

REPARATIONS IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS: AN ANALYSIS OF THE JURISPRUDENCE ON COLLECTIVE CASES OF INDIGENOUS PEOPLES AND THE ECONOMIC, SOCIAL AND CULTURAL ASPECTS OF THEIR REPARATIONS

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INTRODUCTION

In the past, it was not feasible to hold states accountable for human rights infringements as there were no international obligations *vis-à-vis* persons under their jurisdiction. Accountability and international redress for these situations was considered utopia. Today, it is generally acknowledged as a basic principle of international law that a state must make adequate reparation for the harm it caused to individuals by breaching its international obligations. Nevertheless, there are myriad questions and answers that have been derived from the application of this principle.

What is adequate reparation? Is it possible to impose reparations as a preventive approach? How can a state repair a collective harm? Can violations of civil and political rights (CPRs) result in reparations enforcing economic, social and cultural rights (ESCRs)? The African, European and Inter-American Systems have found different answers to some of these questions and to others that have surged from examining the concept of redress.

This analysis focuses on the Inter-American System of protection and defense of human rights (I/A System) and its response to complex challenges that arise in this area. In examining these challenges, it addresses a two-fold problem that exists in the I/A System. On one hand, the Inter-American construction of human rights standards has focused on the recognition of individuals as subjects of public international law; in the accountability for acts performed in violation of individual, not collective rights. On the other hand, the I/A System provides for a catalogue of

enforceable rights, most of which are of civil and political nature¹.

In response to this two-fold problem, the I/A System has, through its jurisprudence, developed a comprehensive legal regime on reparations for human rights violations that exemplifies better ways to protect human rights in the region. This article analyzes the most important developments on the topic of reparations in cases of indigenous peoples, to emphasize those that mandate reparations for a collective harm as well as those that result in the enforcement of economic, social and cultural rights.

I. Reparations for a collective in indigenous peoples' cases within the Inter-American System

The history and circumstances of the Americas have allowed the Inter-American Court of Human Rights (IACtHR or I/A Court) to deal with cases of multiple victims that often are part of a collective that shares a conflict or a history of social disadvantages that served as the premise for the human rights violations that were committed against them. Their urgent and massive need for reparations has raised questions. What are collective rights? How are reparations carried out when there are large numbers of victims with a collective identity? Is *restitutio in integrum*² implementable with regards to a collective?

In order to better understand these questions and their legal and practical implications, it is necessary to address who is considered a beneficiary

of reparations in the I/A System's jurisprudence; the measures ordered as non-repetition guarantees in cases involving individual and collective beneficiaries; and some of the debates surrounding the notion of reparations for a collective.

a. The beneficiaries of reparations in the Inter-American jurisprudence

Wording of Article 63 of the American Convention on Human Rights (ACHR),³ 1969, refers to the "injured party" as a beneficiary of measures to ensure the enjoyment of her right or freedom violated as well as of a remedy and fair compensation. However, the ACHR does not define the term, which is not found in the actual Rules of Procedure of the I/A Court (2009) either. These only include a definition of "alleged victim" and "victim," the latter referring "to the person whose rights have been violated, according to a judgment pronounced by the Court."⁴ The I/A System's lack of definition as to "what does "injured party" mean" and "who are to be included as beneficiaries of a reparation" has led to different interpretations by the I/A Court.⁵

Comparatively, the United Nations' Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("UNBPGR"), defined victims as "persons who individually or collectively suffered harm."⁶ In that respect, the concept of collective rights has been present in the discussion regarding indigenous peoples and minorities in the past.⁷ Even though they don't contain a definition of collective rights, the UN Declaration on the Rights of Indigenous Peoples, the Indigenous and Tribal Peoples Convention of the International Labour Organization (ILO Convention 169), and the Draft American Declaration on the Rights of Indigenous Peoples, establish collective rights and refer to them as essential for indigenous peoples.⁸

The *Aloeboetoe et al. Case* (1993) was the first case to deal with reparations for a collective in the I/A System.⁹ It addressed the detention, inhumane or degrading treatment, and killing of seven members of the Saramaka tribe (Maroons) by the Suriname military in 1987. In its application to the IACtHR, the Inter-American Commission on Human Rights (IACHR) explained that

in traditional Maroon society, a person is a member not only of his or her own family group, but also of his or her own village community and tribal group [...], the villagers

make up a family in the broad sense. This is why damages caused to one of its members also represent damages to the community, which would have to be indemnified.¹⁰

Even though the I/A Court did not grant reparations for the Saramaka tribe as a whole, it ordered compensatory measures on behalf of the 46 relatives of the seven direct victims. The IACtHR also ordered a measure of satisfaction that had individual and collective effects, when it decided that the state was obliged to reopen and staff the school of Gujaba and to make the medical dispensary operational.¹¹

The *Mayagna (Sumo) Awas Tingni Community Case* (2001) once again raised the issue of communal rights to reparations. In its application, the IACHR alleged that Nicaragua had neither demarcated the communal lands of the Awas Tingni Community, nor adopted effective measures to ensure the property rights of the community to its ancestral lands and natural resources, and further that the state did not ensure an effective remedy in response to the community's protests regarding its property rights. Accordingly, the IACHR requested reparations for the community as a whole and not for its individual members.¹² The IACtHR ordered the reparations requested to the members of the community,¹³ who were considered the beneficiaries, but also ordered the state to invest a sum of money "in works or services of collective interest for the benefit of the Awas Tingni Community, by common agreement with the community."¹⁴ This was the first time the I/A Court accredited a "community", and not a member to it, as a subject of collective reparation.

Later, the IACHR submitted the *Plan de Sánchez Massacre Case* (2004), alleging denial of justice and other acts of intimidation and discrimination to the detriment of the survivors and the next of kin of the victims of the massacre of 268 persons, most of them members of the indigenous Mayan people in Guatemala.¹⁵ The case presented several obstacles for the identification of all the victims and the I/A Court determined as beneficiaries the surviving victims and ordered individual reparations to them. However, given that the victims in the case were members of the Mayan people, the I/A Court considered "that an important component of the individual reparation is the reparation that the Court will [...] grant to the members of the community as a whole" and proceeded to order measures of satisfaction and guarantees of non-repetition that had cultural elements and a collective impact.¹⁶

In the *Moiwana Community Case* (2005), the IACHR argued that members of the armed forces of Suriname attacked the N'djuka Maroon village of Moiwana massacring over 40 persons and razing the village to the ground. The IACHR considered that the beneficiaries of reparations in this case should be the Moiwana residents who survived the attack and the family members of those who were killed.¹⁷ The I/A Court considered as beneficiaries individualized Moiwana Community members, except it established:

Given that the victims of the present case are members of the N'djuka culture, this Tribunal considers that the individual reparations to be awarded must be supplemented by communal measures; said reparations will be granted to the community as a whole in subsection D. [OTHER FORMS OF REPARATION (Satisfaction measures and non-repetition guarantees)].¹⁸

Additionally, in the *Cases of the Yakye Axa Indigenous Community* (2005) and *Sawhoyamaya Indigenous Community* (2006), both dealing with traditional territory among other issues, the IACHR alleged that the Communities and all their members were entitled to reparations, since their own cultural identity required that they be considered from a collective and individual perspective.¹⁹ The I/A Court established in the *Yakye Axa Case* that it shared the view of the Commission "that the reparations take on a special collective significance,"²⁰ but it did not make a specific reference to it in the *Sawhoyamaya Case*. Notwithstanding that, the I/A Court deemed that the beneficiaries of the reparations it ordered were the members of the Indigenous Communities and not the Communities themselves.²¹

Lastly, in the *Saramaka People Case* (2007), the IACHR argued that Suriname committed violations against the members of a tribal community. The IACHR alleged that the state had not adopted effective measures to recognize their right to the use and enjoyment of the territory they have traditionally occupied and used and that the state had violated the right to judicial protection to the detriment of such people by not providing them effective access to justice, particularly the right to own property in accordance with their communal traditions.²² However, the IACHR did not identify the members of the Saramaka people, and the I/A Court sustained that even though it had

previously held that in a contentious case before the Court, the Commission must individually name the beneficiaries of possible

reparations [...] given the size and geographic diversity of the Saramaka people,²³ and particularly the collective nature of reparations to be ordered [...], the Court does not find it necessary in the instant case to individually name the members of the Saramaka people in order to recognize them as the injured party. Nevertheless, the Court observes that the members of the Saramaka people are identifiable in accordance with Saramaka customary law, given that each Saramaka individual belongs to only one of the twelve matrilineal *lòs* in which the community is organized.

Thus, [...] the Court considers the members of the Saramaka people as the "injured party" [...] who, due to their status as victims of the violations established in the [...] Judgment [...], are the beneficiaries of the collective forms of reparations ordered by the Court.²⁴

Nevertheless, the IACtHR ordered "collective forms of reparations" on behalf of the members of the Saramaka people and not the group, except for one of the guarantees of non-repetition measures specifically dealing with a special duty of the state regarding indigenous and tribal peoples.²⁵

The measures of reparation ordered by the I/A Court in these seven cases involving indigenous peoples have had fundamental collective aspects, but they are mostly rendered individually to members of a collective. This article sustains that, a group of beneficiaries does not necessarily imply collective reparations; despite the fact that the beneficiaries are members of a collective that already existed when the violations occurred.²⁶ The creativity and cultural sensibility shown by the I/A Court have been essential in striving for collective reparations, however the complexity of having large numbers of beneficiaries of a reparation -that should be aimed at bringing full restitution to each of them- has created multiple tasks to the I/A supervisory organs and complying states. This is especially true in cases involving indigenous populations, in which communal rights are exercised.²⁷ How can reparation be facilitated? Guarantees of non-repetition have played an important reparatory role particularly with regards to the collective. The next section will study these measures from a comparative perspective.

b. Non-repetition guarantees in individual and collective cases

Other forms of reparation besides compensation are essential to *restitutio in integrum*. However, guarantees of non-repetition are fundamental

in amplifying the protection and remedy granted with regards to subjective rights in an individual case and to the resolution of underlying systemic or structural problems that impeded the adequate protection of the rights violated. While they are usually considered as part of reparations to individual victims, they also have a collective element.²⁸

Since cases that are brought to the I/A System have the potential to both seek a remedy for a particular victim or group, and to function as a useful tool for the resolution of underlying situations that could affect a collective, the question of how guarantees of non-repetition are addressed in individual and collective cases in the I/A System remains to be important. Is there a difference? Should there be one?

As stated in the *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, presented by the UN Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights,

[...] the individual and collective aspects of victimized persons and groups are in many instances closely interrelated. This coincidence of individual and collective aspects is particularly manifest with regard to the rights of indigenous peoples [...] Against this background it is therefore necessary that, in addition to individual means of reparation, adequate provision be made to entitle groups of victims or victimized communities to present collective claims for damages and to receive collective reparation accordingly.²⁹

Indigenous peoples –who have been recognized as collective subjects of law³⁰ having a collective right to reparations³¹– have successfully brought cases to the I/A System where measures of reparation have been ordered for the benefit of the community and interpreted as reparatory measures for collective harm suffered.³² For example, in different cases, the I/A Court ordered the corresponding states to:

- Invest, as reparation for immaterial damages, the total sum of US\$50,000 in works or services of collective interest for the benefit of the community, by common agreement with the community;³³
- Adopt legislative, administrative and other measures necessary to recognize and ensure the right of the peoples to be effectively consulted, in accordance with their traditions and customs, or when necessary, the right to give or withhold their

free, informed and prior consent, with regards to development or investment projects that may affect their territory, and to reasonably share the benefits of such projects with the members of the peoples, should these be ultimately carried out,³⁴

What do these measures of reparation have in common? First, they address a common problem or need; second, they are ordered on behalf of a collective,³⁵ without making reference to their members; and third, consultation and agreement of the collective with the measures are required. However, one is a compensatory measure and the other a guarantee of non-repetition. As the focus is on the latter, the next question is, are those elements also present in guarantees of non-repetition ordered in individual cases?

Even in cases where there is an individual beneficiary, this type of measure has progressively addressed a common problem or need of a society or a group of persons, when deemed appropriate. The *Loayza Tamayo Case* is but one example.³⁶ In the case, which involved the right to personal liberty, humane treatment, fair trial and judicial protection of the victim, the I/A Court ordered the state to adopt the internal legal measures necessary to adapt the Crime of Terrorism and Crime of Treason to conform to the ACHR.³⁷ Another example is the *Ximenes Lopes Case*, which dealt with the violation of the rights to life and humane treatment of a person with mental illness. In it, the IACtHR decided that the state should adopt all the measures necessary to keep developing an education and training program for staff in health care, psychiatry, psychology, nursing, and for any person involved in mental health services, in particular, covering the principles that govern treatment to patients with mental illness, according to international standards and the provisions of its Judgment.³⁸

These reparations address a common problem or need beyond the individual victim and order measures that would benefit a collective without making reference or identifying each of the potential beneficiaries. Thus, the question remains –is there a need for consultation and agreement of the victims when guarantees of non-repetition are ordered by the I/A Court in cases of individual victims? Some of the measures ordered as guarantees of non-repetition refer to the participation of the injured party; consultation and agreement, however, while ideal when ordering measures of satisfaction, are not elements of the guarantees of non-repetition ordered in individual cases.

In the IACtHR's case-law, the difference between guarantees of non-repetition ordered in collective cases involving indigenous peoples and those ordered in individual cases, is more evident in the cultural awareness and respect for self-determination shown by the I/A Court and –in the examples studied- reflected in the order for consultation and agreement necessary for the modification of laws and practices. Cases involving indigenous peoples attempt to remedy or correct historically discriminatory treatment against them and deal with the connecti between land, culture, and fundamental rights. They represent a special example of collectivity in the economic, social and cultural scenario; and the IACtHR, therefore, has recognized the need for active participation of the collective in making decisions that would be reparatory for their group based harm.³⁹

This practice is in conformity with the spirit of consultation and participation which constitutes the cornerstone on which the provisions of the ILO Convention 169 are based. In fact, the ILO Convention 169 requires that states consult indigenous and tribal peoples on issues that affect them, and that they are able to engage in free, prior and informed participation in policy and development processes that affect them.⁴⁰

Accordingly, the reparation program that resulted from the Truth and Reconciliation Commission in Perú assures that collective victims decide democratically what specific measures of reparation should be implemented in their communities, according with common parameters.⁴¹ Nevertheless, looking beyond the problem of a state's political willingness and the complications due to the number of victims, as stated by the International Center for Transitional Justice (ICTJ), the Human Rights Association (APRODEH)⁴² and academics,⁴³ and as can be observed by the guarantees of non-repetition ordered as collective forms of reparation in indigenous peoples' cases, one of the problems in the implementation of collective reparations is the apparent confusion between reparations for human rights violations and development of social programs and public policies that must be led by the state.

Given the importance of conceptual discussions regarding the need and adequacy of repairing a collective, this article focuses first on identifying some of the debates over the scope, content and mechanisms by which the right to adequate reparation should be satisfied, then on identifying what measures should be ordered under "reparations," and finally, on distinguishing if they are any different from a state's general obligations.

Both ultimately are geared toward addressing the questions: Is there overlap between public policy and redress? Is the I/A Court deciding matters that are not to be decided by law? Are the limits for judicially imposed reparations?

c. Public Policy or Reparation? Guarantees of non-repetition as collective forms of reparation in cases of indigenous peoples

It is generally acknowledged that the I/A Court has developed important jurisprudence in cases involving reparations for indigenous peoples. The issue of how to repair a collective often surfaces in these cases. In fact, as seen *supra*, the IACHR and the IACtHR have not necessarily agreed on that matter –the IACHR often requests measures of reparation on behalf of communities and peoples as well as its members, and the I/A Court instead orders them on behalf of its individual members, in most cases. However, measures of satisfaction and guarantees of non-repetition ordered in indigenous cases have overcome the individuality of reparations ordered and are important means for collective redress.

In that respect, in the *Aloeboetoe Case* the I/A Court ordered the state to reopen a school and make the medical dispensary operational in the town from where the victims were as a form of reparations.⁴⁴ In the *Mayagna (Sumo) Awas Tingni Case*, the I/A Court ordered the state to adopt in its domestic law the necessary measures to create an effective mechanism for delimitation and titling of the community member's property.⁴⁵ In the *Plan de Sánchez Massacre Case*, the I/A Court ordered the state to provide adequate housing to the surviving victims; and implement in the community programs of: study and dissemination of the Maya-Achí culture; maintenance and improvement of the road systems, sewage system and potable water supply; provide teaching personnel trained in intercultural and bilingual teaching; and establish of a health centre in the village with adequate personnel and conditions.⁴⁶

In the *Moiwana Case*, the I/A Court ordered the state to establish a community development fund; and build a memorial.⁴⁷ In the *Yakye Axa Indigenous Community* and *Sawhoyamaxa Indigenous Community* Cases, the I/A Court ordered the state to implement a community development fund; deliver basic supplies and services necessary for the communities' survival as long as the members of the Indigenous communities remain landless; set up communication systems; implement

a registration and documentation program; and enact into its domestic laws the measures necessary to establish a mechanism to claim restitution of the ancestral lands.⁴⁸ Finally, in the *Saramaka People Case*, the I/A Court ordered that the state remove or amend the provisions that impede protection of the right to property of the members of the Saramaka people; and adopt, in its domestic legislation, and through prior, effective and fully informed consultations, measures to recognize, protect, guarantee and give legal effect to the right of the members of the Saramaka people to hold collective title of the territory they have traditionally used and occupied.⁴⁹

These reparations are but a few examples of measures that give rise to debates on the scope, content and mechanisms by which the right to adequate reparation should be satisfied. Are they measures of public policy or measures of redress? In fact, while not endorsing the following statements, arguments that collective reparation measures tend to go beyond the scope of the case and order measures of reparation that are not proportional to the violation found; that collective reparation measures tend to go beyond the content of "reparations" and into public policy or humanitarian areas; and that reparation measures ordered by the I/A Court should only be of individual nature and collective reparations should be a matter of national administrative reparation programs, have arise.⁵⁰

When determining who the victim of the violation is, what the violation is, and who the beneficiary of the reparation is in the cases analyzed *supra*, other questions emerge and illustrate the debate proposed. Does the violation of the rights to life, humane treatment, personal liberty and judicial protection of seven victims give rise to the obligation to reopen a school and a medical dispensary? Is the delivery of supplies and services necessary for a community's survival a measure of reparation for a violation of its CPRs? Are the reparations meant to be measures sustained in time? Is it for a Court to determine how much water a community should receive?

In response to the arguments proposed, it is sustained that it is important to keep in mind that the measures of reparation that the I/A Court orders are intended not only to bring full restitution to victims of human rights violations but also have a preventive component, that is necessary to address past violations and prevent future occurrences. Other measures of reparation that go beyond compensation, like satisfaction measures and guarantees of non-repetition, might not have

a direct, proportional effect on the violation that occurred to the detriment of an individual victim in a specific case. Nevertheless, in individual and collective cases these measures are linked on some level to the situation or condition that enabled the specific violation to happen.

Additionally, guarantees of non-repetition represent a creative way in which the I/A System—a system with limited resources—aims to prevent the occurrence of the same type of violations to the detriment of others, and maximizes the ability of an individual case to make a difference in the situation or condition of others. It is not a class action, but instead a preventive method to guarantee the non-repetition of those acts which violate human rights, which is pertinent to the implementation of a treaty and to prescribe the consequences of a failure to comply with it. It forms the essence of those guarantees of non-repetition that are not only aimed at the direct victim, but that have an umbrella effect, broadening the protection over individuals, collectiveness and societies as a whole—an added plus to be recognized to the I/A Court's jurisprudence and its construction on reparations.

Furthermore, with regards to the question of possible overlapping between public policy and redress, it should be noted that when implementing collective forms of reparation there is often the challenge of distinguishing between reparations and economic, social and other measures that might be interpreted to fall within public policy of a state rather than within international legal order. As stated *supra*, the ICTJ and APRODEH distinguished this issue as one of the main problems in the implementation of collective reparations in Perú,⁵¹ and there are recent studies that refer vastly to this issue regarding reparations for the victims of the armed conflict in Colombia.⁵²

The subsidiarity of the I/A System and its nature, hold a difference of principle with regards to state internal programs and policies that render moot the question of judicially imposed reparations *vis á vis* administrative state initiatives.

On one hand, it is accepted that there could be an overlap between measures of collective reparations ordered by the I/A Court and social, economic, or other programs that are to be implemented by the states. However, this possible overlap is not so problematic when analyzed from the nature and origin of state obligations. A measure of reparation ordered by the I/A Court is of a different nature and responds to a failure of a state to comply with international norms that pro-

tect the rights of its inhabitants; therefore, it will ordinarily order the state, by means of measures of reparation, to comply with an obligation that is understood to be a state obligation in the first place. The overlap could be understood as natural due to the subsidiary nature of the measure ordered and the usefulness of the I/A Court's criteria in setting parameters and guide the formulation of reparation policies and programs.

On the other hand, a public policy or social, economic or other state program and an administrative reparations program for a collective are intended to address different situations by the same actor. They both originate from the states obligations, but administrative measures of reparation can be distinguished from general obligations, a distinction that is most relevant when designing and implementing massive administrative reparations by a state, and less so when complying with an international Court by implementing reparations of a collective form.

On that respect, as stated by the ICTJ and APRODEH,

It is important to remember that the reparative measures [ordered by the I/A Court] are the result of an analysis of what justice requires under two conditions vastly different from the ones facing those responsible for designing a reparations program. On the one hand, the function of a body like the Inter-American Court demands that it judge cases on the basis of individual justice. This approximation to the concept of justice differs substantially from that which can and should guide those responsible for creating reparations programs to serve the victims and also society as a whole. On the other hand, an entity like the Inter-American Court has no option but to make case-by-case rulings; that is, the method of applying its concept of individualized justice is necessarily circumscribed by the legal process established for these ends. In contrast, public and civilian authorities faced with responding to and benefiting a much wider and more complex set of victims find themselves having to adopt other methods and forms of reparations that respond to the national reality.⁵³

Finally, with respect to the individual nature of the reparations ordered by the state *vis á vis* the collective nature of state initiatives regarding massive reparations, while the I/A Court concededly was meant to address individual cases, its capacity to respond to the changing societal needs should be noted, alongside the progress in the re-

cognition for international judicial determination of reparations for a collective. This recognition has been referred to by, for example, the UNBPGR,⁵⁴ the Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights,⁵⁵ and the UN Committee on the Elimination of Racial Discrimination.⁵⁶

In sum, measures of reparation with collective effects ordered by the I/A Court contain important social, economic, and preventive elements that deal with reparations to the injured party but also with the reconstruction of relations between the state and the victims from a human rights approach. Their implementation in cases of indigenous peoples often faces several difficulties regarding its communal aspect with effects both on the determination of the subject of law (the community, its members or both) and the determination of how to repair a high number of victims. However, the main obstacle for their fulfillment is not rooted in the collective forms of reparations ordered by the I/A Court but in a state's willingness to comply with them. Nevertheless, many aspects should be considered in order to ensure more comprehensive integral collective reparations.⁵⁷

Whilst recognizing that some of the collective forms of reparations include complex processes of consultation, planning, and implementation, these measures are dictated with the purpose of advancing human rights protections and depend mostly on the states' willingness to comply with them. In that respect, the jurisprudence on reparations created in collective cases, and particularly in cases involving indigenous communities, not only reflects the collective aspect of reparations but has also allowed the system to advance in enforcing the indivisibility of human rights by ordering measures of economic, social and cultural impact on behalf of the members of indigenous communities or peoples.

II. Reparations for indigenous peoples' cases and their economic, social and cultural component

States parties to the ACHR have an obligation to "respect" and "ensure" the rights guaranteed by it. However, given that states have often breached their duties, some of the I/A Court's most significant contributions have been in the area of redress for victims of human rights violations. In that respect, the I/A Court has elaborated on the rights guaranteed by the Declaration, the Convention and its additional protocols. Through its

Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.⁶⁹

By limiting the rights whose infringement can be brought before the I/A System through the system of individual petitions, the Protocol of San Salvador restricted the judicial competence of the IACHR and the I/A Court to address the violation of other rights, beyond those related to trade unions and education, included therein. This limitation created an obstacle for achieving accountability and reparation for ESCRs in the I/A System but has not impeded important jurisprudential developments on the topic of reparations that mandate enforcement of ESCRs for human rights violations.

As stated by Verónica Gómez,

[...] access to health services, food and housing, among other ESC rights by vulnerable groups such as indigenous peoples, afro-descendant communities, displaced persons and migrant workers have been frequently analysed in the light of the obligation to ensure, *inter alia*, the rights to life, to physical integrity, to equality before the law, to freedom of conscience, to access to information, to property, and to judicial protection pursuant to the American Convention and/or the American Declaration [...]. In addition, individuals and organizations of civil society increasingly bring to the attention of the Inter-American System situations where the redress of human rights violations associated with civil rights demands the modification of social policy or other measures related to ESC rights protection.⁷⁰

This “indirect enforcement” of ESCRs through the expansive interpretation of CPRs⁷¹ has been present in recent decisions of the I/A Court, especially through measures of reparation ordered in cases regarding indigenous peoples. While this article endorses a pragmatic support to this practice, its purpose is not to undermine the justiciability of ESCRs, but instead to evidence how creative litigation and decisions from the I/A Court have helped overcome normative obstacles or

structural weaknesses -that should be addressed by member states of the OAS- to strengthen the theory of the indivisibility of human rights and achieve its implementation.

b. The right to property in cases of indigenous peoples before the I/A System

Article XXIII of the American Declaration protects the right to property, stating 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.” Even though it could be considered an ESCR, the ACHR categorizes the right to property as a civil and political right and establishes, in Article 21, the following:

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

The I/A Court has dealt with several cases regarding the right to property from the ACHR’s civil and political approach, however, the economic, social and cultural aspects of this specific right acquire a greater importance in cases of indigenous peoples and their lands, which often deal with economic disparities and cultural threats stemming from past and present wrongs committed against them.⁷² In this respect, the right to property has been not only important for the development of a collective approach to human rights violations in these cases, but has also permitted the I/A Court, independently and in conjunction with other rights, to extend its interpretation to include the duty to “respect” and “ensure” ESCRs.

The *Mayagna (Sumo) Awas Tingni Case* led to a landmark decision with regards to the right to property and its special importance in cases of indigenous peoples. When arguing the state’s breach, the IACHR made reference to traditional land tenure and its special consequences in a case where there was a communal aspect to land and a special link to it and other natural resources based on traditional patterns of use and occupation of ancestral territory.⁷³ The I/A Court drew from

ramaka people; 2) grant them legal recognition of the collective juridical capacity to ensure the enjoyment of their right to communal property and collective access to justice; 3) modify its domestic legislation –prior consultation– to guarantee the people’s right to hold collective title over the territory which includes the lands and natural resources necessary for their social, cultural and economic survival; 4) adopt measures to recognize and ensure their right to be consulted and obtain consent in accordance with the people’s traditions; and 5) ensure that environmental and social impact assessments are conducted prior awarding any concessions, and implement adequate safeguards to minimize damaging effects that such projects may have upon social, economic and cultural survival of the Saramaka people.⁸⁵

As seen in the I/A Court’s latest judgment on the right to property in a collective case, the I/A Court has developed more comprehensive measures of reparations in these cases. Yet, it has extensively interpreted the right to property in cases involving indigenous peoples and their lands and has analyzed it–without labeling such right as one type or another–alongside the special circumstances of indigenous peoples. This, to assure enforcement of reparation measures that deal with the basic economic, social and cultural needs that they have as a result of the obstruction of effective use of their lands and territories. The next section examines this in greater detail.

c. Measures of reparation in cases of indigenous peoples and the ESCRs component

Many cases that do not deal with indigenous communities but order measures of reparation that enforce ESCRs could be cited to demonstrate the development of the I/A Court’s jurisprudence on this matter. This article, however, does not intend to cover the universe of reparations that the I/A Court has ordered to this respect, it focuses only on those cases involving indigenous communities, as their elements epitomize the proactive enforcement of ESCRs in the I/A System.

As seen *supra*, even in cases where the I/A Court has not considered collective elements when determining a violation, it has ordered measures that have a collective impact. In that respect, the I/A Court has expanded the definition of these types of reparation measures throughout its jurisprudence to promote access to certain rights which have been historically denied to indigenous peoples.

This could be analyzed, for example, with the right to education, which is included in Article XII of the ADRD and Article 13 of the Protocol of San Salvador. According to Article 19(6) of the Protocol of San Salvador, the right to education is one of the two rights that may give rise to application of the system of individual petitions governed by the ACHR; however, the violation of such right has not been alleged by the IACHR and the I/A Court has not yet found a direct violation, even though it has ordered measures that advance the implementation of such right.⁸⁶

Why would the right to education not be addressed directly if it could be? One of the main reasons is related to the fact that the Protocol of San Salvador entered into force in 1999 and the violations alleged in the cases might be prior to this date and to the ratification, if any, of the pertaining states. Another reason, which would also apply to other ESCRs that are not directly enforceable in the I/A System, is the effective use of strategic litigation, and the ability to obtain implementation through a more conservative approach than direct confrontation with normative obstacles (limitations of the Protocol of San Salvador) and generational discussions, for example.⁸⁷

In any case, in the *Aloeboetoe Case* as in the *Plan de Sánchez Massacre*,⁸⁸ *Yakye Axa*,⁸⁹ and *Sawhoyamaya* cases, the I/A Court has not only ordered measures that result in the enforcement of the right to education, but has also done so–with the exception of the *Aloeboetoe Case*–with a culturally sensitive approach to indigenous peoples and the particularities that the I/A Court has deemed necessary. The Case of *Sawhoyamaya* exemplifies this approach when it establishes that

while the members of the Community remain landless, the State shall immediately, regularly and permanently adopt measures to: [...] e) provide the school of the “Santa Elisa” settlement with all necessary material and human resources, and establish a temporary school with all necessary material and human resources for the children of the “Kilómetro 16” settlement. The education provided must, inasmuch as possible, respect the cultural values of the Community and of Paraguay, and is to be bilingual; in the Exent language, and at the discretion of the members of the Community, either in Spanish or in Guaraní.⁹⁰

This reference to the cultural values that should be taken into account when dealing with the right to education, warrants also mentioning

tional cooperation in support of the relevant national policies.

However, the judicial enforcement of the right to health has been a consequence of reparations granted mostly in cases where there was a violation to the right to humane treatment established in Article 5 of the ACHR.⁹⁷ Specifically regarding cases of Indigenous peoples, in the *Plan de Sánchez Massacre Case*, the I/A Court found a violation to the right to humane treatment and ordered the state to

provide, free of charge, through its specialized health institutions, the medical treatment required by the victims, including, *inter alia*, any necessary medication [and to] create a specialized program of psychological and psychiatric treatment, which must also be provided free of charge.⁹⁸

The I/A Court went further when ordering the establishment of a health centre in the village of Plan de Sánchez with adequate personnel and conditions, and also by ordering training for the personnel of the Municipal Health Centre so that they may provide medical and psychological care to those who have been affected by the violations committed in the case and who require treatment.⁹⁹

The I/A Court has also ordered reparations that enforce the right to health in cases dealing with property rights—and not humane treatment. The cases involving the Yakye Axa and Sawhoyamaya Communities in Paraguay are one example in which I/A Court ordered these measures of reparation for as long as the injured parties remain landless. The I/A Court stated that given the special state of vulnerability and the impossibility of resorting to the Communities' traditional subsistence mechanisms, the state must provide immediately, regularly and permanently, medical care and appropriate medicine to protect the health of all persons, especially children, the elderly and pregnant women together with periodic parasite removal and vaccination campaigns, respecting their practices and customs. Additionally, the I/A Court established that the state must set up latrines or any other type of sanitation facilities for effective and healthy management of the biological waste of the Communities.¹⁰⁰

These reparations contain elements of the right to health that are protected in the ADRD and the Protocol of San Salvador; it can be observed—for example—that immunization and special attention to high risk groups were taken into account when determining the reparations.

Furthermore, the I/A Court has ordered access to the right to water, which is not explicitly referred to in the I/A System's norms but is part of the preservation of health and well being or adequate standard of living as has been interpreted in the Universal System.¹⁰¹

It is to be observed that in the *Plan de Sánchez Massacre Case*, the I/A Court ordered the state to set up a "sewage system and potable water supply."¹⁰² Accordingly, in the cases of the Yakye Axa and Sawhoyamaya communities, the I/A Court stated that as long as the injured parties remain landless, the state must supply, immediately and on a regular basis, sufficient drinking water for consumption and personal hygiene of the members of the communities.¹⁰³

Article 68(1) of the ACHR establishes that "[t]he States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties." Therefore, the I/A Court has established that monitoring the compliance with its decisions is an inherent jurisdictional power.¹⁰⁴ During the supervision of the compliance with the judgments in the cases of the Yakye Axa and Sawhoyamaya communities the I/A Court ordered the state to inform about the regularity of the provision of water, the method used to deliver the water and to sanitarily preserve it, the amount of water delivered by person, and the method used by the state to determine such amount.¹⁰⁵

Additionally, in the same two cases, the I/A Court has implemented the communities "Right to Food" by ordering that, as long as the injured parties remain landless, the state "must supply food in quantities, variety and quality that are sufficient for the members of the Community to have the minimum conditions for a decent life."¹⁰⁶ As with the right to water, during the supervision of the compliance with the judgments, the I/A Court ordered the state to report on

- (1) the delivery schedule;
- (2) the amount of food delivered per person and/or per family;
- and (3) the criteria used by the State to determine the type and amount of food to be delivered, and the delivery schedule.¹⁰⁷

Regarding the right to housing, contained in right to the preservation of health and to well-being in the ADRD,¹⁰⁸ the I/A Court has ordered in the *Plan de Sánchez Massacre Case* that the state "provide adequate housing to the surviving victims who reside in the village of Plan de Sánchez and require it."¹⁰⁹

In addition, the I/A Court has made important progress in determining the scope of the measures ordered for indigenous peoples as it includes basic elements of consultation and respect for their self-determination when granting reparations. In this sense, the measures of reparation ordered for members of indigenous communities exemplify not only advancement in the collective area, but also in the enforcement of economic, social and cultural rights. This advancement has been essential in the effort to correct historically discriminatory treatment against indigenous peoples and to deal with the connection between land, culture and their fundamental rights. However, they have also been essential in overcoming the restriction that threatens the justiciability for economic, social and cultural rights. This limitation has not impeded important jurisprudential developments on the topic of reparations that mandate enforcement of all human rights, but has to be addressed by the I/A System in order to defeat unequal normative protection of such rights.

In this respect, the right to property has been not only important for the development of a collective approach to human rights violations in cases of indigenous peoples but has also allowed the I/A Court, independently and in conjunction with other rights, to extend its interpretation to include the duty to “respect” and “ensure” economic, social and cultural rights by means of its jurisprudence. As a result, the rights to education, benefits of the culture, health, healthy environment, food, water and housing are examples of rights that have been effectively protected by the I/A System in cases involving indigenous peoples; this goes beyond the rhetorical recognition of all

categories of rights as interrelated, interdependent and indivisible, and guarantees their enforcement without a distinction.

However, the Inter-American System has reached a crucial moment, requiring an evaluation of its achievements and the challenges it faces. Such an evaluation needs to take into account the steps taken and the progress achieved in order to increase the focus on the issue of implementation by the states. The latter is necessary to strengthen a general understanding that the measures ordered go beyond the realm of a state’s willingness to comply with them and into its duty to effectively implement them, with the purpose of guaranteeing that the reparations ordered have a real capacity to make changes that benefit the injured party and societies in general.

This is sustained in the conviction that the I/A Court’s practice is a relevant force for advancing respect for human rights without distinction and should evolve, like rights do, to become a more practical instrument in the search for full reparation through the enforcement of its judgments. The goal is real mitigation of the damage caused to the injured party as well as acknowledgment of the need for recognition of collectivities as subjects of international human rights law and the indivisibility of human rights in general.

The aforementioned is espoused in the hope of defeating the obstacles for achieving real reparation for civil, politic, economic, social and cultural rights, recognizing the increasing urgency for this achievement and acknowledging and respecting the rights of the collective, until harmful state practice is eliminated and human rights prevail, to make utopia become a reality.

which it adopted a more narrow approach. With this, the Court departed from its historic ample interpretation of Article 63(1) of the ACHR and excluded the term “relatives of the victims,” eliminating their possibility to become beneficiaries of reparations without having to be declared victims of human rights violations. See, I/A Court H.R., *La Cantuta v. Perú Case*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C, Nº. 162; and I/A Court H.R., *La Cantuta v. Perú Case*. Interpretation of the Judgment of Merits, Reparations and Costs. Judgment of November 30, 2007. Series C, Nº. 173. Judge Cançado Trindade has criticized this approach. He defined victim as “the human being that has suffered an injury or damage, individually or in the company of other human beings, as a consequence of an act – or omission – that is internationally illegal [...]” Concurring opinion of Judge Cançado Trindade, *Interpretation of the judgment in the case of la Cantuta v. Perú*, November 30, 2007, para. 36. Judge Cançado Trindade added (*ibid.*, para. 62) that:

injured party corresponds to the ample notion of victim, according to the jurisprudential construction of the I/A Court, under the American Convention [...] The centralization of the victims does not refer only to the direct victims, but also to their next of kin as injured parties. The centralization of the victims is not limited to the determinations of the Court with regard to the merits of the cases solved by it; instead it refers also to the decisions with regard to the reparations.

6. UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, res 60/147, December 16, 2005, principle 8.
7. A working definition developed at the UN (Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study on the Problem of Discrimination against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1986/7/add 4, para. 379) states:
Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future

generations their ancestral territories, and their ethnic identity, as the basis for their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

For concept and definitions see also, Patrick Thornberry, *Indigenous peoples and human rights* (Manchester: Manchester University Press, 2002), Ch 1.

8. Fergus Mackay, *Los derechos de los pueblos indígenas en el sistema internacional* (Lima: Aprodeh, 1999), 53-55.
9. The I/A System has identified measures to deal with reparations in cases with multiple beneficiaries. However, this analysis focuses on those reparations that are effectively ordered in cases in which there is an important collective or communal identity that distinguishes them from cases with many individual victims which do not necessarily share a commonality besides the condition of victims.
10. I/A Court H.R., *Aloeboetoe et al. v. Suriname Case*. *Supra* note 6, para. 83.
11. *Ibid.*, operative para. 5.
12. I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua Case*. Judgment of August 31, 2001. Series C, Nº. 79, paras. 158, 2.
13. Although it did not individualized them.
14. I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua Case*. *Supra* note 13, para. 167 and operative para. 6.
15. I/A Court H. R., *Plan de Sánchez Massacre v. Guatemala Case*. Judgment of April 29, 2004. Series C, Nº. 105, para. 2.
16. *Ibid.*, para. 86 and operative paragraphs.
17. I/A Court H. R., *Moiwana Community v. Suriname Case*. Judgment of June 15, 2005. Series C, Nº. 124, para. 173.
18. *Ibid.*, para. 194.
19. I/A Court H. R., *Indigenous Community Yakye Axa v. Paraguay Case*. Judgment of June 17, 2005. Series C, Nº. 125, para. 185; and I/A Court H. R., *Indigenous Community Sawhoyamaxa v. Paraguay Case*. Judgment of March 29, 2006. Series C, Nº. 146, para. 201.
20. I/A Court H. R., *Indigenous Community Yakye Axa v. Paraguay Case*. *Supra* note 20, para. 188.
21. In both cases the Court proceeded to individualize each of the victims. See, I/A Court H. R., *Indigenous Community Yakye Axa v. Paraguay*

- Case. Supra* note 20, para. 189; and I/A Court H. R., *Indigenous Community Sawhoyamaya v. Paraguay Case. Supra* note 20, para. 204.
22. I/A Court H.R., *Saramaka People. v. Suriname Case*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C, N^o. 172, para. 2.
 23. The Saramaka population is comprised of approximately 30,000 people. Given the lack of accurate census information on the Saramaka community, estimates broadly range from 25,000 to 34,482 members. The Saramaka people are also dispersed throughout the Upper Suriname River, Brokopondo District, and other areas of Suriname, including Paramaribo.
 24. I/A Court H.R., *Saramaka People. v. Suriname Case. Supra* note 23, paras. 188, 189.
 25. *See Ibid.*, operative para. 8, where the Court states that:
The State shall adopt legislative, administrative and other measures necessary to recognize and ensure the right of the Saramaka people to be effectively consulted, in accordance with their traditions and customs, or when necessary, the right to give or withhold their free, informed and prior consent, with regards to development or investment projects that may affect their territory, and to reasonably share the benefits of such projects with the members of the Saramaka people, should these be ultimately carried out. The Saramaka people must be consulted during the process established to comply with this form of reparation [...].
 26. *See e.g.*, Nicolás María López Calera, *¿Hay derechos colectivos? Individualidad y socialidad en la teoría de los derechos* (Madrid: Ariel, 2000); Gregorio Peces Barba, "Los derechos colectivos," in: Francisco Javier Ansuátegui Roig (ed.), *Una discusión sobre derechos colectivos* (Madrid, Dykinson, 2001); and Dwight G. Newman, "Collective Interests and Collective Rights," in: *American Journal of Jurisprudence*, 49: 127–164 (2007).
 27. *See e.g.*, I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua Case. Supra* note 13, para. 149 where the Court explains:
Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. 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 a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.
 28. Given that the mechanism created by the OAS for the protection of human rights was geared to fight isolated human rights violations and given the scarcity of resources, guarantees of non-repetition are essential measures of reparation in the I/A System. They consist of institutional reforms and other measures that seek to prevent new human rights violations and eliminate their structural causes. These preventive measures try to, *inter alia*, promote and restore the rule of law and respect for human rights and democratic processes, and repeal laws and procedures that enabled violations in the first place.
 29. UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1993/8, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*. Final report submitted by Theo van Boven, Special Rapporteur, July 2, 1993, para. 14.
 30. For example, Colombia recognized indigenous peoples as collective subjects of law since 1993. *See*, Constitutional Court of the Republic of Colombia, Judgment T-380 of 1993, M.P. Carlos Gaviria Díaz. Also, Paraguay recognizes in its legislation that "the indigenous Community has ceased to be a factual reality to become an entity with full rights, not restricted to the rights of the members as individuals, but rather encompassing those of the Community itself, with its own singularity." *See*, I/A Court H. R., *Indigenous Community Yakye Axa v. Paraguay Case. Supra* note 20, para. 83.
 31. UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation N^o. 23: Indigenous Peoples, August 18, 1997, para. 5.
 32. *See e.g.*, I/A Court H. R., *Plan de Sánchez Masacre v. Guatemala Case. Supra* note 16, where the Court refers to the collective harm suffered by the Community for the massacre of 268 of its members.

53. ICTJ and APRODEH, *Design Parameters for a Reparations Program in Perú*, *supra* note 42, 19-20.
54. UNBPGR, *supra* note 7.
55. UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1993/8, *supra* note 30, para. 14.
56. UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation N^o. 23, *supra* note 32, para. 5.
57. Catalina Díaz Gómez, Nelson Camilo Sánchez, Rodrigo Uprimny Yepes (eds.), *Reparar en Colombia: los dilemas en contextos de conflicto, pobreza y exclusión*, *supra* note 44, 145-192. *See also*, Carlos Martín Beristain, *Diálogo sobre la Reparación: experiencias en el sistema interamericano de derechos humanos* (San José: Instituto Interamericano de Derechos Humanos, 2008).
58. As part of the battle against neglect and impunity, joint international efforts to protect human rights resulted in the adoption of the American Declaration of the Rights and Duties of Man in May 1948, followed by the Universal Declaration of Human Rights in December 1948. Even though neither establishes legally binding obligations of the State in relation to the individual or a collective, the Universal and the American Declarations set vital precedents in developing international law of human rights.
59. The Declaration does not condition the enjoyment of these rights on progressive development or on the availability of resources but simply enshrines them alongside other rights more commonly labelled as civil and political. *See*, Verónica Gómez, "Economic, Social and Cultural Rights in the Inter-American System," in: Mashood A. Baderin and Robert McCorquodale, (eds), *Economic, Social and Cultural Rights in Action* (Oxford: Oxford University Press, 2007), 171.
60. *See*, Preamble of International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.
61. Adopted by GA resolution 2200A (XXI) of 16 December 1966, entered into force on March 23, 1976.
62. Adopted by GA resolution 2200A (XXI) of 16 December 1966, entered into force on January 3, 1976.
63. First Optional Protocol to the ICCPR, adopted by GA resolution 2200A (XXI) of 16 December 1966, entry into force March 23, 1976.
64. ICESCR, Art. 2.
65. Audrey Chapman and Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp-Oxford-New York: Intersentia, 2002), 3-5. *See also*, UN Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993, Art. 5.
66. Optional Protocol to the ICESCR, adopted by GA resolution A/RES/63/117 of December 10, 2008.
67. ACHR, Article 26 "Progressive Development."
68. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, adopted in San Salvador, El Salvador, on 17 November 1988 at the XVIII Regular Session of the OAS General Assembly, Preamble.
69. Article 8(1)(a) of the Protocol of San Salvador establishes the rights of workers to organize trade unions and join the union of their choice, and Article 13 devotes substantial content to the right to education.
70. Verónica Gómez, "Economic, Social and Cultural Rights in the Inter-American System", *supra* note 60, 171.
71. *Ibid.*, signaling as an example of the criticism to the "indirect enforcement": Mathew Craven, "Assessment of Progress on Adjudication of Economic, Social and Cultural Rights" in: John Squires, Malcolm Langford, and Bret Thiele (eds.), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (UNSW Press, 2005), 27 and afterwards; and conversely as pragmatic support to it: Víctor Abramovich and Christian Courtis, *Los derechos sociales como derechos exigibles* (Madrid: Trotta, 2002), 168 and afterwards.
72. Dinah Shelton, "Reparations for Indigenous Peoples: The Present Value of Past Wrongs," in: Federico Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford: Oxford University Press, 2008), 47-72.
73. I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua Case*. *Supra* note 13, para. 140, 149.
74. *Ibid.*, para. 148.
75. *Ibid.*, para. 149.

76. *Ibid.*, para. 153.
77. I/A Court H. R., *Moiwana Community v. Suriname Case*. *Supra* note 18, paras. 127-135, 98-100.
78. I/A Court H. R., *Indigenous Community Yakye Axa v. Paraguay Case*. *Supra* note 20, paras. 123-156, 160-178.
79. *Ibid.*, para. 135.
80. I/A Court H. R., *Indigenous Community Sawhoyamaya v. Paraguay Case*. *Supra* note 20, paras. 116-144, 150-178.
81. *Ibid.*, para. 168.
82. I/A Court H.R., *Saramaka People v. Suriname Case*. *Supra* note 23, paras. 78-158.
83. *Ibid.*, para. 79.
84. *Ibid.*, para. 86.
85. *Ibid.*, operative paras. 5-9.
86. Even though the violation of the Article 13 of the Protocol of San Salvador hasn't been alleged before the Court, the Tribunal could analyze it based on the principle of *iura novit curiae*.
87. *See*, I/A Court H. R., *Yean and Bosico Girls v. Dominican Republic Case*. Judgment of September 8, 2005. Series C, N^o. 130, where the Court addressed the right to education through the rights of the child (Article 19 ACHR).
88. *See*, I/A Court H. R., *Plan de Sánchez Massacre v. Guatemala Case*. *Supra* note 16, operative para. 9(d), where the Court decided that the State shall "supply of teaching personnel trained in intercultural and bilingual teaching for primary, secondary and comprehensive schooling."
89. *See*, I/A Court H. R., *Indigenous Community Yakye Axa v. Paraguay Case*. *Supra* note 20, para. 221, where the Court orders that, as long as the Community remains landless, given its special state of vulnerability and the impossibility of resorting to its traditional subsistence mechanisms, the State must supply, immediately and on a regular basis, sufficient bilingual material for appropriate education of the students at the school in the current settlement of the Community.
90. I/A Court H. R., *Indigenous Community Sawhoyamaya v. Paraguay Case*. *Supra* note 20, para. 230.
91. *See*, I/A Court H. R., *Plan de Sánchez Massacre v. Guatemala Case*. *Supra* note 16, operative paras. 2, 4-5, where the Court refers to the use of Maya-Achí. In this sense, the Court ordered a publication in Maya-Achí that –aiming to be culturally sensible– does not respond to the use of said language, for it is mostly orally based and not a written language. *See also*, I/A Court H.R., *Saramaka People v. Suriname Case*. *Supra* note 23, operative para. 11.
92. *See e.g.*, I/A Court H.R., *Saramaka People v. Suriname Case*. *Supra* note 23, operative para. 12.
93. I/A Court H. R., *Plan de Sánchez Massacre v. Guatemala Case*. *Supra* note 16, operative para. 9(a).
94. I/A Court H.R., *Bámaca Velásquez v. Guatemala Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of February 22, 2002. Series C, N^o. 91, operative para. 1; and I/A Court H. R., *Moiwana Community v. Suriname Case*. *Supra* note 18, operative para. 2.
95. *See*, I/A Court H. R., *Plan de Sánchez Massacre v. Guatemala Case*. *Supra* note 16, operative para. 6, where the Court orders the State to pay to maintain and improve the infrastructure of the chapel in which the victims pay homage to those executed in the massacre.
96. I/A Court H.R., *Bámaca Velásquez v. Guatemala Case*. *Supra* note 95, para. 81. *See also*, Separate opinion of Judge Cañado Trindade to the judgment in the case, February 22, 2002.
97. Two individual cases before the I/A Court have dealt with the issue, but it has also been through the Right to Humane Treatment established in the ACHR. *See*, I/A Court H. R., *Case of Ximenes Lopes v. Brazil*. *Supra* note 39, and I/A Court H.R., *Case of Albán Cornejo et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of November 22, 2007. Series C, N^o. 171.
98. I/A Court H. R., *Plan de Sánchez Massacre v. Guatemala Case*. *Supra* note 16, operative para. 7.
99. *Ibid.*, operative para. 9(e).
100. I/A Court H. R., *Indigenous Community Yakye Axa v. Paraguay Case*. *Supra* note 20, para. 221; and I/A Court H. R., *Indigenous Community Sawhoyamaya v. Paraguay Case*. *Supra* note 20, para. 230.
101. UN Committee on Economic, Social and Cultural Rights, General Comment N^o. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights).
102. I/A Court H. R., *Plan de Sánchez Massacre v. Guatemala Case*. *Supra* note 16, operative para. 9(c).

103. I/A Court H. R., *Indigenous Community Yakye Axa v. Paraguay Case*. *Supra* note 20, para. 221; and I/A Court H. R., *Indigenous Community Sawhoyamaxa v. Paraguay Case*. *Supra* note 20, para. 230.
104. The Court renders decisions on compliance since 2001, and in 2007 started holding private hearings on compliance supervision.
105. I/A Court H. R., *Indigenous Community Yakye Axa v. Paraguay Case*. Monitoring Compliance with Judgment. Order of February 8, 2008, para. 12(a)(i) and I/A Court H. R., *Indigenous Community Sawhoyamaxa v. Paraguay Case*. Monitoring Compliance with Judgment. Order of February 2, 2007, para. 4(a)(i). In both cases the Court has held private hearings -with the participation of the parties- for the State to inform on specific measures and progress on compliance.
106. I/A Court H. R., *Indigenous Community Yakye Axa v. Paraguay Case*. *Supra* note 20, para. 221; *see also*, I/A Court H. R., *Indigenous Community Sawhoyamaxa v. Paraguay Case*. *Supra* note 20, para. 230.
107. I/A Court H. R., *Indigenous Community Yakye Axa v. Paraguay Case*. *Supra* note 106, para. 12(a)(iii); and I/A Court H. R., *Indigenous Community Sawhoyamaxa v. Paraguay Case*. *Supra* note 106, para. 4(a)(iii).
108. *See*, UN Committee on Economic, Social and Cultural Rights, General Comment N^o. 4: The right to adequate housing (Art.11 (1)), 1991.
109. I/A Court H. R., *Plan de Sánchez Massacre v. Guatemala Case*. *Supra* note 16, operative para. 8.
110. I/A Court H.R., *Saramaka People. v. Suriname Case*. *Supra* note 23, operative para. 9.