a whole.”⁶⁶¹ For the IACHR, the general international legal principles applicable in the context of indigenous peoples’ human rights include the right to have their legal title to the property and use of territories and resources “changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.”⁶⁶² By virtue of Articles II (right to equality), XVIII (right to due process and a fair trial) and XXIII (right to property) of the American Declaration of the Rights and Duties of Man, States must take special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation.⁶⁶³

282. Informed consultations and consent also figure in the jurisprudence of UN treaty bodies. The Human Rights Committee has recognized that the enjoyment of indigenous peoples’ cultural rights, including those associated to the use of the land and natural resources, “may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”⁶⁶⁴ The Committee on the Elimination of Racial Discrimination has called upon States to return the lands and territories which have traditionally been owned, used or occupied by indigenous and tribal peoples whenever they have been deprived of them without their free and informed consent.⁶⁶⁵

283. The duty of consultation, consent and participation has special force, regulated in detail by international law, in the realization of development or investment plans or projects or the implementation of extractive concessions in indigenous or tribal territories, whenever such plans, projects or concessions can affect the natural resources found therein. Indigenous peoples’ participation through their own institutions and distinctive forms of organization is required before the approval of investment or development plans or projects over natural resources. The importance of this topic, and its central role in the current indigenous panorama of the Americas, is detailed the following section of the present study.

284. According to ILO Convention No. 169, Article 6, States must consult indigenous peoples “through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.”⁶⁶⁶ The Convention also clarifies that such consultations must be carried out “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”⁶⁶⁷ Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples regulates the duty of consultation is as follows: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

285. Consultation is not as a single act, but a process of dialogue and negotiation that implies both parties’ good faith and the objective of achieving a mutual agreement. Consultation procedures, as a form of guaranteeing indigenous and tribal peoples’ right to participate in matters which can affect them, “must be

⁶⁶¹ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 142.

⁶⁶² IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130.

⁶⁶³ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 131.

⁶⁶⁴ Human Rights Committee, General Comment No. 23 (1994): Article 27 (rights of minorities), CCPR/C/21/rev.1/Add.5 (1994), par. 7; cited in: IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130, footnote No. 99.

⁶⁶⁵ CERD, General Recommendation 23, Indigenous Peoples, U.N. Doc. A/52/18, Annex V (1997), par. 5. Cited in: IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130, footnote No. 99.

⁶⁶⁶ ILO Convention No. 169, Article 6(1)(a).

⁶⁶⁷ ILO Convention No. 169, Article 6.2.

designed to secure the free and informed consent of these peoples, and must not be limited to notification or quantification of damages.”⁶⁶⁸ The consultation procedure may not be limited to compliance with a series of formal requirements. Even in instances in which indigenous peoples’ consent is not a necessary requirement, States have the duty to give due regard to the results of the consultation or provide objective and reasonable motives for not having taken them into consideration.

286. The right to participation in the decision-making processes that may affect ancestral territories belongs to the individual members of such peoples, and to the peoples as a whole. The IACHR has emphasized that “the collective interest of indigenous peoples in their ancestral lands is not to be asserted to the exclusion of the participation of individual members in the process. To the contrary, the Commission has found that any determination of the extent to which indigenous peoples may maintain interests in the lands to which they have traditionally held title and have occupied and used must be based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole.”⁶⁶⁹ Procedures to obtain the prior and informed consent of the community as a whole require “at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.”⁶⁷⁰ The requirement of full participation by indigenous and tribal peoples in the determination, by administrative authorities, of their territorial property rights or interests, is disregarded whenever there are members of such peoples who have not been afforded the opportunity of playing a full and effective role in the selection, authorization or mandate of those who act on behalf of the people before the authorities;⁶⁷¹ whenever the corresponding claims are promoted by a given band, clan or segment of the corresponding people, without an apparent mandate by the other bands, clans or segments thereof;⁶⁷² or whenever appropriate consultations among the members of the entire people are not carried out at the moment of adopting substantial decisions on said rights or interests, in particular when those decisions entail the extinguishment of rights over ancestral territories.⁶⁷³

287. Regardless of the above, the representation of these peoples during the consultation processes must be the one established by the affected peoples themselves in accordance with their tradition, having taken into account the will of the whole people as channeled through the corresponding customary mechanisms. In relation to the State duty to develop consultation processes with the Saramaka people, the Inter-American Court held that “the Saramaka must determine, in accordance with their customs and traditions, which tribe members are to be involved in such consultations”,⁶⁷⁴ and which ones shall represent them before the State for these purposes: “by declaring that the consultation must take place “in conformity with their customs and tradition”, the Court recognized that it is the Saramaka people, not the State, who must decide which person or group of persons will represent the Saramaka people in each consultation process ordered by the Tribunal.”⁶⁷⁵ The Court concluded that “accordingly, the Saramaka people must inform the State which person or group of persons will represent them in each of the aforementioned consultation processes. The State must then consult with those Saramaka

⁶⁶⁸ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 248.

⁶⁶⁹ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 165.

⁶⁷⁰ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 142.

⁶⁷¹ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 140.

⁶⁷² IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 140.

⁶⁷³ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 140.

⁶⁷⁴ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 15.

⁶⁷⁵ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 18.

representatives to comply with the Court's orders. Once such consultation has taken place, the Saramaka people will inform the State of the decisions taken, as well as their basis."⁶⁷⁶

288. In consulting with regard to the right to communal property, States must not cause detriment to other indigenous communities.⁶⁷⁷ The prolonged absence of effective titles to indigenous property has led, in several countries, to a high level of legal uncertainty around indigenous communities' rights over their traditional lands and territories, which has sometimes translated into property conflicts between indigenous communities themselves.⁶⁷⁸ In this context, the Inter-American Court has taken into account the legitimate claims that neighboring indigenous communities may have over the same geographical areas and has stipulated that in the demarcation processes, the precise limits of indigenous territories, "may only be determined after due consultation with said neighboring communities,"⁶⁷⁹ with their participation and informed consent.⁶⁸⁰

B. Participation in Respect to Decisions over Natural Resources

289. Indigenous and tribal peoples have the right to "be involved in the processes of design, implementation, and evaluation of development projects carried out on their lands and ancestral territories",⁶⁸¹ and the State must "ensure that indigenous peoples be consulted on any matters that might affect them,"⁶⁸² taking into account that "the purpose of such consultations should be to obtain their free and informed consent."⁶⁸³ When States grant natural resource exploration or exploitation concessions to utilize property and resources encompassed within ancestral territories, they must adopt adequate measures to develop effective consultations, prior to granting the concession, with communities that may potentially be affected by the decision.⁶⁸⁴ The right of every person to participate in governance (Art. 23, American Convention on Human Rights), applied to indigenous peoples in the framework of development projects carried out over the lands, territories and natural resources they use or occupy, translates into prior, free and informed consultation processes, as stated in ILO Convention No. 169.⁶⁸⁵ Natural resource exploitation in indigenous territories without the affected indigenous people's consultation and consent violates their right to property⁶⁸⁶ and their right to participate in government.

⁶⁷⁶ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 19. [footnote omitted].

⁶⁷⁷ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 193, and par. 197 – Recommendation 1.

⁶⁷⁸ See, e.g., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Supervision of compliance with the judgment), Resolution of May 7, 2008, pars. 16, 20 (referring to conflicts between the Awas Tingni community and other indigenous communities as obstacles to the process of delimitation, demarcation and granting of title to the petitioner community).

⁶⁷⁹ I/A Court H.R., *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 15, 2005. Series C No. 124, par. 133.

⁶⁸⁰ I/A Court H.R., *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 15, 2005. Series C No. 124, par. 210.

⁶⁸¹ IACHR, Follow-up Report - *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 157.

⁶⁸² IACHR, Follow-up Report - *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 157.

⁶⁸³ IACHR, Follow-up Report - *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 157.

⁶⁸⁴ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 143.

⁶⁸⁵ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 246. IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 26.

⁶⁸⁶ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 144.

290. Consequently there is a State duty to consult and, in specific cases, obtain indigenous peoples' consent in respect to plans or projects for investment, development or exploitation of natural resources in ancestral territories: States must "promote, consistent with their relevant international obligations, participation by indigenous peoples and communities affected by projects for the exploration and exploitation of natural resources by means of prior and informed consultation aimed at garnering their voluntary consent to the design, implementation, and evaluation of such projects, as well as to the determination of benefits and indemnization for damages according to their own development priorities."⁶⁸⁷ Through such prior consultation processes, indigenous and tribal peoples' participation must be guaranteed "in all decisions on natural resource projects on their lands and territories, from design, through tendering and award, to execution and evaluation."⁶⁸⁸

291. Carrying out consultation procedures is a responsibility of the State, and not of other parties, such as the company seeking the concession or investment contract. In many of the countries that form part of the Inter-American system, the State responsibility to conduct prior consultation has been transferred to private companies, generating a *de facto* privatization of the State's responsibility. The resulting negotiation processes with local communities then often fail to take into consideration a human rights framework, because corporate actors are, as a matter of definition, profit-seeking entities that are therefore not impartial. Consultation with indigenous peoples is a duty of States, which must be complied with by the competent public authorities.⁶⁸⁹

292. The minimum contents of the duty to consult, as elaborated by Inter-American jurisprudence and international instruments and practice, define consultation not as a single act, but as a process of dialogue and negotiation that involves both parties' good faith and the aim of reaching mutual agreement.

293. Prior consultation procedures "must involve the groups that may be affected, either because they own land or territory or because such ownership is in the process of determination and settlement."⁶⁹⁰ In other words, indigenous and tribal peoples who lack formal titles of property over their territories must also be consulted in relation to the granting of extractive concessions or the implementation of development or investment plans or projects in their territories.⁶⁹¹ Applying this rule, in the *Awas Tingni* case the Inter-American

⁶⁸⁷ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1141, Recommendation 5. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 5.

⁶⁸⁸ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 248.

⁶⁸⁹ The UN Special Rapporteur has explained in this sense that "[f]requently, issues of consultation arise when Governments grant concessions to private companies to extract natural resources, build dams, or pursue other development projects within or in close proximity to indigenous lands. In this connection, the State itself has the responsibility to carry out or ensure adequate consultation, even when a private company, as a practical matter, is the one promoting or carrying out the activities that may affect indigenous peoples' rights and lands. In accordance with well grounded principles of international law, the duty of the State to protect the human rights of indigenous peoples, including its duty to consult with the indigenous peoples concerned before carrying out activities that affect them, is not one that can be avoided through delegation to a private company or other entity. Further, as is the case in other contexts, consultations on extractive or other development activities affecting indigenous peoples should take place at the earliest opportunity and in all phases of decision-making, such that consultations should occur before concessions to private companies are granted. // The Special Rapporteur has observed several instances in which the State hands over consultation obligations to the private company involved in a project. In addition to not absolving the State of ultimate responsibility, such delegation of a State's human rights obligations to a private company may not be desirable, and can even be problematic, given that the interests of the private company, generally speaking, are principally lucrative and thus cannot be incomplete alignment with the public interest or the best interests of the indigenous peoples concerned." The Rapporteur thereby concluded that "[e]ven when private companies, as a practical matter, are the ones promoting or carrying out activities, such as natural resource extraction, that affect indigenous peoples, States maintain the responsibility to carry out or ensure adequate consultations." UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, pars. 54-55, 72.

⁶⁹⁰ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 246.

⁶⁹¹ The UN Special Rapporteur has explained in this sense that "[t]he duty to consult is not limited to circumstances in which a proposed measure will or may affect an already recognized right or legal entitlement. The Special Rapporteur notes with concern that some States have effectively or purposefully taken the position that direct consultation with indigenous peoples regarding natural resource extraction activity or other projects with significant environmental impacts, such as dams, is required only when the lands within which the activities at

Court concluded that the State had “violated the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property”, for having “granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled.”⁶⁹²

294. The elaboration of principles that provide the basic content of the State duty to consult is a result of the Court’s “evolutionary interpretation” of Article 21 of the American Convention, which takes into account the broader developments in the context of the international human rights regime and in the legal provisions and jurisprudence of the relevant OAS Member States. In fact, in its elaboration of the duty to consult, the Court expressly cites the provisions of ILO Convention No. 169 and of the United Nations Declaration, as well as the jurisprudence of the Human Rights Committee and the reports by the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.

295. ILO Convention No. 169 reflects the State duty to consult in relation to the exploitation of state-reserved natural resources which can affect the interests of indigenous peoples. According to the text of the Convention, “governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.”⁶⁹³ The state duty to consult in relation to the exploration or exploitation of natural resources is guided, in the context of the Convention, by the general rules set forth in Article 6, according to which States must consult indigenous peoples “through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly”.⁶⁹⁴ Likewise, the Convention clarifies that these consultations must be undertaken “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”⁶⁹⁵

296. Article 19 of the United Nations Declaration also regulates generically the duty to consult in the following terms: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

297. Non-observance of the principles that define the essential content of the duty to consult results in emergence of international State responsibility. In fact, in the Saramaka case, the lack of application of the duty

...continuation

issue take place have been recognized under domestic law as indigenous lands. Such a position is misplaced since, commensurate with the right to self-determination and democratic principles, and because of the typically vulnerable conditions of indigenous peoples, the duty to consult with them arises whenever their particular interests are at stake, even when those interests do not correspond to a recognized right to land or other legal entitlement. In this regard, a tripartite committee of the ILO Governing Body has expressly affirmed: ‘The consultations referred to in article 15, paragraph 2, are required in respect of resources owned by the State pertaining to the lands that the peoples concerned occupy or otherwise use, whether or not they hold ownership title to those lands.’ [Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC), para. 48] One can easily imagine innumerable ways in which indigenous peoples and their interests may be affected by development projects or legislative initiatives in the absence of a corresponding legal entitlement.” UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, July 15, 2009, par. 44.

⁶⁹² I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 153.

⁶⁹³ ILO Convention No. 169, Article 15.2.

⁶⁹⁴ ILO Convention No. 169, Article 6(1)(a).

⁶⁹⁵ ILO Convention No. 169, Article 6.2.

to consult and other connected safeguards was the main argument that led the Inter-American Court to conclude that there had been a violation of said people's right to property, and determine the corresponding reparations.⁶⁹⁶

Adequate regulatory framework

298. Compliance with the State duty to consult must be regulated in the domestic legal system through legislative or administrative measures (Articles 1.1 and 2 of the American Convention), in such a way as to fully guarantee the principle of legality and legal certainty to all interested actors. However, the absence of regulation does not exempt the State from said duty. States must approve legislation "that develops the individual rights of indigenous peoples, that guarantees the mechanisms of participation of indigenous persons in the adoption of political, economic, and social decisions that affect their rights, and that they be accorded greater political participation in the adoption of decisions at the national level;"⁶⁹⁷ for these purposes, States must prescribe clear rules and requirements for the process of the consultations, which include for example "information that must be shared with the communities concerned or the extent of community support necessary to permit a license to be issued."⁶⁹⁸ In most instances, the right to be consulted is violated because of the absence or limitations of the legislative and administrative mechanisms that regulate the duty to consult. ILO control organs have elaborated on the duty to consult in relation to the provisions of Convention No. 169, which stipulates States' duty to develop, "with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity",⁶⁹⁹ *inter alia* through "the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned".⁷⁰⁰

299. The absence of clear legal guidelines for the consultation procedure implies, in practice, a serious obstacle for compliance with the State duty to consult. In the absence of a legal framework on this obligation, some OAS Member States have resorted to the application of general environmental law, which frequently incorporates requirements of information and public hearings to allow for local participation in relation to investment and development projects, generally during the phase of elaboration of social and environmental impact studies. Nonetheless, in light of the Inter-American human rights standards, these types of mechanisms are usually insufficient to accommodate the requirements of consultation with indigenous peoples, visualized as a special mechanism to guarantee their rights and interests in accordance with the criteria established by the organs of the system applying international standards.⁷⁰¹

300. States also have the general obligation to consult indigenous peoples on the legislative measures which can affect them directly, particularly with regard to the legal regulation of the consultation procedures.⁷⁰²

⁶⁹⁶ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 156.

⁶⁹⁷ IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 39 – Recommendation 1.

⁶⁹⁸ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 143.

⁶⁹⁹ ILO Convention No. 169, Article 2.1.

⁷⁰⁰ ILO Convention No. 169, Article 33.2.

⁷⁰¹ As the Constitutional Court of Colombia has indicated, "the participation [of the indigenous peoples] is not reduced merely to an intervention in the administrative procedure aimed at ensuring the right of defense for those who have been affected by the authorization of the environmental license ... but has a larger meaning given the lofty interests it seeks to protect, such as those that go to the definition of the destiny and security of the subsistence of said communities." Judgment on Tutela action T-652, of November 10, 1998. In the case of Peru, the Constitutional Court has indicated that Supreme Decree 012-2008-EMM, which regulates citizen participation in relation to hydrocarbon-related activities, does not meet the requirements of Convention 169 for consultation with indigenous peoples. Constitutional Court, Case No. 03343-2007-PA-TC, para. 32 See Response of CAAAP, DAR and CARE-Perú, p. 13 ("the citizen participation procedure is not, for the [indigenous peoples], in the nature of a consultation.")

⁷⁰² Cfr. ILO Convention No. 169, Art. 6.1(a); United Nations Declaration, Art. 19. According to the UN Special Rapporteur, "[n]otwithstanding the necessarily variable character of consultation procedures in various contexts, States should define into law consultation procedures for particular categories of activities, such as natural resource extraction activities in, or affecting, indigenous territories. Such

Compliance with the duty to consult indigenous and tribal peoples about the definition of the legislative and institutional framework of prior consultation, is one of the special measures required to promote indigenous peoples' participation in the adoption of the decisions that affect them directly.

301. It is important to note that, although Inter-American jurisprudence and international practice have elaborated the minimum contents of the State duty to consult, there does not exist a single formula applicable in all countries to comply with this duty.⁷⁰³ Article 34 of ILO Convention No. 169 explicitly incorporates the principle of flexibility in the application of its provisions: "The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country."

Prior consultation

302. Consultation, in order to be prior, must be carried out during the exploratory or planning phase of the corresponding project, plan or measure, well before commencement of its execution activities. Consultation procedures must be developed "preceding the design and execution of natural resource projects on the ancestral lands and territories of indigenous peoples."⁷⁰⁴

303. As the Inter-American Court indicated in its judgment in the Saramaka case, the consultation with indigenous or tribal peoples must take place during the first stages of the development or investment plan or project or the extractive concession: "not only when the need arises to obtain approval from the community, if such is the case. Early notice provides time for internal discussion within communities and for proper feedback to the State."⁷⁰⁵ The UN Special Rapporteur has pointed out, in the same sense, that "in all cases in which the duty to consult applies, the objective of the consultation should be to obtain the consent or agreement of the indigenous peoples concerned. Hence, consultations should occur early in the stages of the development or planning of the proposed measure, so that indigenous peoples may genuinely participate in and influence the decision-making."⁷⁰⁶

304. As for projects and concessions for natural resource exploitation or extraction in indigenous territories, consultation must be carried out from the very moment of evaluation of the grant of a concession: States must secure, beforehand, the effective participation of the affected indigenous or tribal people, through their traditional decision-making methods, both in relation to the process of evaluating the granting of concessions in their territory, and in the adoption of the corresponding decisions.⁷⁰⁷ This is also the meaning of Article 15 of ILO Convention No. 169, which requires States to conduct consultations with indigenous peoples "before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their

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mechanisms that are included into laws or regulations, as well as ad hoc mechanisms of consultation, should themselves be developed in consultation with indigenous peoples." UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, July 15, 2009, par. 67.

⁷⁰³ The UN Special Rapporteur has explained in this sense that "[t]here is not one specific formula for carrying out consultations with indigenous peoples that applies to all countries and in all circumstances", and that "[t]he specific characteristics of the consultation procedure that is required by the duty to consult will necessarily vary depending upon the nature of the proposed measure and the scope of its impact on indigenous peoples". UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, July 15, 2009, pars. 37, 45.

⁷⁰⁴ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 249.

⁷⁰⁵ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 133.

⁷⁰⁶ UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, July 15, 2009, par. 65.

⁷⁰⁷ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 147.

lands”.⁷⁰⁸ The prior nature of consultation in these instances is also confirmed by the United Nations Declaration, which clarifies that consultation must be conducted “prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”⁷⁰⁹

Culturally adequate consultation

305. For the Inter-American Court, the State duty to consult indigenous peoples must be carried out in accordance with their customs and traditions, through culturally adequate procedures and taking into account their traditional decision-making methods.⁷¹⁰ In general terms, “all issues related to the consultation process with the [corresponding] people, as well as those concerning the beneficiaries of the ‘just compensation’ that must be shared, must be determined and resolved by the [respective] people in accordance with their traditional customs and norms”;⁷¹¹ “in ensuring the effective participation of members of the [corresponding] people in development or investment plans within their territory, the State has a duty to actively consult with said community according to their customs and traditions.”⁷¹² States must allow for the effective participation of indigenous and tribal peoples, in accordance with their traditions and customs, in the decision-making processes that relate to extractive concessions or development or investment plans or projects; Articles 21 and 1.1 of the American Convention are violated by not doing so.⁷¹³ As the Inter-American Court has explained, “consultations must be [conducted] through culturally appropriate procedures,”⁷¹⁴ peoples must be consulted “in accordance with their own traditions,”⁷¹⁵ and “consultation should take account of the ... people’s traditional methods of decision-making.”⁷¹⁶

306. The rule of cultural adequacy of consultation requires that indigenous peoples’ representation be defined in accordance with their own traditions; according to the Inter-American Court in the case of the Saramaka people, “by declaring that the consultation must take place ‘in conformity with their customs and tradition’, the Court recognized that it is the Saramaka people, not the State, who must decide which person or group of persons will represent the Saramaka people in each consultation process ordered by the Tribunal.”⁷¹⁷ Consequently, “the Saramaka people must inform the State which person or group of persons will represent them in each of the aforementioned consultation processes. The State must then consult with those Saramaka representatives to comply with the Court’s orders.”⁷¹⁸ These requirements have a clear normative basis in the main international

⁷⁰⁸ ILO Convention No. 169, Article 15.2.

⁷⁰⁹ United Nations Declaration, Article 32.2.

⁷¹⁰ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 131.

⁷¹¹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 27.

⁷¹² I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 133.

⁷¹³ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 154.

⁷¹⁴ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 133.

⁷¹⁵ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 133.

⁷¹⁶ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 133.

⁷¹⁷ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 18.

⁷¹⁸ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 19. This also implies that “the decision as to whom should be consulted regarding each of the various issues mentioned above (...) must be made by the Saramaka people, pursuant to their customs and

human rights instruments. Thus, ILO Convention No. 169 requires consultations to be conducted “through appropriate procedures and in particular through their representative institutions.”⁷¹⁹ In similar terms, the United Nations Declaration requires consultations to be conducted “through their own representative institutions”.⁷²⁰

307. Reaffirming the criteria of flexibility and the need to take into account the specific circumstances of both the reasons for the consultation and of the different interested peoples, the ILO control organs have pointed out that given the diversity of indigenous peoples, the Convention does not impose a model representative institution.⁷²¹

Informed consultation

308. Processes for granting extractive concessions or implementing investment or development plans or projects, require the full provision of precise information on the nature and consequences of the project to the communities prior to and during the consultation.⁷²² According to the Inter-American Court’s jurisprudence, consultation must be informed, in the sense that indigenous peoples must be made “aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily.”⁷²³ For the Inter-American Court, “this duty requires the State to both accept and disseminate information”⁷²⁴, and “entails constant communication between the parties”.⁷²⁵ The informed nature of consultations is connected to the obligation to carry out social and environmental impact assessments prior to the execution of development or investment plans or extractive concessions which may affect these peoples.⁷²⁶

309. The right to participate in decision-making processes related to investment or development plans or projects or extractive concessions, and the right of access to information, are two basic elements to “support and enhance the ability of individuals to safeguard and vindicate”⁷²⁷ the rights to life and personal integrity in situations of serious environmental risk, and thus contribute to “the quest to guard against environmental

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traditions. The Saramaka people will then communicate to the State who must be consulted, depending on the issue that requires consultation.” [I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 12, 2008. Series C No. 185, par. 22].

⁷¹⁹ ILO Convention No. 169, Article 6.1.

⁷²⁰ United Nations Declaration, Article 32.

⁷²¹ Report of the Committee established to examine the representation alleging non-observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Engineers of the Federal District (SENGE/DF), GB.295/17; GB.304/14/7 (2006), para. 42.

⁷²² IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 142.

⁷²³ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 28, 2007. Series C No. 172, par. 133.

⁷²⁴ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 28, 2007. Series C No. 172, par. 133.

⁷²⁵ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 28, 2007. Series C No. 172, par. 133.

⁷²⁶ According to the UN Special Rapporteur, “[i]n cases involving natural resource exploitation or development projects affecting indigenous lands, in order for the indigenous peoples concerned to make free and informed decisions about the project under consideration, it is necessary that they are provided with full and objective information about all aspects of the project that will affect them, including the impact of the project on their lives and environment. In this connection, it is essential for the State to carry out environmental and social impact studies so that the full expected consequences of the project can be known. These studies must be presented to the indigenous groups concerned at the early stages of the consultation, allowing them time to understand the results of the impact studies and to present their observations and receive information addressing any concerns.” UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, July 15, 2009, par. 53.

⁷²⁷ IACHR, *Report on the Situation of Human Rights in Ecuador.* Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

conditions which threaten human health”.⁷²⁸ As explained by the IACHR, “access to information is a prerequisite for public participation in decision-making and for individuals to be able to monitor and respond to public and private sector action. Individuals have a right to seek, receive and impart information and ideas of all kinds pursuant to Article 13 of the American Convention.”⁷²⁹ Therefore, the IACHR has advised States: “as the right to participate in decision-making and the right to effective judicial recourse each require adequate access to information, the Commission recommends that the State take measures to improve systems to disseminate information about the issues which affect them, and to enhance the transparency of and opportunities for public input into processes affecting the inhabitants of development sectors.”⁷³⁰

310. The Inter-American jurisprudence on this point is fully consistent with international standards on indigenous peoples’ rights. In this field, ILO Convention No. 169 establishes that consultations on projects for the exploration or exploitation of natural resources must be aimed at “ascertaining whether and to what degree their interests would be prejudiced”.⁷³¹ Indigenous peoples’ right to be fully informed of the content and purpose, as well as of the possible negative and positive impacts of investment or development plans or projects or extractive concessions in their traditional territories, stems from these peoples’ right to determine and elaborate the priorities and strategies for the development or use of their lands or territories and other resources.⁷³²

311. In analogy to the safeguards applicable in other judicial or administrative procedures in which indigenous peoples or individuals take part, informed consultation requires States to adopt measures to ensure that members of indigenous peoples or communities “can understand and be understood (...), where necessary through the provision of interpretation or by other effective means”.⁷³³

312. Likewise, States may be required to provide these peoples with other means, which can include technical and independent assistance, in order for indigenous peoples to be able to adopt fully informed decisions.⁷³⁴

313. Informed consultation also requires States to ensure that the procedures “establish the benefits that the affected indigenous peoples are to receive, and compensation for any environmental damages, in a manner consistent with their own development priorities.”⁷³⁵

314. The complexity and magnitude of investment or development plans or projects or concessions for natural resource extraction may require holding prior information meetings. These meetings, however, are not to be confused with the type of negotiation and dialogue required by a genuine consultation process.

⁷²⁸ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁷²⁹ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁷³⁰ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁷³¹ ILO Convention No. 169, Article 15.2.

⁷³² ILO Convention No. 169, Article 7.1.

⁷³³ ILO Convention No. 169, Article 12.

⁷³⁴ ILO Convention No. 169, Article 12. Technical support to indigenous peoples in the context of consultation procedures may also be interpreted as one of the requirements for the provision of means for indigenous peoples to be able to fully exercise their right to autonomy. ILO Convention 169, Art. 6.1.(c) As pointed out by the UN Special Rapporteur, “indigenous peoples are typically disadvantaged in terms of political influence, financial resources, access to information, and relevant education in comparison to the State institutions or private parties, such as companies, that are their counterparts in the consultations. (...) States must dully address the imbalance of power by ensuring arrangements by which indigenous peoples have the financial, technical and other assistance they need, and they must do so without using such assistance to leverage or influence indigenous positions in the consultations.” UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, pars. 50-51.

⁷³⁵ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 248.

Consultation in good faith, aimed at reaching an agreement

315. The process of consultation with indigenous peoples must be carried out in good faith, and in all cases with the aim of achieving an agreement, or receiving indigenous peoples' informed consent to the development or investment plans or extractive concessions that can affect their property right over lands, territories and natural resources.⁷³⁶ In the Inter-American Court's words, "consultations must be in good faith (...) ⁷³⁷ and with the objective of reaching an agreement".⁷³⁸ As a general rule, States must "ensure, through clear consultation procedures, that their free and informed prior consent is obtained in order to carry out said projects."⁷³⁹ States' primary obligation is to secure, in accordance with Convention No. 169, that "all projects to build infrastructure or exploit natural resources in the indigenous area or that affect their *habitat* or culture is processed and decided on with the participation of and in consultation with the peoples interested, with a view to obtaining their consent and possible participation in the benefits."⁷⁴⁰

316. The duty to consult with the aim of obtaining consent is reiterated in several specific provisions of the UN Declaration on the Rights of Indigenous Peoples.⁷⁴¹ In relation to investment or development projects over natural resources, Article 32 establishes: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."⁷⁴²

317. The international and regional regulation's emphasis on good faith in compliance with the State duty to consult indigenous peoples seeks to establish a safeguard against merely formal consultation procedures, an unfortunately frequent practice which has been consistently denounced by indigenous peoples. Consultation procedures are not tantamount to compliance with a series of *pro forma* requirements.⁷⁴³ The IACHR has

⁷³⁶ The UN Special Rapporteur has clarified in this regard that "[i]n all cases in which indigenous peoples' particular interests are affected by a proposed measure, obtaining their consent should, in some degree, be an objective of the consultations. (...) this requirement does not provide indigenous peoples with a 'veto power', but rather establishes the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned. (...) These principles [of consultation and consent] are designed to build dialogue in which both States and indigenous peoples are to work in good faith towards consensus and try in earnest to arrive at a mutually satisfactory agreement. (...) the duty of States to consult with indigenous peoples and related principles have emerged to reverse historical patterns of imposed decisions and conditions of life that have threatened the survival of indigenous peoples. At the same time, principles of consultation and consent do not bestow on indigenous peoples a right to unilaterally impose their will on States when the latter act legitimately and faithfully in the public interest. Rather, the principles of consultation and consent are aimed at avoiding the imposition of the will of one party over the other, and at instead striving for mutual understanding and consensual decision-making." UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, pars. 48-49.

⁷³⁷ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 133.

⁷³⁸ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 133.

⁷³⁹ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 165.

⁷⁴⁰ IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 39 – Recommendation 5.

⁷⁴¹ United Nations Declaration, Articles 10, 11, 15, 17, 19, 28, 29, 30, 32, 36, 38.

⁷⁴² *Ibid.*, Article 32.2.

⁷⁴³ As explained by the UN Special Rapporteur, the language of the UN Declaration on the Rights of Indigenous Peoples in this regard "suggests a heightened emphasis on the need for consultations that are in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process." UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, par. 46.

explained that consultation procedures, as a means to guarantee indigenous and tribal peoples' right to participate in matters that may affect them, "must be designed to secure the free and informed consent of these peoples, and must not be limited to notification or quantification of damages."⁷⁴⁴

318. Consultation in good faith requires the absence of any type of coercion by the State or by agents acting with its authorization or acquiescence. In too many cases, the consultation of indigenous peoples is carried out in climates of harassment and even violence perpetrated by private security guards hired by the companies that are responsible for the projects, and sometimes by public security forces.

319. Good faith is also incompatible with practices such as attempts to disintegrate the social cohesion of the affected communities, whether it is through the corruption of communal leaders or the establishment of parallel leaderships, or through negotiations with individual members of the community that are contrary to international standards.

320. In this sense, consultation in good faith requires the establishment of a climate of mutual confidence between the parties, based on the principle of reciprocal respect. As pointed out by an ILO Committee, "[r]ecalling that the establishment of effective consultation and participation procedures contributes to preventing and resolving disputes through dialogue ... the Committee emphasizes the need to: endeavour to achieve consensus on the procedures to be followed; facilitate access to such procedures through broad information; and create a climate of confidence with indigenous peoples which favours productive dialogue."⁷⁴⁵ This means, *inter alia*, that "[i]n order to achieve a climate of confidence and mutual respect for the consultations, the consultation procedure itself should be the product of consensus. The [UN] Special Rapporteur has observed that, in many instances, consultation procedures are not effective and do not enjoy the confidence of indigenous peoples, because the affected indigenous peoples were not adequately included in the discussions leading to the design and implementation of the consultation procedures."⁷⁴⁶

321. As a process that involves two parties, consultation in good faith also has a series of implications for indigenous peoples themselves. As parties to good faith negotiation and dialogue processes in the framework of the State duty to consult, indigenous peoples have the primary responsibility of actively taking part in such processes. Nonetheless, indigenous peoples' responsibilities towards consultation may not be interpreted in such a way as to limit their human rights or the exercise of peaceful forms of social protest.

322. The Inter-American Court has cited the case of *Apirana Mahuika and others v. New Zealand*,⁷⁴⁷ in which the Human Rights Committee "decided that the right to culture of an indigenous population under Article 27 of the ICCPR could be restricted where the community itself participated in the decision to restrict such right. The Committee found that 'the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy'."⁷⁴⁸

⁷⁴⁴ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 248.

⁷⁴⁵ Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC), GB.294/17/1; GB.299/6/1 (2005), para. 53.

⁷⁴⁶ UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, par. 51.

⁷⁴⁷ UNHRC, *Apirana Mahuika et al. v. New Zealand* (Seventieth session, 2000), U.N. Doc. CCPR/C/70/D/547/1993, November 15, 2000, para. 9.5.

⁷⁴⁸ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 130.

The duty of accommodation

323. A constitutive element of negotiation and dialogue between the authorities and indigenous peoples in the framework of consultation procedures, is that the aim of these procedures must be to obtain an agreement and indigenous peoples' informed consent.⁷⁴⁹

324. Insofar as development or investment plans or projects or extractive concessions substantially affect the right to indigenous property and other connected rights, the duty to consult requires, from all involved parties, flexibility to accommodate the different rights and interests at stake. The States' duty is to adjust or even cancel the plan or project based on the results of consultation with indigenous peoples, or failing such accommodation, to provide objective and reasonable motives for not doing so.

325. Failure to pay due regard to the consultation's results within the final design of the investment or development plans or projects or extractive concessions is contrary to the principle of good faith that governs the duty to consult, which must allow indigenous peoples the capacity to modify the initial plan. From another perspective, decisions related to the approval of such plans, that fail to express the reasons that justify failing to accommodate the results of the consultation procedure, could be considered contrary to the due process guarantees set by the standards of the Inter-American human rights system.

The duty to give reasoned decisions

326. The fact that indigenous peoples' consent is not required as an outcome of every consultation process does not imply that the State duty to consult is limited to compliance with formal procedures. From a substantive standpoint, States have the duty to take into account the concerns, demands and proposals expressed by the affected peoples or communities, and to give due regard to such concerns, demands and proposals in the final design of the consulted plan or project.

327. Whenever accommodation is not possible for motives that are objective, reasonable and proportional to a legitimate interest in a democratic society, the administrative decision that approves the investment or development plan must argue, in a reasoned manner, which are those motives. That decision, and the reasons that justify failure to incorporate the results of the consultation to the final plan, must be formally communicated to the respective indigenous people.⁷⁵⁰

328. As analyzed in Chapter X, the decisions taken must be subject to review by higher administrative and judicial authorities, through adequate and effective procedures, which evaluate the validity and pertinence of said reasons, as well as the balance between the rights and interests at stake.

⁷⁴⁹ The United Nations Declaration on the Rights of Indigenous Peoples clarifies that the states must hold consultations with indigenous peoples "in order to obtain their free, prior and informed consent." United Nations Declaration, Articles 19, 32. Convention 169 stipulates that consultations should be conducted "with the objective of achieving agreement or consent to the proposed measures." ILO Convention No. 169 Article 6(2).

⁷⁵⁰ As the Inter-American Court of Human Rights has indicated, "the decisions adopted by national bodies that could affect human rights must be duly justified, because, if not, they would be arbitrary decisions. In such sense, the reasons given for a judgment must show that the arguments by the parties have been duly weighed.... Moreover, a reasoned decision demonstrates to the parties that they have been heard." I/A Court H.R., Case of Apitz Barbera *et al.* ("First Court of Administrative Disputes") v. Venezuela (Preliminary Objection, Merits, Reparations and Costs). Judgment of August 5, 2008, Series C No. 182, para. 78. In addition, the Court has emphasized that the reasoned explanation of judicial or administrative decisions is the guarantee that "grants credibility to legal decisions in the framework of a democratic society," "affords ... the possibility of challenging the Order and obtaining a new examination of the issues by higher Courts," and, accordingly, is "constitutes one of the 'due guarantees' enshrined in Article 8(1) of the Convention in order to safeguard the right to the due process of the law." I/A Court H.R., Case of Tristán Donoso v. Panama, Judgment of January 27, 2009, Series C, No. 193, pars. 152-153.

C. The Limited Duty to Obtain Prior Informed Consent

329. Regardless of the fact that every consultation process must pursue the objective of consent, in some specifically defined cases, the Inter-American Court's jurisprudence and international standards legally require states to obtain indigenous peoples' free and informed consent prior to the execution of plans or projects which can affect their property rights over lands, territories and natural resources.

330. The Inter-American Court has underscored "the difference between 'consultation' and 'consent' in this context,"⁷⁵¹ stating the obligation of obtaining consent in the following terms: "the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions."⁷⁵² In its subsequent interpretive judgment in the Saramaka case, the Court added: "the State has a duty, from the onset of the proposed activity, to actively consult with the Saramaka people in good faith and with the objective of reaching an agreement, which in turn requires the State to both accept and disseminate information in an understandable and publicly accessible format. Furthermore, depending upon the level of impact of the proposed activity, the State may additionally be required to obtain consent from the Saramaka people. The Tribunal has emphasized that when large-scale development or investment projects could affect the integrity of the Saramaka people's lands and natural resources, the State has a duty not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent in accordance with their customs and traditions."⁷⁵³

331. The Court has observed that "other international bodies and organizations have similarly considered that, in certain circumstances, and in addition to other consultation mechanisms, States must obtain the consent of indigenous and tribal peoples to carry out large-scale development or investment projects that have a significant impact on the right of use and enjoyment of their ancestral territories",⁷⁵⁴ citing in this regard a decision of the Committee on Elimination of Racial Discrimination concerning Ecuador.⁷⁵⁵

332. As the Inter-American Court noted, the United Nations Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has also spoken to this obligation, observing that: "[w]herever [large-scale projects] occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them. [...] The principal human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence."⁷⁵⁶

⁷⁵¹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 134.

⁷⁵² I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 134.

⁷⁵³ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 17.

⁷⁵⁴ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 136.

⁷⁵⁵ CERD, Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador (Sixty second session, 2003), U.N. Doc. CERD/C/62/CO/2, June 2, 2003, para. 16.

⁷⁵⁶ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 135.

333. The requirement of consent must be interpreted as a heightened safeguard for the rights of indigenous peoples, given its direct connection to the right to life, to cultural identity and other essential human rights, in relation to the execution of development or investment plans that affect the basic content of said rights. The duty to obtain consent responds, therefore, to a logic of proportionality in relation to the right to indigenous property and other connected rights.⁷⁵⁷

334. The development of international standards on indigenous peoples' rights, including those set by the Inter-American system, makes it possible to identify a series of circumstances where obtaining indigenous peoples' consent is mandatory.

1. The first of these situations, identified by the UN Special Rapporteur, is that of development or investment plans or projects that imply a displacement of indigenous peoples or communities from their traditional lands, that is, their permanent relocation. The requirement of consent in these cases is established in Article 10 of the UN Declaration: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return".⁷⁵⁸
2. Indigenous peoples' consent is also required, according to the Inter-American Court in the Saramaka judgment, in cases where the execution of development or investment plans or of concessions for the exploitation of natural resources would deprive indigenous peoples of the capacity to use and enjoy their lands and other natural resources necessary for their subsistence.
3. Another case in which, as pointed out by the Special Rapporteur, indigenous peoples' consent is required, is that of storage or disposal of hazardous materials in indigenous lands or territories, as established in Article 29 of the UN Declaration.⁷⁵⁹

Example of application: indigenous populations affected by development activities in Bolivia

In its 2007 report on the state of human rights in Bolivia, the IACHR assessed the situation of the indigenous peoples and communities affected by the development of natural resource exploration and exploitation projects in their ancestral territories, from their design throughout their implementation, highlighting four aspects that had an impact upon the effective enjoyment of their human rights: (1) in parallel to a protracted and difficult process of granting of legal title to property over lands and territories, "there has been an expeditious process of concessions to private businesses to exploit lumber and mining and hydrocarbons resources, a process that has sparked claims and disputes over lands that are still in the regularization process" [par. 245]; (2) the granting of concessions had taken place without conducting prior consultation procedures with the interested peoples and communities; (3) some of these projects had caused serious environmental contamination, with noxious effects upon the continuity of basic subsistence activities and on the health of the members of the indigenous communities that were located in the territories where they were being carried out; and (4) there were no judicial mechanisms which could enable indigenous peoples to contest the effects to which they were exposed.

⁷⁵⁷ The UN Special Rapporteur has explained in this line that "the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent. The Declaration recognizes two situations in which the State is under an obligation to obtain the consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultations. These situations include when the project will result in the reallocation of a group from its traditional lands, and in cases involving the storage or disposal of toxic waste within indigenous lands (arts. 10 and 29, para. 2, respectively)." UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, par. 47.

⁷⁵⁸ See, in the same sense, Article 16 of ILO Convention No. 169.

⁷⁵⁹ United Nations Declaration, art. 29.2 ("States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent").

In relation to the lack of prior consultation, the IACHR reminded the state that according to article 23 of the American Convention, citizens have the right to participate in matters that can affect them; “in the case of indigenous peoples and of development projects planned for the lands, territories and natural resources that they use or occupy, this right entails prior procedures of free and informed consultation, as indicated in ILO Convention 169.” [par. 246] The IACHR noted in this sense that “such procedures must involve the groups that may be affected, either because they own land or territory or because such ownership is in the process of determination and settlement.” [par. 246] The Commission also noted in relation to this point that the Bolivian Constitutional Tribunal had adopted a decision in June 2006, in which it had restricted the scope of the right to prior consultation, having struck down as unconstitutional the expression “securing the consent of the indigenous and aboriginal communities and peoples” from the Hydrocarbons Act, because it considered –as explained by the Commission– that “the consultation of indigenous peoples must not be understood in the sense of requiring authorization for exploitation activities, for the subsoil belongs to the State and the interests of the majority cannot be jeopardized by the lack of consent from indigenous peoples. In this respect, the Tribunal holds that the purpose of the consultation is to quantify damage and not to obtain consent.” [cited in par. 247] In this regard, the Commission referred to the scope of indigenous and tribal peoples’ right to prior consultation in light of the inter-American jurisprudence, and emphasized that “the consultation procedure, in the sense of guaranteeing indigenous peoples’ right to participate in matters that may affect them, is of much broader scope: it must be designed to secure the free and informed consent of these peoples, and must not be limited to notification or quantification of damages. On the contrary, it must guarantee participation by indigenous peoples, through the consultation process, in all decisions on natural resource projects on their lands and territories, from design, through tendering and award, to execution and evaluation. It must also ensure that such procedures will establish the benefits that the affected indigenous peoples are to receive, and compensation for any environmental damages, in a manner consistent with their own development priorities.” [par. 248] In this sense, the IACHR deplored that “beyond the absence of consultations preceding the design and execution of natural resource projects on the ancestral lands and territories of indigenous peoples, (...) the foregoing decision places judicial constraints on the scope of their participation in such consultation, notwithstanding Article 6.2 of ILO Convention 169 which applies to this issue, having been incorporated into Bolivian legislation at the time of its ratification.” [par. 249] For such reasons, the IACHR recommended that the State, “consistent with its international obligations, guarantee the participation of indigenous peoples and affected communities in projects for the exploration and exploitation of natural resources, through prior and informed consultations designed to obtain their free consent in the design, execution and evaluation of those projects, as well as in determining benefits and compensation for damages, according to their own development priorities.” [par. 297 – Recommendation 5]

As for the environmental damages, the undermining of basic subsistence activities and the harms to health caused by the natural resource exploration and exploitation projects, the IACHR described two emblematic examples of which it had been informed: on the one hand, the strong contamination of the Pilcomayo River in the departments of Potosí and Tarija with toxic wastes of metals and other elements, which was affecting indigenous peoples because of the decrease in their agricultural, fishing and other activities, as well as affecting the health of persons who, out of necessity, continued to consume contaminated food – a situation of special vulnerability for boys, girls and women in fertile age. On the other hand, the contamination of streams and bodies of water in the Bosque Seco Chiquitano by waste from the lateral gas pipeline to Brazil, which had seriously affected the ancestral territory of the Chiquitano indigenous peoples. In relation to both cases, the IACHR reminded the State that “the right to life enshrined in the American Convention includes the right to a dignified existence” [par. 253], and that “when the State becomes aware of the serious situation facing persons who live in areas close to rivers and creeks polluted by natural resource projects, it is the State’s duty to adopt all the measures at its disposal to mitigate the damage caused by the concessions it has granted, and to impose sanctions for the failure to comply with applicable environmental or criminal legislation. The Inter-American Court has held the failure to take such measures, despite knowledge of the severity of the situation, to engage international responsibility for the effects on life and personal integrity flowing from those conditions.” [par. 253]. Consequently, it recommended the state: “In the context of projects underway, implement participatory mechanisms to determine the environmental damages they may be causing and their effects on the basic subsistence activities of indigenous peoples and peasant communities living in the vicinity of such projects. If their lives or personal integrity are threatened, such projects should be immediately suspended and the appropriate administrative and criminal penalties imposed. If the projects continue, the State must guarantee that affected persons will share in the benefits from those projects, and it must determine and enforce compensation for such damage.” [par. 297 – Recommendation 6]. The Commission also noted in this regard that social conflicts in Bolivia were increased by tensions between indigenous peoples, the State and the concessionary companies of this kind of projects, “where the sustainability of such projects is not measured in advance, using effective mechanisms of participation for the persons and groups affected, regardless of whether the State has recognized their ownership, and where environmental and even criminal liability rules are deliberately ignored without any penalties imposed by the State.” [par. 254]. The IACHR also explained that the observed problems were based on the lack of effective application of the legislation which incorporated ILO Convention 169 into the domestic legal system; and it clarified that in order to solve those problems, “the provisions of that Convention must be incorporated horizontally into legislation governing the entire process of design, award and implementation of natural resource projects, and the absence of such regulation must not serve as an excuse for not applying the international rule which, as noted above, is part of domestic legislation and is automatically enforceable.” [par. 255] In this last sense, the IACHR recommended the State to “incorporate the provisions of ILO Convention 169 on this issue into its domestic legislation on development projects, and adopt measures for their effective enforcement.” [par. 297, Recommendation 4]

Finally, in relation to the lack of judicial mechanisms to contest these situations, the IACHR explained that it exacerbated the state of defenselessness of indigenous peoples; and it clarified that even though there were criminal penalties for non-compliance with environmental legislation, it had been informed that “the few criminal actions initiated over these events have been delayed and obstructed by lack of action on the part of the prosecutors, and by external pressures. Moreover, the organizations representing the persons affected by this situation complained that they have no preventive judicial remedy for extreme situations that may affect their right to life. Nor, according to that information, are there any judicial steps that could be taken collectively by a group affected by such a situation, such as a class action.” [par. 256] For this reason, the IACHR recommended the state to “[g]uarantee access to an adequate and effective judicial remedy for challenging environmental damages of a collective nature so that, in addition to criminal action, there will be a mechanism of a judicial nature to obtain an immediate response in circumstances where projects are causing irreparable damage to groups of individuals.” [par. 297 – Recommendation 7]

X. RIGHTS TO STATE PROTECTION, OF ACCESS TO JUSTICE AND TO REPARATIONS

A. Administrative Procedures

335. Constitutional provisions and legislation to respect indigenous peoples' rights must be coupled with developing and implementing State policies and actions to enforce them, with indigenous peoples' participation. Administrative authorities have the primary responsibility to enforce the laws that protect indigenous peoples' territorial and resource rights; therefore indigenous and tribal peoples have the right to the existence of effective and prompt administrative mechanisms to protect, guarantee and promote their rights over ancestral territories. As explained by the IACHR, States are bound to adopt measures to guarantee and give legal certainty to indigenous and tribal peoples' rights in relation to ownership of their property, *inter alia* through the establishment of special, swift and effective mechanisms and procedures to solve legal claims over such property.⁷⁶⁰

336. These special mechanisms and procedures must be effective; ineffectiveness of the legally established procedures to enforce indigenous peoples' territorial rights violates articles 1 and 2 of the American Convention on Human Rights.⁷⁶¹ The Inter-American Court has assessed, in light of the requirements of effectiveness and reasonable time established in Article 25 of the American Convention, whether States have administrative procedures in place for granting title to property over lands, and if so, whether they implement such procedures in practice;⁷⁶² and it has explained that in order to comply with the conditions set forth in Article 25, it is insufficient for there to be legal provisions that recognize and protect indigenous property – it is necessary for there to exist specific and clearly regulated procedures for matters such as the granting of title over lands occupied by indigenous groups or their demarcation, attending their specific traits.⁷⁶³ The Court has also required that administrative procedures for the restitution of indigenous communities' lands offer a real possibility for the members of indigenous and tribal peoples to recover their traditional lands.⁷⁶⁴ In the Court's terms, by virtue of Article 2 of the American Convention on Human Rights, "it is necessary to establish appropriate procedures in the framework of the domestic legal system to process the land claims of the indigenous peoples involved. The States must establish said procedures to resolve those claims in such a manner that these peoples have a real opportunity to recover their lands. For this, the general obligation to respect rights set forth in Article 1(1) of said treaty places the States under the obligation to ensure that said procedures are accessible and simple and that the bodies in charge of them have the necessary technical and material conditions to provide a timely response to the requests made in the framework of said procedures."⁷⁶⁵

337. Legislators and administrative authorities have a duty to abstain from adopting regulations which are regressive for the effective enjoyment of indigenous and tribal peoples' territorial rights, as established in the domestic constitutional and legal provisions. Indeed, the IACHR has explained that the implementation of the constitutional and legal provisions that enshrine indigenous and tribal peoples' territorial rights may be hindered,

⁷⁶⁰ IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, par. 66 – Recommendation 4.

⁷⁶¹ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 109.

⁷⁶² I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 115.

⁷⁶³ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, pars. 122, 123.

⁷⁶⁴ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 108.

⁷⁶⁵ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 102.

halted or even reversed through the adoption of regulations aimed at obstructing or undermining the processes of restitution, granting of legal title and demarcation of ancestral lands and territories. States must avoid such regressive measures.⁷⁶⁶

338. These administrative procedures must comply with the rules of due process of law. The Inter-American Court has specified that due process must be followed both in the administrative procedures and in any other procedure whose decision may affect a person's rights.⁷⁶⁷ The effective recourses that States must offer in accordance with Article 25 of the American Convention "must be substantiated according to the rules of due legal process (Article 8 of the Convention)."⁷⁶⁸ The Inter-American Court has indicated that the internal administrative procedures that must comply with due process guarantees include, for example, procedures for the recognition of indigenous leaders, procedures for recognition of juridical personality, and land restitution procedures.⁷⁶⁹

339. The right to legally established administrative recourses to achieve a final solution of indigenous territorial claims⁷⁷⁰ includes the right to obtain a final resolution within a reasonable time, without unjustified delays.⁷⁷¹ Ineffectiveness of administrative procedures for territorial claims represents, in practice, a failure by the State to guarantee indigenous peoples' property rights over their ancestral territories.⁷⁷² There is a violation of Articles 8 and 25 of the American Convention, in connection with Articles 1.1 and 2 thereof, whenever the legally established administrative procedures for land reclamation instituted by the members of the indigenous communities disregard the principle of reasonable time and prove to be ineffective.⁷⁷³

340. The IACHR has explained that indefinite delays or tardiness in the identification of the lands available for indigenous and tribal peoples are obstacles to the effective enjoyment of their right to land and territory. States have an obligation to adopt measures to prevent the occurrence of delays, and indigenous and tribal peoples have a right to the adoption of measures to prevent undue delays,⁷⁷⁴ free from excessive legal rigors or high costs; for the Commission, procedures which are long, repetitive, delayed, costly or formalist undermine

⁷⁶⁶ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, pars. 235, 240, 244, 297 – Recommendation 3.

⁷⁶⁷ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 62. I/A Court H.R., *Case of Baena-Ricardo et al. v. Panama. Merits, Reparations and Costs*. Judgment of February 2, 2001. Series C No. 72, par. 127. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 82, 83.

⁷⁶⁸ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 62.

⁷⁶⁹ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 81, 82.

⁷⁷⁰ IACHR, Arguments before the Inter-American Court of Human Rights in the case of Yakye Axa v. Paraguay. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 52(e).

⁷⁷¹ IACHR, Arguments before the Inter-American Court of Human Rights in the case of Yakye Axa v. Paraguay. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 52(c). IACHR, Arguments before the Inter-American Court of Human Rights in the case of Sawhoyamaya v. Paraguay. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 74(a).

⁷⁷² IACHR, Arguments before the Inter-American Court of Human Rights in the case of Yakye Axa v. Paraguay. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 52(g).

⁷⁷³ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 104.

⁷⁷⁴ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, pars. 235, 238, 244; 297 – Recommendation 3.

the communities' rights.⁷⁷⁵ A given delay may be defended by the State if it "proves that the delay is directly related to the complexity of the case or to the conduct of the parties involved."⁷⁷⁶ The complexity of procedures for the restitution of indigenous and tribal peoples' territories must be taken into account in evaluating the reasonableness of the delays,⁷⁷⁷ but, a protracted delay like the 11 year and eight months that passed in the Yakye Axa case, "constitutes in itself a violation of the right to fair trial."⁷⁷⁸ There is a violation of Article 25 whenever delays in the administrative procedures are produced, not by the complexity of the case, but by the systematically delayed actions of the State authorities.⁷⁷⁹

341. States also "must ensure that such proceedings are accessible and simple and that the agencies responsible for them have the technical and material conditions necessary to respond promptly to applications and requests submitted in the course of such proceedings."⁷⁸⁰ To the same extent, the corresponding administrative procedures must be free of unnecessary formalisms or requirements that undermine their prompt development. The process of legal demarcation, recognition and granting title to land and use of natural resources must not be hindered or delayed by bureaucratic difficulties, such as the requirement of certificates or documents issued by other governmental authorities, which delay or paralyze successful recognition of indigenous lands.⁷⁸¹

Example: bureaucratic obstacles to the recognition of indigenous territories

In its 1999 report on the situation of human rights in Colombia, the IACHR referred to the process of recognition, granting of title to property and delimitation of indigenous territories, explaining that the general success of this process had been undermined by the legal requirement of having a Certificate of Environmental Preservation. The State itself had abstained from issuing such certificate to the indigenous communities that had filed the corresponding claims, and the Colombian Institute of Agrarian Reform, which was the competent body for carrying out the titling proceedings, could not complete the allocations without that certificate. The IACHR recommended the Colombian State to "take appropriate measures to ensure that the process of legal demarcation, recognition and granting title to land and use of natural resources to indigenous communities is not hindered or delayed by bureaucratic difficulties." [Recommendation 2]

342. The IACHR has explained that conditions such as the requirement of having individual identification documents, or of obtaining recognition of indigenous organizations' or authorities' juridical personality, can constitute obstacles to effective access to land and territory, if they are pre-requisites to obtaining legal title to property or representing the peoples before administrative authorities. States must eliminate these obstacles that prevent recognition of individual or collective juridical personality and that hinder the effective

⁷⁷⁵ IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 21.

⁷⁷⁶ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 86.

⁷⁷⁷ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 87.

⁷⁷⁸ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 86.

⁷⁷⁹ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 88.

⁷⁸⁰ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 242. See also: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 109.

⁷⁸¹ IACHR, *Third Report on the Human Rights Situation in Colombia*. Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Recommendation 2. The UN Special Rapporteur has pointed out that in many cases, the institutional structure of public administration is an obstacle for implementation of the legal provisions that protect indigenous peoples' rights: "One of the clearest illustrations of the 'implementation gap' is to be found in the public administration. With a few exceptions, the State bureaucracy reacts slowly to new legislation in favour of indigenous rights; it is not functionally prepared to address the new challenges; it exists in an administrative culture that makes it difficult to welcome and accept multiculturalism and the right to be different; it advocates a heritage of assimilation that rejects recognition of the indigenous peoples; and it often displays discriminatory, not to say racist, behaviour on indigenous issues within its own administration. This has been extensively documented in the areas of the administration of justice, education, health, environmental policy, agrarian issues and economic development." UN – Commission on Human Rights – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, UN Doc. E/CN.4/2006/78, par. 87.

enjoyment of the right to territorial property. Indigenous and tribal peoples have the right to recognition of the juridical personality of their members, authorities and organizations, and to be free from difficulties or delays in such recognition that constitute obstacles for the effective access and enjoyment of their rights over lands, territories and natural resources.⁷⁸²

343. In order to comply with Article 25, “as regards indigenous peoples, it is essential for the States to grant effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs;”⁷⁸³ the Inter-American Court has applied the rights to due process of law and judicial guarantees in Articles 8 and 25 of the American Convention, to determine whether or not the administrative or judicial procedures that affect indigenous and tribal peoples’ rights have taken into account their specificities, special vulnerability, customary law and other distinctive usages and customs. The Court has also pointed out that the domestic procedures for land reclamation by indigenous communities must consider their distinctiveness, including the special meaning that land has for them.⁷⁸⁴ Domestic land restitution procedures that do not take into account indigenous and tribal peoples’ distinctive aspects, or that privilege non-indigenous modalities of ownership, do not afford a real possibility of restitution of traditional lands, and therefore are not effective or adequate for the achievement of that purpose.⁷⁸⁵

344. The IACHR has also emphasized that States must review their legislation, procedures and practices in order to ensure that the determination of indigenous peoples’ and persons’ territorial rights takes place in accordance with the rights enshrined in the Inter-American human rights instruments,⁷⁸⁶ which can imply the due training of administrative officials in this matter.

345. Administrative authorities must act in an informed manner in adopting decisions that affect indigenous territories. Thus, the actions of administrative authorities aimed at protecting indigenous peoples’ territorial rights must proceed from recognition of their status as historically excluded groups.⁷⁸⁷ In general, in the process of designing policies and programs to recognize and grant legal title to indigenous and tribal ancestral territories, it is necessary for States to have a complete evaluation of the situation of the respective communities, and the legal, institutional – administrative or judicial - and other failures which may have contributed to the situation of dispossession⁷⁸⁸ in order for State measures to address both the complexity of the issue and its actual extent, and to deal with the legal, institutional and other obstacles that may have frustrated past initiatives.⁷⁸⁹ Domestic procedures for territorial reclamation must be based as well on sufficient technical studies and technical-scientific grounds; such procedures and decisions must include “a detailed survey individualizing the specific area of the (...) territory that belongs to the members of the [corresponding community] as a result of the attachment

⁷⁸² IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, pars. 235, 237, 244, 297 – Recommendation 3.

⁷⁸³ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 63. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 82, 83.

⁷⁸⁴ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 104.

⁷⁸⁵ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 102, 104, 108.

⁷⁸⁶ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 173, Recommendations 1 and 2.

⁷⁸⁷ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 229.

⁷⁸⁸ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, pars. 275, 276, 297 – Recommendation 9.

⁷⁸⁹ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 276.

and special significance these particular lands have for their members”,⁷⁹⁰ indicating its extension and its limits. The absence of these studies and technical-scientific groundings deems the procedures inoperative.⁷⁹¹

346. The IACHR has also demanded that the competent State entities carry out a substantial independent review of the historical or other evidence which can allow them to decide on the pertinence of said peoples’ territorial claims over their ancestral lands in a substantive manner, through an effective and fair procedure.⁷⁹² This requirement is disregarded along with the rights to property and due process, when the administrative decisions are not based on an independent review of the available evidence in order to establish whether the territorial claim is founded,⁷⁹³ but on other grounds such as arbitrary stipulations or negotiations.

347. Administrative procedures for land reclamations must be decided through a serious good faith administrative evaluation of the situation; the outcome may not be subordinated exclusively to the will of one of the parties, because such a process does not offer a real possibility of recovering traditional lands, and therefore is not effective for the achievement of this purpose.⁷⁹⁴

348. States must ensure that the governmental entities in charge of developing administrative procedures for the recognition of indigenous and tribal peoples’ territorial rights act in strict compliance with the applicable laws, without irregularities.⁷⁹⁵

349. Moreover, the IACHR has indicated that States are bound to secure the funds and resources necessary to comply with their constitutional and international obligations towards indigenous and tribal peoples’ territorial rights.⁷⁹⁶

350. The decisions and procedures that comprise the administrative mechanisms must be subject to judicial review. Under Article 25 of the American Convention on Human Rights, indigenous and tribal peoples have the right, in addition to the administrative mechanisms, to an effective judicial recourse aimed at protecting their legitimate territorial claims, and enabling them to seek enforcement of their rights by the Courts.⁷⁹⁷

Example: Obstacles to the implementation of legal provisions

In its 2007 report on the situation of human rights in Bolivia, the IACHR examined some factors that have obstructed the implementation of the different constitutional provisions that enshrine the country’s indigenous peoples’ territorial rights. The IACHR positively valued the State’s ratification of ILO Convention No. 169, as well as the adoption of different constitutional provisions that recognize indigenous peoples human rights, in particular over original community lands, and also as to the sustainable use and enjoyment of natural resources. However, it also noted that these constitutional provisions had not been incorporated in a cross-cutting manner to the legal system, in such a way as to be

⁷⁹⁰ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29th, 2006. Series C No. 146, par. 107.

⁷⁹¹ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29th, 2006. Series C No. 146, pars. 102, 107, 108.

⁷⁹² IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 142.

⁷⁹³ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 142.

⁷⁹⁴ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 102, 106, 108.

⁷⁹⁵ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 155.

⁷⁹⁶ IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, par. 50 – Recommendation 2. See also I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 143.

⁷⁹⁷ IACHR, Arguments before the Inter-American Court of Human Rights in the case of Yakye Axa v. Paraguay. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 52(f).

reflected in the different laws on matters that may directly or indirectly affect indigenous and tribal peoples. Consequently the IACHR recommended the State to “incorporate the provisions of ILO Convention No. 169 on this issue into its domestic legislation on development projects, and adopt measures for their effective enforcement.” [par. 297, Recommendation 4]

Law 1715 of 1996, or “National Agrarian Reform System Law”, established a process of legal clarification and granting of title over lands aimed at returning ancestral territories to indigenous peoples. Nonetheless, the IACHR explained that the practical implementation of this legislation had been scarce. Among the factors that delayed or obstructed the implementation of this law, the IACHR was informed of the following:

1. Corruption of administrative and judicial officials: “the validation of fraudulent ownership documents; alteration of the expert report procedures established by law replacing them with false documents; lack of access to information for indigenous peoples and interested communities; and the excessive formalities required, such as the presentation of a brief signed by a lawyer, or payment for certain official procedures.” [par. 236]
2. Difficulties in the recognition of indigenous authorities’ and organizations’ juridical personality before both administrative and judicial bodies, impeding “any real possibility to counter the allegations of landholders in the agrarian courts.” In addition, “there are no regulations on the recognition of legal personality, and in practice it is the municipal councils and the mayors who grant such recognition, without any uniform standards or rules.” [par. 237]
3. “Indefinite delays in the identification of available lands and difficulties in enforcing the few decisions in favor of indigenous peoples (...), reflecting the lack of will on the part of the respective authorities. The Commission was informed about threats and violence against them and the organizations that support them.” [par. 238]
4. The existence of violent conflicts with non-indigenous landowners [par. 238].
5. Evictions ordered by administrative resolutions, “before the processing of land claims had been completed.” [par. 238]
6. The Government’s constant promotion of “conciliation proceedings in which, given the precarious living conditions of indigenous peoples and peasant communities, they are induced to be ‘flexible’ and in the worst cases to cede their territorial rights” [par. 239]
7. The subsequent issuance, without prior consultation, of different decrees “under the guise of technical standards that, in practice, have obstructed and frustrated the process of agrarian reform, and have boosted the market for land.” [par. 240]

The IACHR noted that in 2006 Bolivia approved Law 3545, on “Reprocess of the Agrarian Reform”, and expressed that it “welcomes this initiative and hopes that in its implementation the necessary efforts will be made to overcome the institutional obstacles described above, and to make it a real instrument for recognizing and awarding title to and/or return of the ancestral lands and territories of indigenous peoples, a collective right that, as the Inter-American Court has held, is included in the right to property enshrined in Article 21 of the American Convention” [par. 244].

Consequently, the IACHR recommended the Bolivian State to “guarantee effective enforcement of the new law relating to agrarian reform, adopting the necessary measures to eliminate the obstacles cited by the Commission that have prevented access to land and territory for all sectors of Bolivian society. As part of this process, it is essential that the State bear in mind the particular relationship that indigenous peoples have with the land and that consequently, in the process of land titling, it must give priority to recognizing their ancestral lands and territories as essential for the survival of their cultural identity.” [par. 297 – Recommendation 3].

B. Access to Justice

General Considerations

351. States’ generic duty to protect indigenous property rights requires the effective judicial protection of those rights. Indigenous and tribal peoples have a right to effective judicial protection of their territorial rights, a right encompassed by Articles 8 and 25 of the American Convention and the related provisions of the American Declaration. In this sense, indigenous and tribal peoples’ right to communal property must be judicially guaranteed in the same manner that judicial recourse is granted for the guarantee of the right to private non-indigenous property. In the IACHR’s opinion, “for indigenous peoples, access to a simple, rapid, and effective legal remedy is especially important in connection with the enjoyment of their human rights, given the conditions of vulnerability under which they normally find themselves for historical reasons and due to their current social circumstances.”⁷⁹⁸

352. Article 25 of the American Convention on Human Rights establishes, in broad terms, “the obligation of the States to offer, to all persons under their jurisdiction, effective legal remedy against acts that violate their fundamental rights.”⁷⁹⁹ For the Inter-American Court, “the right of every person to simple and rapid

⁷⁹⁸ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awes Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awes Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 104(n).

⁷⁹⁹ I/A Court H.R., *Case of the Mayagna (Sumo) Awes Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 111. I/A Court H.R., *Case of the Constitutional Court v. Peru. Merits, Reparations and Costs*. Judgment of

remedy or to any other effective remedy before the competent judges or courts, to protect them against acts which violate their fundamental rights, 'is one of the basic mainstays, not only of the American Convention, but also of the Rule of Law in a democratic society, in the sense set forth in the Convention'';⁸⁰⁰ therefore, "the inexistence of an effective recourse against the violation of the rights recognized by the Convention constitutes a transgression of the Convention by the State Party in which such a situation occurs. In that respect, it should be emphasized that, for such a recourse to exist, it is not enough that it is established in the Constitution or in the law or that it should be formally admissible, but it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to remedy it."⁸⁰¹ For the Court, "non-existence of an effective remedy against the violations of basic rights recognized by the Convention constitutes in itself an abridgment of this treaty by the State Party in which there is such a situation."⁸⁰² The lack of effective remedies that allow the State structures to ensure the free and full exercise of the human rights of their members, constitutes non-compliance with the duty to adopt internal law provisions that can permit the safeguard of the rights established in the American Convention, pursuant to Article 2.⁸⁰³ States' domestic legislation must establish an effective judicial recourse, aimed at protecting indigenous peoples' legitimate territorial claims; the absence of such recourses or their ineffectiveness constitutes a violation of Articles 8, 25, 2 and 1.1 of the American Convention.⁸⁰⁴

353. In order for the State to comply with the provisions of Article 25 of the American Convention on Human Rights, "it is not enough for the remedies to exist formally, since they must also be effective."⁸⁰⁵ For the Court, "article 25 of the Convention is closely linked to the general obligation of article 1(1) of the Convention, which assigns protective functions to domestic law in the States Party, and therefore the State has the responsibility to designate an effective remedy and to reflect it in norms, as well as to ensure due application of that remedy by its judicial authorities."⁸⁰⁶ The ineffectiveness of territorial claims procedures represents, in

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January 31, 2001. Series C No. 71, par. 89. I/A Court H.R., *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and (8) American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, par. 23.

⁸⁰⁰ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 112. I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74, par. 135. I/A Court H.R., *Case of the Constitutional Court v. Peru. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 71, par. 90. I/A Court H.R., *Case of Bámaca-Velásquez v. Guatemala. Merits*. Judgment of November 25, 2000. Series C No. 70, par. 191.

⁸⁰¹ I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74, par. 136. I/A Court H.R., *Case of Cantoral-Benavides v. Peru. Merits*. Judgment of August 18, 2000. Series C No. 69, pars. 102, 164. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 113. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 61.

⁸⁰² IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 52(b).

⁸⁰³ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Sawhoyamaya v. Paraguay*. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 74(d).

⁸⁰⁴ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Sawhoyamaya v. Paraguay*. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 74(b).

⁸⁰⁵ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 114. I/A Court H.R., *Case of the Constitutional Court v. Peru. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 71, par. 90. I/A Court H.R., *Case of Bámaca-Velásquez v. Guatemala. Merits*. Judgment of November 25, 2000. Series C No. 70, par. 191. I/A Court H.R., *Case of Cesti-Hurtado v. Peru. Merits*. Judgment of September 29, 1999. Series C No. 56, par. 125.

⁸⁰⁶ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 135. I/A Court H.R., *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, par. 237. I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*.

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practice, a failure by the State to secure indigenous communities' property rights over their ancestral territories.⁸⁰⁷ States are bound to adopt "appropriate domestic legal steps necessary to ensure an effective procedure to offer a definitive solution to the claim made by the members of the [corresponding] Community."⁸⁰⁸

354. For the IACHR, "a state's obligation to provide effective judicial remedies is not fulfilled simply by the existence of courts or formal procedures, or even by the ability to resort to the courts. Rather, a state must take affirmative steps to ensure that the remedies provided by the state through its courts are 'truly effective in establishing whether there has been a violation of human rights and in providing redress.'"⁸⁰⁹ States are bound to "adopt the appropriate domestic law measures necessary to ensure an effective procedure providing a final solution to the claim laid by the members of the [respective community]",⁸¹⁰ and failure to do so implies a violation of Articles 8, 25, 1.1 and 2 of the Convention.

355. On this point, the IACHR has held that the State duty to grant special protection to indigenous peoples is applied, inter alia, in relation to the right to judicial protection;⁸¹¹ that States must adopt "effective (...) judicial measures for the purpose of achieving a final solution" to indigenous communities' territorial claims;⁸¹² that indigenous peoples, as groups, are also the bearers of the right to judicial protection under Articles XVIII of the American Declaration of the Rights and Duties of Man and 25 of the American Convention on Human Rights;⁸¹³ that the lack of an effective judicial remedy entails a violation of their substantive right to judicial protection;⁸¹⁴ and that in not allowing indigenous peoples to access the judicial power through specific routes to obtain remedy, states also incur in discrimination.⁸¹⁵

356. Article 25 of the American Convention is not fulfilled solely with the possibility of presenting petitions to administrative authorities, not even if such a possibility admits the presentation of petitions to the President of the Republic, given that Article 25 requires states to "provide adequate and effective judicial remedies for alleged violations of communal property rights of members of indigenous and tribal peoples."⁸¹⁶ Applying this

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Judgment February 6, 2001. Series C No. 74, par. 135. I/A Court H.R., *Case of Cantoral-Benavides v. Peru. Merits*. Judgment of August 18, 2000. Series C No. 69, par. 163.

⁸⁰⁷ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 52(g).

⁸⁰⁸ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 103.

⁸⁰⁹ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 184. IACHR, Report No. 11/98, Case 10.606, Samuel de la Cruz Gómez (Guatemala), par. 52.

⁸¹⁰ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 111.

⁸¹¹ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 126.

⁸¹² IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Sawhoyamaya v. Paraguay*. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 74(e).

⁸¹³ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, pars. 185, 186.

⁸¹⁴ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 175. IACHR, Report 39/97, Case No. 11.233, Martín Javier Roca Casas (Peru), pars. 98, 99.

⁸¹⁵ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awás Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 104(h).

⁸¹⁶ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 184.

general rule, in its judgment on the case of the Saramaka people, the Inter-American Court ordered Suriname, as a measure of reparation, to “adopt legislative, administrative and other measures necessary to provide the members of the Saramaka people with adequate and effective recourses against acts that violate their right to the use and enjoyment of property in accordance with their communal land tenure system.”⁸¹⁷

Matters regarding which indigenous and tribal peoples have the right of access to justice

357. As a general rule, indigenous and tribal peoples have the right of access to justice whenever there are threats or violations of their territorial rights, in any of their manifestations or components.⁸¹⁸ Inter-American jurisprudence has identified a series of specific issues with respect to which States must ensure indigenous and tribal peoples’ right of access to justice, including territorial claims;⁸¹⁹ processes for the reclamation of lands;⁸²⁰ and requests for judicial precautionary injunctions related to indigenous communities’ territorial rights.⁸²¹ This enunciation is not, however, comprehensive.

358. Also, Inter-American jurisprudence has emphasized that one of the matters regarding which the right of access to justice must be enforced, is that of allowing judicial review of the decisions adopted by administrative authorities which have an effect on the corresponding territorial rights. Thus, to be compatible with international human rights law, it is necessary for those affected by administrative decisions to be granted a judicial recourse for the protection of their property rights, in conditions of equality, in such a way that both the collective and the individual nature of the claimed property rights are considered, and all of those affected are afforded an opportunity to participate in a full and informed manner in the determination of their territorial claims.⁸²² The IACHR has underscored that there must exist judicial recourses available for indigenous peoples to contest administrative decisions that affect their territorial rights; such judicial review must be substantial and be adopted through an effective, impartial and fair process, particularly to ensure that the determination of the legal status of lands and territories is made after a process of mutual and informed consent with the affected indigenous people as a whole, in light of the rights to property and a fair trial.⁸²³

359. The IACHR has explained that judicial review of the administrative decisions modifying or extinguishing indigenous and tribal peoples’ legal title of property over lands must be based on a judicial evaluation of the pertinent evidence, with due consideration for the substance matter of the claim, through a process of substantive adjudication by the Courts.⁸²⁴ Access to justice in these cases is a manifestation of the right to equality of treatment of the members of the people concerned. The general requirements established in international law to carry out expropriation procedures must be complied with – i.e. a valid public purpose, notice to the owners, fair compensation and judicial review. Treating indigenous peoples differently with respect to

⁸¹⁷ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 194(f).

⁸¹⁸ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Sawhoyamaya v. Paraguay*. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 74(c).

⁸¹⁹ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 63.

⁸²⁰ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 81, 82. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 96.

⁸²¹ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 81, 82.

⁸²² IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 171.

⁸²³ IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, pars. 137, 139, 141, 142.

⁸²⁴ IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 137.

these requirements, without an objective and reasonable justification based on a legitimate aim, constitutes a violation of the right to equality in the determination of their property rights over their ancestral territories.⁸²⁵

360. Indigenous and tribal peoples also have the right to have access to justice in order to seek an effective investigation of the acts of violence of which they are victims, especially those linked to territorial conflicts, and a due sanction of those responsible.⁸²⁶

361. The organs of the Inter-American system have clarified that indigenous and tribal peoples and their members have the right to specific judicial mechanisms which can enable them to contest the consequences that they bear derived from the noxious effects of natural resource exploration and exploitation projects in their territories. As explained by the IACHR, “[t]he right to access judicial remedies is the fundamental guarantor of rights at the national level. Article 25 of the American Convention (...) means that individuals must have access to judicial recourse to vindicate the rights to life, physical integrity and to live in a safe environment”.⁸²⁷ The lack of these judicial mechanisms exacerbates their state of defenselessness towards these projects. Said judicial mechanisms must include: criminal actions; precautionary judicial instruments for extreme situations that may affect the right to life; and collective judicial actions that may be exercised by groups affected by the same situation.⁸²⁸

362. In effect, the IACHR has clarified that indigenous and tribal peoples have a right to the existence of accessible, adequate and effective judicial recourses for contesting environmental harms in a collective manner, in addition to criminal actions, which can enable them to obtain an immediate judicial response in case of suffering irreparable harms as groups of persons, as a consequence of natural resource exploration and exploitation projects in their territories. States are in the obligation of establishing and securing access to such judicial recourses.⁸²⁹ The IACHR has also indicated that States must guarantee compliance with their environmental and criminal legal provisions in relation to natural resource exploration and exploitation projects in indigenous territories, and impose the corresponding sanctions in case of non-compliance.⁸³⁰

363. Domestic courts play an especially important role at the moment of guaranteeing effective compliance with state obligations in relation to the protection of communal property in the context of development or investment plans. Judicial review must not only be limited to a verification of compliance with the protective measures established in the applicable legislation for indigenous communal property – it must also verify that such compliance is in accordance, in form and in substance, with the Inter-American standards.

364. Official actions that must be subject to judicial review in this context should include, at least, (a) decisions related to the approval of the plan or project, or those related to prior consultation, including the accommodation of the consultation’s results and, should it be the case, the application of the state duty to obtain indigenous peoples’ consent; (b) decisions regarding the approval of environmental and social impact assessments, or the lack of such assessments, including allegations related to the objective or independent nature, the quality or scope of the assessments, as well as the incorporation of mitigation measures and/or alternatives in relation to the

⁸²⁵ IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, pars. 143, 144, 145.

⁸²⁶ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, pars. 1065, 1071, 1137 – Recommendation 4.

⁸²⁷ IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁸²⁸ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, pars. 256, 287.

⁸²⁹ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1141, Recommendation 7. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 6.

⁸³⁰ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 254.

negative impacts identified therein; (c) decisions regarding the establishment of benefit-sharing mechanisms or other forms of compensation, or the lack thereof.

Other characteristics of the access to justice to which indigenous and tribal peoples are entitled

365. Indigenous and tribal peoples have the right to access justice as peoples, that is, collectively. Judicial recourses which are only available to persons who claim the violation of their individual rights to private property are not adequate or effective to repair alleged violations of the right to communal property of indigenous and tribal peoples; it is necessary for indigenous and tribal peoples, as collective entities, to use such recourses in their condition of collectives, in order to affirm their right, and their members' right, to communal property.⁸³¹ In its judgment in the Saramaka case, the Inter-American Court ordered Suriname, as a measure of reparation, to "grant the members of the Saramaka people legal recognition of their collective juridical capacity, pertaining to the community to which they belong, with the purpose of ensuring the full exercise and enjoyment of their right to communal property, as well as collective access to justice, in accordance with their communal system, customary laws, and traditions."⁸³²

366. Indigenous and tribal peoples have the right to access the courts; and although alternative conflict resolution mechanisms "may help to reduce procedural delays and deliver justice in remote areas where the judiciary has no presence, they should be regarded as supplementary mechanisms and cannot replace the official justice system, whose absence continues to harm the most vulnerable groups."⁸³³ States have the duty to adopt measures to improve the coverage of official justice.⁸³⁴ Since indigenous and tribal peoples have the right to have access to State justice, States have the duty to establish and apply judicial systems that accord with their cultural diversity.⁸³⁵ States must adopt measures to secure an effective and equitable access to justice for all of the population; this implies the obligation to provide sufficient economic and material resources for the functioning of the judiciary, and providing its operators with inter-cultural training that includes education in indigenous cultures and identity.⁸³⁶ Likewise the IACHR has emphasized the need for States to support and strengthen the agrarian justice system "with the necessary material and human resources."⁸³⁷

367. Indigenous and tribal peoples' right of access to justice, as well as their right to defense, requires that they are able to participate as parties in the processes conducted before the judiciary in relation to their territorial rights.⁸³⁸

368. Indigenous and tribal peoples' right of access to justice implies that the judges who hear cases related to their territorial rights must adopt their decisions without discrimination, and taking into account their

⁸³¹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 179.

⁸³² I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 194(b).

⁸³³ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 184.

⁸³⁴ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 184.

⁸³⁵ IACHR, *Justice and social inclusion: The challenges of democracy in Guatemala*. Doc. OEA/Ser.L/V/II.118, Doc. 5 rev. 1, December 29, 2003, par. 236, (available in Spanish only).

⁸³⁶ IACHR, *Justice and social inclusion: The challenges of democracy in Guatemala*. Doc. OEA/Ser.L/V/II.118, Doc. 5 rev. 1, December 29, 2003, pars. 237, 238, (available in Spanish only).

⁸³⁷ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 183.

⁸³⁸ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 280.

condition of indigenous and tribal peoples in reaching a decision.⁸³⁹ The judges must be duly trained on the rights that stem from the ancestral use and possession of land by indigenous and tribal peoples, as well as on indigenous customary law, because disregard for them significantly curtails indigenous and tribal peoples' capacity to claim respect for their rights, and recognition of the ancestral possession of their territories.⁸⁴⁰

369. Indigenous and tribal peoples' right of access to justice implies that judges who hear cases related to their territorial rights must adopt their decisions with due motivation.⁸⁴¹ When indigenous peoples resort to the legally established judicial organs seeking remedies that protect them from acts that violate their rights, "the jurisdictional body must give reasons to support its conclusions, and it must decide on the admissibility or inadmissibility of the legal claim which originates the judicial remedy, after a procedure in which evidence is tendered and there is debate on the allegation."⁸⁴² Judicial recourses are ineffective if they do not recognize the violation of rights, they do not protect claimants in their affected rights, or provide an adequate reparation. In eluding a decision on the petitioners' rights, they are prevented from enjoying the right to a judicial remedy in the terms of Article 25 of the American Convention on Human Rights.⁸⁴³

370. An essential element of the effectiveness of judicial protection is timeliness: "The right to judicial protection requires that courts adjudicate and decide cases expeditiously, particularly in urgent cases."⁸⁴⁴ Judicial procedures initiated by indigenous and tribal peoples to protect their territorial rights must be conducted and completed within a reasonable term –according to the Inter-American jurisprudence's criteria on the reasonability of procedural delays-; otherwise they shall become illusory and ineffective.⁸⁴⁵ In order to determine the reasonable time within which a judicial process must be completed, four factors must be taken into account: "(a) the complexity of the case; (b) the procedural activity of the interested party; and (c) the conduct of the judicial authorities",⁸⁴⁶ as well as (d) the impact of the passage of time upon the legal situation of the person involved in the process.⁸⁴⁷ Unjustified delays in the adoption of final decisions by the judges to whom indigenous and tribal peoples resort to protect their territorial rights, constitute a violation of the right to judicial protection established in Article XVIII of the American Declaration of the Rights and Duties of Man.⁸⁴⁸ Under said Article, the State violates indigenous and tribal peoples' right to judicial protection "by rendering domestic judicial proceedings brought by them ineffective through unreasonable delay and thereby failing to provide them with effective access

⁸³⁹ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 280.

⁸⁴⁰ IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, par. 57.

⁸⁴¹ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 280.

⁸⁴² IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 104(b).

⁸⁴³ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 104(a).

⁸⁴⁴ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, pars. 176. IACHR, Report No. 52/97, Case 11.218, *Arges Sequeira Mangas (Nicaragua)*, pars. 106, 133-134.

⁸⁴⁵ I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 134.

⁸⁴⁶ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 177. I/A Court H.R., *Case of Genie-Lacayo v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 29, 1997. Series C No. 30, par. 77. IACHR, Report 2/97, Cases 11.205 *et al.*, *Jorge Luis Bronstein and others (Argentina)*, pars. 241, 245-246.

⁸⁴⁷ I/A Court H.R., *Case of Valle Jaramillo and others v. Colombia. Merits, Reparations and Costs*. Judgment of November 27, 2008, Series C No. 192, par. 155. I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 133.

⁸⁴⁸ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 186.

to the courts for protection of their fundamental rights.”⁸⁴⁹ Article 25 of the American Convention on Human Rights is violated to the detriment of indigenous peoples when there are unwarranted delays in the procedures initiated to protect their territorial rights.⁸⁵⁰ Procedures that affect the rights of indigenous and tribal peoples must be conducted without unjustified delays that are disproportionate to their level of complexity.⁸⁵¹ Articles 8 and 25 of the American Convention, in connection with Articles 1.1 and 2 thereof, are violated when legal procedures for land claims initiated by the members of indigenous communities disregard the principle of reasonable term.⁸⁵²

371. Part of indigenous and tribal peoples’ right of access to justice is for the judicial decisions that protect them to be complied with. Article 25 of the American Convention on Human Rights is violated, to the detriment of indigenous peoples, when the judgments and other judicial decisions that protect their rights are not complied with or ignored.⁸⁵³ The right to judicial protection “pertains to the obligation of the States parties to ensure that the competent authorities comply with judicial decisions, pursuant to article 25(2)(c) of the Convention.”⁸⁵⁴

The Right to Juridical Personality

372. Indigenous peoples’ collective capacity to act, through their freely chosen representatives, is a pre-condition to their securing effective State compliance with the obligation to guarantee their communal property, through actions such as requests for territorial demarcation and active participation in all of the phases of this procedure; the request for other measures of protection of the right to communal property; and access to the competent administrative and judicial bodies to report violations of said right. The Inter-American Court has thus derived from the collective nature of indigenous title to property the need for collective capacity to access the judicial or administrative mechanisms to defend that right. In the case of the Saramaka people v. Suriname, the Inter-American Court explained that limiting juridical personality to the individual members of indigenous communities “fails to take into account the manner in which members of indigenous and tribal peoples in general, and the Saramaka in particular, enjoy and exercise a particular right; that is, the right to use and enjoy property collectively in accordance with their ancestral traditions.”⁸⁵⁵

373. Recognizing the juridical personality of the people as a whole allows for the development of initiatives taken by peoples’ chosen representatives to defend communal territory, rather than individual recourse to State authorities.⁸⁵⁶ For the Court, juridical personality of the group would also avoid debates about identifying

⁸⁴⁹ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 196.

⁸⁵⁰ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 104(n).

⁸⁵¹ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 89.

⁸⁵² I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 104.

⁸⁵³ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, pars. 104(d), 104(n).

⁸⁵⁴ IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua*. Cited in: I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 104(d).

⁸⁵⁵ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 168.

⁸⁵⁶ “Any individual member of the Saramaka people may seek judicial protection against violations of his or her individual property rights, and (...) a judgment in his or her favor may also have a favorable effect on the community as a whole. In a juridical sense, such individual members do not represent the community as a whole. The decisions pertaining to the use of such individual property are up to the individual and not to the Saramaka people in accordance with their traditions. Consequently, a recognition of the right to juridical personality of the

the true representative of the people for purposes of actions before national authorities and international bodies.⁸⁵⁷ Therefore, the Court held that “the right to have their juridical personality recognized by the State is one of the special measures owed to indigenous and tribal groups in order to ensure that they are able to use and enjoy their territory in accordance with their own traditions. This is a natural consequence of the recognition of the right of members of indigenous and tribal groups to enjoy certain rights in a communal manner.”⁸⁵⁸

374. The lack of recognition of collective juridical personality “places the [respective] people in a vulnerable situation where individual property rights may trump their rights over communal property, and where the [respective] people may not seek, as a juridical personality, judicial protection against violations of their property rights recognized under Article 21 of the Convention.”⁸⁵⁹ Thus, the State must establish, in consultation with the people and fully respecting their traditions and customs, the judicial and administrative conditions necessary to ensure the recognition of their juridical personality, with the aim of guaranteeing them the use and enjoyment of their territory in accordance with their communal property system, as well as the rights to access to justice and equality before the law.⁸⁶⁰ Failure to adopt these measures by the State entails a violation of Articles 3, 21, 25, 1.1 and 2 of the Convention.

375. Official mechanisms to recognize indigenous peoples’ and communities’ personality necessarily imply a recognition of their forms of social and political organization. Although these recognitions can become effective mechanisms to provide legal security, it must be recalled that said recognitions have a merely declaratory, and not constitutive, effect on the existence of indigenous peoples and communities and their traditional forms of authority. In the same way, the process of official recognition of indigenous peoples through the granting and registration of their juridical personality may not be considered as a barrier for them to fully enjoy their right to communal property.

C. Reparations for Violations of the Right to Territorial Property

Reparations in cases of total or partial loss of ancestral territory

(i) Restitution of the Ancestral Territory

376. The type of reparations ordered by the courts in cases of violation of the right to territorial property necessarily varies, depending on the violation detected and its scope in the specific situation. Nonetheless, for claims or requests for the recovery of ancestral territories, and in general in all cases that involve the loss of possession of ancestral territory, the preferred form of reparation is restitution of the claimed territory – in particular because this is the measure of reparation that comes the closest to *restitutio in integrum*.⁸⁶¹ This is a manifestation of the rule by which States are in the obligation of respecting and restoring indigenous and tribal

...continuation

Saramaka people as a whole would help prevent such situations, as the true representatives of the juridical personality would be chosen in accordance with their own traditions, and the decisions affecting the Saramaka territory will be the responsibility of those representatives, not of the individual members.” I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 169.

⁸⁵⁷ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 170.

⁸⁵⁸ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 172.

⁸⁵⁹ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 173.

⁸⁶⁰ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 174.

⁸⁶¹ I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, par. 281.

peoples' rights to communal property, and to "the granting of lands, at no cost, of sufficient extent and quality to conserve and develop their ways of life."⁸⁶² It also reflects the precept by which "once it has been proved that land restitution rights are still current, the State must take the necessary actions to return them to the members of the indigenous people claiming them."⁸⁶³

(ii) Compensation

377. If there are concrete and justified reasons that make it impossible for States to provide restitution, indigenous and tribal peoples' must receive a compensation, primarily oriented by the meaning and value that lost land has for the peoples.⁸⁶⁴ This implies the provision of alternative lands in sufficient extension and quality. If the indigenous people so decide, however, a compensatory indemnity may be granted in money or in kind; in addition, there may be additional losses for which reparation is due even after alternative lands have been granted, for which reason there subsists a right to obtain, in an additional manner, the corresponding indemnity.

378. The Committee on Elimination of Racial Discrimination has especially called upon States parties to the Convention, in its General Recommendation No. 23, to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories."⁸⁶⁵

379. In general terms, in cases of violation of indigenous peoples' territorial rights, the IACHR has recommended that States "make individual and communal reparations of the consequences of the breach of the rights mentioned. The reparations to be paid by the (...) State must be calculated pursuant to international standards, and must be adequate to compensate pecuniary and non-pecuniary damages caused by the human rights violations (...). The manner and amount of the reparation must be agreed upon with the members of the [indigenous] Community and its representatives pursuant to the customary law, values, usage and customs of the Indigenous Community".⁸⁶⁶

380. In such cases, reparations have both a collective and an individual dimension. The Inter-American Court has explained that in cases of communities whose rights over ancestral territory are violated, reparations acquire a special collective significance; reparation is awarded individually for the members of the community, but it has as an important component the reparations granted to the members of the communities as a whole.⁸⁶⁷

⁸⁶² IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, pars. 50, Recommendation 1.

⁸⁶³ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 135.

⁸⁶⁴ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 241. See also: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 149.

⁸⁶⁵ CERD, General Recommendation 23, Indigenous Peoples, U.N. Doc. A/52/18, Annex V (1997), par. 5. Cited in: IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130, footnote No. 97.

⁸⁶⁶ IACHR, Report No. 73/04, case of the Sawhoyamaya Indigenous Community (Paraguay), October 19, 2004, Recommendation 6. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 8.

⁸⁶⁷ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, pars. 188, 189.

381. Part of the reparations must cover the immaterial damages caused to peoples by the violation of their territorial rights. As explained by the Inter-American Court, “non-pecuniary damage may include distress and suffering caused directly to the victims or their relatives, tampering with individual core values, and changes of a non pecuniary nature in the living conditions of the victims or their families”.⁸⁶⁸ In order to assess immaterial damages in these cases, it must be especially taken into consideration that the lack of guarantee of the right to communal property causes suffering to the members of the affected indigenous communities.⁸⁶⁹ For the purpose of compensating immaterial damages, it is also relevant to consider the lack of concretion of the right to communal property, as well as the serious living conditions to which the members of the corresponding community have been exposed as a consequence of the State’s delay in enforcing their territorial rights;⁸⁷⁰ such living conditions also cause them suffering.⁸⁷¹

382. The special relationship between indigenous and tribal peoples and their traditional territories has been taken into account by the Court at the moment of establishing reparations in cases where specific communities have been forcibly dispossessed of their territories. Thus in the Moiwana case, the Court considered that the community’s forced displacement had caused emotional, spiritual, cultural and economic damage to its members, considering this fact relevant for the calculation of the reparations for immaterial damages that the State had to afford.⁸⁷² Indeed, the relationship with territory and its meaning is relevant for determining the amount of compensatory indemnities: “the special significance of the land for indigenous peoples in general (...) entails that any denial of the enjoyment or exercise of their territorial rights is detrimental to values that are very representative for the members of said peoples, who are at risk of losing or suffering irreparable damage to their cultural identity and life and to the cultural heritage to be passed on to future generations.”⁸⁷³ For indigenous and tribal peoples, “possession of their traditional territory is indelibly recorded in their historical memory, and their relationship with the land is such that severing that tie entails the certain risk of an irreparable ethnic and cultural loss, with the ensuing loss of diversity.”⁸⁷⁴ Similarly, in the case of the Sawhoyamaxa community, in assessing immaterial damages, the Inter-American Court took into account “the non enforcement of the right to hold title to the communal property of the members of the Sawhoyamaxa Community, and the detrimental living conditions imposed upon them as a consequence of the State’s delay in enforcing their rights over the lands.”⁸⁷⁵

Reparations in cases of impacts upon the natural resources of the ancestral territory

383. Indigenous and tribal peoples have a right to the determination and enforcement of indemnities for the environmental damages caused by natural resource exploration and exploitation projects or development

⁸⁶⁸ I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 219.

⁸⁶⁹ I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 73-75.

⁸⁷⁰ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 202.

⁸⁷¹ I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, pars. 73-75.

⁸⁷² I/A Court H.R., *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 15, 2005. Series C No. 124., par. 195(c).

⁸⁷³ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 203.

⁸⁷⁴ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 216.

⁸⁷⁵ I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 222.

or investment plans in their territories, and for the undermining of their basic subsistence activities;⁸⁷⁶ as provided for in ILO Convention No. 169, indigenous and tribal peoples have the right to receive an indemnity for any harm they may have sustained as a result of natural resource utilization activities.⁸⁷⁷

384. Participation in the benefits is one, albeit not the only form of fair compensation that corresponds to indigenous peoples in relation to the deprivation or limitation of their right to property as a consequence of the execution of development or investment plans or projects or extractive concessions. For example, in relation to those development or investment plans or projects that do not translate directly into monetary benefits as a result of natural resource exploitation, or that generate diffuse benefits for all (such as, for example, the construction of different types of infrastructure), fair compensation in favor of the affected peoples does not necessarily translate into benefit-sharing mechanisms, but will require a definition of adequate compensatory systems.

385. Article 40 of the UN Declaration on the Rights of Indigenous Peoples establishes, in general terms, indigenous peoples' right to "remedies for all infringements of their individual and collective rights". Under the umbrella of this general provision, the Declaration incorporates different hypotheses in which the right to reparation or compensatory indemnity operates – i.e. damages to the environment, to the productive capacity of lands and other natural resources, and to indigenous peoples' health.⁸⁷⁸ The broad formulation of these provisions suggests that the duty of reparation is applicable not only to the negative impact of activities carried out by State authorities, but also by commercial companies or other private actors. In this latter type of cases, states are in the obligation of securing the existence of effective and accessible reparation mechanisms.

386. Indigenous and tribal peoples also have the right to participate in the determination of the environmental damages caused by said projects, as well as in the determination of the impacts upon their basic subsistence activities.⁸⁷⁹ To that same extent, indigenous and tribal peoples have the right to participate in the process of determination of the indemnity for the damages caused by natural resource exploration and exploitation projects in their territories, in accordance with their own development priorities,⁸⁸⁰ and States have the international obligation of guaranteeing their participation in such process of determination of the indemnity.⁸⁸¹ In this regard, states must ensure that prior consultation procedures "will establish the benefits that the affected indigenous peoples are to receive, and compensation for any environmental damages, in a manner consistent with their own development priorities."⁸⁸²

387. The forms of compensation of environmental harm required by the Inter-American human Rights protection system are illustrated with the Inter-American organs' decisions on reparations in cases of violations of

⁸⁷⁶ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1141, Recommendation 6. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 6.

⁸⁷⁷ IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 26.

⁸⁷⁸ United Nations Declaration, Articles 20.2, 29.2-3, 32.2.

⁸⁷⁹ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1141, Recommendation 6. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 6.

⁸⁸⁰ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1141, Recommendation 5. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 5.

⁸⁸¹ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1141, Recommendation 5. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 5.

⁸⁸² IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 248.

indigenous and tribal peoples' territorial rights. For these types of violations in general, the IACHR has recommended states to "make individual and communal reparations of the consequences of the breach of the rights mentioned. The reparations to be paid by the (...) State must be calculated pursuant to international standards, and must be adequate to compensate pecuniary and non-pecuniary damages caused by the human rights violations (...). The manner and amount of the reparation must be agreed upon with the members of the [respective] Community and its representatives pursuant to the customary law, values, usage and customs of the Indigenous Community."⁸⁸³

388. In its judgment on the case of the Saramaka people v. Suriname, the Inter-American Court considered, in establishing the indemnity for material damages, that "a considerable quantity of valuable timber was extracted from Saramaka territory without any consultation or compensation (...). Additionally, the evidence shows that the logging concessions awarded by the State caused significant property damage to the territory traditionally occupied and used by the Saramakas (...)." ⁸⁸⁴ Therefore the Court ordered a monetary compensation for the people, on account of the material damages caused directly by these activities.

389. In the same judgment on the Saramaka people case, in determining the indemnity for immaterial damages, the Inter-American Court held: "the Court described the environmental damage and destruction of lands and resources traditionally used by the Saramaka people, as well as the impact it had on their property, not just as it pertains to its subsistence resources, but also with regards to the spiritual connection the Saramaka people have with their territory (...). Furthermore, there is evidence that demonstrates the suffering and distress that the members of the Saramaka people have endured as a result of the long and ongoing struggle for the legal recognition of their right to the territory they have traditionally used and occupied for centuries (...), as well as their frustration with a domestic legal system that does not protect them against violations of said right (...), all of which constitutes a denigration of their basic cultural and spiritual values. The Court considers that the immaterial damage caused to the Saramaka people by these alterations to the very fabric of their society entitles them to a just compensation."⁸⁸⁵

390. In accordance with paragraph 194(d) of the Court's judgment in the Saramaka case, the determination of the beneficiaries of the fair compensation in relation to development and investment projects in Saramaka territory "must be made in consultation with the Saramaka people, and not unilaterally by the State. In any case, (...) 'these matters can be discussed and addressed during the consultations and process of reaching agreement on the legislative and administrative measures required to give effect to, *inter alia*, the benefit sharing requirement.'" ⁸⁸⁶ The Court explained that "all issues related to the consultation process with the Saramaka people, as well as those concerning the beneficiaries of the 'just compensation' that must be shared, must be determined and resolved by the Saramaka people in accordance with their traditional customs and norms, and as ordered by the Court in its Judgment."⁸⁸⁷

391. The calculation of compensatory indemnity for limitations of the right to indigenous communal property must follow criteria of non-discrimination in relation to other private owners. This is expressly recognized by the World Bank policy on indigenous peoples, by which they must receive, "in a culturally appropriate manner,

⁸⁸³ IACHR, Report No. 73/04, case of the Sawhoyamaya Indigenous Community (Paraguay), October 19, 2004, Recommendation 6. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 8.

⁸⁸⁴ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 199.

⁸⁸⁵ I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, par. 200.

⁸⁸⁶ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 25.

⁸⁸⁷ I/A Court H.R., *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185, par. 27.

benefits, compensation, and rights to due process at least equivalent to that to which any landowner with full legal title to the land would be entitled in the case of commercial development on their land.”⁸⁸⁸

392. As happens with the other safeguards applicable to the protection of the right to indigenous communal property, in relation to illegal extraction of natural resources in their territories, it is not necessary for indigenous peoples to have a formal title to property in order to be able to have access to the courts to claim the protection of their rights, including reparation for harms suffered⁸⁸⁹.

393. As the IACHR has highlighted, indigenous and tribal peoples have the right to participate in the determination of the environmental damages caused by projects for the exploration and exploitation of natural resources which are in course of being developed, as well as in the determination of the impacts upon their basic subsistence activities;⁸⁹⁰ they also have the right to participate in the process of determining the indemnity for the damages caused by such exploration or exploitation of natural resources projects in their territories, according to their own development priorities.⁸⁹¹

394. Finally, the IACHR has explained that a constitutive part of the State’s duties of immediate action in these cases is the obligation of carrying out the necessary investigations to identify those responsible for environmental harm, impose the corresponding sanctions, and proceed to the appropriate measures of reparation: “Where the right to life (...) has been infringed upon by environmental contamination, the Government is obliged to respond with appropriate measures of investigation and redress”.⁸⁹²

⁸⁸⁸ World Bank, OP 4.10, par. 18.

⁸⁸⁹ As pointed out by several Governments of the States of the Interamerican System, indigenous peoples have access to, at least, the domestic courts to claim reparation or compensation for the damages caused to the environment, even in the absence of a legal title to property. Cf. General Environment Law No. 25675 [Argentina]; Answer of El Salvador, p. 14 (“A title to property is not a procedural requirement to initiate or conduct the judicial actions derived from environmental damages”).

⁸⁹⁰ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1141, Recommendation 6. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 6.

⁸⁹¹ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1141, Recommendation 5. See also: IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 5.

⁸⁹² IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.