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#### ABSTRACT

This paper reviews the primary advances in the Inter-American System of Human Rights in recent years in regard to the rights of indigenous populations. From a critical point of view, it sets out to decipher the most important jurisprudence and juridical grounds on which the Inter-American Court has based its latest decisions on territorial, economic, social and cultural rights of indigenous populations, as well as indigenous political rights and reparations for violations of their human rights. (Original in Spanish.)

#### KEYWORDS

The Inter-American System of Human Rights – Indigenous rights – Indigenous territory – Economic, social and cultural rights – Political rights – Reparations.



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# RECENT ADVANCES IN THE JUSTICIABILITY OF INDIGENOUS RIGHTS IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

Mario Melo

## Introduction

Although indigenous rights have been a fundamental matter of interest to the Inter-American System of Human Rights since its creation<sup>1</sup>, between the years 2001 and 2005 the Inter-American Court of Human Rights (from here on referred to as “the Court” or “the Inter-American Court”) resolved several cases that envelop such rights, and the Court has developed lines of jurisprudence that imply significant advances in many ways.

Undoubtedly, the *Awas Tingni*<sup>2</sup> case is a model for new approaches on the part of international justice in the treatment of rights that titulary correspond, collectively, to indigenous communities in virtue of their ethnic and cultural particularities in relation to society as a whole. Judicial decisions in cases such as *Plan de Sánchez*,<sup>3</sup> *Moiwana*,<sup>4</sup> *Yakye Axa*<sup>5</sup> and *Yatama*<sup>6</sup> have permitted the Court to strengthen its analysis and make advances in applications on the various rights tied to territory, ethnic identity and political participation.

Beginning with an analysis of these decisions, it is possible to reflect on the importance of the Inter-American System of Human Rights in the development of rights in the region; on the limits and potentialities in the required demands of economic, social and cultural rights; and on ethnic and cultural dimensions in the reparations for violations to the human rights of indigenous populations.

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*See the notes to this text as from page 47.*

## **The changing interpretations of human rights**

A careful reading of the American Convention of Human Rights (from here on: “American Convention”) leaves one with an impression that the restricted circumference and capacity of the catalogue of rights to which it is dedicated is not enough to protect indigenous populations, who have a special significance on the American continent, in accord with requirements imposed by particularities in the ethnic and cultural features they present. Neither has the Inter-American System, until now, put in place international instruments containing specific references on the rights of indigenous peoples.<sup>7</sup>

However, the problematical issues of indigenous Americans, historically submitted to secular processes of domination, exploitation and discrimination, are still pressing. In recent decades, the world has been witness to grave situations in various regions of America, in which, either by direct actions of the State, or by omissions on the part of governors in meeting obligations; indigenous populations have lost their lives, their integrity, their identity, their land – their means of sustenance and cultural reproduction.

In confronting these situations, the Inter-American Commission and the Inter-American Court of Human Rights have been required to act in several circumstances in recent years. As their fundamental mandate is to learn about and resolve violations to the rights set apart in the American Convention (article 33 of the Convention), they have appropriately resorted to the characteristic of progressivity<sup>8</sup> in those human rights that, through intervention by jurisprudence, are endowed by the American Convention with the necessary sense and scope to provide special protection to this important segment of the American population.

To achieve this goal, the Court developed a method of interpretation for instruments of human rights based on three criteria:

1. Polysemy of juridical terms:

The juridical terms employed in the wording of an instrument of human rights have “autonomous” meaning, sense and scope that is not comparable to those that are expressed in internal law.

2. The instruments of human rights are living instruments:

As such, they should be interpreted in a manner that is not rigid or static but in harmony with the evolution of life conditions.<sup>9</sup>

3. The integration of *corpus juris* of the international law on human rights:<sup>10</sup>

It is useful and appropriate to use other international treaties on human rights, different than those of the American Convention<sup>11</sup> to consider the matter being examined within the measure of the evolution of human rights in international law.

The juridical foundation of the Court to establish the first two criteria mentioned in the interpretation of the American Convention are, in the opinion of Judge García Ramírez,<sup>12</sup> in the principle contained in article 31.1 of the Vienna Convention on the Rights of Treaties that obligate the interpretation of a treaty to “good faith in accordance with current meanings to be ascribed to the terms of the treaty in the context therein and taking into account its object and purpose.” Also, in the opinion of García Ramírez, in the *pro homine* rule (in respect of men), inherent in the international law of human rights – frequently invoked in the jurisprudence of the Court – which conveys a greater and better protection of the people, with the ultimate purpose to preserve the dignity, to secure fundamental rights and to encourage the development of all human beings.”<sup>13</sup>

Regarding the third criterion that has been identified, its legal foundation is the third item carved into article 31 of the Vienna Convention on the Law of Treaties, which obligates the interpretation of treaties in accordance with the system to which they are inscribed,<sup>14</sup> and to the proper rules of interpretation as established in article 29 of the American Convention.

*Article 29. Rules of Interpretation*

*No provision of this Convention shall be interpreted to:*

*a. permit any of the States party to this accord, or any group or person to suppress the enjoyment or exercise of the rights and liberties recognized by this Convention, or to limit them to a greater extent than is provided for herein;*

*b. restrict enjoyment or exercise of any right or liberty recognized by virtue of the laws of any of the States party to either this accord or any other convention to which one of the declared states is a party;*

*c. exclude other rights or guarantees that are inherent to all humans or derived from a democratic form representative of government; and*

*d. exclude or limit the effects produced by the American Declaration on the Rights and Obligations of Men and other international acts of the same nature.*

*(American Convention)*

## The right to private property and its evolutive interpretation

With this method of interpretation, the Court has been able to develop the sense and scope of the right to private property, consecrated in article 21 of the American Convention, in such a way that permits it to embrace dimensions such as collective property, territoriality, hereditariness and inviolability, which are inseparable when taking into account the ample guarantees of this right in the context of indigenous peoples.<sup>15</sup>

The Court order from a strict legal sense:

*Article 21. The right to private property*

*1. Every person has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment in the interest of society.*

*2. No one shall be deprived of his property, except by virtue of fair compensation, and for the reasons of social interest or public use, and in these cases, according to methods established by law.*

*3. Profit in any amount as well as any other form of exploitation of one man by another is to be prohibited by law.*

*(American Convention)*

The mere act of reading the wording of this article, leaves no doubt that the American Convention protects the rights to private property in much the same way it is conceived by classical civil law. The first item of the article says that “everyone” (meaning “every” natural or legal person, individually considered) has the right to the use and enjoyment of his property” (that is to say, has the privilege to exercise authority over the property he or she owns).

But the sense and scope stipulated through civil law on private property rights are not sufficient to contain the much wider aggregate of realities that must be seen by the international law on human rights. The Inter-American Court has had to understand that the right to private property, in the international law on human rights, has a significance distinct from the one considered by civil law. Beginning with that comprehension, it has interpreted article 21 of the American Convention with a sense and scope that accords with the emerging realities it has had to confront.

In the sphere of Indigenous Rights with which we are now occupied, and in accord with a non-restrictive interpretation of rules that are stated in article 29 of the American Convention, the Inter-American Court on Human Rights considers that:

*[...] article 21 of the Convention protects property in a sense that comprehends, among others, rights to members of indigenous communities within a framework of commonality of possession[...] (item 148 of the Awas Tigni Case Decision)*

The Court has surpassed the individualistic view seen in classical civil law on private property and is able to contain article 21 of the American Convention, the collective dimension of indigenous communal property. To illustrate the new content and scope of article 21, the Court has recourse to the authority of ILO Covenant 169 on the right of indigenous communities to communal property.<sup>16</sup>

The Court understands that the obligation of the State to guarantee the right of every person to the “use and enjoyment of his property” (American Convention, article 21.1) includes the duty to complete surveys and to recognize property rights of indigenous communities and, until such demarcation is performed, should refrain from actions that could affect “the use and enjoyment of the property located in the geographical area where the members of the Community live and realize their activities” (Paragraph 153. Awas Tigni Case Decision).

### **Restrictions to indigenous territorial rights**

The decision in the Yakye Axa case addresses the complicated subject of the conflicts between the special private property rights and those of indigenous property held in common. Because both rights come under the protection of the American Convention, the conflict is always resolved with a restriction of the rights of one of them. The Court sets “the guidelines that define the admissible restrictions to the enjoyment and exercise of these rights: a) they must be established by law; b) they must be necessary; c) they must be proportional, and d) they must have as their objective a legitimate goal of a democratic society.”<sup>17</sup>

However, the Court advises that whenever these guidelines are applied, the States must take into account that indigenous territorial rights are of a different nature, as they are intimately related to the survival of indigenous peoples and their members, their identity, their cultural reproduction, their development possibilities and fulfillment of their life plans.<sup>18</sup>

And the restriction to the right of private property in particular favors indigenous communal property, “to be necessary in attaining the collective goal of preservation of cultural identities in a democratic and pluralistic society, in the sense of the American Convention.”<sup>19</sup>

However, the Court clarifies that conflicts between particular “territorial

interests” and those of the state facing indigenous communities are not always resolved in favor of the latter. If the States are unable to avoid restraint of indigenous territorial rights “for specific and justifiable reasons,” compensation granted to the prejudiced party must be oriented principally by the profound significance the land has to indigenous peoples.<sup>20</sup>

### **Territorial, economic, social and cultural rights**

The most important development regarding Indigenous rights that the Inter-American Court has achieved so far has been through the evolutive interpretation of Article 21 of the Convention, which incorporated in the right to private property the indigenous concept of possession.

By so doing, as has been said, it defeats the civilian conception that regards property as an eminently individual right; in order to grant it a new capacity, more in accord with the circumference of human rights, that is to say, a valid style of life that includes diversity and is worthy of a guarantee of protection. Thus, in the decision of the *Awas Tingni* Case, it acknowledges “among the indigenous peoples exists a communitarian tradition in the commonality form of collective ownership of the land, in the sense that the ownership of the land is not centered in the individual but in the group and its community<sup>21</sup>,” and assumes that this form of property also requires its guardianship.

The Court takes a further step and defines the strict relationship between indigenous communities and their traditional territories, including the natural resources found there, and that any immaterial elements contained in them are also protected by article 21 of the American Convention.<sup>22</sup> In effect, it makes an evolutive interpretation of the term “property” as used in the aforementioned article, and explains that it encompasses “corporeal and incorporeal elements and any other immaterial object susceptible to having some value”.<sup>23</sup>

Therefore, article 21 of the American Convention guarantees the enjoyment of immaterial benefits, such as “the special relationship” which the indigenous peoples have with their territories; it does not merely refer to possession or advantages of use, but to the fact that it is “a material and spiritual element they must enjoy completely, inclusive of the preservation of their cultural legacy and its transmission to future generations”.<sup>24</sup>

A relationship of such importance must be “acknowledged and understood to be a fundamental basis of their culture; spiritual life; integrity; their economic survival, and for the preservation and transmission of their culture to their future generations.”

The lack of an effective guarantee on the part of the States for the right of indigenous peoples to have access, to use and completely enjoy their ancestral territories and any natural resources existing therein, endangers the possibility of their leading a dignified life, as it affects their access to their traditional life and foods, clean water and their traditional medicine, as indicated by the Court in its resolution of the Yakye Axa Community case; as, since 1999, deprived of access to their traditional territories, they were made to assume conditions of life that are incompatible with human dignity.<sup>25</sup>

Therefore, the Court understands that to effectively safeguard the communal property of indigenous peoples over their territories and the natural resources found on them, also implies the guarantee of a material and spiritual base on which they can rely for their sustenance, their quality of life, their life plan, their cultural identity and their perspectives for development, with a focus on intergenerational equity. Summarizing, the guarantee to indigenous peoples of their territory is the guarantee for their economic, social and cultural rights (from here on referred to as ESCR).<sup>26</sup>

The Inter-American Court resolved the Awas Tingni Case by declaring that the Nicaraguan State had violated article 21 of the American Convention. The Court ordered that they complete delimitation and demarcation and grant official recognition of title on the lands that had been occupied by the community since ancestral times; the use and enjoyment of which had been disturbed by a concession the State had made over the indigenous lands that had never been duly titled in their favor; the State has now been ordered to do so.

The Court also resolved the case of the Yakye Axa Community by declaring that the Paraguayan State had violated the right to the property consecrated in article 21 of the American Convention, and the right to life of the community when it permitted its displacement and impeded the return and access to the resources of its ancestral land in favor of alleged private new owners, and ordered the State to identify and freely return their ancestral lands to the indigenous Community.

In both cases, the Inter-American Court decided upon ESCR and realized the practice of justiciability on these rights.

### **The Yatama case and the political rights of indigenous peoples**

In June 2005, the Inter-American Court passed judgment in the Case of Yatama vs. Nicaragua, taking up the problematical issue of the practice of political rights guaranteed by the American convention as well as by the



Nicaraguan Constitution on the part of members of the indigenous communities.

In that decision, the Court redefined the sense and scope of the political rights guaranteed in article 23 of the American Convention, in agreement with the rights of equality and non-discrimination protected by article 24, by using the criteria established in items a) and b) of article 29 of the American Convention.

Yatama, the political party of members of the indigenous and ethnic communities of the Nicaraguan Atlantic Coast, were impeded from participating in the 2000 municipal elections by the vote-managing organisms in Nicaragua, basing their ban on the supposed non-fulfillment of the requisites of the internal electoral legislation.

The Court declared: “The State violated political rights and the right to equality before the Law, as granted in articles 23 and 24 of the American Convention on Human Rights, in relation to Convention articles 1.1 and 2; prejudicing candidates proposed by YATAMA[...].”

In its analysis, the Court understood that the obligation of the State to guarantee political rights implied that regulations for its exercise and application be carried out according to the principles of equality and non-discrimination.<sup>27</sup> In the case of people who belong to indigenous or ethnic communities, the regulation must also take into account specifications such as their languages, customs and forms of organization, which may be different from the majority of the population.

The Court included in its consideration that the Nicaraguan election laws allow participation in electoral processes only through political parties, imposing upon natives a way of organization that is culturally alien to them, thus violated the internal regulations of Nicaragua, which compel the State to respect the indigenous ways of organization. The requirement for taking part in elections only through a political party was, to the indigenous people, an illegitimate restriction in the exercise of their political rights.

In the same way, all the other requisites for participation in electoral processes, imposed on citizens in general without considering specific conditions, and without considering the specific conditions of the members of indigenous and ethnic communities, who, in order to fulfill these requisites, are placed at a disadvantage compared to other candidates. Thus, for example, the requisite imposed by the Nicaraguan electoral law on political parties to present candidates in 80% of the municipalities in which the electoral process will take place, implied that the indigenous Yatama party had to participate in the elections of non-indigenous municipalities. As such, the requisite could not be complied with, as in purely indigenous communities it constituted an obstacle to its own fulfillment.

## The Court Decision

*225. The Court considers that the State must adopt all necessary measures to guarantee to the members of the ethnic and indigenous communities of the Atlantic Nicaraguan Coast their participation, under conditions of equality, in all decision-making on the affairs and policies that fall within or might fall within their rights, or in the development of said communities, in such a way that they are integrated in the institutions and organs of the government; and have direct participation in proportion to their population in the management of public affairs; in the same manner as if doing so from their own institutions and in accordance with their values, employment, customs and methods of organization, and always in a form that is compatible with those human rights the Convention is dedicated to.*

This decision constitutes an important precedent for analogous situations in which there is a full exercise of rights by members of indigenous and ethnic communities, as it implies that no conditions or requisites can be imposed on them that ignore their cultural peculiarities.

## Reparation

As a consequence of the evolutive interpretation of Article 21 of the American Convention, which begins with a resolution in which the Inter-American Court addresses the particular dimension that the indigenous people have toward the ownership of land and property, the aforesaid Tribunal has slowly had to accept that violations committed in prejudice to the human rights of indigenous populations provoke different effects than those that can be seen in non-indigenous victims, and therefore, reparations should include measures that repair any damages, as far as possible, to the ethnic identity of the victims as well as to the self-esteem of their communities.

In the *Awas Tingni Case*, the reparations ordered by the Court concentrated on the issues of delimitation, demarcation and the providing of official titles for indigenous lands, and ordered that the State take the necessary measures to create an effective mechanism that would incorporate the customary rights, uses, values and customs of the indigenous communities; and ordering that logically, in this case, they proceed to realize these activities in relation to the territory of the *Awas Tingni*<sup>28</sup> Community, and that, moreover, they indemnify this community, in ready cash, for the prejudices caused by the State for not having acted earlier.<sup>29</sup>

Even though these measures attacked the fundamental problem of an

absence of lawful assurances for the use and enjoyment of the property and territory of the indigenous community, we think that they fell short in repairing the damages to their quality of life, spirituality, identity and the life plan of the community. These damages had been provoked by the disquietude the community suffered to the special relationship they customarily have to their territory, which obligated legal security for their property via delimitation, demarcation, and legal title to their lands.

The Court, as has been said, reached an important development at a fundamental moment of transcendence, beyond the pecuniary, that exists between indigenous peoples and their territory, but at the moment of repairing the effects from not having a guarantee of this relationship, it failed precisely in the pecuniary, fixing a monetary indemnification without a complement of any measure of satisfaction or ethnic reaffirmation.

In the decision of the Yakye Axa Case, the Court has made some advances in this type of reparation. Measures were arranged securing the special relationship between the community and its ancestral territory, such as the adoption of mechanisms for internal rights to guarantee the effective enjoyment of indigenous property rights; In the case of the Yakye Axa Community, the identification and free delivery of its ancestral territory, the guarantee of subsistence to the community until the concretion of the delivery of their land and a statute for a program and a fund for community development.<sup>30</sup>

As supplements, the Court ordered two measures of satisfaction: a public act of recognition of the responsibility of the state, and the publication and diffusion of the relevant parts of the decision.<sup>31</sup> In our judgment, these measures were not sufficient, but in some manner they have had the effect of reaffirmation of the self-esteem of a community that has suffered taunts and humiliation.

In the Moiwana Case, referring to the massacre of members of the community which obliged the survivors to flee their territory, abandoning the cadavers of relatives and friends, without having the opportunity to perform their traditional spiritual rites which they are obligated to do in order to obtain rest for their dead, the Court, besides taking measures to reassure the relationship between community and territory, analogous to the decisions it made in the two previous cases, also ordered two measures of satisfaction clearly oriented to restore the ethnic self-esteem of the N'djuka people: a public apology and the recognition of responsibility on the part of the State and the establishment of a monument in memorial.<sup>32</sup>

In this case, the immaterial damages which the Court gained for the community survivors were very grave and they link to the relevant characteristics of the N'djuka culture, such as feelings of humiliation, anger

and fear that were provoked at the time by impediments in the law that were conducive to the sanctioning of those guilty of the massacre, and in proportion to their impunity, could lead the offended spirits to take vengeance for their debts. They were also afraid of contracting spiritual illnesses as a consequence of not having realized adequate burial rites for the massacre victims and, by supposition, the abrupt interruption of the connection of the community with its territory due to the forced displacement they had been subject to immediately following the massacre. Confronting these effects, the Court introduced, as a way to make reparations, an indemnification in currency.<sup>33</sup>

Looking at analogous incidents, the brutal and indiscriminate massacre of indigenous Maya Achi men, women and children from the Plan of Sanchez Community, the Court adopted more advanced measures for satisfaction. In the first place, it clearly defined the impact the massacre had on the culture and ethnic identity of surviving members of the community:

*49.12 With the death of the women and the elders, who were the oral transmitters of the Maya Achi culture, their skills and knowledge could not be passed on to new generations, which provoked an actual cultural void. Orphans did not receive the formation traditionally inherited from their ancestors. At the same time, the militarization and repression that the law submitted the survivors of the massacre to, especially, the young, led to a loss of trust and faith in the traditions and knowledge of their ancestors. (Plan de Sánchez Case Decision)*

Still worse, the community was not able to perform adequate funerary rituals for the massacre victims, which caused grave suffering in their relatives and an alteration in their process of mourning. Neither ceremony nor traditional rite of the Maya culture could be freely performed, due to the vigilance and repression by the military that followed the massacre.<sup>34</sup>

In general, the Court observed that practices and values intrinsic to Maya culture, such as decision-making by consensus, the respect and the service, had been displaced by authoritarian practices and an arbitrary use of power, linked to the militarization of their day to day lives that finished by provoking the severance of group unity and a loss of reference.<sup>35</sup>

In view of this situation, the Court adopted reparatory measures on two levels: on the individual plane, through a pecuniary indemnification, and on the collective plane, through the following measures for satisfaction:

- a) Resume investigations to permit the victims to know the truth about the massacre.
- b) Have a public act for the acknowledgement of responsibilities and

- in memory of the massacre victims.
- c) Translate all of the Court decisions into the Maya Achí language and make them public.
- d) Create a housing and development program.
- e) Offer medical and psychological treatment.

The measure concerning the translation of the Court's decision into the vernacular language and the effect of its distribution is very important, because on one hand it contributes to the reconstruction of the memory of the Maya Achí people and puts within their reach access to the decisions in which all the facts have been collected, analyzed and authorized, and on the other hand because it contributes to the reaffirmation of their injured identity, because having the decisions in their own language permits their appropriation, as an element of justice, on the part of the Maya Achi people.

Likewise, the Court considered that the immaterial damages provoked by the inadequate guarantees to the rights of the candidates of the political party of the indigenous Yatama to participate in local elections with conditions equal to others, provoked a grave impact to their individual self-esteem, due to the high valorization their culture places on the electoral process. The sense that they were suffering discrimination provoked a feeling of demoralization in them and led them to believe that, just as always in the rest of their lives they had felt excluded, they were now still being excluded.<sup>36</sup>

The Court, among the other reparatory measures adopted, ordered the State to reform the electoral requisites, so that "the members of indigenous and ethnic communities participate in the electoral processes in an effective way, while taking into account their traditions, uses and customs."<sup>37</sup>

The Court has been reiterative when stating that judgment itself constitutes reparation. Without a doubt, this is true, but it is still too soon to know whether the level of fulfillment of reparatory measures ordered corresponds to the expectations generated by the performance of justice.

### **Free, informed and prior consent: A pendent challenge in the Court.**

Although there have been important advances on the rights of the indigenous in the Inter-American System, it is also possible to identify, in the same field, some challenges that have not yet been addressed or resolved.

Perhaps the most important challenge is the one that fully recognizes the rights of indigenous peoples in decisions adopted by the State that directly affect their rights and territory, without the State having consulted

them, and without the State having considered the indigenous right to “free, informed and prior consent.”

This right, which appears as article XXI.2 in the Plan of the American Declaration on the Rights of Indigenous Peoples that has been discussed since 1997 in the compass of the OAS<sup>38</sup>, has been recognized by the Inter-American Commission of Human Rights in its reports on the situation of human rights in diverse countries of the continent,<sup>39</sup> and includes those on the level of contentious, as in the case 11.140 Mary and Carry Dann vs. the United States.<sup>40</sup> The Court has pronounced in the following sense:

*Art. 140. The Commission first considered that Articles XVIII and XXIII of the American Declaration in particular obligate the member States to guarantee that full determination of the extent to which indigenous complaints maintain interests in the lands to which they have traditionally held title and occupied and used, is based upon a process of full information and mutual consent on the part of the entire indigenous community. This requires, at the least, that all members of the community have been fully and fairly informed of the nature and consequences of the process and offered a true opportunity to participate both individually and collectively[...].*

*Art. 141. On the contrary, due to the weight of the action, and in consequence of the anxiety in the Dann case to intervene, a clear collective interest in the Western Shoshone territory may not have been justly satisfied through the legal proceedings initiated by the Temoak Group, the courts in the last instance did not undertake any measures to address the substance of these objections but rather disregarded them, on the basis of the celerity of the processes of the ICC. In the opinion of the Commission and in the context of the present case, this was not sufficient for the State to meet its particular obligation to ensure that the condition of the Western Shoshone traditional lands had been determined through a process of both informed and mutual consent on the part of the people of the Western Shoshone in their totality.*

This publication of the Commission has particular importance, since it puts an end to the controversy due to the United States of North America not recognizing the authority of the Inter-American Court. In equal conditions, the Commission pronounced judgment in their report on the background judgment in the Case of Maya Indigenous Communities of the Toledo District, Belize.<sup>41</sup> In the latter case, the IACHR considered:

*5. In the report, having examined the evidence and arguments presented on behalf of the parties, the Commission concluded that the State violated the*

*right to property protected by Article XXIII of the American Declaration, and the right to equality protected by Article II of the American Declaration, to the detriment of the Maya people, by not taking effective measures to delimitate boundaries and to officially recognize their right to communal property on lands they have traditionally occupied and used, and by executing logging and oil concessions to third parties allowing the use of the property and resources that could be enclosed within the lands which must still be delimited, demarcated and titled, without having neither consulted the Maya people nor having obtained their informed consent. The Commission also concluded that the State violated the right to judicial protection guaranteed by Article XVIII of the American Declaration to the detriment of the Maya people, by rendering judicial proceedings brought by them ineffectual through a root of unreasonable delay.*

The strict relationship and interdependence between territory, previous consultation, previous consent and economic, social and cultural rights are very explicit in the Report of the IACHR.

*153. In addition, the Commission reached the conclusion that the State, by agreeing to logging and oil concessions for third parties to make use of the property and resources that could fall within the lands which must still be delimited and granted official titles, or otherwise clarified and protected, without the informed consent of the Maya people, and with the resulting environmental damage, to the detriment of the Maya people further violated their right to property, protected by Article XXIII of the American Declaration.*

*154. Finally, the Commission observes the affirmation of the Petitioners that the failure of the State to engage in meaningful consultations with the Maya people in connection with the logging and oil concessions in the Toledo District, and the negative environmental effects arising from those concessions, further constitute violations of several other rights under international law, including the right to life under Article I of the American Declaration, the right to religious freedom and worship under Article III of the American Declaration, the rights of a family and its protection under Article VI of the American Declaration, the right to the preservation of health and well-being under Article XI of the American Declaration, and the right to consultation implicit in Article 27 of the ICCPR, Article XX of the American Declaration, and the principle of free determination.*

*155. In its analysis in this case, the Commission has emphasized the exceptional nature of the right to property as it applies to indigenous people, whereby the*

*land traditionally used and occupied by these communities plays a primordial role in their physical, cultural and spiritual life. As previously recognized by the Commission in reference to the right of property and the right of equality, the free exercise of these rights is essential for the enjoyment and perpetuation of their culture". Analogically, the concept of family and religion within the context of indigenous communities, including the Maya people, is intimately linked to their traditional lands, where their ancestral burial grounds, places of religious significance and customary dignity, are related to the occupation and use of their physical territories. Furthermore, in its analysis, the Commission has specifically concluded in this case that the duty to consult is a fundamental component of the State's obligations to give effect to the right of communal property to the Maya people in the lands they have traditionally used and occupied.*

The Court, in compensation, has not yet published its decision in respect to this theme. In the *Awas Tingni Case*, it has not made any statement regarding the argument presented by the Inter-American Commission in its closing speech, in the sense that "by ignoring and rejecting the territorial claim of the Community, and by agreeing to a concession for logging within a land that traditionally belongs to the Community without a consultation for its opinion, "the State violated a combination" of the following articles protected in the Convention: 4 (right to life); 11 (protection of honor and dignity); 12 (freedom of conscience and religion); 16 (freedom of association); 17 (protection of the family); 22 (right of circulation and residence); and 23 (political rights)." The Court limited itself to referring to only its own Decisions regarding the right to property and the right to legal protection of the members of the *Awas Tingni Community* and, moreover, rejected the violation to the rights protected by the aforementioned articles, because the Commission had not given foundations for them in its closing arguments.

## Method of conclusions

a) The Inter-American System of Human Rights is demonstrating its importance in the dynamics of the process that is amplifying and deepening the international protection of human rights, in the measures of its decisions, through the evolutive interpretations of the American Convention, it has been able to extend the significance and scope of the rights protected in it, in order to contain in an ample manner the new realities it must confront.

While the amplification of the coverage of human rights in the region and in the international system moves at an excessively slow pace in the process of generating new international instruments, the legal system is more agile and perhaps even more effective.



b) The important advances that the Inter-American Court has made in the development of the right to property in relation to indigenous territories, have been oriented by the comprehension of their territory as a base of both the material and spiritual foundations of the indigenous peoples' economic, social and cultural rights.

By this standard, the decisions that have been published in recent years by the Court, tutelary of a special relationship between indigenous peoples and their territory, and overcoming in practice any doctrinal debate on the justiciability of ESCR, demonstrate that these rights are susceptible to protection by international justice. Decisions such as those of *Awás Tingni* and *Yakye Axa* are shining ESCR decisions, as they protect the quality of life as a collective right of the communities, inseparably bound to their territory.

c) The decisions that have been reviewed in this work clearly show that the violations to human rights produce different presumptions when committed against indigenous populations, and so require reparatory measures founded on their ethnic particularities. There is still a long way to go in this matter. Nevertheless, the principle measure adopted by the Court to repair immaterial damage is by pecuniary indemnification. It is worth asking about what undesirable impacts this type of measure might have on the life of communities with little contact with the market economy.

Creativity is imperative in the search for new attempts at measures of satisfaction that comply with the objective of restoring the situations caused from the severe damage to the self-esteem and the ethnic identity of indigenous communities and peoples that have been subject to violations of their human rights.

In cases such as *Plan de Sánchez*, ethnically appropriate measures were thought of. That would be the line worth exploring.

d) There will probably be new cases of indigenous rights linked to the exploitation of the natural resources within their territories, that will potentially arrive for resolution by the Inter-American Court in the next few years, presenting opportunities for this high court to publish jurisprudence regarding the right to consultation and free, informed and prior consent, all of which will undoubtedly be of great importance in guaranteeing the territory of the indigenous peoples, as the material basis of their lives and of their economic, social and cultural rights.

## NOTES

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1. See for example: Inter-American Commission of Human Rights, Report on the Situation of Human Rights in a Segment of Nicaraguan Population of Miskit Origin, November 9, 1983 and Inter-American Commission of Human Rights, *Decision No 12/85*, Case No. 7615 vs. Brazil. (*Yanomami Case*), March 5, 1985. "The reports by the Inter-American Commission of Human Rights and the decisions passed by the Inter-American Court of Human Rights are available on the Internet at <[www.cidh.org](http://www.cidh.org)> and at <[www.corteidh.or.cr](http://www.corteidh.or.cr)>".
2. Inter-American Court of Human Rights, *Case of the Mayagna Community (Sumo) Awas Tingni vs. Nicaragua*, Decision from August 31, 2001, available on the Internet at <[www.cidh.org](http://www.cidh.org)> and at <[www.corteidh.or.cr](http://www.corteidh.or.cr)>.
3. Inter-American Court of Human Rights, *Case of Plan de Sánchez Massacre vs. Guatemala*, Decision from November 19, 2004 (Reparations), available on the Internet at <[www.cidh.org](http://www.cidh.org)> and at <[www.corteidh.or.cr](http://www.corteidh.or.cr)>.
4. Inter-American Court of Human Rights, *Case of the Moiwana Community vs. Nicaragua*, Decision from June 15, 2005, available on the Internet at <[www.cidh.org](http://www.cidh.org)> and at <[www.corteidh.or.cr](http://www.corteidh.or.cr)>.
5. Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community vs. Paraguay*, Decision from June 17, 2005, available on the Internet at <[www.cidh.org](http://www.cidh.org)> and at <[www.corteidh.or.cr](http://www.corteidh.or.cr)>.
6. Inter-American Court of Human Rights, *Case of Yatama vs. Nicaragua*, Decision from June 23, 2005, available on the Internet at <[www.cidh.org](http://www.cidh.org)> and at <[www.corteidh.or.cr](http://www.corteidh.or.cr)>.
7. In 1989, the General Assembly of the OAS agreed upon the creation of an inter-American instrument on the rights of indigenous peoples. Since 1992, the Inter-American Commission has begun the elaboration process of a project tending to the American Declaration of Indigenous Peoples. So far, the Commission has approved a 1995 draft and its modifications, approved in 1997, are still under discussion. Fergus Mackay, *Los derechos de los pueblos indígenas en el sistema internacional*, 1. ed, Lima, APRODEH, 1999.
8. "The bases of progressivity lie in the conception of international protection itself. The various instruments about it contain explicit statements of will on the need of new development that will increase and consolidate every aspect covered in them." Pedro Nikken, *Introducción a la protección internacional de los derechos humanos - XIX Curso interamericano de derechos humanos*, San José, Costa Rica, IIDH, July 19-28, 2001.
9. "The terms of an international treaty on human rights have autonomous meaning, and, as such, they cannot be collated with the sense they have in internal law. Besides, such treaties on human rights are living instruments, the interpretation of which has to comply with the evolution of time and, in particular, with the present life conditions" (Inter-American Court of Human Rights, *Awás Tingni Decision*, quoted, par. 146.)
10. The Inter-American Court of Human Rights has stated this criterion at the Consultive Opinion (Opinión Consultiva OC-18/03. *Condición Jurídica y Derechos de los migrantes indocumentados.*)

11. "In the present case, in view of the scope of quoted article 21 of the Convention, the Court considers it useful and appropriate to make use of other international treaties different from the American Convention, such as ILO Covenant 169, to interpret its provisions according to the evolution of the inter-American system, considering the corresponding development of Human Rights International Law" (*Yakye Axa Decision*, quoted, par. 127.)
12. Concurring reasoned vote by Judge Sergio García Ramírez to the *Awás Tingni Case Decision*. Inter-American Court of Human Rights, *Awás Tingni Decision*, quoted.
13. *Idem*.
14. Inter-American Court of Human Rights, *Yakye Axa Case Decision*, quoted, par. 126.
15. However, the right to property is not the only one whose meaning and scope the Inter-American Court has widened - thanks to an evolutive interpretation- in order to embrace the particular realities of indigenous peoples. In the *Yatama Case*, which refers to political rights, the Court considered that articles 23 and 24 of the American Convention incorporate the right of the members of indigenous and ethnic communities to a practice of their political rights "according to their values, uses, customs and forms of organization, whenever they are compatible with the human rights codified in the Convention" (paragraph 225, *Yatama Case Decision*). The first of such articles refers to the right to take part in the management of public affairs, to vote and be voted through authentic public elections with a universal, equal and secret vote, and to have access to public office in equal conditions; and the second refers to equality before the law.
16. Inter-American Court of Human Rights, *Yakye Axa Case Decision*, quoted, par. 130.
17. *Ibid.*, par. 144.
18. *Ibid.*, par. 146 and 147.
19. *Ibid.*, par. 148.
20. *Ibid.*, par. 149.
21. Inter-American Court of Human Rights, *Awás Tingni Case Decision*, quoted, par. 149.
22. Inter-American Court of Human Rights, *Yakye Axa Case Decision*, quoted, par. 137.
23. Inter-American Court of Human Rights, *Awás Tingni Case Decision*, quoted, par. 144.
24. *Ibid.*, par. 149.
25. Inter-American Court of Human Rights, *Sentencia Caso Yakye Axa*, quoted, par. 167 and 168.
26. "The safeguard of the right to communal property of indigenous peoples must take into account that the land is tightly bound to their traditions and oral expressions, habits and languages, arts and rituals, to their knowledge and uses related to nature, cooking arts, common law, clothing, philosophy and values. Depending on their environment, their integration with nature and their history, the members of indigenous communities transmit this immaterial cultural heritage from generation to generation, and it is constantly re-created by the members of the communities and of the indigenous groups." *Ibid.*, par. 154.
27. Inter-American Court of Human Rights, *Yatama Case vs. Nicaragua*, Decision passed on June 23, 2005, quoted, par. 201.

28. Inter-American Court of Human Rights, *Awas Tingni Case Decision*, quoted, par. 164.
29. *Ibid.*, par. 167.
30. Inter-American Court of Human Rights, *Yakye Axa Case Decision*, quoted, resolute points 6 to 10.
31. *Ibid.*, resolutory points 11 and 12.
32. Inter-American Court of Human Rights, *Sentencia Caso Moiwana*, quoted, par. 216 to 218.
33. *Ibid.*, par. 195 and 196.
34. Inter-American Court of Human Rights, *Plan de Sánchez Case Decision*, quoted, par. 49.13 & 49.14
35. *Ibid.*, par. 49.16.
36. Inter-American Court of Human Rights, *Yatama Case Decision*, quoted, par. 246.
37. *Ibid.*, resolutory point 12.
38. See OEA/Ser/L/V/II.95 Dic.6, 1997.
39. See e.g.: Inter-American Commission of Human Rights: *Report on the Situation of Human Rights among the Segment of Nicaraguan Population of Miskito Origin*, Second Part, Section E, paragraph 27. 1983; Inter-American Court of Human Rights, *Third Report on the Situation of Human Rights in Colombia*, Chapter X, Rights of Natives, J. Recommendations, 4, 1999 and Inter-American Commission of Human Rights, *Second Report on the Situation of Human Rights in Peru*, Chapter X, Rights of Indigenous Communities, H. Recommendations, 4, 2000.
40. Inter-American Court of Human Rights, *Report No. 75/02*, December 27, 2002.
41. Inter-American Commission of Human Rights, *Report No 40/04, Case 12.053* (Indigenous Maya Communities of the Toledo District vs. Belize), October 12, 2004.

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Translation by Alex Ferrara