

COLLECTIVE REPARATIONS FOR VICTIMIZED INDIGENOUS COMMUNITIES: EXAMPLES OF HUMAN RIGHTS VIOLATIONS BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS



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1. INTRODUCTION

International human rights proclaim the right of every victim to effective reparations (remedies). However, the provision of reparations for international crimes is a recent development. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) provide reparations for victims of crimes within their jurisdictions, but their approach is very limited.¹ However, this is not the case for the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).²

Increasingly, international criminal justice is seen not only as a means for prosecuting and punishing perpetrators but also as a way to provide victims with adequate recognition and to redress the harm endured.³

One must bear in mind that this right, the right to reparation, to redress a wrong, has been a fundamental principle of any legal code.⁴ The right to a remedy was already included in several international and regional human rights treaties, as well as in international humanitarian law.⁵

International human rights law, by means of Court cases, provides examples on what kind of collective reparations can be awarded to victimized groups. The Inter-American Court of Human Rights' case law is highly instructive in this regard. Therefore this article traces the right to reparations or remedies in the Inter-American system, and illustrates, through a number of ca-

ses involving indigenous communities, that such remedies often have a collective dimension.

The Right to Reparation under International Law

Traditionally, public international law was primarily concerned with inter-state responsibility.⁶ In this light, only a state could prosecute another state and demand reparations for the injuries caused over its citizens.

After World War II, however, international human rights law began to emerge and state responsibility towards individuals became an international concern. Therefore, under international law, the violation of any human right gives rise to a right to reparation for the victim.⁷ However, these international legal instruments do not offer specific guidance regarding the ways and means by which states should repair such violations.⁸ This gap leaves open the questions of why and to what extent reparations should be afforded.⁹

In order to reaffirm the existence of victims' rights to redress violations, the United Nations adopted the "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," (hereinafter UN Basic Principles), which outlines 5 types of reparations: restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition.¹⁰



reparations provide judges of both regional courts of human rights and international criminal courts with quite some discretion over the content of reparations.

Difficult questions arise, *inter alia*, when human rights are violated. Is monetary compensation sufficient? When the violation is committed against a community, are individual reparations adequate?

The IACtHR has also not only attempted to repair the direct consequences of the rights violated but also to further improve the social conditions of the victims of these human rights violations. This is because these victims are usually the poorest, most vulnerable and discriminated people and their situations deteriorate even further because of the violations of their rights.³³ In this light the Peruvian Truth and Reconciliation Commission established that indigenous populations, who tend to suffer severe discrimination and poverty, amounted to 75% of the victims during the conflict in this country.³⁴

To sum up, the IACtHR has ordered non monetary remedies in a wide variety of situations. Gross and systematic abuses clearly present a new challenge that invites us to closely examine which reparations are adequate. In Judge Cançado Trindade's words: "*reparations for human rights violations only provide the victims the means to attenuate their suffering, making it less unbearable, perhaps bearable*"³⁵

An area in international law where the need for collective reparations is particularly apparent relates to indigenous peoples. The Inter-American Court of Human Rights in particular has recently produced a progressive line of cases dealing with indigenous peoples, collectively victimized, and has awarded a varied spectrum of remedies tailored to the demands of these often vulnerable groups.

2. INDIGENOUS PEOPLES IN INTERNATIONAL LAW: THE BROADER CONTEXT AND SOME KEY ISSUES

Before going into the specifics of the Inter-American Court's cases on indigenous land rights, it is important to elaborate a bit on the development of indigenous peoples' rights in international law. Although indigenous peoples frame their claims in the language of human rights, these are often claims of a distinctly collective nature, and in that way they appear to be somewhat at odds with traditional individual human rights. Furthermore, we will see that IACtHR takes into account the broader body of international law when dealing with these cases.

Public international law, in its pure post-Westphalian form is created by sovereign nation states. Human rights law, in its predominant perception since the end of the Second World War, has been concerned with protecting the individual. The primary concern with the State and the individual in international law is challenged by the emerging legal framework on the protection of intermediate, vulnerable groups. While this development has been a rather slow one, opposed by many states on the basis of arguments related to inter-group conflict, secession and controversy over the collective nature of the claimed standards,³⁶ a substantial body of *generic* and *targeted* legal norms, pertaining to the protection of certain (ethno-cultural) groups has developed.³⁷

Generic protection of these groups in international law centres around Article 27 of the International Covenant on Civil and Political Rights, which protects the right to culture.³⁸ Targeted norms focus on specific types of groups³⁹ within the broader framework of minority protection, e.g. national minorities, immigrants, and indigenous peoples. The last four decades have witnessed the emergence of a considerable body of (quasi-)legal norms pertaining specifically to this latter group. Indigenous peoples have sought international legal protection, since states are often the violators of their asserted rights.

While official statistics remain contested, indigenous peoples make up approximately 6% of the world's population (some 370 million individuals) and encompass around 5000 distinct peoples in over 72 countries. They represent about 80% of the world's cultural diversity and their environments comprise approximately 80% of the globe's biological diversity.⁴⁰ Although there is no single official definition in international law, relevant characteristics of indigenous peoples are that they are culturally distinct from the majority population, they have retained some or all of their own governmental and cultural structures (and are willing to preserve those), and often have a special, spiritual relation with their lands. Well-known working definitions focus on objective criteria and on subjective elements, whereas self-identification as indigenous is considered a fundamental criterion.⁴¹

Unfortunately, indigenous peoples are often also among the most marginalized in society, and have been victimized in many ways. They have suffered from historical injustice due to colonisation, oppression by the majority, forced integration and relocation, and often currently still form vulnerable groups in the larger states in which

UN Basic Principles: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The judgments, which include reparation orders, are “final and not subject to appeal,”⁵⁷ and therefore are binding on the States Parties.⁵⁸

Although there is not an explicit provision authorizing the Court to monitor compliance with its judgments, it has declared such authority part of its ‘inherent judicial authority.’⁵⁹ Interestingly, in the *Baena-Ricardo* case, the competence of the Court to monitor compliance with its decisions was challenged for the first time.⁶⁰ The Court rejected the challenge stating the following: “its jurisdiction includes the authority to administer justice; it is not restricted to stating the law, but to also encompass monitoring compliance with what has been decided...”

In practice, judicial monitoring results in the Court requesting periodic reports from States Parties concerning their efforts to comply with the reparations orders.⁶¹ While the Court has had much success with compliance over the years of monitoring the execution of its judgments, particularly with compensation,⁶² the effectiveness of efforts to end impunity remains one of the biggest problems the Court faces.⁶³

The Court has been sensitive toward victims’ needs and has supported a fair deal of their requests.⁶⁴ In the following section the relevant jurisprudence concerning progressive reparations for indigenous peoples awarded by the IACtHR will be explored.

The principle of *restitutio in integrum* states that victims should receive full reparation; therefore, States should make all efforts to restore the victim to the situation they were in before the crime occurred. However, this principle often difficult to apply in cases dealing with a variety of violations, such as, *inter alia*, extrajudicial killings, forced disappearances or violations of the right to life. Nonetheless, when appropriate, the Inter-American Court has ordered restitution of property or restoration of rights to communities.⁶⁵

The Court has ordered restitution as return of property, both to individuals with official property title⁶⁶ and to groups with no official property title.⁶⁷ In the landmark case of *Awás Tingni Community v. Nicaragua*, which will be discussed at more length below, the Court recognized that indigenous groups are entitled to special protection:

“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.”*⁶⁸

Similarly, in cases of massacres the Court has ordered the restoration of the right to property.⁶⁹ For instance, in *Moiwana v. Suriname*, the Court ordered the State to take legislative, administrative, and any other necessary measures to ensure the property rights of the members of the *Moiwana* community in relation to the traditional territories from which they were expelled.⁷⁰ These measures were intended to allow the community to return to their land.

When measures of restitution are not possible, the most common modality of reparation is compensation to which the Article 63(1) of the American Convention specifically refers.⁷¹ Notably, the Court has awarded compensation for victims in almost all of its decisions. However, this section will focus on cases in which groups or communities have been awarded reparations. In assessing the proportionality of the harm suffered and the adequate compensation necessary, the Court has embraced a wide variety of concepts of material damages, ranging from loss of earnings as a result of the violation to compensation for lost opportunities.

Precise calculations for loss of earnings are usually determined on a case by case basis. However, the Court has devised several approaches to calculate those damages. The first approach is to determine earning projections based on the victim’s current salary, age, and life expectancy⁷² but if this is not possible, the Court will base its calculation on the minimum wage.⁷³ When these two criteria cannot be applied, the Court will base its calculation on the actual economic and social situation of the victims.

When addressing massacre cases that occur in rural areas dependent on agricultural activities,⁷⁴ the Court awarded lost wages calculated either by using the minimum wages⁷⁵ or equitable principles in connection with agricultural activities.⁷⁶

The Court has adopted a very progressive approach to material damages in relation to lost earnings when the violations occur against communities with both a subsistence and spiritual connection to the land. For example, in the case of the *Moiwana Community*, the Court noted that the group had been violently removed from their lands and then suffered “poverty and deprivation” as a result of their inability “to practice their customary means of subsistence and livelihood.”⁷⁷ Similarly, in *Plan de Sánchez*, the Court presumed material damages from the displacement of a community of

and resources, since the protection of these rights does not only imply the protection of an economic unit, but also aims at shielding a community from outside interference with their cultural and social development, which is inextricably linked to their relationship with their lands. The Commission's concern for indigenous peoples' land and property rights is perhaps best illustrated in the 1993 report on the human rights situation of the Maya communities in Guatemala:

*"From the standpoint of human rights, a small corn field deserves the same respect as the private property of a person that a bank account or a modern factory receives."*⁹⁰

The First Step: Communal Land Tenure in *Awes Tingni v. Nicaragua*

The milestone decision dealing with Indigenous Peoples' rights to land and resources, and foundation for the decisions in the following cases, is the case of the *Mayagna (Sumo) Awes Tingni Community v. Nicaragua*,⁹¹ in which the Court held that the international human right to hold property includes the right of indigenous peoples to the protection of their customary land and resource tenure.⁹²

In the opinion of the Court, the State of Nicaragua violated the property rights of the *Awes Tingni* Community by granting logging concessions for the community's territory to a foreign company and by failing to provide effective protection and recognition of the community's customary land tenure system.⁹³ The Community members found out about these logging concessions only when they discovered loggers already employed on their territories. When the *Awes Tingni* community petitioned the Commission in 1995, it revealed problems that continued to persist for the *Mayagna*, *Miskito* and other indigenous peoples in the coastal region, even though Nicaragua formally recognised indigenous peoples' land tenure in its Constitution and laws.⁹⁴

In its final ruling of 31 August 2001, the Court reaffirmed that indigenous peoples have rights to their traditionally used and occupied territories, and that these rights arise autonomously under international law.⁹⁵ The State's failure in effectively responding to the *Awes Tingni* community's request for the titling of their lands in combination with the inadequate action on behalf of the Nicaraguan courts to timely provide for a legal answer, led to a violation of Article 25 of the Convention, the right to judicial protection.⁹⁶

Most significantly, the Court held that the concept of property under Article 21 of the Convention, for indigenous peoples means a communal property-right. The Court stated that: "Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community."⁹⁷ This form of collective property 'transcends' the traditional conception of private property since:⁹⁸ "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."⁹⁹

In establishing this revolutionary reasoning on the concept of communal property, the Court looked into recent developments in international law and stated that such international legal conceptions have an "autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law."¹⁰⁰ Apparently, the Court assumed the emergence of elements of new international customary norms.¹⁰¹

The Court inquired into the core values of the American Convention's property provisions seen in light of the underlying values of the O.A.S. Human Rights System. Moreover, the Court took into account the broader body of international law and contemporary developments within this field.¹⁰² Amongst others, the ICCPR (mainly articles 1 and 27) and ILO Convention N° 169 were considered as additional sources for interpreting the rights of the indigenous community.¹⁰³ For the first time, the Court referred to a violation of human rights principles, as set forth in the American Convention, from the standpoint of collective property rights of indigenous peoples as subjects of international law.¹⁰⁴

With regard to the perceived remedies, the Court found that in order to fulfil its obligations under the Convention, Nicaragua was required to: "Carry out the delimitation, demarcation and titling of the corresponding lands of the members of the *Awes Tingni* Community, within a maximum term of 15 months, with full participation by the Community and taking into account its customary law, values, customs and mores."¹⁰⁵ Demarcation of the land could thus only proceed

with the participation of the Community and in accordance with its customary law. Furthermore, the Court ordered Nicaragua to pay \$ 50.000 as reparation for immaterial damages, for the collective benefit of the community.¹⁰⁶

The Court employed an *evolutionary* method of interpretation,¹⁰⁷ taking into account modern conceptions of indigenous property rights and the special relation indigenous peoples have with their lands and territories.¹⁰⁸ The Court adopts this realist and evolutionary (progressive) approach or interpretive method instead of engaging in more formalistic interpretive exercise.¹⁰⁹

Follow up: The twin cases of Yakye Axa and Sawhoyamaxa

The twin cases of *Yakye Axa* and *Sawhoyamaxa* offer another example of the often destitute situation of indigenous communities.¹¹⁰ In these cases, most prominently in the *Sawhoyamaxa case*, the Court expands its evolutionary method of interpretation to the right to life. The *Yakye Axa* and *Sawhoyamaxa* indigenous communities traditionally subsisted as hunter-gatherers, but were displaced when non-indigenous groups acquired their territories. Awaiting the outcome of the legal procedures they started, both communities settled on a small strip of land between a highway and the fence that separated them from their traditionally occupied lands. Living conditions in these roadside settlements were appalling and the communities did not have access to basic health, water and food.¹¹¹

In the *Yakye Axa* case, the Court declared that the restitution of land for indigenous populations must be guided primarily by the meaning of the land for them.¹¹²

Next to a violation of the right to property and the right to judicial protection, the Court also found a violation of the right to life, interpreted as entailing positive obligations for the state to protect the conditions necessary for life.¹¹³

The Court ordered a variety of remedies in both cases. Paraguay was ordered to: identify and return the traditional territories of the communities, provide basic services and goods, implement community development programs, take all necessary measures to guarantee effective exercise of the right to property, pay compensation and even set up a emergency communication system.¹¹⁴

Saramaka People v. Suriname: Land Rights as a Precondition for Cultural and Physical Survival of a People

Although the Court's judgment in the case of the *Saramaka People v. Suriname* was to some extent similar to the one in the *Awas Tingni* case, the Court had to deal with some complicating differences.¹¹⁵ As in *Awas Tingni*, the State granted logging concessions on *Saramaka* territory to a foreign (in this case Chinese) company, without allowing any form of participation of the inhabitants of the region. The *Saramakas* are one of the six Maroon tribal peoples that inhabit the forests of Suriname.¹¹⁶

Although the *Saramakas* could not be seen as 'indigenous' or 'first inhabitants' the Court asserted that they are subject to the same protection, since they make up a tribal community.¹¹⁷ The Court stated that the right to property is also applicable to tribal peoples, who, like indigenous peoples, deserve special protection under international law, since both groups share distinct characteristics, amongst others regarding the special relation these peoples have with their lands, which requires special measures under international human rights law.¹¹⁸ This special relation and subsequent conception of communal ownership is considered in detail by the Court in its analysis of the customary land use pattern of the *Saramaka People*.¹¹⁹ It concluded that the territory, like in *Awas Tingni*, collectively belonged to the *Saramaka People* as a whole and that such a concept of communal property must be protected by article 21 of the Convention.¹²⁰

The Court considered the community's land rights, in addition to a necessity for *physical survival*, as essential for the *cultural and spiritual survival* of distinct peoples. It distilled the relevant norms from the broader body of international law and stated that although Suriname had not ratified ILO 169, it was party to a number of other international instruments protecting human rights.¹²¹

In the *Saramaka* case the Court emphasises the importance of having collective juridical capacity as a precondition for effective participation and the exercise of the collective right to property. Furthermore, it expands its reasoning and applicable remedies in relation to the property rights of indigenous communities. Next to the require-

ments of delimitation, demarcation and titling of indigenous territory, the Court ordered Suriname to: (a) amend its legislation impeding the exercise of the right to property, through fully informed, prior, and effective consultations with the Saramaka people, (b) grant the Saramakas legal recognition of their collective juridical capacity, (c) perform prior environmental and social impact assessments before awarding any concession for any development or investment project within Saramaka territory, (d) finance radio broadcasts and newspaper issues on the verdict and (e) compensate material and non-material damages, to be allocated in a development fund for the benefit of the community as a whole.¹²²

Thus, the approach the IACtHR employs serves to develop international human rights law so as to give it meaning in the contemporary struggles of indigenous peoples. The asserted remedies focus on pragmatic solutions to the real-life problems faced by different indigenous and tribal communities in the Americas.

4. Conclusions

This article aimed to illustrate the diverse nature of collective reparations in the Inter-American Human Rights System, and why there is a need for them. Particularly in relation to indigenous peoples, collective remedies are invaluable for their protection.

Like individual reparations, collective reparations may come in a myriad of forms. Collective reparations for indigenous communities not only aim to repair the harm caused directly by the human rights violations asserted, but also attempt to improve the often destitute living conditions of these marginalized communities in the long term.

The Inter-American Court has sought actively to contribute to the improvement of the living conditions of these victims. Recognition as a victimized community is a necessary first step, in order to subsequently guarantee their key-rights to property and life. The IACtHR's progressive line of cases dealing with indigenous communities illustrates that collective rights are not only theoretical constructs or abstract entities subject to academic debate, but that these concept can have real meaning and impact for those who are most in need of them. Collective reparations form a necessary corollary to those rights and standards. Nevertheless, effective implementation remains a key issue.

The IACtHR's cases on indigenous peoples are indicative of the Court's pioneer status when it comes to protecting vulnerable, victimized communities. Unfortunately, to present, only the *Awas Tingni* case has been fully implemented. Nevertheless, these cases might provide good examples or practices to be taken into account by other international courts, in dealing with victimized groups in a variety of contexts.

NOTES

1. The Statute of the ICTY lays down in Article 24(3), the penalties' provision that "in addition to imprisonment, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners", also the Statute of the ICTR in Article 23 (3) provides the Tribunal with the authority to order "any return of property and proceeds". Therefore, the statutes do not empower them sufficiently to address victim's concerns. It should be pointed out that both the Special Tribunal for Lebanon and the Special Court for Sierra Leone also fail to ward reparations to victims of crimes within their jurisdictions.
2. See: Rome Statute, Article 75 (2); Rules of Procedure and Evidence of the ICC, Rule 97 (1) and (3); and ECCC's Statute, Article 39.
3. This has been enshrined in the 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., UN Doc. A/RES/60/147
4. Shelton Dinah, *Remedies in International Human Rights Law*, 2nd ed., Oxford: Oxford University Press, 2005, p. 23.
5. Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final report submitted by Mr. Theo van Boven, Special Rapporteur, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities Fort-fifth session Item 4 of the provisional agenda; 2 July 1993, E/CN.4/Sub.2/1993/8, pp. 13-14.
6. Under the International Law of Injury of Aliens, a State violated an international obligation to another State when it injured a citizen of another State. See: *The Mavrommatis Palestine Concessions Case (Greece v. Britain)*, Permanent International Court of Justice, Judgment of August 1924.
7. This right is enshrined in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, American Convention on Human Rights, European Convention on Human Rights, Rome Statute. This right has also being recognized in several decisions of international courts such as the Inter-American Court of Human Rights and the European Court of Human Rights.
8. Particular attention must be paid to reparations gross violations of human rights and fundamental freedoms.
9. Shelton, D.L. "Remedies in International Human Rights Law," Oxford University Press: United Kingdom, 2006, p. 837.
10. 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, U.N. Doc., Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. This is a not binding document; nevertheless, it has already exerted an impact upon the right of victims. It also should be point out that in the framing of this document, Theo van Boven turned to established principles in international law, namely, to the International Law Commission Draft Articles on State Responsibility (ILC Draft Articles).
11. UN Basic Principles, par. 8.
12. This type of reparation refers to measures aimed to restore the dignity of victims and survivors such as apologies, burials, memorials and monuments and the renaming of streets.
13. Meaning that the reparation is based on financial compensation of economically looses.
14. Rubio Marín, Ruth, *Gender and Collective Reparations in the Aftermath of Conflict and Political Regression*, in Kymlicka, Will and Bashir, Bashir (Eds.) *The politics of reconciliation in multicultural societies*, Oxford: Oxford University Press, 2008.
15. The following TRC have recommended this kind of reparations: Guatemala, Peru, East Timor, Sierra Leone, Marroco and Liberia.
16. At the international level represents a great challenge to provide universal parameters to absolute different conflicts whereas at the national sphere it could represent a complete



change in public policies aimed to the improvement of social conditions.

17. Uprimny Rodrigo and Nelson Camilo, *Propuestas para una restitución de tierras transformadoras*, in *Tareas pendientes para la transformación de políticas públicas de preparación en Colombia*, ICTJ: Colombia, 2010, p. 196.
18. However, groups as holder of human rights have been recognized explicitly and implicitly in two occasions. The IACtHR in the *Yakye Axa Case* stated: "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. Legal status, in turn, is a legal mechanism that grants them the necessary status to enjoy certain basic rights, such as communal property, and to demand their protection when they are abridged. And the Colombian Constitutional Court in its judgment C-169 of 2001 upheld that Colombian communities are holder to fundamental rights.
19. Social programmes as a form of reparation for human rights violations not only benefit the victims but also the community as a whole. This modality of reparation in order not to lose its relevance is oft-granted along with symbolic reparations.
20. The reparations granted by the Inter-American Court are aimed to reintegrate (oft-marginalized) victims into society in order to end social exclusion while the European Court later has restricted reparations to a "mere satisfaction." It is also noteworthy that the European Court may refer reparations to the national systems, while the Inter-American Court will resolve the cases before it and its respective reparations exclusively. This could be explained by the political situation of several States party to the Organization of American States during the first working years of the Inter-American Court. At the time of entry into force of the Inter-American Convention several States, namely, Argentina, Bolivia, Brazil, Chile, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay were under dictatorial governments and the Inter-American Court played an important role in the democratic transition that these countries undertook. Conversely, being a democracy is the first membership requirement of the European System.
21. However, it is worth pointing out that this Court has intended to change its traditional practice of granting compensation as the only form of reparation. The change can be seen in the cases: *Assanidze v. Georgia* and *Ilascu v. Moldova*, both cases related to unlawful detention. The Court, in both cases, explicitly declared that compensation sometimes is completely inadequate to redress a violation of the Convention and considered that the State must secure the applicant's release at the earliest possible date. Since it is for the State to decide, along with the Council of Ministers, the best mechanism to redress a wrong, the State is not bound to follow such recommendation. The ECHR has also upheld pilot judgments when declaratory relief and individual compensation was insufficient to deal with the volume of complaints where violations of the Convention were systematic. These pilot judgments aim at a collective restitution of the enjoyment of specific rights. See. *Broniowski v. Poland* and *Hutten-Czapska v. Poland*.
22. *Velásquez-Rodríguez v. Honduras Case*, IACtHR Judgment of July 1988; *El Amparo v. Venezuela Case*, IACtHR, Judgment of September 14, 1996; *Neira Alegria v. Peru Case*, IACtHR Judgment of September 19, 1996; *Caballero Delgado and Santana v. Colombia Case*, IACtHR of January 29, 1994.
23. This was precisely the project that the victim had been denied through unlawful imprisonment. *Cantoral Benavides v. Perú Case*, IACtHR, Judgment of December 3, 2001.
24. *Serrano Cruz sisters v. El Salvador Case*, IACtHR, Judgment of March 1, 2005, par. 192-194.
25. The main reason of this form of reparations was family reunification due to the disappearance of children in El Salvador internal conflict. See: *Suarez Rosero v. Ecuador*, IACtHR, Judgment of November 1997.
26. *Bámaca-Velásquez v. Guatemala Case*, IACtHR Judgment of November 2000, *Neira Alegria v. Peru Case*, IACtHR, Judgment of September 19, 1996.
27. *Cantoral Benavides v. Perú Case*, IACtHR, Judgment of December 2001.
28. *Aloboetoe v. Surinam Case*, IACtHR, Judgment of September 10, 1996, par. 96.
29. *Loayza Tamayo v. Peru Case*, IACtHR, Judgment of September 17, 1997.

of undesirable consequences. It had become a destructive concept, in part at least because of the way it was understood by governments. In practice it had become a concept which meant the extinction of ways of life which are different from that of the dominant society. (...) policies of pluralism, self-sufficiency, self-management and ethno-development appeared to be those which would give indigenous populations the best possibilities and means of participating directly in the formulation and implementation of official policies."

ILO Conventions are legally binding. Up till now however, ILO Convention 169 has only been ratified by 21 States.

45. The provisions and principles of ILO Convention 169 were substantially influenced by the Martínez Cobo Study, for the final report see: Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations, E/CN.4/Sub.2/1983/21/Add.8.
46. Anaya, S. James, *Indigenous Peoples in International Law* (Second Edition, Oxford University Press, 2004).
47. International Covenant on Civil and Political Rights (G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976) & International Covenant on Economic, Social and Cultural Rights (G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976). See A. Eide, 'Rights of Indigenous Peoples, Achievements in International Law during the Last Quarter of a Century' (2006) *Netherlands Yearbook of International Law*, 163.
48. James Anaya, the current U.N. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, distinguishes two significant developments after the end of the Cold War and the decolonisation period. Related to the decline of the Soviet authoritarian system, there arose a renewed world-wide faith in non-authoritarian democratic institutions. Moreover, the idea of subsidiarity gained ground; the conviction that decisions can often best be made at the most local level (bottom-up instead of top-down approaches). The second development Anaya mentions can be characterised as the embrace of cultural pluralism, brought about by the fading classic notion of the culturally or ethnically homogenous nation-state. See: Anaya, S. James, *Indigenous Peoples in International Law* (Second Edition, Oxford University Press, 2004).
49. In other words; where ILO Convention N° 107 was still 'about them, without them' the newer instruments are more a result of a cooperative effort, in which indigenous representatives had a say about what kind of measures, rights or policies they need.
50. Noteworthy, this concept of indigenous self-determination does not, in contemporary international law, focus on secession and independent statehood (external self-determination), but on forms of autonomy or self-government and effective participation in the larger political order (a distinct form of internal self-determination) See: Cassese, Antonio, *Self-Determination of Peoples, a Legal Reappraisal*, (Cambridge University Press, 1995, reprinted in 1996). Also see: Summers, James, *Peoples and International Law, How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, (Martinus Nijhoff Publishers, Leiden/Boston, 2007).
51. Will Kymlicka, 'The Internationalization of Minority Rights' (2008) *International Journal of Constitutional Law*, 6(3/4). Kymlicka argues that potential self-governing groups, like indigenous peoples, should get similar tools of nation-building to those of states. See: Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity*, (Oxford University Press, USA, 2007).
52. United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, adopted by the General Assembly on Thursday September 13, by a vote of 144 in favour, 4 against and 11 abstentions. The final text was the result of a process of nearly 25 years of drafting and discussion.
53. A. Eide, 'Rights of Indigenous Peoples, Achievements in International Law during the Last Quarter of a Century' (2006) *Netherlands Yearbook of International Law*, 207.
54. These rights are to be read in conjunction with the broader framework of human rights protection, see: Preamble and inter alia article 46(2) of the United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295).
55. The collective provisions in the Declaration flow from some of the most pressing issues for indigenous peoples: threats to their lands, conflicts over resources, exclusion from decision-making and the lack of self-determined

- development. See e.g.: W. van Genugten, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems' (2010) 104 *Am. J. Int'l L.* & S. Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples' (2008) 41 *Vanderbilt Journal of Transnational Law*.
56. Velásquez-Rodríguez v. Honduras Case, IACtHR, Judgment of July 1988, par. 25.
 57. American Convention, Article 67.
 58. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. American Convention, Article 68(1).
 59. Cantoral-Benavides v. Peru Case, IACtHR, Judgment of November 20, 2009, par. 9
 60. Baena-Ricardo Case, Judgment of November 28, 2003, IACtHR, par. 82
 61. Cantoral-Benavides v. Peru Case, IACtHR Judgment of November 20, 2009. The Court also provides the victims' representatives and the Inter-American Commission on Human Rights to present observations on reports submitted by the State. If necessary, the Court also could send communications to the responsible State to urge it to comply with specific reparation measures.
 62. Full compensation payments have been made in a number of cases, such as: Velásquez Rodríguez v. Honduras Case, Judgment of August 17, 1990; Loayza Tamayo v. Peru Case, Judgment November 27, 2002, par.6; El Amparo v. Venezuela Case, Judgment of November 28, 2002.
 63. Pasqualucci, Jo M., *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge: Cambridge University Press, 2003, pp. 339-40.
 64. It is worth pointing out that the progressive interpretation of the Court is due, to some extent, to great advocacy of the lawyers representing the victims before it.
 65. In the case of the Massacre of Mapiripán, the Court ordered the State of Colombia to "ensure security conditions for the next of kin of the victims, as well as other inhabitants of Mapiripán who had been displaced, to be able to return to Mapiripán, if they wish to do so."
 66. Cantoral Huamaní and García Santa Cruz v. Peru Case, IACtHR, Judgment of January 28, 2008.
 67. The Court has recognized the collective right of indigenous communities to their traditional lands because of its cultural dependence on them regardless the existence of an official property life. Mayagna (Sumo) Awas Tingni Community v. Nicaragua Case, IACtHR, Judgment of August 31, 2001, par. 0149.
 68. Mayagna (Sumo) Awas Tingni Community v. Nicaragua Case, IACtHR Judgment of August 31, 2001, par. 149.
 69. Moiwana Community v. Suriname Case, IACtHR, Judgment of June 15, 2005.
 70. Moiwana Community v. Suriname Case, IACtHR, Judgment of June 15, 2005, par. 3; Mayagna (Sumo) Awas Tingni Community v. Nicaragua Case, IACtHR, Judgment of August 31, 2001, par. 3-4.
 71. According to the UN Basic Principles compensation is granted for material and non-material damages. However, the Court uses the following wordings instead: pecuniary and non-pecuniary damages.
 72. El Amparo v. Venezuela Case, IACtHR, Judgment of September 14, 1996, par. 28.
 73. El Amparo v. Venezuela Case, IACtHR, Judgment of September 14, 1996, pars. 28-29.
 74. Mapiripán v. Colombia Case, IACtHR, Judgment of September 15, 2005, par. 96; Pueblo Bello v. Colombia Case, IACtHR, Judgment of January 31, 2006, par. 95(21).
 75. Mapiripán v. Colombia Case, IACtHR, Judgment of September 15, 2005, pars. 78-79.
 76. Pueblo Bello v. Colombia Case, IACtHR, Judgment of January 31, 2006, par. 248.
 77. Moiwana Community v. Suriname Case, IACtHR, Judgment of June 15m 2005, par.187.
 78. Massacre Plan de Sánchez v. Guatemala Case, IACtHR , Judgment of November 19, 2004, pars. 73-74.
 79. Aloboetoe et al v Suriname Case, IACtHR Judgment of September 10, 1993, par. 96.
 80. Velásquez-Rodríguez v. Honduras, IACtHR, Judgment of July 21, 1989, par. 36
 81. Caracazo v. Venezuela Case, IACtHR , Judgment of August 29, 2002, par. 119; Barrios Altos v. Peru Case, IACtHR. Judgment of March 14, 2001, par. 41; Massacre of Plan de Sánchez v. Guatemala Case, IACtHR, Judgment of November 19, 2004, par. 99; "Las Dos Erres" Massacre v. Guatemala Case, IACtHR, Judgment of November 24, 2009, par. 129.

82. This right has been developing in the inter-American system in recent years. This concept of this right is based on the accumulative interpretation of Article 25, Articles 1(1), 8, and 13 of the American Convention on Human Rights.
83. *Massacre of Plan de Sánchez Case*, IACtHR, Judgment of November 19, 2004, pars. 101-102.
84. *Villagrán Morales v. Guatemala Case*, *Street Children v. Guatemala*; and *Trujillo-Oroza v. Bolivia*
85. *Barrios Altos v. Peru Case*. IACtHR Judgment of November 30, 2001, par 5; *Mapiripán Massacre v. Colombia Case*, IACtHR, Judgment of September 15, 2005, pars 10-13; *Moiwana Community v. Suriname Case*, Judgment of June 15, 2005, pars 2-7; and “*Las Dos Erres*” *Massacre v. Guatemala Case*, IACtHR, Judgment of November 24, 2009, par. 265.
86. *Trujillo-Oroza v. Bolivia Case*, IACtHR, Judgment of February 27, 2002, par. 110; *Trujillo Oroza v. Bolivia Case*, IACtHR Judgment of February 27, 2002, par. 98, *Loayza Tamayo v. Peru Case*, IACtHR, Judgment of November 27, 1998, par. 5.
87. *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua Case*, IACtHR, Judgment of August 31, 2001, *Yakye Axa Indigenous Community v. Paraguay Case*, IACtHR, Judgment of June 17, 2005. *Sawhoyamaxa Indigenous Community v. Paraguay Case*, IACtHR, Judgment of March 29, 2006, the *Saramaka People v. Suriname Case*, IACtHR, Judgment of November 28, 2007.
88. Annual Report of the Inter-American Commission on Human Rights 2007, OEA/Ser.L/V/II.130, Doc. 22, rev. 1, 29 December 2007, (Original: Spanish), point 56.
89. Annual Report of the Inter-American Commission on Human Rights 2007, OEA/Ser.L/V/II.130, Doc. 22, rev. 1, 29 December 2007, (Original: Spanish), point 55.
90. OEA/Ser.L/V/II.83, Doc. 16 rev., June 1, 1993, Fourth Report on the Situation of Human Rights in Guatemala, Chapter III, *The Guatemalan Maya-Quiche Population and their Human Rights*, (Original: Spanish).
91. *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua Case*, IACtHR, Judgment of August 31, 2001. Noteworthy, the *Awas Tingni Case* is the Court’s only case dealing with communal property for indigenous communities where the State has fully complied with the Court’s order. In December 2008, after a long implementation process, the official titling of the territory of the *Awas Tingni* community was concluded. On the implementation process, see: Alvarado, Leonardo J., *Prospects and Challenges in the Implementation of Indigenous Peoples’ Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua*, *Arizona Journal of International and Comparative Law* 24, 2007.
92. S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, *Arizona Journal of International and Comparative Law* 19, 2002, p. 1.
93. S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, *Arizona Journal of International and Comparative Law* 19, 2002, p. 2.
94. The Nicaraguan government de facto continued to regard the indigenous lands as state-owned, which subsequently did not pose an obstacle for granting the concessions. While the State agreed to a friendly settlement, as suggested by the Commission, no progress was made and after two years the Commission made a determination of state responsibility and submitted its confidential report to the government. Nicaragua subsequently failed to indicate its willingness to implement the Commission’s recommendations regarding securing the *Awas Tingni* traditional lands, and the Commission submitted the case to the Inter-American Court of Human Rights in June of 1998. See amongst others: Anaya, S. James, *Indigenous Peoples in International Law*, Second Edition, Oxford University Press, 2004, p. 267. S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, *Arizona Journal of International and Comparative Law* 19, 2002, p. 3.
95. Alex Page, *Indigenous Peoples’ Free, Prior and Informed Consent in the Inter-American Human Rights System*, *Sustainable Development, Law and Policy* 16, 2004, p. 16.
96. *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR, Judgment of August 31, 2001, paragraph 173. The Court acknowledged that the implementation of domestic legal protections for indigenous peoples is an obligation arising under the American Convention on Human Rights and that states may

Also see: Steven Keener & Javier Vasquez, *A Life Worth Living: Enforcement of the Right to Health Through the Right to Life in the Inter-American Court of Human Rights*, 40 *Colum. Hum. Rts. L. Rev.* (2008-2009).

112. IACtHR, *Case of the Yake Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005 (Merits, Reparations and Costs), par. 149.
113. *Yakye Axa Indigenous Community v. Paraguay Case*, IACtHR, Judgment of June 17, 2005: para. 33.
114. *Yakye Axa Indigenous Community v. Paraguay Case*. IACtHR, Judgment of June 17, 2005. Paragraph 242. *Sawhoyamaya Indigenous Community v. Paraguay*, IACtHR, Judgment of March 29, 2006, paragraph 248.
115. *The Saramaka People v. Suriname*, IACtHR, Judgement of November 28, 2007. Like in the *Awas Tingni* case, the Court ordered the State to delimit, demarcate and title the territories of the community with their full participation.
116. The other five Maroon peoples are: the Aucaner, the Paramaka, the Aluku, the Kwinti and the Matawai People. Together they form a population of approximately 60.000 individuals. Suriname is also home to four distinct indigenous peoples: the Kalinya, Lokono, Trio and Wayana People. They number about 20.000 individuals. Maroons are the descendants of escaped African slaves who were brought to Suriname by the colonial powers and regained their freedom (from the Dutch) in the 18th Century. Their freedom and autonomy were recognised in treaties concluded with the Dutch and through more than two hundred years of colonial administrative practice. See: *Forest Peoples Programme and Association of Saramaka Authorities, Free, Prior and Informed Consent: Two Cases from Suriname*, 2007, p. 2.
117. *Saramaka People v. Suriname Case*, IACtHR, Judgement of November 28, 2007, paragraph 84: The Court assessed that the members of the Saramaka People, although not indigenous to the region they inhabit, make up a tribal community: "Whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms customs and/or traditions."
118. *Ibid.*, paragraph 86. The Court also referred to the *Moiwana* case, where another Maroon community was granted the same special protection as Indigenous Peoples were. See: the *Moiwana Community v. Suriname Case*, IACtHRM, Judgment of June 15, 2005, Series C N° 124, paragraph 132 and 133.
119. Full assessment of the Court's analysis in this respect falls outside the scope of this paper. For the Courts analysis on the *Saramaka* customary patterns of land use, see, *Saramaka People v. Suriname Case*, Judgement of November 28, 2007, IACtHR, mainly paragraphs 77 - 101.
120. *Saramaka People v. Suriname Case*, IACtHR, Judgement of November 28, 2007, paragraph 90: "The close ties of indigenous peoples 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, their relationship with the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy to preserve their cultural legacy and transmit it to future generations."
121. *Saramaka People v. Suriname Case*, IACtHR, Judgement of November 28, 2007, paragraphs 97 -107. Also see, Marcos A. Orellana, *Saramaka People v. Suriname*, *American Journal of International Law*, 102, 2008, p. 3. Orellana states that the Court, in considering that Suriname had not ratified ILO Convention N° 169 and its legislation did not recognise a right to communal property, utilized systemic interpretation techniques (analysing the matter in light of articles 1 and 27 of the ICCPR) to overcome this hurdle.
122. *The Saramaka People v. Suriname Case*, IACtHR, Judgement of November 28, 2007, paragraph 214.

