The Evolution of International Indigenous Rights in the Inter-American Human Rights System

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Abstract

Indigenous communities in the Western hemisphere are increasingly relying on international law and international fora for enforcement of their human rights. When there are no domestic laws that recognise indigenous rights, or such laws exist but there is no political will to enforce them, indigenous peoples in the Americas may turn to the Inter-American human rights system. Consequently, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have developed a progressive case law in this area. In 2005 and 2006, the Inter-American Court decided seminal indigenous ancestral land rights cases and a political rights case. This article analyses these cases and the previous jurisprudence and decisions on indigenous rights in the Inter-American system.

1. Introduction

Indigenous peoples are part of the pluricultural populations of most American States. In general, these peoples are descendants of the original inhabitants of the land before the formation of the State, who have their own traditions,
customary law and cultural values. Indigenous communities have long suffered violations of their most basic human rights, either perpetrated by the State or by third parties who acted free from interference by the State. Indigenous peoples have been killed, their rights to ancestral lands have been extinguished, their lands have been invaded by those attempting to exploit natural resources, their customs have been denigrated and they have been denied judicial remedies for these abuses. These violations continue today. In 2004, the Sarayaku Indigenous Peoples petitioned the Inter-American system for interim measures to protect the community from the acts of an Argentine oil company that had been granted governmental permission to search for oil on Sarayaku ancestral lands without the community's permission. To intimidate the community, the petroleum company had planted land mines in their hunting areas, detonated explosives that destroyed their springs and sacred sites and beaten and threatened villagers.

Indigenous communities in the Western hemisphere are increasingly relying on international law and international fora for enforcement of their human rights. It is important for human rights systems to respect and protect indigenous rights and customs. When there are no domestic laws that recognise indigenous rights, or such laws exist but there is no political will to enforce them, indigenous peoples in the Americas may turn to the Inter-American human rights system. Every American State has accepted the competence of the Inter-American Commission to consider violations of human rights in its jurisdiction, just by virtue of having ratified the Charter of the Organization of American States, a treaty. Thus, the Dann Sisters, members of the Western Shoshone Peoples of the Southwest United States, could take their case alleging the US government's violation of their land rights before the Inter-American Commission when the US Supreme Court denied them relief. If the State, as is the case with both the United States and Canada, has not also ratified the

1 Under international law, the categorisation of who is indigenous is left to the people themselves. See Draft American Declaration on the Rights of Indigenous Peoples, 25 March 2006, OEA/Ser.K/XVI GT/DADIN/doc260/06. The draft American Declaration on the Rights of Indigenous Peoples is still under negotiation. The latest draft can be viewed at: www.oas.org. One common description is that indigenous peoples are those who descended from the people who inhabited a geographic area before it was colonised and became a State and who retain a separate cultural identity. See Article 1(b), Indigenous and Tribal Peoples Convention 1989, ILO C169; 28 International Legal Materials 1382. See, generally, García Ramírez, Estudios Jurídicos (Mexico City, Universidad Nacional Autónoma de México, 2000) at 191-255.


3 Ibid.

American Convention on Human Rights (American Convention),\(^5\) the Commission will determine whether the State violated the protections set forth in the American Declaration on the Rights and Duties of Man (American Declaration).\(^6\) For those American States that are also States Parties to the American Convention, the Commission determines whether there have been violations of that Convention.\(^7\) The Commission or the State Party involved then may refer a case to the Inter-American Court of Human Rights if the State has also accepted the jurisdiction of the Court either *ipso facto* for all cases or by special agreement in a particular case.\(^8\) Consequently, some indigenous rights cases, most notably those against the United States, Canada and Belize, were decided solely by the Inter-American Commission, whereas the Inter-American Court also issued judgments in other cases brought against Nicaragua, Colombia, Guatemala and Paraguay.

Although the American Convention, unlike its African counterpart,\(^9\) generally sets forth only individual rights and does not directly address the corresponding rights of peoples,\(^10\) the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have developed a progressive case law on indigenous peoples' rights. The Inter-American Court has recently decided seminal indigenous rights cases, giving its judicial imprimatur to evolving principles of international indigenous law.\(^11\) In a case brought by the

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6 American Declaration on the Rights and Duties of Man 1948, in Basic Documents at 17.

7 The following States are States Parties to the American Convention on Human Rights: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. See Basic Documents at 56. See: http://www.cidh.oas.org.

8 21 of the 24 States Parties to the American Convention have also recognised the jurisdiction of the Inter-American Court. They are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. Basic Documents at 56. For a more complete discussion of the functioning of the Inter-American human rights system see Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge: Cambridge University Press, 2003) at 1–25.


Yakye Axa people against Paraguay, the Court expanded on its earlier decision in the Awas Tingni case against Nicaragua regarding enforced indigenous communal land rights. In Yakye Axa, the Court opined that when the State is to determine whether communal ancestral land rights or current individual land rights will prevail in the same property, it could be necessary to restrict the right to individuals' private ownership of property in order to preserve 'the cultural identity of a democratic and pluralistic society.' In the Yatama case against Nicaragua, the Inter-American Court dealt with the right of indigenous peoples to participate in government. The Court held that Nicaraguan electoral law constituted a disproportionate restriction on the political rights of the candidates of an indigenous and ethnic party because the State's requirements for participation in the municipal elections required a form of organisation that was foreign to the customs and traditions of the people.

In these cases, the Inter-American Court became the first international judicial body to give its imprimatur to a progressive interpretation of a wide range of indigenous rights and the principles underlying those rights. The Court and the Inter-American Commission are establishing precedents in indigenous rights that add to the authority set forth in a limited but increasing number of international instruments, draft declarations, decisions and comments. The precedents established also apply to other peoples who share communal lands and who celebrate their own culture and traditions within the framework of democratic nations.

This article analyses the case law on indigenous rights of the Inter-American Court as well as certain decisions of the Inter-American Commission. Section 2 sets forth basic international principles that underlie decisions of the Court and Commission, such as non-discrimination, the right of indigenous people to participate in decisions affecting them, respect for indigenous customary law, continuing violations and the applicability of indigenous law to tribal and other peoples. Section 3 explains the importance of State recognition of the juridical personality of indigenous peoples for their attainment of communal rights. Section 4 analyses the Inter-American Court and Commission's decisions on indigenous ancestral land rights, including collective rights, the right to title and demarcation of their land, and the right to control of natural resources. Section 5 interprets the Inter-American Court's contribution to the right of indigenous peoples to participate in government in accordance with their customary law. Sections 6 and 7 discuss Court holdings on indigenous peoples' right to religion and right to life. Section 8 evaluates the effectiveness of the remedies provided by States for the violation of indigenous rights. Section 9 describes the Court and Commission's use of interim measures to provide

14 Ibid. at paras 218–9.
indigenous peoples with immediate protection, and Section 10 sets forth the types of reparations ordered by the Inter-American Court for violations of indigenous rights.

2. Principles Applied in Indigenous Rights Cases

Before examining the principles that the Court has articulated in its statement of indigenous rights, it may be helpful to note the following elements of the Court's approach to the interpretation of the Convention. An important consideration in the matter of indigenous rights is that the Court holds that human rights treaties are living instruments whose interpretation must consider changes over time and present-day conditions.\(^{15}\) The Court also interprets the American Convention in the light of other treaties, resolutions and declarations.\(^{16}\) In interpreting indigenous peoples' rights under the American Convention, the Inter-American Court and Commission may take into account the International Labor Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, which entered into force in 1991 and has been ratified by 17 States.\(^{17}\) Many of the ratifying States are members of the OAS, including Argentina, Bolivia, Brazil, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru and Venezuela. Certain indigenous rights recognised in ILO Convention 169, particularly the inalienability of collective land rights, also have been recognised in the constitutions of some American States.\(^{18}\) The Draft UN Declaration on Indigenous Rights\(^{19}\) and the Draft American Declaration on the

15 *Mayagna (Sumo) Awas Tingni Community v Nicaragua* IACtHR Series C 79 (2001); 10 IHRR 758 (2003) at para. 125.

16 *Yakye Axa Indigenous Community* supra n. 12 at para. 128. The Court explained that:

[[the corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the [international law's] faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law. (Ibid.)]]

17 Indigenous and Tribal Peoples Convention 1989, supra n. 1.


Rights of Indigenous Peoples, which do not create binding State obligations, reflect current progressive views on indigenous law. The Inter-American Court and Commission have referred to provisions of the above ILO Convention 169 in their interpretations of the indigenous rights protected by the American Convention and the American Declaration.

A. Non Discrimination and Equal Protection of the Law

The Inter-American Court and the Inter-American Commission apply general principles of non-discrimination and equal protection of the law when considering indigenous rights. The Inter-American Court relies on natural law to hold that equality arises directly from the unity of the human family and is inextricably linked to the dignity of the individual. The Court explained that the principle of non-discrimination cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.

The American Convention and the American Declaration both include broad non-discrimination clauses. In addition, they provide that 'all persons are

20 Draft American Declaration on the Rights of Indigenous Peoples, supra n. 1.
21 There have been two indigenous rights treaties promulgated, both under the auspices of the International Labor Organization (ILO). The original treaty, Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 328 UNTS 247, entered into force in 1959. It has been criticised as being too assimilationist. See Anaya, Indigenous Peoples in International Law, 2nd edn (Oxford: Oxford University Press, 2005) at 54–5; and Smith and van den Ander (eds), The Essentials of Human Rights (London: Hodder Arnold, 2005) at 175.
23 Ibid.
24 Article 1(1), American Convention provides that there can be no discrimination on the basis of 'race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition'. See also Article II, American Declaration. In this regard, the Inter-American Commission stated that

the notion of equality before the law set forth in the Declaration relates to the application of substantive rights and to the protection to be given to them in the case of acts by the State or others. Further, Article II of the American Declaration, while not prohibiting all distinctions in treatment in the enjoyment of protected rights and freedoms, requires at base that any permissible distinctions be based upon objective and reasonable justification, that they further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought.

(Mary and Carrie Dann v United States, supra n. 4 at para. 143.)
equal before the law'. Consequently, all persons are entitled, 'without discrimination, to equal protection of the law'. The Inter-American Court stated categorically that '[i]n the current stage of the evolution of international law, the fundamental principal of equality and non-discrimination has entered into the domain of jus cogens', an imperative norm.

The Inter-American Court cautioned States that, pursuant to the equal protection clause of the American Convention, States are obligated to refrain from adopting discriminatory laws or regulations, to eliminate discriminatory regulations and practices and to establish laws and administrative measures that 'recognize and assure the effective equality of all persons before the law'. A State is barred from exercising discrimination either in law or in fact not only as to the rights set forth in the American Convention but also with respect to any rights recognised under its domestic laws.

The Court does not hold that all discrepancies in legal treatment are per se discriminatory, but rather only those that have 'no objective and reasonable justification'. According to the Court, certain inequalities may be instrumental in attaining justice for those who are in a 'weak legal position'. Specifically in reference to indigenous peoples, the Inter-American Court has emphasised that 'in order to effectively guarantee [the rights of members of an indigenous community] when interpreting and applying domestic norms, States must take into consideration the characteristics that differentiate members of indigenous peoples from the population in general and that make up their cultural identity'. The Court also held that '[i]n respect to indigenous peoples, it is indispensable that States grant effective protection that takes into account their particularities, their economic and social characteristics, as well as their especially vulnerable situation, their customary law, values, customs and mores.'

B. Participation of Indigenous Peoples in Decisions Affecting Them

The Inter-American Court recognises that indigenous people have the right to participate in decisions affecting them and that those decisions must reflect their customary law and culture. State and international decisions that affect indigenous peoples should only be made in conjunction with the active

25 Article II, American Declaration and Article 24, American Convention.
26 Article II, American Declaration; Article 24, American Convention.
27 Yatama, supra n. 3 at para. 184.
28 Ibid. at para. 185. See Article 24, American Convention.
29 Yatama, supra n. 3 at para. 186.
30 Proposed Amendments of the Naturalization Provisions, supra n. 22 at para. 56.
31 Ibid.
32 Yaku Axa Indigenous Community supra n. 12 at para. 51.
33 Ibid. at para. 63. Article XI(1), draft American Declaration on the Rights of Indigenous Peoples states in this regard that 'States shall adopt special measures, when necessary, so that indigenous peoples can fully enjoy their human rights.
34 Mayagna (Sumo) Awas Tingni Community, supra n. 15 at para. 164.
participation of the people in question. Such consultations must be culturally appropriate and procedurally adequate, in that the indigenous peoples must have access to sufficient information to permit them to participate meaningfully in the decisions that will impact their communities. Moreover, measures adopted by States to protect indigenous peoples 'shall not be contrary to the freely expressed wishes of the peoples concerned.'

In this regard, the Inter-American Commission specified that any State determination as to the maintenance of the rights of indigenous peoples to their ancestral land must be '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.' In the *Maya Indigenous Communities* case, the Inter-American Commission specified that '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.'

The Inter-American Court requires that indigenous peoples must be consulted when the State undertakes to fulfil a Court-ordered remedy. For example, in ordering reparations in the *Awas Tingni* case, the Inter-American Court specified that the State should undertake the demarcation and titling of the Community's ancestral lands with full participation of the Community, taking into account its customary law, values, customs and mores. In the *Yakye Axa*

35 See Articles 2 and 5, Indigenous and Tribal Peoples Convention stating that any action planned or taken by the State with respect to indigenous peoples, should be undertaken 'with the participation of the peoples concerned.'

36 Anaya, 'Indigenous Peoples' Participatory Rights In Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources', (2005) 22 *Arizona Journal of International and Comparative Law* 7 at 16. 'The concept of consulting the indigenous communities that could be affected by the exploration or exploitation of natural resources includes establishing a genuine dialogue between both parties characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord.' Ibid. citing the Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Ecuador of the Indigenous and Tribal Peoples Convention No. 169, 1989, made under Article 24 of the ILO Convention by the Ecuadorian Confederation of Free Trade Union Organizations (CEOSL), 14 November 2001, GB.282/14/2 at para. 38.

37 Article 4(2), Indigenous and Tribal Peoples Convention. In its General Comment 23, the UN Human Rights Committee observed that 'The enjoyment of [indigenous] rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.' UN Human Rights Committee, General Comment No. 23: The rights of minorities (Article 27), 8 April 1994, CCPR/C/21/Rev.1/Add.5:1–3 IHRR 1 (1993) at para. 7.


39 Ibid.

40 See *Mayagna (Suno) Awas Tingni Community*, supra n. 15 at para. 164.

41 Ibid.
case, the Court also explained that when ancestral lands cannot be returned to indigenous peoples, the decision to award them alternative land or to pay them just compensation must be made by an agreement with the peoples involved and in accordance with their consultation procedures, values and customary law.\textsuperscript{42} Except for its early decision in the \textit{Aloëboetoe} case, where the Court exhibited some paternalism in setting up a trust fund for the compensation owed to both the adults and the children in the community,\textsuperscript{43} the Court has ordered that indigenous and ethnic people be consulted in decisions that will affect them.

\textbf{C. Observance of Indigenous Customary Law and Cultural Values}

The Inter-American Court takes into consideration the customary law of indigenous peoples when analysing indigenous rights.\textsuperscript{44} Customary law within this context are the long-held customs and practices of a people, which its members regard as mandatory. In the \textit{Aloëboetoe} case, the Inter-American Court considered the marriage customs of the Saramaca people in apportioning compensation to the victims' next of kin.\textsuperscript{45} The Court had accepted Suriname's recognition of its international responsibility for the kidnapping and extra-judicial execution of seven young village men by the Surinamese military.\textsuperscript{46} In determining the beneficiaries of the reparations, the Court ruled that official Surinamese family law was not effective in the region inhabited by the Saramaca and, thus, would not be applied in the case.\textsuperscript{47} Rather, the Court took into account the customary marriage practices of the Saramacan people in its decision as to who qualified as family members who would be awarded reparations.\textsuperscript{48} Under Saramacan tribal customs, polygamy was common, and marriages were not registered with the State.\textsuperscript{49}

\textsuperscript{42} \textit{Yakye Axa Indigenous Community}, supra n. 12 at para. 151.
\textsuperscript{44} \textit{Mayagna (Sumo) Awas Tingni Community} supra n. 15 at para. 151. The Preamble to the American Declaration emphasises that 'since 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'.
\textsuperscript{45} \textit{Aloëboetoe et al.}, supra n. 43 at para. 62.
\textsuperscript{46} Ibid. at para. 12.
\textsuperscript{47} Ibid. at para. 58. Under international law, rules of succession, which identify a decedent's beneficiaries, are generally determined under local law which would be national law. (Ibid. at para. 62.) Surinamese national law provides that a person's next of kin includes the legally recognised spouse, the children, and perhaps the decedent's dependent parents. (Ibid. at para. 62.) Moreover, Suriname law requires that marriages must be officially registered to be recognised by the State, and the State does not recognise polygamous relationships. (Ibid. at para. 17.) The Saramaca tribe, however, lived in a remote area and was not aware of national laws. Had they even known of and wished to comply with governmental requirements, there were no accessible facilities to officially register their marriages. (Ibid. at para. 58.)
\textsuperscript{48} Ibid. at para. 62.
\textsuperscript{49} Ibid. at paras 17 and 58.
Consequently, the Court ordered that reparations be paid to all the wives, children and, in some cases, the parents of the victims, in accordance with the local cultural law of succession.\textsuperscript{50}

The Inter-American Court ordered reparations to reinforce the cultural traditions and customary law of the Achí Mayan peoples when their culture was almost destroyed through human rights violations. The Court found in the \textit{Massacre of Plan de Sánchez} case that the deaths of the women and elderly, who were traditionally the oral transmitters of the Mayan Achí culture, interrupted the passage of cultural knowledge to future generations, producing a cultural vacuum.\textsuperscript{51} The militarisation and repression to which the survivors and especially the young people were subjected after the massacre resulted in their loss of faith in their traditions. The survivors of the massacre could not freely practice Mayan cultural ceremonies and rights because the Guatemalan military controlled all their activities.\textsuperscript{52} Thus, the traditional Mayan values of respect, service and action by consensus were forcibly replaced by authoritarianism and the arbitrary use of power.\textsuperscript{53} The Inter-American Court recognised the importance of the Mayan culture to the identity of the people and, thus, ordered as a form of reparations that the communication system among the Mayan Achí villages be improved and that instruction in the Mayan Achí culture be instituted in the affected communities.\textsuperscript{54}

\textbf{D. Application of Indigenous Case Law to Tribal and Other Peoples}

International indigenous law may be applicable to tribal and other peoples who hold land collectively and have long-held customs and traditions similar to those of indigenous peoples. ILO Convention 169 is entitled the 'Indigenous and Tribal Peoples Convention.'\textsuperscript{55} In international law, self-identification as 'indigenous' is a fundamental criterion in determining who is considered indigenous.\textsuperscript{56}

\textsuperscript{50} Ibid. at para. 66.


\textsuperscript{52} Ibid. at para. 49(13).

\textsuperscript{53} Ibid. at para. 49(16).

\textsuperscript{54} Ibid. at paras 6–9.

\textsuperscript{55} Article 1(a), Indigenous and Tribal Peoples Convention. But see Article 1(1), draft American Declaration on the Rights of Indigenous Peoples which states only that it 'applies to the indigenous peoples of the Americas.' The 1997 draft of the proposed American Declaration specified that it applied to 'indigenous peoples as well as peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws and regulations.' Article 1(1), Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights on 26 February 1997.

\textsuperscript{56} Article 1(b), Indigenous and Tribal Peoples Convention. Article 1(1), Draft American Declaration on the Rights of Indigenous Peoples.
The Inter-American Court has applied to tribal and other peoples the jurisprudence that it developed in indigenous cases. The Court accords special protection to tribal and other groups who exercise an 'omni-comprehensive relationship' with their ancestral lands.\textsuperscript{57} When peoples hold their ancestral land communally and have a close spiritual and cultural relationship with that land, the Inter-American Court will apply its jurisprudence on indigenous land rights and other related rights.\textsuperscript{58}

In the \textit{Moiwana v Suriname} case, the Court applied the case law that it developed in indigenous rights cases to the peoples of the N’djuka Maroon community who had been driven from their traditional land by a massacre perpetrated by the Surinamese military.\textsuperscript{59} The ancestors of the inhabitants of this community had been brought to the territory, which is now Suriname, in the 17th century as African slaves.\textsuperscript{60} Over time, many of them escaped to the rainforest, where they established autonomous communities and came to be known as Maroons.\textsuperscript{61} The N’djuka People, whose village was massacred, are one of the six Maroon communities having their own language, history, cultural traditions and religion.\textsuperscript{62} The villagers have not been able to return to their traditional lands since the 1986 massacre and are living as internally displaced people in Suriname or as refugees in French Guiana.\textsuperscript{63}

Although they are not technically indigenous to the area, the Court applied its jurisprudence on indigenous land rights to the N’djuka ‘tribal people’ in accordance with international law.\textsuperscript{64} Their tradition of sharing land communally, their relationship to the land and the pre-eminent role they accord custom and common religious and spiritual practices is sufficiently similar to the practices and customs of the indigenous peoples for them to merit similar protection. The diversity of a democratic society is equally enhanced by protection of the life style and values of peoples such as the N’djuka.

\section*{E. Continuing Violations of Indigenous Rights}

Generally, an international human rights court has jurisdiction \textit{ratione temporis} if the alleged violation takes place during a time when the court has jurisdiction over the State. States may file preliminary objections to the court's jurisdiction

\begin{itemize}
\item \textsuperscript{57} \textit{Moiwana Community v Suriname} IACtHR Series C 124 (2005) at para. 133.
\item \textsuperscript{58} Ibid. at paras 131–4.
\item \textsuperscript{59} Ibid.
\item \textsuperscript{60} Ibid. at para. 86.1. The N’djuka Community now numbers approximately 49,000 people. (Ibid. at para. 86.3.)
\item \textsuperscript{61} Ibid. at para. 86.1.
\item \textsuperscript{62} Ibid. at paras 86.1 and 86.4.
\item \textsuperscript{63} Ibid. at paras 86.19, 86.27 and 86.43.
\item \textsuperscript{64} Ibid. at paras 133–5.
\end{itemize}
because the violation occurred before the entry into force of the treaty for that State or before the State accepted the jurisdiction of the tribunal.\footnote{See Pasqualucci, supra n. 8 at 107–13.} Many violations of indigenous rights, especially land rights, took place before the American Convention entered into force for any State or before the 1980s and 1990s when most States Parties to the Convention accepted the jurisdiction of the Inter-American Court. Thus, were there no exceptions to this principle, even the current continuing effects of these violations would be beyond the jurisdiction of the Inter-American Court and other international adjudicative bodies.

Although a State may violate human rights long before it ratifies a human rights treaty or accepts the jurisdiction of an international tribunal, if the legal effects of that violation continue thereafter, the tribunal may have jurisdiction \textit{ratione temporis} over the effects of those violations that constitute continuing violations. Under this principle, even when indigenous peoples are deprived of their lands before the State ratified the American Convention, the Inter-American Court may hold that it has jurisdiction \textit{ratione temporis} to determine if there is a 'continuing' violation of the right to property.\footnote{Moiwana Community supra n. 57 at para. 43. The European Court of Human Rights also holds that there is a continuing violation of the right to property when land has not been returned to the victims (not a case of indigenous law). See \textit{Loizidou v Turkey} (Merits) 1996-VI 2210; (1997) 23 EHRR 513 at para. 41. See also UN Human Rights Committee General Comment No. 24, General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant, 2 November 1994, CCPR/C/21/Rev.1/Add.6; 2 IHRR 10 (1994) at para. 14.}

When the peoples are still displaced and the State has not returned their land, provided them with acceptable alternative lands or compensated the peoples for the loss of their ancestral lands, the Court holds that a violation of the rights continues to the present day. For example, in \textit{Moiwana v Suriname}, the Nd\juka tribal people had been forcefully displaced from their lands by a massacre in 1986 and had not been able to return.\footnote{Ibid. at para. 34.} Suriname, however, had not acceded to the American Convention or accepted the jurisdiction of the Inter-American Court until 1987. The State, thus, objected to the Court's jurisdiction of the case \textit{ratione temporis}.\footnote{Ibid. at para. 45.} The Court held that it could not consider the human rights violations that took place during the massacre and the forced displacement of the people.\footnote{Ibid. at para. 34.} The Court could, however, rule on violations that occurred after or continued after the State's accession and acceptance of jurisdiction. In this regard, the Court stated 'Moiwana community members continue to be either internally displaced within Suriname or to live as refugees in French Guiana. Thus, the Tribunal may properly exercise jurisdiction over the ongoing nature of the community's
displacement, which—although initially produced by the 1986 attack on the Moiwana Village—constitutes a situation that persisted after the State recognized the Tribunal’s jurisdiction in 1987 and continues to the present day.\(^\text{70}\)

Similarly, the Inter-American Court could not rule on a massacre of indigenous peoples that took place in Guatemala before Guatemala ratified the American Convention and accepted the jurisdiction of the Court, but it did rule on related events which took place after the Court had jurisdiction. In Guatemala a genocidal policy against the Mayan Indians was instituted during internal fighting in the 1970s and 1980s. According to the established facts of the Massacre of Plan de Sánchez case, from 1978 to 1983 when Guatemala was in the midst of an internal armed insurgency, the Guatemalan military planned a counter-insurgency campaign aimed at the destruction of Mayan people and villages that could be aiding the insurgents.\(^\text{71}\) The Guatemalan Historic Clarification Commission reported that Guatemala’s highest military authorities had ordered and carried out the massacres of 626 defenseless villages.\(^\text{72}\) Under its doctrine of national security, the Guatemalan army had identified members of the Mayan indigenous peoples as ‘internal enemies’.\(^\text{73}\)

In the Massacre of Plan de Sánchez case the Inter-American Court dealt with the aftermath of the 1982 massacre of one Mayan highland village.\(^\text{74}\) On the day of the massacre, approximately 60 military and paramilitary troops went from door to door in the village gathering the people to central locations.\(^\text{75}\) Many of the men escaped, assuming that they would be the targets and that the women, children and old people would not be harmed.\(^\text{76}\) However, everyone who was found was a target and most of them were killed. The young women and girls were taken to a house where they were raped, beaten and then killed.\(^\text{77}\) The other children were beaten to death.\(^\text{78}\) Grenades were thrown into the house where the elderly and others were enclosed, and anyone who tried to leave was shot.\(^\text{79}\)

\(^{70}\) Ibid. at para. 108.
\(^{71}\) Plan de Sánchez Massacre, supra n. 51 at para. 42(5). Some human rights violations, such as the right to life, affect indigenous and non-indigenous alike. The long-term violence in Guatemala affected highland campesinos—both indigenous and non indigenous. See Hannum, supra n. 11 at 323–43. The prejudice, however, was directed again the indigenous. In its annual report on the Situation of Human Rights in Guatemala, the Commission stated that ‘[t]hose who retain characteristics that identify them as Mayas–language, community structure, dress, religious practices—are not only excluded from positions of power and prestige in the nation, but in general are scorned by politicians, conservative, liberals or marxists.’ Inter-American Commission on Human Rights, Fourth Report on the Situation of Human Rights in Guatemala (1993) at 34 quoted in Hannum, ibid. at 335.
\(^{72}\) Plan de Sánchez Massacre, supra n. 51 at para. 42(6).
\(^{73}\) Ibid. at para. 42(7).
\(^{74}\) Ibid. at para. 42(15).
\(^{75}\) Ibid. at para. 42(17).
\(^{76}\) Ibid.
\(^{77}\) Ibid. at para. 42(18).
\(^{78}\) Ibid.
\(^{79}\) Ibid. at para. 42(19).
Jurisdictional limitations restricted the violations which could be considered by the Inter-American Court. Although Guatemala had ratified the American Convention in 1978, four years before the massacre of Plan de Sánchez, the State did not accept the jurisdiction of the Court until 1987. Therefore, the Court was barred jurisdiction \textit{ratione temporis} from considering the violations committed during the massacre itself.

The Court had authority, however, to consider violations of the American Convention that occurred subsequent to Guatemala’s acceptance of the Court’s jurisdiction. These violations included the harassment of survivors and the government’s continuing refusal to allow the survivors to discuss the massacre, bring legal actions based on the killings or bury the dead in accordance with their religious convictions. In 2004, Guatemala accepted international responsibility before the Court for violations of the rights to humane treatment, a fair trial, privacy, property, equal protection, judicial protection and freedom of association, religion and expression.

3. Juridical (Legal) Personality of Indigenous Peoples

The American Convention provides that ‘every person has a right to recognition as a person before the law’. The recognition of the legal or juridical personality of an indigenous community is important because it allows a people to bring legal and administrative actions before State domestic organs in the name of the community. As stated by the Inter-American Court, ‘[t]he juridical personality, [82]

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80 Ibid. at para. 4.
81 The Court was also barred from considering the petitioners’ claim that Guatemala was responsible for a policy of genocide against the indigenous Mayan people, again due to jurisdictional limitations. (Ibid. at para. 51.) The Inter-American Court has jurisdiction to interpret and apply the provisions of the American Convention. It does not have jurisdiction to render judgments on violations of other treaties, unless that treaty confers jurisdiction on the Inter-American Court. When interpreting provisions of the Convention the Inter-American Court can take into account the relevant provisions of other treaties, especially if those provisions are \textit{jus cogens}. See \textit{Las Palmeras v Columbia} IACtHR Series C 67 (2000); 9 IHRR 61 (2002) at para. 32; and \textit{Bámaca-Velásquez v Guatemala} IACtHR Series C 70 (2000); 9 IHRR 130 (2002) at paras 208–9. The Convention on the Prevention and Punishment of the Crime of Genocide 1948 does not confer such jurisdiction on the Inter-American Court. In the \textit{Plan de Sanchez} Case, the Inter-American Court stated that

\[\text{[i]n relation to the theme of genocide that was referred to by the Commission, the Court has competence to declare violations of the American Convention of Human Rights and of other instruments in the Inter-American system of protection of human rights that confer jurisdiction on it. Nevertheless, facts such as those stated, that gravely affect the identity, values, and development of the members of the Maya Achi Peoples within a pattern of massacres, cause an aggravated impact that compromises the international responsibility of the State and which this Court will take into account when it resolves reparations. (Ibid.)}\]

82 Ibid. at paras 36(3) and 36(4).
83 Article 3, American Convention. Article IV, proposed American Declaration on the Rights of Indigenous Peoples specifies that ‘[i]ndigenous peoples have the right to have their legal personality fully recognized by the States within their systems’ supra n. 1.
for its part, is the legal mechanism that confers on [indigenous peoples] the necessary status to enjoy certain fundamental rights, as for example the rights to communal property and to demand protection each time they are vulnerable.'

States have effectively delayed recognition of indigenous peoples' rights or judicial remedies for violation of those rights by creating obstacles to the administrative procedure whereby indigenous peoples are granted legal personality. In the Yakye Axa case against Paraguay, the Yakye Axa indigenous people applied for the recognition of its legal personality in accordance with Paraguayan domestic law so that it could, as a people, demand the restitution of its ancestral lands. The State initially delayed three years in granting recognition to the leaders of the group, and then delayed an additional three years before it recognised the community's legal personality. The State then argued that the administrative procedure for the restitution of the lands did not begin until the State granted the application for recognition of juridical personality. The Inter-American Court rejected the State's argument, reasoning that juridical personality only makes operative the pre-existing rights of indigenous communities that they have exercised historically. State recognition is not their beginning as legal persons. Indigenous political, social, economic, cultural and religious rights and forms of organisation, as well as the right to reclaim their traditional lands belongs to the people themselves who are recognised even by the Paraguayan Constitution as pre-existing the State. The recognition of juridical personality is merely a legal formality. Consequently, the Court concluded that indigenous rights do not stem from State recognition of the legal status of the community.

4. Ancestral Land Rights

The colonisation of the western hemisphere resulted in many indigenous peoples losing possession of their ancestral lands and territories. In recent years, some of these peoples have demanded the restitution of those lands. The American Convention does not specifically address the issue of the restitution of ancestral lands; it does provide, however, that '[e]veryone has the right to the use and enjoyment of his property'.

84 Yakye Axa Indigenous Community, supra n. 12 at para. 83.
85 Ibid. at para. 50(17).
86 Ibid.
87 Ibid. at para. 78.
88 Ibid.
89 Ibid.
90 Ibid. at para. 82.
91 Ibid.
92 Article 21(1), American Convention. The Inter-American Court has defined 'property' as 'those material things that can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and nonmovables, corporeal and incorporeal elements and any other tangible object capable of having value.' (Ibid. at para. 137, quoting Mayagna (Sumo) Awas Tingni Community, supra n. 15 at para. 144.)
In interpreting this right with respect to indigenous peoples, the Inter-American Court has recognised that one aspect of the right of indigenous people to their ancestral lands is based on the distinct relationship that they have to those lands. In this regard, the Court stated that

[indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; 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. For indigenous communities, relations to the land are not merely a matter of possession and production but [have] a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.]

A. Collective Land Rights

The Inter-American Court has clarified that the American Convention's provision protecting the right to property is broader than the individual right to own property. It also includes the right to own property collectively. Although during the drafting of the American Convention the provision on property initially referred to 'private property', the adjective 'private' was deleted in English but not in other languages.

The Court recognises that indigenous peoples traditionally own land communally as well as, in some cases, individually. An indigenous community settlement typically includes a 'physical area comprised of a nucleus of houses, natural resources, gardens, plantations and their surroundings tied when possible to their cultural tradition'.

93 Mayagna (Sumo) Awas Tingni Community, supra n. 15 at para. 149. The Inter-American Commission made a similar observation in the Dann Sisters case against the United States. The Commission stated that 'continued utilization of traditional collective 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 and that control over the land refers both to its capacity for providing the resources which sustain life, and to the geographic space necessary for the cultural and social reproduction of the group'. (Mary and Carrie Dann, supra n. 4 at para. 128)

94 Mayagna (Sumo) Awas Tingni Community, supra n. 15 at para. 149. Article XXIII, American Declaration, however, provides that '[e]very 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'. For a discussion of cases involving collective indigenous rights before the Inter-American Commission, see generally Kreimer, Collective Rights of Indigenous Peoples in the Inter-American Human Rights System, Organization of American States, (2000) 94 American Society of International Law Proceedings 315.

95 Mayagna (Sumo) Awas Tingni Community, supra n. 15 at para. 145

96 Ibid. at para. 149.

97 Yakye Axa Indigenous Community, supra n. 12 at para. 139, quoting Paraguayan Law No. 43/89 at Article 3. See also Mayagna (Sumo) Awas Tingni Community, supra n. 15 at para. 148: 'it is the opinion of this Court that Article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.'
The Inter-American Court holds that 'the close relationship of the indigenous peoples with their traditional territories and the natural resources found there, which are connected to their culture, as well as the incorporeal elements that arise from them, should be safeguarded by [the right to property provision] of the American Convention'. Moreover, the Court recognised that 'the possession of its traditional territory is etched in an indelible form in the historic memory' of indigenous people.

B. Restitution of Ancestral Lands

The right to property set forth in the American Convention may require that the State return ancestral lands to indigenous people. In the Yakye Axa case, the Inter-American Court ordered Paraguay, if possible, to return ancestral land to a small group of indigenous peoples who no longer lived on the land. After years of pursuing unsuccessful proceedings in Paraguay, the Yakye Axa, a Paraguayan indigenous people, petitioned the Inter-American human rights system for a determination that their human rights had been violated and for reparations, including the restitution of their lands. The people had traditionally lived by hunting, fishing and gathering on its communally-owned lands. At the end of the 19th century, however, the lands of the Yakye Axa and of other Paraguayan indigenous peoples were sold to British business owners. The Anglican Church then arrived to convert the indigenous peoples to Christianity and oversee grain ranches. The indigenous peoples were employed as labourers on the land that had been their own.

In the 1980s, the Anglican Church purchased lands for new indigenous settlements and provided the indigenous groups that moved to these settlements with agricultural, sanitary and educational assistance. At that time, the conditions of the Yakye Axa people, who were still living as workers on their ancestral land, were economically difficult and physically dangerous. The Yakye Axa men received no pay or low wages for their work, the women were employed...

98 Yakye Axa Indigenous Community supra n. 12 at para. 137. Article 21, American Convention. Article 13, ILO Convention 169 and the domestic laws of some States also recognise the right to restitution of indigenous lands, providing that 'governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship'.


100 Yakye Axa Indigenous Community supra n. 12 at para. 242. resolution 6. The Yakye Axa total approximately 90 families comprised of about 320 persons. (Ibid. at para. 50(10).)

101 Ibid. at paras 50.3 and 50.7.

102 Ibid. at para. 50.10.

103 Ibid. at para. 50.11.

104 Ibid.

105 Ibid. at paras 50.12 and 50.13.
sexually exploited by Paraguayan workers and the entire community suffered from insufficient food and the absence of health services. Due to these conditions, the members of the Yakye Axa People moved to a new settlement in 1986, leaving their ancestral lands. The move, however, did not improve their living conditions. The land was overcrowded for a hunting and gathering society, there was little food and water, and the Yakye Axa people, who were not native to that area, were marginalised by local indigenous groups.

In 1993, the Yakye Axa attempted to begin proceedings in domestic courts for the restitution of their ancestral lands. At that time, several Yakye Axa families moved to the side of the road at the entrance of the territory they claimed communally. Although the Paraguayan Constitution provides that indigenous peoples have the right to their ancestral land, the private owners of the range land that was claimed by the Yakye Axa were not willing to sell part of the ranch to the State for restitution to the Yakye Axa. Paraguayan law specifies that indigenous peoples can only reclaim their ancestral land if one of the following conditions applies: it is State-owned land; the current owners are not making rational use of the land; or the current owners are willing to sell the land to the State. As none of these conditions applied, Paraguay did not return the land to the Yakye Axa people.

C. Balancing Ancestral Communal Land Rights Against Private Land Rights

The right to communal ancestral indigenous lands is relative, and must be balanced against competing claims to the land in question. The Inter-American Court has ruled that the American Convention's protection of property rights applies to both private individual ownership and communal ownership. The Court specified in the Yakye Axa case that when there is a conflict between private property rights and communal ancestral indigenous rights in the same land, which requires the State to recognise one right over the other, the State should analyse the elements of the restriction on property on a case-by-case basis.

106 Ibid. at para. 50.13.
107 Ibid.
108 Ibid. at para. 50.15.
109 Ibid. at para. 50.16.
110 Ibid. at para. 87.
111 Ibid. at para. 138, quoting the Paraguayan Constitution at Article 64.
112 Ibid. at para. 50.35.
113 Ibid. at para. 97.
114 Ibid. at para. 143. Anaya states that '[i]nasmuch as property is a human right, the fundamental norm of nondiscrimination requires recognition of the forms of property that arise from the traditional or customary land tenure of indigenous peoples, in addition to the property regimes created by the dominant society'. Anaya, supra n. 21 at 142.
115 Yakye Axa Indigenous Community, ibid. at para. 146.
The American Convention and the jurisprudence of the Inter-American Court set forth guidelines to determine admissible restrictions on the enjoyment and exercise of rights in general, including the right to property.\textsuperscript{116} These restrictions must be established by domestic law and must be necessary, proportionate and passed with the goal of reaching a legitimate objective in a democratic society.\textsuperscript{117} The American Convention's provision for the right to property specifies that State law may subordinate the use and enjoyment of property 'to the interest of society.'\textsuperscript{118} The Court specified that '[t]he necessity of legally contemplated restrictions will depend on if [the restrictions] are oriented to satisfy a compelling public interest.'\textsuperscript{119} It is insufficient for the State to demonstrate, for example, that the law fulfils a useful or opportune purpose.\textsuperscript{120} The Court further stated that 'the restriction must be proportionate to the interest that justifies it and be closely tailored to accomplishing this legitimate objective, interfering as little as possible with the effective exercise of the right restricted.'\textsuperscript{121} Finally, to be compatible with the Convention, the restrictions should be justified according to collective objectives that, by their importance, clearly predominate over the necessity for the full enjoyment of the right restricted.\textsuperscript{122} In this regard, the Court emphasised that

States should bear in mind that indigenous territorial rights include a broader and different concept that is related to the collective right of survival as an organized people, and that the control of their habitat is a necessary condition for the reproduction of their culture, for their development and to fulfill their life plans. Ownership of the land guarantees that members of indigenous communities conserve their cultural patrimony.\textsuperscript{123}

Moreover, the Court said that a State's 'failure to recognize the ancestral right of the members of indigenous communities to their lands could affect their other basic rights such as their right to cultural identity and the very survival of the indigenous communities and their members.'\textsuperscript{124}

The Court noted that it could be necessary to restrict the right to individuals' private ownership of property to preserve 'the cultural identity of a democratic and pluralistic society' and that such a restriction would be proportional if just

\begin{itemize}
\item \textsuperscript{116} Ibid. at para. 144.
\item \textsuperscript{117} Ibid.
\item \textsuperscript{118} Article 21 (1), American Convention.
\item \textsuperscript{119} Yakye Axa Indigenous Community supra n. 12 at para. 145.
\item \textsuperscript{120} Ibid.
\item \textsuperscript{121} Ibid. The Inter-American Court cited its earlier jurisprudence in Ricardio Canese v Paraguay IACHR Series C 111 (2004) at para. 96; and Herrera Ulloa v Costa Rica IACHR Series C 107 (2004) at para. 127 (both cases addressing the restrictions within the context of freedom of expression.)
\item \textsuperscript{122} Yakye Axa Indigenous Community supra n. 12 at para. 145.
\item \textsuperscript{123} Ibid. at para. 146.
\item \textsuperscript{124} Ibid. at para. 147.
\end{itemize}
compensation was made to those who must give up their private property.\textsuperscript{125} In general, the American Convention permits the subordination of the use and enjoyment of property rights 'to the interest of society'.\textsuperscript{126} The Court's position that the recognition of indigenous ancestral property rights is important to the survival of cultural diversity in a democratic society would support a permissible restriction on private property 'to the interest of society'.

Although the Court's pronouncements appear to favour the return of indigenous ancestral lands, the Court also stated that '[t]his does not mean that whenever there is a conflict between the territorial interests of individuals or the State and the territorial interests of the members of indigenous communities, the latter will prevail over the former'.\textsuperscript{127} When the Yakye Axa asked for an interpretation of the Court's judgment because the State appeared unwilling to expropriate the private land claimed by the Yakye Axa people and intended to provide other land in the general area, the Court would not dictate to the State which specific lands were to be returned by the State to the Yakye Axa people.\textsuperscript{128}

### D. The Right to Alternative Lands or Compensation When the State Cannot Return Ancestral Communal Land

When a State cannot return ancestral land to indigenous peoples, it should, with the agreement of the interested people, attempt to find them alternative lands, taking into account their customs, values and intended use of the land.\textsuperscript{129} ILO Convention 169, cited by the Inter-American Court, provides that whenever possible, if ancestral land cannot be returned to indigenous people, through the agreement of the people and the State, or, if agreement cannot be reached, through appropriate procedures, the people shall be given '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'.\textsuperscript{130} If alternative land is not available or acceptable, with their agreement the people should be given compensation for the land. That compensation should principally take into account 'the meaning that the land has for them'.\textsuperscript{131}

\textsuperscript{125} Ibid. at para. 148.
\textsuperscript{126} Article 21(1), American Convention.
\textsuperscript{127} Yakye Axa Indigenous Community, supra n. 12 at para. 149.
\textsuperscript{128} Yakye Axa Indigenous Community (Interpretation of Judgment), supra n. 99 at para. 22.
\textsuperscript{129} Yakye Axa Indigenous Community, supra n. 12 at paras 151 and 217.
\textsuperscript{130} Article 16(4), Indigenous and Tribal Peoples Convention quoted in Yakye Axa Indigenous Community, supra n. 12 at para. 150. But see Article XII(2), draft Declaration on the Rights of Indigenous Peoples which states only that 'indigenous peoples have the right to restitution of the property that is part of that heritage of which they may be dispossessed, or, when restitution is not possible, to fair and equitable compensation', supra n. 1. The parties have not agreed on this principle or the wording of the principle as evidenced by the brackets surrounding the Article in the draft.
\textsuperscript{131} Yakye Axa Indigenous Community, supra n. 12 at para. 149.
The Inter-American Commission considered the principles of restitution and compensation in *Mary and Carrie Dann v United States*, finding that the government had violated the ancestral land rights of Mary and Carrie Dann, members of the Western Shoshone Indigenous People of the Southwest United States.\(^{132}\) The Dann sisters had been denied restitution and ownership of their ancestral lands, and the compensation which they refused to accept did not take into account the meaning of the land to them or to the Western Shoshone people.\(^{133}\) The US government argued that the rights of the Western Shoshone to the lands in question had been extinguished in 1872 through the encroachment of non-native Americans.\(^{134}\) In 1977, the US Indian Claims Commission (ICC), which did not have authority to order the return of the land to the Western Shoshone, agreed that they would be compensated for the loss of their ancestral lands at a rate of approximately 15 cents per acre in accordance with 1872 land values.\(^{135}\) The People refused the compensation and it was placed in a US government trust fund.\(^{136}\)

After the US Supreme Court affirmed the ICC ruling, the Dann sisters brought their case to the Inter-American Commission.\(^{137}\) The Inter-American Commission held that the Dann sisters' domestic property claims to their ancestral lands had not been determined through a fair process that complied with international human rights norms.\(^{138}\) The Inter-American Commission found that the decision of the ICC that the land rights of the Western Shoshone had been extinguished, was made based upon an agreement between the US government and only one band of the Western Shoshone people.\(^{139}\) Other Western Shoshone bands, such as the Danns, were not allowed to intervene in the proceedings even though the ICC's determination also extinguished their rights to much of their ancestral land.\(^{140}\) The Inter-American Commission concluded that the Danns had not been afforded equal protection of the law in the ICC proceedings.\(^{141}\) The case could not be referred to the Inter-American Court because the US has not ratified the American Convention or accepted the jurisdiction of the Court.

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132 *Mary and Carrie Dann*, supra n. 4 at paras 1–2. The petitioners also claimed violations of their right to equality before the law, religious freedom, right to a family, right to work and right to a fair trial. (Ibid. at para. 35.)

133 Ibid. at paras 85 and 112.

134 Ibid. at paras 3 and 82.

135 Ibid. at paras 85 and 112.

136 Ibid. at paras 3 and 85.

137 A complainant may only pursue a case before the Inter-American human rights system after they have exhausted all domestic remedies. Article 46(1)(a), American Convention.

138 *Mary and Carrie Dann*, supra n. 4 at para. 142.

139 Ibid. at paras 140–2.

140 Ibid. at para. 142.

141 Ibid. at para. 143.
E. Demarcation and Title to Ancestral Land

The land rights of indigenous peoples who continue to live on their ancestral lands also may be tenuous if they lack title to the land or its boundaries have not officially been established. Indigenous title to ancestral lands is essential to deter the State or third parties from encroaching on the land. The Inter-American Court has stated that 'as a result of customary practices, possession of the land should suffice for indigenous communities lacking actual title to the land to obtain official recognition of their property and for [its] consequent registration.'142

Although some State constitutions recognise indigenous ancestral land rights, the Court has made clear that 'the merely abstract or juridical recognition of indigenous lands, territories and resources practically lacks sense if the property has not been established and physically delimited'.143 In the Awas Tingni case, the Inter-American Court ordered Nicaragua to demarcate and title the lands of the Awas Tingni People of the Atlantic Coast of Nicaragua.144 The indigenous people's representatives had filed a complaint in the Inter-American human rights system to oppose the governmental grant of a logging concession on lands long possessed by the Awas Tingni, an indigenous community made up of more than 600 people.145 The people relied on their ancestral land for their subsistence, using it for family farming, communal agriculture, hunting and fishing.146 Extensive logging of their land would have destroyed their forests and disrupted their customs and lifestyle. The community did not have a deed or title to the lands where they and their ancestors had long lived,147 even though the Nicaraguan Constitution recognised the right of indigenous peoples to communal ownership of their land.148 The Inter-American Court ordered the government to officially recognise the Awas Tingni's right to their ancestral lands.149

The Inter-American Court allows States a margin of appreciation in identifying the ancestral lands of indigenous peoples. The Court does not deem itself competent to identify traditional lands; rather, the Court's role is to determine whether the State has respected and guaranteed the right of indigenous peoples to their communal property.150 The Court has stated that it is then for

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142 Mayagna (Sumo) Awas Tingni Community, supra n. 15 at para. 151.
144 Mayagna (Sumo) Awas Tingni Community, supra n. 15 at para. 173, resolution 4.
145 Ibid. at para. 103.
146 Ibid. at paras 103(d) and (e).
147 Ibid. at para. 103(g).
148 Ibid. at para. 116, quoting the Nicaraguan Constitution at Article 5.
149 Ibid. at para. 173, resolution 4.
150 Yakye Axa Indigenous Community, supra n. 12 at para. 215; and Yakye Axa Indigenous Community (Interpretation of Judgment), supra n. 99 at para. 22.
the State to delimit, demarcate, title and return the lands to the people because it is the State that possesses the technical and scientific expertise to do so.\textsuperscript{151}

The State’s obligation to identify indigenous ancestral lands, however, is subject to limitations. The State must take into account that ‘the possession of traditional territory is indelibly marked in the historic memory [of the members of the Community] and that the relation that they maintain with the land is of a quality that severing their connections with the land implies a certain risk of an irreparable ethnic and cultural loss with a consequent loss of diversity as a result.’\textsuperscript{152} Nonetheless, it is the State that makes the final determination, with the participation of the peoples, as to the exact location of the lands that will be returned. In the request for an interpretation of the judgment in the \textit{Yakye Axa} case made by the representatives of the victims, it appeared that the State was ignoring the community’s request that it be awarded particular lands and was instead giving them other lands that the State claimed to be their greater traditional territory.\textsuperscript{153} Although the Court reminded the State of the people’s connection to their ancestral lands, it left the ultimate determination of the State to decide on the exact location of the lands to be awarded to the Yakye Axa people. As a practical matter, the Court can set forth the general principles for States to follow in identifying and titling ancestral lands, but it cannot become involved in every dispute between the State and the people. It is incumbent upon the State to fulfill the spirit as well as the letter of the Court’s order to return ancestral lands to indigenous peoples.

A further complicating factor to the State’s obligation to demarcate and title ancestral lands is that due consideration must be given to other peoples or individuals, whether they be indigenous, ethnic or other, who live in close proximity and who may have overlapping claims to the land at issue in a particular case.\textsuperscript{154} In its ruling on the request for interpretation of its judgment in \textit{Moiwana Community v Suriname}, the Inter-American Court specified that the State must determine the boundaries of the Moiwana traditional lands with the participation and informed consent of the Moiwana People and of the neighbouring villages and indigenous communities.\textsuperscript{155} It would be inequitable for the State to title the lands of the applicants who were victorious in a suit before an international tribunal without determining the rights of neighbouring claimants. At the same time, it must be recognised that a land-titling procedure that would recognise the rights to all possible competing and overlapping claims to land may well take longer than the Court has allocated to the State to make reparations by titling the land in question.

\textsuperscript{151} \textit{Yakye Axa Indigenous Community (Interpretation of Judgment)}, ibid. at para. 23.
\textsuperscript{152} \textit{Yakye Axa Indigenous Community}, supra n. 12 at para. 216.
\textsuperscript{153} \textit{Yakye Axa Indigenous Community (Interpretation of Judgment)}, supra n. 99 at para. 18.
\textsuperscript{154} See \textit{Moiwana v Suriname (Interpretation of Judgment)} IACtHR Series C 145 (2005) at para. 19.
\textsuperscript{155} Ibid.
While indigenous land rights do not depend on recognition in domestic legal systems, the Inter-American Court has used the protections offered by the State’s domestic laws in its interpretation of the American Convention right to property. Constitutions and laws in some States such as Nicaragua and Paraguay protect communal indigenous ancestral lands. Nicaraguan law provides that such lands are ‘inalienable’ and cannot be sold, donated, encumbered or taxed. The Paraguayan Constitution provides that ‘[i]ndigenous peoples have the right to communal property, in the amount and quality sufficient for the conservation and development of their characteristic lifestyle.’ The Inter-American Court ordered Paraguay to return and demarcate the ancestral lands of the Yakye Axa people and, likewise, ordered Nicaragua to demarcate the traditional lands of the Awas Tingni Community.

In the absence of domestic recognition of indigenous land rights, however, the Court will interpret the American Convention to protect the communal ancestral land rights of indigenous and tribal peoples in accordance with its earlier jurisprudence. For example, Suriname, does not recognise communal property rights, and the victims in the Moiwana v Suriname case, the N’djuka tribal people, have neither individual nor collective title to the land traditionally occupied by them. Surinamese law provides that the land belongs to the State. The Inter-American Court found that the N’djuka people, like indigenous people, have an important spiritual, cultural and material relationship with their traditional lands that they had occupied until 1986 and that their occupation of the land for many years and their relationship should suffice to provide them with government recognition of their property. As reparations, the Court ordered

156  *Maya Indigenous Communities of the Toledo District*, supra n. 38 at para. 117.
157  *Yakye Axa Indigenous Community*, supra n. 12 at para. 138. Article 29, American Convention provides that ‘no provision of this Convention shall be interpreted as: b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State party or by virtue of another convention to which one of the said States is a party’.
158  Article 36, Nicaraguan Law No. 28 which regulates the Autonomy Statute of the Regions of the Atlantic Coast of Nicaragua, 30 October 1987, published in La Gaceta No. 238 (the Official Gazette of the Republic of Nicaragua). This law states that: ‘Communal property are the lands, waters, and forests that have traditionally belonged to the Communities of the Atlantic Coast, and they are subject to the following provisions: 1. Communal lands are inalienable: they cannot be donated, sold, encumbered nor taxed, and they are inextinguishable; and 2. The inhabitants of the Communities have the right to cultivate plots on communal property and to the usufruct of goods obtained from the work carried out’. See *Mayagna (Sunio) Awas Tingni Community*, supra n. 15 at para. 150.
159  *Yakye Axa Indigenous Community*, supra n. 12 at para. 138, quoting Article 64, Paraguayan Constitution.
160  *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 150.
161  *Yakye Axa Indigenous Community*, supra n. 12 at para. 138, quoting Article 64, Paraguayan Constitution.
162  Moiwana Community, supra n. 57 at para. 86.5.
163  Ibid. at para. 130.
164  Ibid.
165  Ibid. at para. 86.6.
Suriname to return the land to the People, demarcate the land and grant the N'djuke People collective title to the land and the traditional resources on it.166

E. Control of Natural Resources

Even when the State has recognised the legal right of indigenous peoples to their communal property, conflicts may arise over the control of natural resources on or beneath that land. States sometimes grant contracts to third parties authorising them to exploit the natural resources on lands that historically have been in the possession of indigenous peoples or on lands that have been titled communally to the people. Such contracts can be lucrative for national governments and for the State officials who facilitate those contracts. In recent years, the Nicaraguan government granted logging rights on untitled indigenous lands to a Korean company;167 the government of Belize granted logging rights and oil exploration rights on Mayan reservations to a private company;168 and the Ecuadorian government, which retains the right to exploit subsurface minerals, granted exploration rights on indigenous lands to private foreign companies.169 These companies can be ruthless in attempting to gain access to indigenous communal property.170

The natural resources on ancestral lands often support the indigenous peoples’ subsistence economy and are important to the religious and cultural lives of the people. The people may live by hunting in forested areas, fishing in unpolluted streams and rivers and worshiping at undisturbed historic sacred sites on the land where their ancestors worshiped. Access to their ancestral lands and the natural resources on those lands is directly linked to their ability to obtain adequate food and clean drinking water.171 The Inter-American Court recognised the importance of these resources to indigenous peoples, stating

[t]he culture of the members of the indigenous communities corresponds to a particular way of being, seeing, and acting in the world, as a result of their close relationship with their traditional territory and

166 Ibid. at para. 199(2)(f).
167 Mayagna (Sumo) Awá-Tingni Community, supra n. 15 at para. 153.
168 Maya Indigenous Communities of the Toledo District, supra n. 38.
the resources found there, not only because those resources are their principal means of sustenance, but also because they constitute an integral element in their view of the world, religion and finally, their cultural identity.\textsuperscript{172}

Likewise, the Inter-American Court recognised in the Massacre of Plan de Sanchez case, that 'f[o]r the members of these communities, harmony with the environment is expressed by the spiritual relationship that they have with the land, their manner of managing resources, and their profound respect for nature.'\textsuperscript{173} ILO Convention 169 specifies that the rights of indigenous peoples to the natural resources on their lands must be safeguarded, and that they must have the right to participate in the 'use, management and conservation of these resources.'\textsuperscript{174} Indigenous peoples can only continue to live by their traditional values if they have control of the natural resources on their lands. The decisions of the organs of the Inter-American human rights system are reinforcing indigenous rights to their natural resources.

5. Freedom to Participate in Government

Indigenous peoples have the right, common to all people, to participate in government at every level of the State. The American Convention specifies that every citizen has the right to vote, to be elected, and to participate in public affairs, either directly or through a freely chosen representative.\textsuperscript{175} The State must guarantee these rights equally to all citizens.\textsuperscript{176}

In its only decision to focus on the political rights of indigenous peoples, in Yatama v Nicaragua the Inter-American Court held that Nicaragua violated the political rights of the indigenous and ethnic communities of the Atlantic Coast during the 2000 Nicaraguan municipal elections.\textsuperscript{177} The Nicaraguan

\textsuperscript{172} Yakye Axa Indigenous Community, ibid. at para. 135 [translation by the author].
\textsuperscript{173} Plan de Sánchez Massacre (Reparations), supra n. 51 at para. 85.
\textsuperscript{174} Article 15, Indigenous and Tribal Peoples Convention. Article 15(2) further provides that:

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, 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. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

\textsuperscript{175} Article 23(1)(a), American Convention.
\textsuperscript{176} Article 23(1), American Convention. Yatama, supra n. 13 at para. 195. Article 23(2), American Convention does allow the State to regulate political rights based on 'age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings'.
\textsuperscript{177} Yatama, supra n. 13 at para. 223.
Constitution recognises that 'the Communities of the Atlantic Coast have the right to maintain and develop their cultural identity within national unity; to have their own form of social organization and to manage their local affairs according to their traditions.' The Constitution further provides that the 'State guarantees these communities...the free election of their authorities and representatives.'

The indigenous and ethnic peoples of the Nicaraguan Atlantic Coast have a distinctive form of political organisation, which is referred to as communitarian democracy, and is typified in the YATAMA party. The stated purpose of the YATAMA party is to 'defend the historic rights of the indigenous peoples and ethnic communities over their traditional lands and to promote self-government. [...] emphasize the economic, social and cultural development of the Yapti Tasba, creating a communitarian democracy within the framework of democracy, peace, and the unity of the Nicaraguan state/nation.' Candidates for the YATAMA party are nominated through an open town meeting process that is rooted in the tradition of the peoples.

The YATAMA candidates were not allowed to participate in the 2000 Nicaraguan elections because YATAMA had not fielded candidates in 80 percent of the Nicaraguan municipal elections in accordance with a new national electoral law. YATAMA had neither the connections nor the funding to enter candidates in elections in non-indigenous areas, and, therefore, it was disqualified from entering candidates in any election, even in the areas where the party had structure and leadership. State law did not permit any appeal from the decision of the electoral commission, so representatives of the party took the case to the Inter-American human rights system.

The Inter-American Court held that the Nicaraguan electoral law constituted a disproportionate restriction that unduly limited the political candidates running on behalf of YATAMA. In this regard, the Court reasoned that the State's restrictions required a form of organisation that was foreign to the customs and traditions of the people. The Court stated that

[t]he restriction of participating through a political party imposes on the candidates proposed by YATAMA a form of organization foreign to

\[\text{Mayagna (Sumo) Awas Tingni Community, supra n. 15 at para. 117, quoting Article 89, Nicaraguan Constitution.}\]
\[\text{Ibid. at para. 118, quoting Article 180, Nicaraguan Constitution.}\]
\[\text{Yatama, supra n. 13 at para. 124(11). YATAMA stands for Yapti Tasba Nanih Aslatakanka which means 'the organization of the Peoples of the Mother Earth'. (Ibid. at para. 124(9)).}\]
\[\text{Ibid. at para. 124(11).}\]
\[\text{Ibid. at paras 124(13)–(16).}\]
\[\text{Ibid. at paras 124(24) and 221.}\]
\[\text{Ibid. at para. 222.}\]
\[\text{Ibid.}\]
\[\text{Ibid. at paras 173 and 176.}\]
\[\text{Ibid. at para. 223.}\]
\[\text{Ibid. at paras 218–9.}\]
its uses, customs and traditions, as a requirement to exercise the right of political participation, in contravention of the internal norms that obligate the State to respect the forms of organization of the communities of the Atlantic Coast, and negatively affected the electoral participation of those candidates in the municipal elections of 2000. The State has not justified that this restriction fulfills a useful and suitable purpose that is necessary to satisfy an imperative public interest. To the contrary, this restriction is an impediment to the full exercise of the right to be elected of the members of the indigenous and ethnic communities that make up YATAMA.\textsuperscript{189}

The Court also held that because of the close relationship between the right to be elected and the right to vote, the violation of the rights of the candidates who were not allowed to participate in the elections also violated the rights of the voters.\textsuperscript{190} According to the explanation of the Inter-American Court the closely-connected rights to be elected and to vote represent individual and social political participation.\textsuperscript{191} Therefore, the citizens' right to vote was violated when the State refused to authorise the YATAMA candidates to participate in the election because it limited voters' options.\textsuperscript{192} The Court reasoned that YATAMA 'contributes to establish and preserve the cultural identity of the members of the indigenous and ethnic communities of the Atlantic Coast. Its structure and goals are linked to the traditions, customs and forms of organization of these communities'.\textsuperscript{193} As a result, the Court held that the exclusion of their candidates put those who would have voted for them in a position of inequality. Indigenous voters could no longer vote for the persons they had chosen in their assemblies in accordance with their traditions and customs.\textsuperscript{194}

At the public hearing before the Inter-American Court, the Nicaraguan government recognised that its electoral law required reform.\textsuperscript{195} This statement was interpreted by the Inter-American Court as an admission that the law in question violated the American Convention's right to the political participation of the indigenous and ethnic peoples.\textsuperscript{196} The Court did not accept the government's excuse that it would be difficult to reform the law before the next election in 2006.\textsuperscript{197} Rather, the Court reminded the State that it

\begin{itemize}
\item \textsuperscript{189} Ibid. at para. 218. Article 6(b). ILO Convention 169 provides that Governments shall 'establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.'
\item \textsuperscript{190} Yatuma, supra n. 13 at para. 226.
\item \textsuperscript{191} Ibid. at para. 197.
\item \textsuperscript{192} Ibid. at para. 226.
\item \textsuperscript{193} Ibid. at para. 227.
\item \textsuperscript{194} Ibid.
\item \textsuperscript{195} Ibid. at paras 210 and 256.
\item \textsuperscript{196} Ibid. at para. 210.
\item \textsuperscript{197} Ibid. at para. 257.
\end{itemize}
Evolution of International Indigenous Rights

'cannot invoke the provisions of its internal law as justification for its failure to fulfil international obligations.'198

6. Freedom of Religion

In the jurisprudence of the Inter-American Court, the religious freedom of indigenous peoples has most often been addressed in cases involving limitations on their right to engage in their religious cultural burial customs. Everyone has the right to manifest his or her religious beliefs.199 This right includes the exercise of specific indigenous burial customs which often reflect the religious beliefs in the afterlife of the indigenous peoples. When States do not permit the people to observe their burial customs, the Inter-American Court has held that the peoples' religious rights have been violated.200

The Court honoured the religious and cultural values of the Mayan Indians of Guatemala in the Bámaca Velásquez and the Massacre of Plan de Sánchez cases. In those cases, the Court recognised that 'traditions, rites, and customs have an essential place in [Mayan] community life. Their spirituality is reflected in their close relationship between the living and the dead, and it is expressed by the practice of burial rights, as a permanent form of contact and solidarity with their ancestors.'201 In Bámaca Velásquez, the Court required that the Guatemalan government locate the body of the victim, an indigenous leader in the guerrilla forces of Guatemala; conduct an exhumation; and move his remains to the burial site chosen by his family.202 The Court stated that the funeral ceremonies for the Mam ethnic group of the Mayan culture ensure the possibility of the generations of the living, the deceased person, and the deceased ancestors meeting anew. Thus, the cycle between life and death closes with these funeral ceremonies, allowing them to express their respect for Efraín [the victim], have him near and return him or take him to live with the ancestors, as well as for the new generations to share and learn about his life, something that is traditional in his indigenous culture.203

The right of the Mayan Achí people to observe their religious death and burial rituals after the massacre of the village Plan de Sánchez in Guatemala was also

200 Plan de Sánchez Masacre v Guatemala (Merits) IACtHR Series C 105 (2004) at resolution 3; and Bámaca-Velásquez v Guatemala, supra n. 81 at paras 161 and 165.
201 Plan de Sánchez Masacre (Reparations), supra n. 51 at para. 85.
202 Bámaca-Velásquez v Guatemala (Reparations) IACtHR Series C 91 (2002) at para. 82. Bámaca-Velásquez had been disappeared by the Guatemalan military. (Ibid. at para. 29A.)
203 Ibid. at para. 81.
violated by the Guatemalan government. Mayan Achí death rites normally continue for nine days and are detailed and elaborate. Following the massacre in 1982, when most victims were buried quickly in mass graves, the survivors could not observe their religious customs. The Inter-American Court held that this violated the right to religion of the victims and the survivors. It was not until 1994 that the community could begin to bury the victims of the massacre in accordance with Mayan religious customs and beliefs. At the public hearing before the Inter-American Court, the Guatemalan government accepted international responsibility for its failure to guarantee to the victims' families and other members of the community 'the freedom to manifest their religious, spiritual, and cultural beliefs.'

7. Right to Life

The American Convention provides that 'every person has a right to have his life respected.' The Inter-American Court interpreted the right to life to have an additional dimension in the Yakye Axa case. In that case, the Court stated that essentially, the fundamental right to life is broader than freedom from the arbitrary deprivation of life. The Court specified that the right to life includes the right to live a 'vida digna' or a dignified existence. According to the Inter-American Court, the State, pursuant to its duty to guarantee life, has the obligation to generate living conditions that are at least 'minimally compatible with the dignity of the human person'. The State also has the duty 'not to induce conditions that impede life or make it difficult.' In this regard, the Court clarified that 'the State has the duty to adopt positive concrete measures oriented to satisfy the right to a "vida digna," especially when dealing with persons in a situation of vulnerability and risk', such as the Yakye Axa.

204 Plan de Sánchez Massacre (Merits), supra n. 200 at Resolution 3, holding that Guatemala had violated Articles 12(2) and 12(3), American Convention.
205 Plan de Sánchez Massacre (Reparations), supra n. 51 at para. 38(d) (testimony of expert witness Augusto Willemsen-Díaz, attorney and international expert on the subject of the rights of indigenous peoples).
206 Plan de Sánchez Massacre (Merits), supra n. 200 at para. 42(30).
207 Ibid. at para. 36(4). The State also accepted responsibility for violating the survivors' freedom of expression, since not only were the survivors prevented from manifesting their religious beliefs, but they were also prevented from denouncing or discussing the massacre for more than 10 years after it took place. (Ibid. at para. 87(e))
208 Article 4(1), American Convention.
210 Ibid. at para. 161 citing 'Instituto de Reeducacion del Menor' v Paraguay IACtHR Series C 112 (2004) at para. 156.
211 Yakye Axa Indigenous Community, ibid. at para. 162.
212 Ibid.
213 Ibid.
In the Yakye Axa case, the Inter-American Court held that Paraguay, by delaying the proceedings for the restitution of their ancestral lands, violated the rights of the Yakye Axa community members to live a dignified existence by worsening their living conditions. The community members had lived for more than eight years at the side of the road that led to the entrance to their ancestral lands, awaiting the domestic resolution of their petition for the restitution of their lands. The Court found that the people had lived in ‘conditions of extreme misery’ because of the precariousness of their temporary settlement and the related difficulties of obtaining food, clean water, adequate housing and healthcare. Thus, the State was held liable for the violation of the right to life of the Yakye Axa people for ‘not adopting measures in the face of the conditions that affected their possibility of having a dignified life.’ Considering the abject poverty and destitution in which many American indigenous peoples live as a result of the loss of their ancestral lands and systematic discrimination, States could be held liable for the violation of the right to a ‘vida digna’ in many indigenous land rights cases.

8. State’s Obligation to Provide Effective and Appropriate Remedies

Indigenous peoples have a right to an effective remedy for the violation of their human rights. The American Convention requires States to adopt measures that will give effect to the rights set forth in the American Convention. It also obligates States to suppress norms and practices that violate the Convention guarantees. Moreover, States have an obligation under the American Convention not only to pass laws that provide a remedy for the violation of human rights but also to ensure due application of that remedy by State authorities. In the Awas Tingni case against Nicaragua, the Inter-American Court found that remedies provided in the Nicaraguan Constitution and other laws were not, in fact, effective to protect the rights of the indigenous peoples to the enjoyment of their communal property. The Inter-American Court held that although Nicaraguan law recognised and protected indigenous communal property in Nicaragua, it did not set forth a legal procedure whereby indigenous people could have their

214 Ibid. at paras 168 and 176.
215 Ibid. at paras 50.8 and 164.
216 Ibid. at paras 164–8.
217 Ibid. at para 161.
218 Article 2, American Convention.
219 Baena Ricardo et al. v Panama IACtHR Series C 72 (2001); 10 IHRR 130 (2003) at para. 180, quoted in Mayagna (Sumo) Awas Tingni Community, supra n. 15 at para. 136.
220 Ibid. at para. 135.
221 Ibid. at para. 122.
222 Ibid.
communal lands demarcated and titled.\textsuperscript{223} Thus, the State had failed to provide a remedy to indigenous peoples to enable them to enforce their right to their communal lands. As reparations, the Court ordered Nicaragua to adopt the necessary legislative and administrative measures to effectively delimit, demarcate and title the property of the Awas Tingni people in accordance with their customary law, values, customs and mores.\textsuperscript{224}

A. Judicial Recourse

Under the American Convention, everyone has the right to an effective recourse before a competent tribunal for protection against the violation of human rights.\textsuperscript{225} Indigenous peoples, therefore, have the right to the timely judicial protection of their fundamental human rights, whether those rights are recognised by the State constitution or domestic laws or by the international treaties that have been ratified by the State. The Inter-American Court has interpreted the American Convention's rights to judicial protection and to due process to mandate ‘the obligation of the States, to offer, to all persons under their jurisdiction, [an] effective legal remedy against acts that violate their fundamental rights. It also establishes that the right protected therein applies not only to rights included in the Convention, but also to those recognized by the Constitution or the law [of the State].’\textsuperscript{226} The ILO Convention likewise provides that ‘the peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights.’\textsuperscript{227}

In the Yatama case, the Inter-American Court found that the candidates for YATAMA, the party of the indigenous and ethnic peoples of the Nicaraguan Atlantic Coast, were given no recourse against a ruling that barred them from participating in municipal elections.\textsuperscript{228} There was no ordinary or extraordinary judicial remedy provided by Nicaraguan law against decisions adopted by the Supreme Electoral Council.\textsuperscript{229} The Inter-American Court held that Nicaragua's law violated the American Convention obligation to provide judicial recourse.

\begin{itemize}
  \item \textsuperscript{223} Ibid. at paras 123–4.
  \item \textsuperscript{224} Ibid. at paras 138 and 164.
  \item \textsuperscript{225} Article 25(1), American Convention.
  \item \textsuperscript{226} Constitutional Court v Peru IACtHR Series C 71 (2001); 9 IHRR 1003 (2002) at para. 89; and OC-9/1987, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights) IACtHR Series A 9 (1987) at para. 23, cited in Mayagna (Sumo) Awas Tingni Community supra n. 15 at para. 111.
  \item \textsuperscript{227} Article 12, Indigenous and Tribal Peoples Convention.
  \item \textsuperscript{228} Yatama, supra n. 13 at para. 176.
  \item \textsuperscript{229} Ibid. at paras 171 and 173. A witness testified that the seven members of the Supreme Electoral Council were from the traditional electoral parties and none of them were indigenous. (Ibid. at para. 110(a).)
\end{itemize}
for human rights violations as some judicial control is indispensable when the powers of the Council were so broad as to favour certain political ends.\textsuperscript{230}

The formal existence of remedies is not sufficient if the remedies are not effective to protect rights.\textsuperscript{231} Even when applicable laws are in force, there may be a lack of political will on the part of State authorities to enforce those laws. When analysing a State's administrative process for the restitution of indigenous lands, the Inter-American Court first determines whether there is a formal remedy for indigenous peoples to request the restitution of their ancestral lands and, if such a remedy exists, the Court then analyses the effectiveness of the remedy.\textsuperscript{232} '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.'\textsuperscript{233}

**B. Effectiveness of Remedy Dependent on Timeliness**

The effectiveness of the remedies available to indigenous peoples for the violations of their rights and the compliance with due process constraints is partially determined by whether the remedy can be implemented in a reasonable time.\textsuperscript{234} The test applied by the Inter-American Court to determine whether the time period for a judicial remedy is reasonable in a particular case depends on three factors: (a) the complexity of the matter; (b) the activity engaged in by the interested party in processing the remedy; and (c) the conduct of the judicial authorities.\textsuperscript{235} In the \textit{Yakye Axa} case, the Inter-American Court determined that the procedures for recognising the indigenous leaders and the juridical personality of the Yakye Axa people were of minimal complexity and that, therefore, the delay of almost 6 years was unjustified.\textsuperscript{236} Moreover, restitution of the indigenous ancestral lands had not yet been made more than 11 years after the Community began to pursue the necessary actions.\textsuperscript{237} The Court determined that such a prolonged delay was itself, in principle, a violation of judicial guarantees.\textsuperscript{238}

Once a prolonged delay is shown, the burden then shifts to the State to prove that the delay bears a direct relationship to the complexity of the case or to the conduct of the parties.\textsuperscript{239} Although the Court in the \textit{Yakye Axa} case found that

\begin{itemize}
\item \textsuperscript{230} Ibid. at para. 175.
\item \textsuperscript{231} \textit{Mayagna (Sumo) Awas Tingni Community}, supra n. 15 at para. 114.
\item \textsuperscript{232} \textit{Yakye Axa Indigenous Community}, supra n. 12 at para. 65.
\item \textsuperscript{233} Ibid. at para. 61, quoting \textit{Mayagna (Sumo) Awas Tingni Community}, supra n. 15 at para. 113.
\item \textsuperscript{234} \textit{Yakye Axa Indigenous Community}, supra n. 12 at para. 65.
\item \textsuperscript{235} Ibid.
\item \textsuperscript{236} Ibid. at paras 67–73.
\item \textsuperscript{237} Ibid. at para. 85.
\item \textsuperscript{238} Ibid. at para. 86.
\item \textsuperscript{239} Ibid.
\end{itemize}
the overall proceeding was complex, it also found that the domestic delays were not a result of that complexity, but rather stemmed from the systematic delayed actions of State authorities. As a result, despite the complexity of the administrative procedures necessary to provide for the return of ancestral lands of the Yakye Axa people, the Court found that the actions of State authorities were not compatible with the principle of reasonable time and, therefore, violated the rights of the Yakye Axa to a judicial remedy.

The Court has also held that indigenous peoples' rights to a judicial remedy have been violated when their application to domestic courts for amparo, a Latin American emergency remedy for the violation of rights, is not decided expeditiously. The Court has stated that amparo is a 'simple, rapid, and effective mechanism' to protect rights. When there is an unjustified delay in deciding an action for amparo, the Inter-American Court holds that the remedy is ineffective and illusory. Nicaraguan domestic law specified that an action for amparo should be decided within 45 days. The Awas Tingni Community's second request for amparo was not decided for over 11 months. As a consequence, the Inter-American Court determined that the remedy was not decided within a reasonable time and was not, therefore, an effective remedy for the violation of the land rights suffered by the Community.

The State's obligation to provide victims of human rights violations with a timely remedy encompasses its duty to investigate the acts that resulted in the violations and to identify, bring to trial and punish the perpetrators and masterminds of the violations. Even 22 years after the massacre of the village of Plan de Sánchez, and 10 years after the findings of the Guatemalan Historical Clarification Commission listed the names of those responsible, the State had neither investigated the matter nor effectively punished the violators. Without punishment, impunity reigns and there is neither individual nor general deterrence. Following the massacre, the survivors were persecuted, threatened, and intimidated by State agents to keep them from denouncing the massacre and from participating in domestic and international proceedings. These acts violated the rights to due process and timely judicial recourse. The Inter-American Court held that the State, to guarantee due process, must provide all means necessary to protect victims from harassment and threats that are meant to obstruct human rights proceedings.

240 Ibid. at para. 88.
241 Ibid. at para. 89.
242 Mayagna (Surno) Awas Tingni Community, supra n. 15 at para. 131.
243 Ibid. at para. 134.
244 Ibid. at para. 131.
245 Ibid. at para. 133.
246 Ibid. at para. 137.
247 Plan de Sánchez Massacre (Merits), supra n. 200 at para. 98.
248 Ibid. at para. 95.
249 Ibid. at para. 94.
250 Ibid.
9. Immediate Protection to Prevent Imminent Danger: Interim Measures

International proceedings, which typically are not resolved for years, are inadequate in urgent circumstances to protect indigenous people from immediate irreparable harm. In that time, persons who are in imminent danger may be injured or killed, and communal indigenous lands may be stripped of natural resources or titled to another party.

The Inter-American Court and the Inter-American Commission have ordered States to take interim measures to protect the lives and physical integrity of indigenous people as well as to protect their lands and natural resources. The Convention authorises the Inter-American Court to adopt provisional measures 'in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons'. The Commission also issues requests to States to take precautionary measures to protect indigenous communities and their lands in 'serious and urgent cases'.

Interim measures are termed 'precautionary measures' when adopted by the Commission and 'provisional measures' when ordered by the Inter-American Court. The over-riding importance of interim measures in human rights cases arises from their potential to end an abusive situation rather than to compensate the victim or the victim's family after-the-fact.

In several instances, the Commission and the Court have issued interim measures to States to protect indigenous rights. The Court ordered Guatemala to protect the lives and physical integrity of witnesses in the Massacre of Plan de Sánchez case after some petitioners and witnesses were harassed and threatened. In the Kankuamo Indigenous People case, both the Inter-American Commission and the Court issued interim measures in an attempt to secure protection for 6,000 community members living on the Kankuamo Indigenous Reserve in Colombia. Due to the geographic location of their land, the members of the group were exposed to violence and threats from armed groups and paramilitaries sometimes affiliated with the

251 Article 63(2), American Convention. The American Convention authorises the Commission in 'cases of extreme gravity and urgency' to circumvent its time-consuming procedures and immediately request that the Inter-American Court of Human Rights adopt provisional measures.

252 Article 25, Rules of Procedure of the Inter-American Commission of Human Rights, in Basic Documents at 150. Although neither the American Convention nor the Statute of the Inter-American Commission authorises the Commission to request that a State adopt precautionary measures, the Court holds that there is a presumption that Court-ordered provisional measures are necessary when the Commission has previously ordered precautionary measures on its own authority that were not effective and another threatening event has subsequently occurred. Digna Ochoa y Plácido et al. v Mexico (Provisional Measures) IACtHR Series E (1999) at para. 6.

253 Plan de Sánchez Massacre (Reparations), supra n. 51 at paras 23–5.

More than 144 members of the Kankuamo Indigenous Peoples had been killed in a 10-year period, and fear had driven many people from their land. The State has an obligation to protect people within its jurisdiction not only from State authorities but also from third parties, including armed irregular groups. The Court, therefore, ordered Colombia to immediately adopt the measures necessary to protect the lives and physical integrity of the Kankuamo indigenous people and to permit those who had been displaced from their lands to return.

When third parties attempt to exploit natural resources on indigenous ancestral lands against the wishes of the people, the resulting violence may necessitate special measures to protect the community. In the Indigenous People of Sarayaku case, in which the Court ordered the government of Ecuador to take provisional measures to protect the Sarayaku People and their lands, the aggressors were employees of an Argentine petroleum company. The State of Ecuador had granted the Argentine Company a contract to explore and exploit petroleum in a region of the country that included the ancestral lands titled to the Sarayaku. The Sarayaku objected to the oil exploration on their land. The petroleum company, with the assistance of State officials, threatened, beat, robbed and tortured members of the Community and even their attorney. Passage by river, the only principal route by which the Sarayaku People could reach its territory, was intentionally blocked with fallen trees, and the petrol company planted landmines in the Sarayaku hunting area which kept the people from hunting for their food. Explosive detonations had destroyed their forests, springs, caves and sacred sites.

The Commission issued precautionary measures in the Maya Indigenous Communities case, requesting that Belize 'take appropriate measures to suspend all permits, licenses, and concessions for logging, oil exploration and other natural resource development activity on lands used and occupied by the Maya communities in the Toledo District until the Commission had the opportunity to investigate the substantive claims raised in the case.' Likewise, in 2004
the Commission requested that the Brazilian government take measures to protect the indigenous peoples in a certain area of Brazil after a group armed with chainsaws and tractors attacked indigenous communities, killing one person, disappearing another and destroying 34 homes, the school and the health clinic.\(^{265}\) The publicity resulting from the measures may have been partly influential in encouraging the government to demarcate the traditional lands of the indigenous peoples in the area, an act which was expected to end the violence perpetrated by ranching and other economic interests against the indigenous people.\(^{266}\)

In the *Dann Sisters* case, the petitioners requested that the Commission issue precautionary measures.\(^{267}\) Although the Dann sisters' petition was already under consideration by the Inter-American Commission, the US government had issued orders and decisions which would have negatively affected their rights and property before the Commission could issue its report.\(^{268}\) The US Bureau of Land Management had published a notice stating that it would impound all livestock grazing on lands which the Western Shoshone peoples claimed as their ancestral lands.\(^{269}\) Moreover, the US government accused the Dann sisters and the Shoshone of trespass on the lands and ordered them to pay a large fine for unauthorised grazing.\(^{270}\)

At that point, the Commission issued precautionary measures ordering the US government 'to stay its intention to impound the Dann's livestock until the Commission had an opportunity to fully investigate the claims raised in the petition'.\(^{271}\) The US did not comply with the Commission's request for precautionary measures. Rather, the US Bureau of Land Management and 40 armed federal agents seized 225 head of the Danns' cattle from their ancestral lands and sold them to the highest bidder. Subsequently, the petitioners requested an amplification of the precautionary measures, notifying the Commission that two bills that had been introduced before the US Congress could cause irreparable harm to their 'ability to survive culturally, physically and economically and to their ability to pursue the very claim set forth in


\(\text{267}\) *Mary and Carrie Dann*, supra n. 4 at paras 14, 16 and 23.

\(\text{268}\) Ibid. at paras 14–25.

\(\text{269}\) Ibid. at para. 14. The Western Shoshone had grazed their cattle on that land for generations. (Ibid.)

\(\text{270}\) Ibid. at para. 18.

\(\text{271}\) Ibid. at para. 22. Likewise, the United Nations Committee for the Elimination of Racial Discrimination (CERD) issued a decision to the United States under its Early Warning and Urgent Action Procedure urging the United States to adopt specific measures to freeze, stop and desist from acts that interfered with Western Shoshone land rights. See CERD, Early Warning and Urgent Action, Decision 1(68), United States of America, 7 March 2006, CERD/C/USA/DEC/1.
their submissions to the Commission.\(^\text{272}\) One bill authorised the US government to auction lands claimed by the Shoshone to private interests, and the other authorised the per capita distribution of the funds awarded but never accepted by the Shoshone for the extinguishment of rights to their ancestral lands.\(^\text{273}\)

Although a State may not always take the interim measures requested, an international body’s request to the State and the facts supporting that request bring public attention to bear on the situation. The publicity generated by an international call for interim measures may encourage the State to take more appropriate action, even if it does not explicitly comply with the measure ordered.

10. Reparations for Violations of Indigenous Rights

When the Inter-American Court holds that a State has violated the American Convention or when the State voluntarily accepts international responsibility for a violation, the State must make reparations to the injured party.\(^\text{274}\) Financial compensation to the victims or their next-of-kin is the most common form of reparations in all human rights cases. State recognition of international responsibility for the violation of indigenous rights and an apology to the victims is another form of reparation. State acknowledgment of wrongdoing often replaces a denial and cover-up of the violations that, in some instances, attempted to cast the blame on the victims themselves.\(^\text{275}\) In the Massacre of Plan de Sanchez case, the President of Guatemala recognised the State’s responsibility for the massacre of the Mayan village.\(^\text{276}\) Moreover, in the public hearing before the Court, Guatemala expressed ‘its profound condolences for the acts lived and suffered by the community of Plan de Sánchez on 18 July 1982, for which in the name of the State it ask[ed] the pardon of the victims, the survivors, and the family members, as a first sign of respect, reparation and the guarantee of non-repetition’.\(^\text{277}\) The Court may require as reparations that the State

\(^{272}\) Mary and Carrie Dann, ibid. at para. 23.

\(^{273}\) Ibid. As reported in July 2004, President George W Bush signed HR884/PL 108–270 into law which distributes 15 cents per acre to the Western Shoshone Nation for the extinguishment of their ancestral lands. According to the article, ‘the land is marked for gold extraction, nuclear testing and to expand Yucca Mountain for a nuclear waste repository’ See Hunter, ‘Dann Sisters Hold Firm as Western Shoshone HR884 Turns Public Law 108–270’, available at: http://www.thinkandask.com/news/shoshone.html.

\(^{274}\) Article 63(1), American Convention.

\(^{275}\) See Bámaca-Velásquez, supra n. 81 at para. 93(a). “Military intelligence” has used slander as a strategy to obstruct the exercise of justice, by diminishing the credibility of the victims of human rights violations and intimidating those in charge of the criminal prosecution’ (expert testimony of Helen Mack). See also Plan de Sánchez Massacre (Reparations), supra n. 51 at para. 49(15), stating that the survivors of the massacre were stigmatised as being guerrillas and were, thus, blamed for it, which forced them to remain silent about what had happened. (Ibid. at para. 87(c)).

\(^{276}\) Plan de Sánchez Massacre, supra n. 200 at para. 34.

\(^{277}\) Ibid. at para. 38.
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acknowledge its responsibility domestically by undertaking acts that publicise its responsibility for the human rights violations. For instance, the Court ordered Guatemala to hold a ceremony in Plan de Sánchez to publicly honour the memory of the persons executed in the massacre.278 In accordance with the Court's reparations decision, the Guatemalan government held the public ceremony in February 2006, over 23 years after the massacre.279 It brought in clowns, jugglers and at least 40 government staff members to commemorate the first of three payments that was made to the survivors as ordered by the Inter-American Court.280

Reparations in cases that involve violations of indigenous rights should include more than official recognition and financial compensation to individuals. The Inter-American Court also generally orders the State to make reparations to the community by requiring that the State improve its social investments in the indigenous communities affected by the violations. Many indigenous villages lack basic infrastructure such as health clinics, schools, roads and utilities. The reparations ordered by the Inter-American Court often reflect ILO Convention 169, which provides that '[t]he improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit'.281

The Inter-American Court ordered Guatemala to make reparations to the 'members of the community together' as well as to the individual victims in the Massacre of Plan de Sánchez case.282 The reparations to the community required the State to contribute to the maintenance and improvement of the chapel where people pay tribute to the victims of the massacre, to provide a health centre, trained health personnel and potable water.283 In the Aloeboetoe case, the Court ordered Suriname to re-open and staff the school and to make the medical dispensary operational.284 Likewise, as reparations for immaterial damages in the Awas Tingni case, the Court ordered Nicaragua to invest $50,000 in 'works or services of collective interest for the benefit of the Community.'285 The decision as to which works and services the State would improve was to be made by an agreement between the Community and the State.286

278 Ibid. at para. 125, resolutions 2 and 3. The Court also ordered the State to translate the American Convention, and the two Inter-American Court judgments into the Maya Achí language. The Court also obligated the State to publish relevant sections of its judgment on the merits in both Spanish and Maya Achí. (Ibid. at para. 125, resolutions 4 and 5.)
280 Ibid.
281 Article 7(2), Indigenous and Tribal Peoples Convention.
282 Plan de Sánchez Massacre (Reparations), supra n. 51 at para. 86.
283 Ibid. at Resolutions 6–9.
284 Aloeboetoe et al. (Reparations), supra n. 43 at Resolution 4.
285 Mayagna (Sumo) Awas Tingni Community supra n. 15 at para. 6.
286 Ibid.
Despite the value of monetary compensation to victims and communities, financial reparations, even accompanied by the State's acknowledgment of responsibility and public ceremonies, are not sufficient to repair the consequences of human rights violations. The Inter-American Court has held that the victims and the families of victims have a right to know the truth of what happened.\textsuperscript{287} Therefore, as a form of reparations, States have an obligation to investigate the violations and prosecute and punish those responsible. Impunity, the failure to punish the perpetrators of violence against indigenous peoples, often results in future violence.

11. Conclusions

The jurisprudence of the Inter-American Court and the decisions of the Inter-American Commission are at the forefront of the progressive development of international indigenous rights. When there are no domestic laws that recognise indigenous rights, or such laws have been promulgated but political will does not exist to enforce them, indigenous peoples in the Americas rely on the Inter-American human rights system for the recognition of their rights and the redress of human rights violations.

The Inter-American Court's jurisprudence in indigenous rights provides a juridical imprimatur to many of the rights claimed by indigenous peoples and recognised by the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, the draft American and UN declarations on indigenous rights and the constitutions of certain American States such as Paraguay and Nicaragua. The Court recognises the vulnerability of indigenous peoples, holding that the non-discrimination clause of the American Convention does not bar all discrimination in treatment, especially when it is necessary to 'attain justice for those who are in a weak legal position' such as indigenous peoples. The Court and Commission recognise and protect the cultural differences that distinguish indigenous peoples from the dominant culture in most States. In doing so, the Court required that a Nicaraguan electoral law be revised because it constituted a disproportionate restriction that was foreign to the customs and traditions of the indigenous and ethnic peoples.\textsuperscript{288} The Commission and Court supported the religious burial customs of indigenous groups, ruling that Guatemala violated their right to religion when the State did not allow the Mayan people to bury their dead according to their custom. The Court also emphasised the need of indigenous peoples for recognition of their juridical personality to enforce their collective rights, and the need for the restitution or protection of their

\textsuperscript{287} Plan de Sánchez Massacre (Merits), supra n. 200 at paras 96–7.
\textsuperscript{288} Yatama, supra n. 13 at paras 218–9.
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communal ancestral lands for the continuing spiritual, cultural and economic survival of the peoples.

The Inter-American jurisprudence and decisions involving indigenous communal ancestral land rights have recognised that indigenous peoples' distinct spiritual relationship with their ancestral lands must be protected. In this regard, the Inter-American Court held that the American Convention's right to property includes the right to the collective ownership of property. The Court has ordered States to return land to the indigenous communities and to title and demarcate that land. When there is a conflict between private and collective land rights, the Court has held that, although the State must decide on a case-by-case basis, it could be necessary to restrict the right to individuals' private ownership of property to preserve the cultural identity of a democratic and pluralistic society. Moreover, the Court recognises that while indigenous people are deprived of their land, the effects of the violation of their right to property exist in the present giving the Court jurisdiction ratione temporis to consider the continuing violation to their right to property.

The decisions rendered by the organs of the Inter-American system will have an impact on the lives of indigenous peoples, however, only when States adopt and enforce domestic laws and measures that comply with the decisions and principles elucidated by the Inter-American Court and Commission. Nonetheless, the Court's jurisprudence lends strong support to the efforts of indigenous rights advocates to encourage or force States to recognise and enforce the rights of indigenous peoples to maintain their communal lands, their culture and their traditions.

Addendum

After this article was completed and in production, the Inter-American Court released another important international indigenous law decision, *Sawjoyamaxa Indigenous Community v Paraguay* IACtHR Series C 146 (2006), in which the Court clarified its jurisprudence on indigenous land rights and added a temporal condition to the right of indigenous peoples to claim their ancestral lands (paras 116–34). The facts in *Sawjoyamaxa* are similar to the facts in *Yakye Axa v Paraguay*. A small community of indigenous peoples had petitioned the Paraguayan government for the restitution of their lands (para. 2). The government had delayed a decision for several years, resulting in the indigenous peoples filing a complaint in the Inter-American system. In response to the petition before the Inter-American system, the government complained that it was being 'condemned for sins committed during the Conquest' and that granting petitions

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289 *Yakye Axa Indigenous Community*, supra n. 12 at para. 148.
for the restitution of indigenous ancestral lands could result in the 'absurdity that the whole country could be returned to the indigenous peoples, since they were the first inhabitants of the territory that is now Paraguay' (para. 125). The Inter-American Court reviewed its jurisprudence stating that

(1) [t]raditional possession by indigenous of their lands has the equivalent effect of full title granted by the State; (2) traditional possession gives the indigenous the right to demand the official recognition of their land and its registration; (3) the members of indigenous peoples that for reasons outside their will have left or lost possession of their traditional lands maintain their right to the property, even when they do not have legal title, except when the lands have been legitimately transferred in good faith to third persons; and (4) members of indigenous peoples that involuntarily lost possession of their lands which have been legitimately transferred to innocent third parties, have the right to recover them or to obtain other lands of equal size and quality. (para. 128.)

The Court also explained that there is a temporal limitation to the right of indigenous peoples to regain their lands (paras 131–3). Accordingly, indigenous peoples' right to restitution remains in force only so long as the people retain a spiritual and material relationship with their ancestral lands (para. 131). The necessary relationship can include 'traditional spiritual or ceremonial use or presence; settlements or sporadic cultivation; seasonal or nomadic hunting, fishing or gathering; the use of natural resources connected to their customs; and any other factor characteristic of their culture' (para. 131). If, however, the indigenous peoples are kept from the land by threats or violence, their right to restitution continues until these impediments disappear (para. 132). The Inter-American Court held that the Sawhoyamaxa Community retained a relationship with the land and that their right to reclaim it had not lapsed (para. 134).

Once it has been determined that the indigenous rights to their ancestral lands has not lapsed, the Inter-American Court will leave it to the State to determine whether the indigenous land rights are superior to the titles of the current good faith owners of the land (para. 136). If the State finds it to be impossible to return the lands to the indigenous people, for objective and fundamental reasons, the State must give them alternative lands of 'equal size and quality' that are chosen with the agreement of the peoples involved (para. 135). The Court clarified that 'the mere fact that the reclaimed lands are in private hands does not constitute a sufficient 'objective and fundamental' reason to refuse prima facie indigenous petitions (para. 138). Likewise, the argument that the lands are being productively used was not sufficient (para. 139). Therefore, when conflicts exist between indigenous communal rights and current private rights to the land, the State must evaluate the claims on a case-by-case basis using the analysis set forth by the Court in *Yakye Axa v Paraguay* (para. 138).