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*29 WHEN AFRO-DESCENDANTS BECAME "TRIBAL PEOPLES": THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND RURAL BLACK COMMUNITIES

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Abstract

The inter-American human rights system has established itself as a permanent and prominent actor in the discussion on the protection of indigenous and Afro-descendant collective territorial rights. It has done so by demonstrating receptivity to the territorial demands of indigenous and Afro-descendant peoples. The inter-American jurisprudence, in order to recognize collective rights to property, assumes and requires that indigenous *30 and certain Afro-descendant peoples have a unique cultural relationship with their lands and qualify as "tribal peoples." While there are benefits and opportunities from the use of an international judicial mechanism to protect these collective rights, there are also limits to employing a litigation strategy based on the cultural approach to territory.

In examining these problems and limitations, this article focuses on one particular type of claim that indigenous and Afro-descendant peoples have been bringing before the inter-American human rights system in the last few decades: claims for the protection of lands and territories they have traditionally owned and the natural resources within them.

The article attempts to respond to the following questions: What groups remain excluded from making similar claims? Does the inter-American system sufficiently protect the natural resources found within traditional territories? Does this cultural approach confront the structural discrimination faced by Afro-descendants in Latin America?

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***31** I. Introduction

In the Saramaka case against Suriname, the Inter-American Court of Human Rights ("IACHR", the "Court", or the "Inter-American Court") [FN2] decided that the Saramaka people, one of six distinct Maroon [FN3] groups whose ancestors were African slaves forcibly taken to Suriname in the 17th Century, comprise a "tribal community." [FN4] In order to arrive at this conclusion, the Tribunal considered that the social, cultural, and economic characteristics of the Saramakas are distinct from other sections of the national community.This is due in large part to the Saramakas' special relationship with their ancestral territories, and because they regulate themselves, at least ***32** partially, through their own norms, customs, and traditions. [FN5] Fundamentally, the Court took a cultural approach, considering the particular identity of this Afro-descendant community and its relationship with the territory in its decision to recognize the right to collective property of the traditional territory. For the Inter-American Tribunal, the culture of the Saramakas:

> is also similar to that of tribal peoples insofar as . . . [they] maintain a strong spiritual relationship with the ancestral territory they have traditionally used and occupied. Land is more than merely a source of subsistence for them; it is also a necessary source for the continuation of the life and cultural identity. . . . [It forms] part of their social, ancestral, and spiritual essence. [FN6]

The Court used this cultural approach to land, territory, and natural resources to extend its jurisprudence on the collective property of traditional territories and indigenous people to certain rural Afro-descendant communities that it could qualify as tribal people. The Tribunal held:

> [T]he Court's jurisprudence regarding indigenous peoples' right to property is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival. [FN7]

The inter-American system has established itself as a permanent and prominent actor in the discussion on the protection of indigenous and Afro-descendant collective territorial rights. It has done so by demonstrating receptivity to the territorial demands of indigenous and Afro-descendant peoples. For this reason, it is necessary to analyze and discuss the ambivalences, contradictions, and existing gaps in the jurisprudence resulting from territorial claims at the inter-American level in order to assess the potential benefits, opportunities, and limitations of an international judicial mechanism to protect these collective rights.

This Article focuses on one particular type of claim that indigenous and Afro-descendant peoples [FN8] and movements have been bringing before the inter-***33** American human rights system in the last few decades: claims for the protection of lands and territories they have traditionally owned and occupied, along with the natural resources within them (water, forests, fauna, minerals, etc.).In the past ten years or so, the inter-American system has begun to systematically adopt decisions on cases related to territorial claims of indigenous and Afro-descendant peoples. In particular, the inter-American jurisprudence has recognized the collective right of indigenous and Afro-descendant persons to territory. [FN9] This jurisprudence will necessarily continue to develop, as more than 70 pending cases in the system pertain to indigenous peoples, with many cases referring to territorial claims. [FN10] There is a smaller number of cases related to Afro-descendants. [FN11]

This Article analyzes the limits of a litigation strategy based on the cultural approach to territory and the transformation of Afro-descendant groups into "tribal peoples." This Article inquires into the problems presented by the fact that the inter-American jurisprudence, in order to recognize collective rights to property, assumes and requires that indigenous and certain Afro-descendant peoples have a unique cultural relationship with their lands that qualify as "tribal peoples" to their traditional lands. [FN12] Questions raised include: What ***34** groups remain excluded from making similar claims? Does the inter-American system sufficiently protect the natural resources found within traditional territories? Does this cultural approach confront the structural discrimination faced by Afro-descendants in Latin America?

This Article proceeds in four parts. Part II presents a brief summary of the inter-American case law (particularly the Court's case-law) with regard to collective indigenous and Afro-descendant territorial rights. Part III analyzes the intrinsic limitations of the cultural approach to territories and resources. Part IV highlights several of the inconsistencies in the Court's cultural approach to territorial claims. Part V proposes the adoption of an expanded approach to collective territorial claims by indigenous and Afro-descendant groups as a way to overcome some of the limitations highlighted in the previous Parts. The Article finishes with some tentative conclusions on the limitations of the use of the cultural approach to protect territories of Afro-descendant communities in Latin America, and some alternative approaches to the protection of those territories.

II. Brief Summary of the Inter-American Case Law

The inter-American jurisprudence has based its protection of collective territories on cultural features and the special cultural connection indigenous peoples and some Afro-descendant communities have with their territories. As a result, it is possible to speak of a doctrine of "distinctive connection" between territory and indigenous people in which this particular connectivity with the territory is precisely what gives rise to their legal recognition of property rights. [FN13]

There are five cases in which the Inter-American Court has extended the scope of property rights enshrined in Article 21 of the American Convention on Human Rights (the "Convention" or the "American Convention") [FN14] to protect "the rights of members of the indigenous communities within the framework of communal property." [FN15] The five cases are: Awas Tingni v. ***35** Nicaragua, [FN16] Yakye Axa v. Paraguay, Sawhoyamaxa v. Paraguay, [FN17] Moiwana v. Suriname, [FN18] and Saramaka v. Suriname. [FN19]

Through these cases, the Court has carried out a progressive interpretation of the right to property, expanding the traditional content of the right from a typically individual right to a collectively exercised right with particular cultural implications. [FN20] The Court has applied the criteria to indigenous peoples as well as to those Afro-descendant communities that qualify as tribal peoples.

First, the Court understood that control and ownership "[are] not centered on an individual, but rather on the group and its community." [FN21] To extend the reach of property rights to the collective territories of indigenous and Afro-descendant communities, the Court began by recognizing certain cultural features of indigenous peoples, their special connection with the land, and certain forms of community organization. It understood that:

> Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the ***36** 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. [FN22]

To emphasize the connection between culture and protection of territory, the Tribunal indicated that:

> The culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity. [FN23]

The Court added that the relationship that indigenous peoples maintain with the land "is such that severing that tie entails the certain risk of an irreparable ethnic and cultural loss, with the ensuing loss of diversity." [FN24] The Court, aiming to "preserve [the] cultural legacy and transmit it to future generations," insisted that community ownership of ancestral lands held a special significance. [FN25] From this perspective, the lack of protection of territorial rights, according to the Court, threatens "the free development and transmission of their traditional practices and culture." [FN26] Because the situation endangers "significant values," the members of the indigenous peoples "are at risk of losing or suffering irreparable damage to their lives and identities, and to the cultural heritage of future generations." [FN27]

***37** Therefore, the Court has specified the following principles of collective territorial rights due to indigenous peoples:

> 1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; 2) traditional possession entitles indigenous people to demand official recognition and registration of property title; 3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and 4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. [FN28]

In 2005, the Court in Moiwana extended these same principles to certain rural Afro-descendant communities, which the tribunal defined as "tribal peoples or communities," utilizing the terminology of Convention 169 from the International Labor Organization. [FN29] The Court considered that members of a Maroon Afro-descendant community from Suriname possessed "an 'all-encompassing relationship' to their traditional lands, and their concept of ownership regarding that territory is not centered on the individual, but rather on the community as a whole." [FN30] For this reason, the Tribunal decided to apply to the Moiwana community the same standards recognizing the right to communal property that the Court developed for indigenous peoples.

Further, in the Saramaka case, involving another Surinamese Afro-descendant community, the Court explained in greater detail the applicability of its indigenous jurisprudence to Afro-descendants. The Court required that the group qualify as a "tribal community" in order to receive the same protection afforded to indigenous peoples. [FN31]To determine whether the group was a tribal community, the Court considered the following elements: possession of social, cultural, and economic characteristics that are different from the rest of the society, particularly a special relationship with their ancestral territories and

full or partial self-regulation of the group through its own norms, customs, and traditions. [FN32] The Court then held that its jurisprudence on indigenous peoples ***38** extends to those rural Afro-descendant communities "that share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that requires special measures under international human rights law in order to guarantee their physical and cultural survival." [FN33] The Tribunal found that international law protects the collective territorial rights of tribal peoples or communities in the same way that it protects indigenous peoples' territories. [FN34]

With the aim of making these territorial rights effective in cases involving communities in possession of the land, the Court has ordered the State in question to "identify the territory" and "establish[] borders and boundaries [and] size." [FN35]If the community is not in possession of the land, the State should "[secure] the availability of sufficient funds" for "the acquisition or condemnation" of the lands, in the event that "the territories belong to a private ***39** owner," [FN36] and undertake negotiations for them. The Court has further ordered that the State should issue title deeds and "materially and formally" transfer the territory to the community. [FN37] Finally, whenever there arise "well-founded reasons that prevent the State from returning back the territory identified as . . . the traditional territory of the community," [FN38] the State must provide "alternative lands." [FN39] Those alternative lands must be chosen by "a consensus with the peoples involved, in accordance with their own mechanism of consultation, values, customs and customary law." [FN40] In deciding whether to condemn traditional lands possessed by third parties or to seek alternative lands, the State should consider "the collective objective of preserving cultural identities in a democratic and pluralist society," [FN41] and have, "[as primary guidance,] the meaning of the land" for the communities. [FN42]In all cases, the Court has ordered the identification, demarcation, and granting of title and exclusion of third parties from the territory.

The Court considered not just territory itself, but also whether property rights extend to "the natural resources . . . associated with their culture [thereof]." [FN43] The Court found that collective property includes the "incorporeal elements" deriving there from. [FN44] Since the unlawful exploitation of natural resources within traditional territories by State or private actors threatens the "survival and the cultural integrity of the community and its members," [FN45] as well as "the existence, value, use or enjoyment of the property," [FN46] the Court in Saramaka clarified the conditions under which plans for development or investment affecting traditional land can be carried out. The Court emphasized that the members of the Saramaka people have the right to use and enjoy the natural resources that are found within the territory they traditionally occupy, and that are necessary for their survival. But, the Tribunal then established that ***40** the right to property does not necessarily prohibit the granting of concessions for the exploration or exploitation of natural resources. The Court said concessions should comply with at least three guarantees: [FN47]

1) Effective participation of the respective community, including prior consent; [FN48]
2) Distribution of benefits in reasonable shares between the State and the community; [FN49] and
3) Prior assessment of the environmental and social impact in the community's territory. [FN50]

To remedy violations of territorial rights, the Court required that States adopt "such legislative, administrative and other measures as are necessary to ensure the property rights of the members of the . . . community in relation to the traditional territories . . . and provide [therefore] for their use and enjoyment ***41** of these territories." [FN51] The Tribunal required that States provide "an effective remedy . . ., as well as [the assurance of] due application of that remedy by its judicial authorities." [FN52] The Court also ordered the establishment of "appropriate procedures," [FN53] which are "accessible and simple," [FN54] "to process the land claims of the indigenous peoples involved," [FN55] [and] "to resolve those claims in such a manner that these peoples have a real opportunity to recover their lands." [FN56]

Additionally, for such cases, the Court has ordered collective economic reparation through the establishment of community development funds. For this remedy, the Court established in general terms the programs in which the resources of such funds should be invested. It also specifies that "the specific components" of said funds and development programs should be determined by a tripartite implementation committee made up of a representative designated by the victims, another by the State, and a third member designated by common agreement between the victims and the State. [FN57] To define and implement these reparations, the Court has required "the participation and informed consent of the victims, as expressed through their representatives" [FN58] and "leaders." [FN59]

***42** III. Intrinsic Limitations of the Cultural Approach to Territories and Resources

The cultural approach to the collective territorial claims, [FN60] as has been briefly explained, rests on the presumption that there are groups-- indigenous peoples and certain Afro-descendants communities--that possess particular cultural characteristics. Among those characteristics are a collective form of land tenure and use, and a special relationship between the group and the land as a space for their cultural identity and cultural reproduction. Because of those particular cultural aspects, the Court grants these groups collective property rights.

This approach, however, presents three limitations. First, since the Court only grants collective property rights to certain groups who can present certain cultural features, groups seeking the benefits of these rights might "essentialize" their culture, portraying it in imprecise ways. The Court thus pressures a group to present its culture as immutable, permanent, and static. Second, the focus on only certain cultural features excludes other groups from the protection of the inter-American system, when the other groups are materially situated in identical situations to those receiving protection. The only distinction is that those other groups do not have the particular cultural features required by the Court. Finally, because the protection offered by the Tribunal to economic activities, particularly the use and exploitation of natural resources, is limited to those "traditional" elements that constitute part of the already essentialized and frozen culture, lands are protected only as they are necessary for the preservation of the cultural identity, and not for their material and economic value.

In the following paragraphs this Article explains in detail these three intrinsic limitations to the Court's approach to collective territories.

A. The cultural approach to territory requires the essentialization of cultural identity

The cultural approach to territory presents difficulties insofar as it essentializes culture by restricting it to a certain moment, thereby preventing the recognition that culture is fluid. [FN61] Particularly before the Inter-American ***43** Court, litigants have emphasized, through anthropological expert reports, cultural features of indigenous or specific Afro-descendant communities relevant to the Inter-American Tribunal, such as ancestry, certain world views, religiosities, and communal forms of coexistence, as if they were permanent and immutable. However, it is much more accurate to recognize there is a constant renegotiation of the cultural relationships of identity-territory with a strong dynamism and capacity for change. The cultural relationship with the territory is not stable or definitive, but rather is marked by fluctuating social relationships, both within the communities and between the community and the society as a whole. [FN62]

Particularly in the case of Afro-descendants, the cultural approach to territory forces Afro-descendant groups to affirm certain cultural features and present themselves in a way similar to indigenous peoples in order to qualify as "tribal" communities and obtain the full range of collective territorial rights. For instance, this is the case of the Alcantaraquilombo in Brazil, where, in their brief to the Inter-American Commission on Human Rights [FN63], the lawyers insisted on highlighting and emphasizing certain practices that were qualified as cultural traditions. [FN64]

When Latin American states adopted similar cultural approaches or standards to territorial claims as those developed by the Court, problems have arisen. In Colombia, for example, Law 70, which recognizes the "right of Black Colombians to Collectively Own and Occupy their Ancestral Lands," adopts a cultural approach to territory. [FN65] One of Law 70's requirements is ***44** that the community be represented by a Community Council. [FN66] Drafters of the law thought the Community Council was a traditional form of organization, when it was, in fact, unknown to many of the black communities. The assumptions of the drafters of certain cultural particularities were translated into a legal requirement creating all sorts of problems. For instance, diverse black communities from the basin of the Cacarica River came together in groups to form a Community Council (Consejo Comunitario Mayor),as required by the law regulating the collective ownership of traditional lands. The only purpose of constituting this Consejo Comunitario Mayor was to enable the communities to claim their collective territorial rights. But, as the Consejo Comunitario Mayor was not a traditional form of organization, tensions regarding the exploitation of forest resources in the community arose between this Consejo Mayor and the Consejos Menores of each community. The Colombian State, through different administrative agencies, granted concessions for the extraction of lumber based upon supposed au-

thorizations from one communal authority or another, despite awareness of the internal dissent, created in part by the manner in which the communities from the basin of the Cacarica River were obligated to group together in order to obtain recognition of collective territorial rights. [FN67]

***45** B. The cultural approach to territory excludes other rural groups

Basing the recognition of property rights to rural land for indigenous peoples and some Afro-descendant communities on their cultural particularities does not allow for the extension of those rights to many other rural communities thatare in materially identical situations with respect to dispossession of the land needed for their survival, but who do not claim any special cultural feature required by the Court. [FN68] For example, the model would exclude many landless, predominantly Afro-descendant rural workers in Brazil who, in many respects, have collective claims to land.

Nor does the cultural approach easily cover the situation of Afro-descendant communities that exploit natural resources but do not necessarily claim a particular cultural adhesion to a territory. This is the situation of the Afro-Colombian communities in the Cerro Teta zone of the Municipality of Buenos Aires in Cauca. Since this Afro-Colombian community does not present all the required "cultural features" that both the Colombian national authorities and inter-American precedents require, these groups faced insurmountable difficulties articulating some ethnic features that would allow them to present a compelling property claim to a hill already recognized as the property of an indigenous community. So far, the ***46** Colombian authorities, applying similar standards in terms of cultural features as those used by the Inter-American Court, have rejected their claims. [FN69]

The entire land ownership system fixes certain rural populations to a certain territory while it gives rise to the geographic mobility of others. [FN70] But the inter-American cultural approach to territory chooses to acknowledge the geographic boundness of only the rural communities that are able to demonstrate their indigeneity or Africanness in a culturally decisive way. This situation results in communities with "sets of materially similar circumstances" being classified along distinct lines and, thus, receiving different legal recognition and protection. [FN71] It gives rise to a valorized identity that legally and socially is considered and experienced as vastly superior to the devaluated and culturally non-specific definition of poor rural landowner or worker. [FN72] As such, the territorial case law of the Inter-American Court enhances the claims of indigenous peoples and certain Afro-descendant communities while excluding, or not granting the same or similar rights to, others in similar material circumstances. [FN73]

C. The culturalization of the use, enjoyment, and exploitation of natural resources does not properly protect the dynamics of economic activities within indigenous or Afro-descendants communities

The Court has clarified and established guidelines regarding when and how the State can exploit, on its own or through concessions, the natural resources in indigenous and Afro-descendant territories. The Court has said that the right to property protects "those natural resources traditionally used and necessary for the very survival, development and continuation of such people's ***47** way of life." [FN74] The Tribunal recognizes the indigenous and Afro-descendant peoples' rights to use and enjoy the natural resources that are "necessary for their physical survival" [FN75] or "essential for their survival." [FN76] But the Court so far has not recognized, at least not explicitly, the right to use or exploit those natural resources that are necessary to improve the communities' economic or social situation, increase their investments, or create capital reserves for future generations.

Furthermore, the inter-American jurisprudence only protects natural resources that are "traditionally used." [FN77] The Tribunal fails to recognize the dynamism and evolution of the way in which natural resources are exploited by indigenous and Afro-descendant peoples. The limited protection provided to natural resources within their territories is one of the consequences of essentializing, or paralyzing, the culture in a given moment. It prevents the exploration or exploitation of natural resources that have not been traditionally utilized (such as oil) from triggering protections granted by the Court. As one analyst had stated, criticizing a similar approach taken by the Constitutional Court of Colombia, "What would happen if new generations of indigenous peoples wished to alter their economic traditions? What would happen if demographic changes within

indigenous groups demanded modification of their systems of production? . . . Is the Court not contributing to a cultural paralysis of indigenous groups?" [FN78]

In the Saramaka case, the Court characterized the Saramaka economy as a "tribal" one by describing it in the following manner:

> ***48** '[T]he very great bulk of food that Saramaka eat comes from [. . .] farms [and] gardens' traditionally cultivated by Saramaka women. The men . . . fish and 'hunt wild pig, deer, tapir, all sorts of monkeys, different kinds of birds, everything that Saramakas eat.' Furthermore, the women gather various fruits, plants and minerals, which they use in a variety of ways, including making baskets, cooking oil, and roofs for their dwellings. [FN79]

From this description and characterization of the Saramaka economy as "tribal," it appears that only traditionally used natural resources and very basic forms of economic activities receive full protection. In fact, the Court separately analyzed the concessions for exploitation of gold, a mineral that is "not traditionally" used by the Saramaka, and the concessions to exploit timber resources that are "traditionally" used by the community. [FN80] In the end, the Court demanded, in both scenarios, prior consultation, shared benefits, and studies on environmental and social impact. [FN81]However, the distinction made between different types of concessions to exploit natural resources, depending on their traditional or nontraditional uses, rather than on the economic, social, or political value of those natural resources, opens up the possibility of different levels of protection. This distinction is made exclusively as a consequence of protecting the territories and the natural resources within the territories based upon their cultural value and significance.

IV. Inconsistencies and Problem Areas in the Court's Cultural Approach to Territorial Claims

The Court's cultural approach is not only inherently limited; the Tribunal also fails to consistently implement the full consequences of the approach. In some areas the Court appears to apply only a formalistic approach to cultural and collective claims without extending the approach to its full potential. In the following Part, this Article explains several key areas where the Court has failed to extend the collective nature of the claims and the cultural particularities approaches to all of their logical consequences. The Part focuses on six main elements showing that the Court has not fully appreciated all of the consequences of its intended protective approach to indigenous and Afro-descendant people. The Tribunal has disregardedtraditional forms of possession and, in fact, ordered the inclusion of collective territories in official forms of property. In other words, instead ***49** of creating a full new property law, the regime has force-fitted collective forms of property within existing frameworks. Despite the Tribunal's insistence on the special attachment of indigneous peoples to their traditional lands, the Court has failed to clearly establish theprevalence of indigenous and Afro-descendant rights over third-party claims in cases of disputes between those communities and private landholders. Nor has the Tribunal fully respected the right of indigenous and Afro-descendants communities to self-determination. To the contrary, in most of its remedial orders, the Court has shown certain administrative and participatory paternalism. The collective nature of the claims and reparations has not extended to certain aspects of the procedure, since the Court still requires the identification of each member of the community, and allows cases to be brought without the specific consent of the community. Finally, the Court has relied on domestic constitutional or international law to reach a solution in several cases.

A. Disregard for traditional forms of possession and inclusion of collective territories into official forms of property

The Tribunal has disregarded traditional forms of possession and, in fact, ordered the inclusion of collective territories into official forms of property.In other words, instead of creating a full new property law framework, it has fitted collective forms of property into existing frameworks. In some ways, the Court's approach to territorial claims could be considered a re-conceptualization of the right to property. The Court recognizes distinct indigenous land tenure systems and requires the guarantee of indigenous peoples' permanent use and enjoyment of the lands they have traditionally used and occupied and of the resources that have sustained them. This shift has been accomplished by including the procedural right to prior informed consultation or consent to protect these territories. [FN82]

Nevertheless, by ordering the identification, demarcation, and titling of collective lands, and the exclusion of third parties

from said properties, the Court has in fact ordered the accommodation of indigenous and Afro-descendant traditional collective land tenures into the forms of property that are generally recognized by Latin American civil law. Because the Court is ordering the identification, demarcation, and titling of the territory, a claimant community would be required to specifically define its territorial boundaries, not only before the State, but also with respect to other communities that share the same territorial space.

***50** But so far the Court has failed to develop any other type of alternative property system model based upon the communities' actual forms of land tenure, for example, by recognizing the nonexistence of fixed boundaries, the utilization of systems with amorphous, permeable, and mobile boundaries, or the shared use of territories by various communities. [FN83] In this way, the Court does not acknowledge the traditions of many indigenous and Afro-descendant communities, which have flexible and porous boundaries, or joint utilization and/or exploitation by diverse communities of common spaces or natural resources.

In the Awas Tingni case, the Court's lack of understanding of these particularities exacerbated already tense relations between Awas Tingni and the neighboring communities. While there was never any difficulty of this nature before fixed borders were imposed, as soon as the Awas Tingni sought to implement the Court's decision in its favor, the community confronted a land dispute first with one community and later with a bloc of ten neighboring communities. [FN84]The situation was particularly tense because the Awas Tingni community belonged to one ethnic group and the surrounding communities were of a different ethnic group. The State only exacerbated these tensions by dividing communities and generating larger confrontations. [FN85]

In the Moiwana case, on the other hand, the Court realized the problem it was creating by fixing the borders, and decided that, in the process of demarcation and titling, the State should ensure "the participation and informed consent of the victims," as well as "the members of the other CotticaN'djuka villages and the neighboring indigenous communities." [FN86]

However, Moiwana is the exception. In the other territorial cases, the Court "did not pay enough attention to the context in which eventual reparations needed to be implemented, and it failed to address the tensions that its decisions were generating with the surrounding communities" . [FN87]It ***51** appears that the Court does not entirely recognize the porousness and flexibility of territorial limits or the shared use of lands. Specifically, the Court's orders are very timid in terms of measures that would facilitate the reintegration of communities in a local environment into a framework of interdependent relationships with other communities. [FN88] Requiring delimitation and demarcation in fact alters the traditional land tenure that the Court intended to protect in the first place.

B. Lack of clear prevalence of indigenous and Afro-descendants rights over third parties' claims

In the case of communities that have been dispossessed of their territories, the Court has avoided extending all of the logical consequences of its jurisprudence regarding the special and cultural link of indigenous and certain Afro-descendant communities with their territories. The Court has recognized the special connection that the indigenous and Afro-descendant peoples have with the land, which is precisely the situation that creates the right to collective property and distinguishes them from other sectors of society. However, when resolving the situation of communities that have been displaced from their territories, the Tribunal has failed to establish all of the procedural and substantive measures necessary to give effect to the special relationship between the community and its lands, and it has permitted other interests to prevail under certain circumstances. In the Yakye Axa and Sawhoyamaxa cases, in which the indigenous communities were living on the roadside of the claimed lands the Tribunal allowed the State to purchase alternative lands for the communities, rather than allowing the indigenous rights to prevail. [FN89]

The Court indicated that the fact that the traditional lands are found to be in private hands is not per se an objective and sufficient ground barring the restitution of the land to the community. [FN90] The Court said that the State should consider "condemning the [traditional lands], taking into account how particularly important they are for the Community." [FN91] However, the Court indicated that when condemnation and return of traditional lands "is not possible on objective and sufficient grounds, the State shall make over ***52** alternative lands, selected upon agreement with the aforementioned Indigenous

Community, in accordance with the community's own decision-making and consultation procedures, values, practices, and customs." [FN92]

The Inter-American Tribunal, when faced with these potential dispossessions, has not established a presumption of invalidity of third-party titles, or any kind of priority of indigenous or Afro-descendant territorial claims over third parties. On the contrary, the Court allows the States to sacrifice indigenous and Afro-descendant territorial rights in favor of the economic interests of third parties having no particular link to the land. In the Yakye Axa and Sawhoyamaxa cases, the Court did not consider it relevant that the agribusiness companies that possessed the lands did not claim any special relationship with the land, aside from an economic relationship. The result is that the cultural link does not clearly prevail over the economic link of third parties in inter-American jurisprudence. The Court could have required the State to provide the particular claimed land to the indigenous peoples and give equivalent land to the ranchers. Instead, the Court took a very different approach, stating that it is not the case that "every time there is a conflict between the territorial interests of private individuals or of the State and those of the members of the indigenous communities, the latter must prevail over the former." [FN93]

C. Administrative and participatory paternalism

The Court has adopted a paternalistic attitude regarding the capacity of indigenous and Afro-descendant communities to manage their own funds and determine the use of Tribunal-awarded economic reparations. This pattern suggests that the Court's understanding of cultural particularities is associated with a conceptualization of cultural backwardness, and that the Tribunal assumes a lack of sophistication regarding the community's ability to handle its own financial matters. The Court imposes severe limits on the freedom of the Afro-descendant or indigenous communities to decide for themselves how to invest the economic reparations that they receive.

In the first of the Court's cases involving an Afro-descendant community, Aloeboetoe, which did not involve a territorial claim, the Tribunal decided to create a trust fund through which a Court-created foundation, rather than the community, would manage the reparations. The purpose of the foundation was ***53** to "provid[e] the beneficiaries with the opportunity of obtaining the best returns for the sums received in reparation," [FN94] and "advise the beneficiaries as to the allocation of the reparations received or of the income they obtain from the trust funds." [FN95] The Court added that the "foundation shall try to ensure that the compensation received by the minor children of the victims be used to cover subsequent study expenses, or else to create a small capital when they begin to work or get married, and that it only be used for ordinary expenses when grave problems of health or family finances require it." [FN96]

Before Aloeboetoe, the Court had only created trust funds managed by the family itself, and only when reparations were ordered for minor children; likewise, never before had the Court put limits on, or given indications about, the types of expenses in which the reparations could be invested. [FN97] With Aloeboetoe, the creation of indigenous trust funds likens indigenous and Afro-descendants to minors, as if the groups had a diminished legal capacity to manage their own economic resources. To not permit the community to manage its own trust fund also reveals the Tribunal's distrust regarding the capacity of the community to handle its own financial resources.

Although the Court has progressed greatly in the fifteen years since its decision in Aloeboetoe, including in cases involving territorial claims, the paternalism of the Court continues to be felt, the Court often contradicts its own arguments regarding the communities' right to prior consent on matters that affect their interests. In territorial claim cases, the Tribunal, rather than providing financial reparations to be paid directly to the community, orders the creation of a fund for collective reparations indicating the areas in which the compensatory sums should be invested. [FN98]

In Moiwana, for example, the Court ordered the creation of a development fund designed for "health, housing and educational programs." [FN99] It added that "the specific aspects of said programs shall be determined" [FN100] by a tripartite implementation committee comprised of a representative designated by the ***54** victims, another by the State, and a third member designated by mutual agreement of the victims and the State. [FN101] Rather than respecting the community's right to decide how to handle its own development, the Court decided that the funds would be managed by the tripartite committee,

which includes a member of the Government, instead of by members of Moiwana. In Yakye Axa, the Court similarly ordered that the State create "a community development fund" for "education, housing, agricultural and health programs," which was to be administrated by a three-person committee that included a Government representative. [FN102] In Sawhoyamaxa, the Court ordered the creation of a community development fund that would be dedicated to the "[implementation of] educational, housing, agricultural and health projects, as well as to provide drinking water and to build sanitation infrastructure," and would also be administrated by a tripartite committee with a governmental presence. [FN103] Lastly, in Saramaka, in addition to mandating the creation of a tripartite governing body, the Court ordered the creation of a community development fund, which it limited to "[financing] educational, housing, agricultural, and health projects, as well as [providing] electricity and drinking water, if necessary, for the benefit of the Saramaka people." [FN104]

It appears that the Tribunal believes that the communities themselves are not best positioned to decide the major priority areas for investment of their resources, or to administer the funds, and, for this reason, decides that the State [FN105] should intervene in the managing committee. [FN106] By deciding the main ***55** areas of investment, the Tribunal imposes its own criteria over the community's own with regard to the areas in which it should invest the reparations. [FN107]In cases not involving indigenous or Afro-descendant peoples, the Court never states how the reparations should be invested.

The case involving the Plan de Sánchez massacre, perpetrated against members of indigenous Mayan communities in Guatemala, although not a purely territorial case, demonstrates the Court's paternalism even more clearly. In Plan de Sanchez, the Court did not carry out any analysis of the legal and factual situation of the territory, despite the fact that many families were displaced from the village after the massacre, exactly as in Moiwana. [FN108] The Tribunal observed that the victims were indigenous Mayans that possessed traditional authorities and their own forms of communal organization, including social, economic, and cultural structures. [FN109] Nonetheless, the Court did not create a communal fund at all. Instead, the Court ordered the State to develop programs in these communities, independent of the public works from the national budget already designated for this region or municipality, without demanding that the programs involve the consent or participation of the community itself. [FN110]

***56** D. Collective representation, prior consent, and standing

To protect the rights of indigenous and Afro-descendant peoples, it is essential to recognize and protect traditional forms of political organization and the election of community leaders and representatives. [FN111] In fact, indigenous forms of political organization is one of the elements that the Court takes into consideration in determining whether a particular community qualifies as indigenous or Afro-descendant for purposes of possessing certain rights. [FN112] Despite the Court's recognition of this factor's importance, the Court's emphasis on indigenous political organizations has led to decisions that actually undermine traditional authority structures in indigenous or Afro-descendant communities.

In responding to an objection regarding whether the original petitioner, the Association of Saramaka Authorities and the twelve Saramaka Captains, had the authority to bring the case, the Court opted for a formalist textual interpretation of the Convention. [FN113] It held that there was no "conventional prerequisite that the paramount leader of a community must give his or her authorization in order for a group of persons to file a petition before the Inter-American Commission." [FN114] Thus, the original petitioners were not required to "obtain authorization from the Gaa'manin order to file a petition." [FN115]

Although the Court's solution was textually and formalistically correct in not requiring consent of the community as a whole, the solution appears completely disconnected from what the Tribunal itself would subsequently decide about the community's right to prior consent on matters that affect its interests, such as territory. [FN116] The Court opened up the possibility for petitions that allege violations to territorial rights of indigenous or Afro-descendant communities without the community or its traditional authorities having given consent, been consulted, or even informed. In fact, the Court's formalistic interpretation allows for future petitions to be presented even against the decisions of the communities themselves.

Though no one in the Saramaka case argued that there were differing strategies or positions among the Gaa'man, the petitioners, and the ***57** Saramaka people, one cannot discount the possibility that such disagreements may occur in the future. It

remains unresolved whether a petition can proceed within the inter-American system without the consent of the community, or even in spite of what the community or community authority has decided. This approach of not investigating or surveying community positions can exacerbate or even generate intra-communal conflicts. The approach also calls into question the consistency of the Court's logic. Why should the inter-American system require that the State consult the communities regarding programs that affect them, while this consent is not necessary to present claims in the name of those same communities before the inter-American system?

E. The identity of the victims and the collective nature of claims and reparations

In collective territorial claims cases, the Court has declared that violations of the right to property are violations of the rights of the "members of the community," [FN117] or "members of the people," [FN118] and not of the community as a whole. The Court does not consider the community as a whole to be the victim of the violation of the right to property; rather, the victim is each one of a community's individuals, even though they are not the individual owners of the collective land. However, when assessing the remedy owed for such violations, the Court frequently determines that the reparations are collective and not belonging or owed to individuals. Collective reparations typically involve granting land titles to the community (as opposed to any individuals) and/or the establishment of funds for community development. It is difficult to understand why the Court considers the victims to be the individual members but orders reparations in a collective fashion.

This confused reasoning can lead to significant political and legal problems. It can potentially create tension between the rights of the members of the community, for whom the Court has recognized the right to property, and whom the Court considers to be victims of the case, and the rights of the community as a whole to collective property, which were recognized in the reasoning of the Court but not in the decision of the Tribunal. This potential ***58** tension, created and unresolved by the Court, could lead to intra-communal problems in the future, favoring extra-communal interests from which certain members of the community could try to benefit by selling or giving concessions as rights-holders recognized by the Court.

While this reasoning could lead to undesirable tensions between communities and individual victims, it also leads to the establishment of difficult requirements and unnecessary costs in these types of cases. With respect to cases in which the Court demands the identification and listing of all of the members of the community upon presenting the case before the Court, [FN119] this could mean naming thousands of people. If individualized reparations are never ordered in territorial cases, it seems superfluous to demand that resources be squandered to individualize the members of the community in order to bring the case. [FN120]

F. The reliance of territorial claims on domestic constitutional or international law

One way in which the Court has failed to extend the cultural approach to its total potential is by relying on domestic constitutional and international law in territorial claims cases. In Awas Tingni, Yakye Axa, and Sawhoyamaxa, the Court recognized the collective rights of those communities to their traditional lands, but only after relying in part on Nicaraguan (Awas Tingni) and Paraguayan (Yakye Axa and Sawhoyamaxa) constitutional provisions recognizing collective indigenous property rights. [FN121]This foundation undoubtedly helped the Court in the early stages of the development of its case law, as it enabled the Court to argue that it was mainly giving international protection to rights already constitutionally recognized, rather than establishing ***59** a profound legal innovation based exclusively in inter-American or international law. In indigenous cases, the Court has yet to rule on a case in which there is no constitutional recognition.

There may, however, be limits to the Court's ability to rely on domestic constitutional law. Generally, Latin American constitutions recognize more collective rights for indigenous peoples than for Afro-descendants, leading scholars to describe the process as indigenous inclusion and Afro-descendant exclusion. [FN122] In fact, at least fifteen countries have legally or constitutionally recognized some form of collective rights for indigenous peoples, including, in the majority of cases, the right to collective ownership of their traditional lands: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, México, Nicaragua, Panamá, Paraguay, Peru, and Venezuela. [FN123] However, only half of them (Bolivia, Brazil, Colombia, Ecuador, Guatemala, Honduras, and Nicaragua) legally or constitutionally extend some form of collective rights to

Afro-descendants. Of these, only Nicaragua recognizes the same collective rights in its constitution for indigenous and Afro-descendants. The new constitutions of Bolivia and Ecuador appear to only partially extend the same rights to Afro-descendants as they do to indigenous peoples. [FN124] The Court has yet to respond to crucial questions, such as what happens in countries where collective property is recognized for indigenous peoples but not for Afro-descendants, or what happens in countries where the constitutional regulations of collective rights for indigenous peoples are greater than the collective rights recognized for Afro-descendants. Will the Court make distinctions between the protections of the collective lands of indigenous versus Afro-descendant communities, depending upon local constitutional regulation?

The Court was eventually forced to respond to cases involving States with no explicit or implicit constitutional recognition of the right to communal land in the context of Afro-descendants. In the Moiwana and Saramakacases against Suriname, the Court had to address the fact that the Surinamese Constitution does not recognize the right to collective property. In those cases, the Court could not rest upon constitutional regulation of the right to property, but rather reiterated the idea that Article 21 of the American Convention has an ***60** autonomous meaning. [FN125] Although this holding represents an important development from the previous Awas Tingni case, the Court still felt obliged to resort to Articles 1 and 27 of the International Covenant on Civil and Political Rights and to the International Convention for the Elimination of All Forms of Racial Discrimination in order to interpret the content of the American Convention. [FN126]Even if the Court separated the legal analysis from domestic law, it still relied on external sources of law outside the American Convention to conclude that communal property rights existed and were violated.

In relation to the Court's reliance on sources of international law aside from the Convention, is it worth examining what would happen in cases in which the States have not ratified the Covenant or the Convention against Racial Discrimination? Will the Court recognize collective territorial rights based exclusively on the American Convention? So far, the Court has given no indication. [FN127]

V. Expanding the Framework for Dealing with Territorial Claims

The inter-American system has managed to produce changes in the political and legal discussion surrounding territorial claims in a number of countries, and has brought greater legal protection to these territories' traditional occupants. As a result of the Court's decision in Awas Tingni, the National Assembly of Nicaragua approved a law that regulates the entire system of indigenous and Afro-descendant communal property. [FN128]In Belize, the Supreme Court recognized the rights of Mayan peoples to their territories, [FN129] based fundamentally on the Inter-American Commission's ***61** decision regarding the claim of the indigenous communities in the Toledo District in the south of the country. [FN130]

Additionally, receiving international recognition of their rights in cases decided by the inter-American system has strengthened individual communities and better positioned them to negotiate with the State. By requiring communities' participation in the implementation of Court-ordered reparations, the system has also opened spaces for consultation and dialogue. From this perspective, the system can be seen as a place that fortifies or legitimizes the claims and the actors through the Court's decisions. [FN131]The territorial cases enable the benefiting communities to confront State authorities, forcing Governments to have conversations from the perspective of human rights and to overcome the invisibility of indigenous and Afro-descendant territorial demands. [FN132] Indigenous peoples and Afro-descendants, in a context of greater legal security for their territories, and with more international recognition, may be in a better position to advance a discussion relating to structural problems, particularly the inequitable distribution of wealth and social and political power in their societies.

But the cultural approach to territory does not highlight and, as a consequence, does not address the structural inequalities that support territorial dispossession. By approaching cases from a cultural perspective, the system appears to be focusing on cultural, rather than economic, injustice. As scholar Nancy Fraser explained, those two injustices require ***62** distinct kinds of remedy. [FN133] The remedy for cultural injustice is some sort of cultural or symbolic change, which Fraser proposes:

> [C]ould involve upwardly revaluing disrespected identities and the cultural products of maligned groups. It could also involve recognizing and positively valorizing cultural diversity. More radically still, it could involve the wholesale

> transformation of societal patterns of representation, interpretation and communication in ways that would change everybody's sense of self. [FN134]

Fraser has termed this type of remedy "recognition." [FN135] In the case of territorial claims, the Court is revalorizing the cultural attachment to land, the value of preserving the spatial dimension of cultural enrichment and reproduction, particular forms of organization, and the exploitation of natural resources as expressions of cultural features.

On the other hand, according to Fraser, the remedy for economic injustice "is political-economic restructuring of some sort." [FN136] "This might involve redistributing income, reorganizing the division of labour, subjecting investment to democratic decision-making, or transforming other basic economic structures." [FN137] Fraser refers to these various remedies using the term "redistribution." [FN138] The Court's orders to return lands, demarcate and grant titles, or establish development funds could be understood as limited forms of redistribution.

So far, though, the territorial claims and resulting Court decisions fail to engage the deep level at which the access to land, natural resources, and economic opportunities are racialized. The inequitable process of appropriation and distribution of land in Latin America has been accompanied and facilitated by a process of exclusion, by means of the racialization of indigenous and Afro-descendant persons and peoples. [FN139] The case law leaves ***63** intact the structures that generate racial disadvantage. [FN140] Thus, there is a need to reconcile the claims for recognition, aimed at remedying cultural injustice, with the claims for redistribution, aimed at redressing economic injustice. As Fraser clearly explained, this is not an easy enterprise. Because people of color suffer at least two analytically distinct kinds of injustice, they necessarily require at least two analytically distinct kinds of remedies, which are not easily pursued simultaneously. [FN141]

In the next Parts, this Article follows Fraser's call to find approaches that minimize the conflicts between economic redistribution and cultural recognition in cases in which both must be pursued simultaneously. [FN142] This is not an attempt to develop an integral doctrine under which to analyze all types of territorial claims. Instead, the Article calls on the Court to better contextualize territorial claims in societies where structural racism and unfair distribution of land prevail. The Court should address those claims simultaneously, when possible, from the perspectives of both the cultural approach to land and the non-discrimination and equal protection clauses of the American Convention.

A. Territorial claims in the context of structural racism and inequality

The lack of effective protection of indigenous and Afro-descendant territories should not and cannot exclusively be considered a problem of a lack of recognition of their distinctive cultural features; rather, it must be viewed as the result of discrimination and marginalization imposed upon indigenous peoples and Afro-descendants by Latin American states and societies. Those discriminatory practices have negatively affected access to opportunities for economic and social development. [FN143] To ignore this is to remain unaware of the deeper causes of the lack of protection of territory. Putting aside this reality ***64** also limits the political potential for mobilization around territory and natural resources, as well as the impact of the Court's decisions.

The territorial cases decided by the inter-American system advance and represent the plight of many other Afro-descendant and indigenous communities. The territorial cases are representative of the lack of legal recognition or effective protection of indigenous and Afro-descendant territories, and not only of the communities that reach the inter-American system. The lack of recognition and protection of their territories is a manifestation of the structural discrimination and profound social marginalization of which indigenous and Afro-descendant persons are victims. Rodolfo Stavenhagen, the former United Nations Special Rapporteur for the Human Rights and Fundamental Freedoms of Indigenous People, called attention to this structural fault when he stated that:

> The profound economic inequalities between indigenous and non-indigenous persons, their social marginalization, their political exclusion, and their cultural subordination form a historic picture of persistent discrimination that cannot be labeled as anything other than structural racism, that is, rooted in the structures of power and control that have come to characterize Latin American societies for centuries. [FN144]

In addition, while the territorial claims are made in the context of unfair distribution of land, the unfair distribution itself goes largely unaddressed. For instance, in the Sawhoyamaxa case, Andrew Leake, one of the expert witnesses called by the Court, put the territorial claims of the indigenous communities populating the Paraguayan Chaco in the context of what he defined as the "[i]nequality in the national agrarian structure reflected in the distribution of lands," or "the faulty distribution of lands in the country." Leake explained how territorial claims should be understood in a country with high numbers of people still living in rural areas, where most of the poor population of the country is concentrated.Cattle farming in these areas accounted for only 1.5% of the farming establishments in 1991, but cattle farmers used almost 80% of the productive lands. Even though agriculture produces three times the share of Gross Domestic Product (GDP) that cattle farming produces, and has a much larger share in total exports, agriculture occupies only one-third as much land as cattle ***65** farming.Ameliorating the unfair distribution would produce more equitable social and economic outcomes, given the fact that cattle farming creates negligible employment opportunities. Leake explained that this unfair distribution is due in part to the structural racism that precludes indigenous people from having political power similarto the cattle farmers.Legislation governing the latifundia--large landed estates-- set forth loose standards that have not fostered distribution of land. But the Court has also failed to make any factual determination regarding this unequalcontext.Nor has the Court addressed issues of distribution of land in analyzing the property rights claims articulated by the Sawhoyamaxa people.

B. The need to contextualize territorial claims in and beyond the context of structural racism and inequalities

Given this context and background of structural inequalities, there is a need to think of the territorial cases as representative of systemic problems produced in a context of structural racism. In not understanding that the litigation of territorial cases is one of the strategies for attacking structural problems, the Court is missing an opportunity to force more structural changes. It is even possible that, by ordering the type of reparations that it does, the Court could be maintaining the status quo of structural inequality. As David Kennedy concluded, a lack of attention to background sociological and political conditions that provide meaning to a right in particular contexts renders the evenhanded pursuit of "rights" vulnerable to all sorts of distorted, and distinctly non-neutral, outcomes. [FN145]

The Human Rights Committee has correctly observed "that the right to enjoy one's own culture in community with the other members of the group cannot be determined in abstract but has to be placed in context." [FN146] Because the Committee, like the Court, considers territorial claims from a cultural perspective, [FN147] its call, albeit limited, to contextualize the violations is crucial and relevant to the inter-American system.

***66** Authors Cavallaro and Brewer recently called on the Court to provide a more contextualized analysis of human rights violations. They have urged the Inter-American Court to consider the social and political dynamics at work in particular countries and cases, to the extent appropriate for an impartial judicial body. [FN148] They contend that the Court cannot rule on cases in total isolation, and that attempting to do so may be counterproductive to the extent that it leads the court to make incorrect factual assumptions. Only by analyzing evidence sufficient to gain a solid understanding of the context in which a violation occurs is it possible for the Court to appreciate the full extent of the violations in the case. [FN149] Additionally, without paying attention to the context, the Court could be missing the fact that a case is representative of a pattern of violations, or that the situation extends beyond the victims of the case. This consideration is especially relevant when the Court issues reparations orders. According to Cavallaro and Brewer, contextual information and an understanding of the local political and social climate are crucial to achieving concrete goals set by the Court, and avoiding societal backlash. [FN150] By decontextualizing the cases, States and, by extension, the Court may be interpreting a problem as a limited violation that can be resolved through the payment of reparations, rather than as a systemic ***67** problem that requires the enactment of systematic, resource-intensive reforms. [FN151]

It would be a useful supplement to Court's reasoning to consider the approach adopted by the African Commission on Human and Peoples' Rights in its leading case on territorial claims by an indigenous community. In the Endorois case, the African Commission put the territorial claim of an indigenous group into the context of their situation as "marginalized and vulnerable groups," who "have not been accommodated by dominating development paradigms and in many cases . . . are being victimized by mainstream development policies and thinking. . . ." [FN152] The African Commission also added that indigenous peoples "have, due to past and ongoing processes, become marginalized in their own country." [FN153] Moreover, the

African Commission noted that the term "indigenous" is not intended to create a special class of citizens, "but rather to address historical and present-day injustices and inequalities." [FN154] The African Commission, through its Working Group of Experts on Indigenous Populations/Communities, has set out four criteria for identifying indigenous peoples. [FN155] These are: the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; and, particularly relevant for our purposes, "an experience of subjugation, marginalization, dispossession, exclusion or discrimination." [FN156]

For the African Commission, the recognition of marginalization, dispossession, exclusion, and discrimination to help determine communities' property rights to their traditional lands constitutes only the first step in the protection of traditional African communities. [FN157] It is the starting point but not the endpoint, as it appears to be in inter-American case law.

***68** In addition to incorporating the marginalization analysis to make structural changes, the Court must consider the general social inequalities in which the territorial claims take place, and also the specific context of each case. The context of each particular case can differ greatly, requiring remedies that may vary with each context. For example, in the Saramaka case, there was a complete lack of State policy recognizing the right to collective property, so demarcation, titling, and protection of lands and territories did not exist for the Saramaka or any other community. There, the Court was creating a special mechanism for one community, in the context of a structural problem faced by all the indigenous and Afro-descendant peoples. In contrast, the Yakye Axa and Sawhoyamaxa cases were based on the limits and shortcomings of an existing mechanism in Paraguay that already constitutionally recognized the right to collective territoriality. In the Paraguayan cases, the Court was addressing a problem specific to certain communities that had not encountered an effective response to their claims, while most of the Paraguayan indigenous communities had already obtained their titling. The differences revealed in the Paraguayan cases show that the Court should apply a more case-by-case approach in its reasoning, and in the reparations ordered, avoiding mechanical repetition of previous decisions that do not necessarily conform to the particularities of each case, or to the legal, political, social, or economic context in which different claims are produced. [FN158]

As just one example of how the differences can be addressed, the inter-American system should recognize the existence of different models of collective ownership of territories. [FN159] In some situations, collective territorial rights may require more than a mere delimitation, demarcation, and titling, as they depend upon complex legal, economic, social, and political aspects. [FN160]

Until now, the Court's decisions have not attempted, and therefore have not managed, to alter the logic of unjust distributions of land, marginalization and poverty, or the inequitable investment of public expenditures to the detriment of indigenous and Afro-descendant peoples. The political and legal construction of a more equal indigenous and Afro-descendant territoriality requires a new model of rural development and agrarian structural ***69** transformation in Latin America, one which effectively incorporates indigenous and Afro-descendant persons and respects their condition as collective subjects with their own forms of organization. [FN161]

In addition, the mechanisms to supervise compliance with and implementation of the judgments should be strengthened. A decade's experience demonstrates that litigation before the inter-American system is not an ultimate objective, but rather a means to an end, a tool in the struggle for the protection of collective territorial rights. The inter-American system cannot be a substitute for domestic mobilizations, but is rather an integral part of the political process of territorial recognition. In fact, the achievement of favorable responses from the inter-American system demonstrates that Court decisions will not be implemented unless they are part of an integral [integral to what?] process of political pressure once the process moves back to the national sphere.

Last but not least, as has been explained in the African context and is also applicable to Latin America, the reform of the laws of land possession involves redefining intra- and inter-communal relationships, as well as the relationships between the communities and the State. [FN162] Thus, reparations ordered in individual cases in favor of particular communities cannot be considered in isolation from the entire territorial situation of indigenous and Afro-descendant peoples. The Court must be aware of and address the intra- and inter-communal tensions that could arise, whom the winners and losers are going to be, and the extent of likely resistance to the Court's decision.

C. A more consistent approach to racial equality and non-discrimination

The cultural approach requires privileging cultural identity over racial identity, promoting further the phenomenon of making race invisible in Latin America. [FN163] Until now, the inter-American system has demonstrated ambivalence regarding whether the lack of recognition of collective rights to territory, or the lack of effective implementation of constitutionally recognized rights, constitutes a form of racial or ethnic discrimination. The Commission, in ***70** the case of the territorial claims of the Mayan communities of Belize, [FN164] and in various admissibility decisions during the last few years, has inconsistently decided to analyze the territorial claims of the indigenous and Afro-descendant peoples from the perspective of racial discrimination. In some cases, the Commission has understood that there is discrimination because certain social groups and forms of land ownership receive effective protection from the State, while others, particularly those associated with indigenous and Afro-descendant peoples, do not. The Commission also considered that discrimination results in the disparate negative impact that lack of protection has on such ethnic or racial groups. [FN165]

The Court has also been ambivalent. Regrettably, the Court has yet to find violations of Article 24 [FN166] regarding equal protection, or even to develop arguments regarding the principle of non-discrimination contained in Article 1.1, although it has found violations of Article 1.1 on its general requirement that States respect and guarantee rights. [FN167]

First, the Court has on several occasions deemed it necessary to recall that, as territorial claims by indigenous communities cases involve "the rights of the members of an indigenous Community . . . pursuant to Articles 24 (Right to Equal Protection) and 1(1) (Obligation to Respect Rights) of the ***71** American Convention, the States must ensure, on an equal basis, full exercise and enjoyment of the rights of these individuals." [FN168] The Tribunal has maintained that to ignore collective forms of ownership and possession in indigenous communities in accordance with their culture, use, customs, and beliefs, "would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons." [FN169] The Court thus used equal protection considerations in analyzing the contours of the right to property.

Second, the Court has said that members of indigenous and tribal peoples require certain special measures to guarantee the full exercise of their rights, particularly with respect to the enjoyment of their rights to property, in order to guarantee their physical and cultural survival. [FN170] States have the positive obligation to adopt special measures in order to guarantee the indigenous and the tribal peoples full and egalitarian exercise of the right to the territories that they have traditionally used and occupied. [FN171] The Tribunal has emphasized in these cases that, in international law, the unequal treatment of persons in unequal conditions does not necessarily constitute impermissible discrimination, and that legislation that recognizes said differences is not, therefore, discriminatory. [FN172]

The inconsistency of the Court is evident in the Saramaka case. In that case, the Court for the first and only time considered that the State failed to fulfill its general obligation to adopt legislative measures, or measures of another nature, necessary to give effect to the rights and to respect and ensure their free and full exercise without discrimination. [FN173] However, the Court did not explain what constituted discrimination in the particular context of the case. Nor did it explain the ways in which in this case differed from previous cases in which the Court had not mentioned the non-discrimination clause. In fact, it ***72** appears that the Court was not fully prepared to rule on this issue; in the dispositive section, the Court simply referred to the obligations to respect, guarantee, and give domestic legal effect to the right to property, juridical personality, and judicial protection, without mentioning the non-discrimination portion of Article 1.1. [FN174]

The main problem with the Court's approach to discrimination is that it considers the non-discrimination principle only as a call to pay attention to the cultural differences of indigenous peoples from the majority population, rather than to their racial and ethnic differences, which also correlate with their unequal access to resources. The Court considers that special measures or the recognition of collective forms of properties are required to protect the cultural differences between indigenous and certain Afro-descendant communities and the rest of the society. The Court has said, "the States must take into account the specific characteristics that differentiate the members of the indigenous peoples from the general population and that constitute their

cultural identity." [FN175] In other words, those measures are needed to treat different cultural groups. But, the Court, so far, has never said that those special measures are required to address the unequal historical treatment against indigenous or Afro-descendant communities, nor to address present racial disparities.

As the Constitutional Court of Colombia has explained, an anti-discrimination approach does not rely exclusively or primarily on the preservation of the cultural singularity of a human group. Rather, it recognizes the asymmetric situation of indigenous and Afro-descendant groups and seeks to eliminate the barriers to full equality. It confronts the causes that generate such disparities and seeks to reduce the effective power deficit between indigenous peoples, Afro-descendants, and others. All this could be done, according to the Colombian Constitutional Court, without eliminating traditional cultural features. [FN176] The Inter-American Court, however, has not yet been willing to take up this call.

By just recognizing the right of occupancy of traditional lands, without taking into account structural discrimination, some territorial decisions may reinstate power inequalities and unfair property relations. [FN177] This occurred in ***73** the case of Yakye Axa, where the private landlords of the traditional lands of the community and the Paraguayan Congress were not interested in altering the power dynamic even after the Court's decision. As the Court recognized in Yakye Axa, the portion of land being claimed was only "a specific part of what was the vast Chanawatsan territory." [FN178] Yet the case resolved the dispute only about that small piece of land.

Additionally, as previously explained, the Court's cultural approach has limited, if any, application to most non-indigenous communities in the Americas. Many Afro-descendant communities could not make a cultural argument. For these communities, the only possibility of getting the protection of the inter-American system is by addressing their claims from the perspective of structural racism of the sort that is so pervasive in Latin America. It appears that the recognition of property rights of large numbers of communities in the hemisphere may well depend on arguments that are more heavily weighted in the direction of non-discrimination. [FN179]

The territorial recognition from the perspective of the principle of equality and non-discrimination would open new perspectives [FN180] and could enormously expand the scope of potential reparations. The equality and non-discrimination approach would permit the consideration of the lack of effective protection of traditional territories in the context, and as an expression of, inequalities and structural racism of which indigenous and Afro-descendant persons are victims. It could also allow the Court to consider the recognition and protection of territories as a remedy for past or present racial discrimination, [FN181] or as reparation for the consequences of slavery and colonialism.

***74** Of course, an antidiscrimination strategy is riskier, given the inter-American system's limited case law with regard to equality, [FN182] particularly equality in collective rather than individual terms. It could also encounter greater resistance on the part of the States, as there is much reluctance in Latin America to talk about issues of racial discrimination.

For this reason, one should think of the cultural and equality arguments as complementary rather than mutually exclusive. Cultural approaches that avoid the limitations reviewed here should be complemented by new alternative arguments from the equality and non-discrimination approaches in order to extend the conceptual field of violations and reparations, and particularly to address the root causes for the lack of protection of traditional lands.

D. The Campo Algodonero (Cotton Field) case as a promising model

Introducing the question of structural racism, and increasing contextualization of the claims, could open the door to more profound redistributive outcomes in the cases decided by the Court. In fact, in the recent Campo Algodonero (Cotton Field) case, which dealt with violence against women in the context of structural gender discrimination, the Court for the first time attempted to articulate the relationship between structural discrimination and reparations. The reasoning in that case is very promising and could have a strong impact on the case law of indigenous and Afro-descendant communities' land claims.

In the Campo Algodonero case, the Court started by recalling that the concept of integral reparation entails the

re-establishment of the previous situation, and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused. [FN183]But, the Court added that in a "context of structural discrimination in which the facts of this case occurred . . . the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable." [FN184] Thus, in ordering reparation, the Court explicitly considered which measures of reparations would "restore the victims to their situation prior to the violation insofar as ***75** possible" and be "designed to identify and eliminate the factors that cause discrimination." [FN185]

In the context of reparations for territorial dispossession, Saffon and Uprimny have termed this approach "transformative reparations," meaning reparations that aim to transform structural relations of inequality, subordination, and exclusion. Traditional reparations, they argue, would preserve situations that are themselves unfair and violate victims' dignity. Instead, a transformative approach to reparations should aim at addressing not only the damage caused to victims, but also the conditions of deprivation in which victims lived that allowed or facilitated their victimization. [FN186] Fraser has also differentiated transformative from affirmative remedies. Affirmative remedies are "aimed at correcting inequitable outcomes of social arrangements without disturbing the underlying framework that generates them." [FN187] Transformative remedies, in contrast, are "remedies aimed at correcting inequitable outcomes precisely by restructuring the underlying generative framework." [FN188]

This complementary approach to reparations is consistent with existing legal standards on reparations for victims as determined by the Inter-American Court, where restitution is complemented by measures of non-repetition. For instance, more than a decade ago, the Court explained in the Garrido case that "reparation may also be in the form of measures intended to prevent a recurrence of the offending acts." [FN189] In certain aspects, non-repetition guarantees identify and attempt to remedy a structural wrong that the Court has recognized in its examination of a case. [FN190] Many times, the Court has made references to directing reparations at "society as a whole" , [FN191] when the Tribunal intends for this type of measure to repair more than the harm to an individual victim. Therefore, while the victim may be ***76** only one individual, all individuals in similar situations are also beneficiaries of the reparation measures. [FN192]

In situations where the right to property over territories has not been recognized or secured, the restitution component is very pertinent, as it requires the return both of the relevant assets and of rights over them. However, as those dispossessions occurred in a context of structural discrimination, the restitution measures need to be complemented by the other components of reparations. Particularly, as the Court did in Campo Algodonero, and as Saffon and Uprimny advocate, those reparations should have a transformative approach or vocation. [FN193] "Indeed, all the components of reparations, including restitution," Saffon and Uprimny advocate, "can be used to transform power relations and inequalities. In the case of restitution, this would imply the return of assets, but with the assurance that victims will be no longer submitted to conditions of exclusion and vulnerability." [FN194] By only recognizing the occupancy of limited spaces of the traditional lands, the Court may be just reinstating power inequalities and unfair property relations. [FN195] For instance, this was the case in Yakye Axa, in which the private landlords of the traditional lands of the community and the Paraguayan Congress were not interested in altering this dynamic. As the Court recognized in the Yakye Axa case, the portion of land being claimed was only "a specific part of what was the vast Chanawatsan territory." [FN196]

In dealing with territorial claims by indigenous peoples and Afro-descendant communities, this approach to transformative reparations for violations in the context of structural discrimination would require litigants to prove the existence of structural racial discrimination and its impact on the territorial claims. The Court would be required to assess whether the simple recognition of the collective rights to property and the identification, demarcation, and titling of these lands would constitute full reparation or instead would entail reestablishing the structural context of discrimination. But, in order to make those determinations, the Court will need evidence of the structural disparities and particular measures needed to address those systemic problems. These transformative reparations could lead to measures that, as the Court put it in Campo Algodonero, "(i) question and . . . modify, the status quo that causes and maintains violence . . .; (ii) . . . clearly le[ad] ***77** to progress in overcoming the unjustified legal, political, social, formal and factual inequalities that cause, promote or reproduce the factors of . . . discrimination, and (iii) raise the awareness of public officials and society on the impact of the issue of discrimination . . . in the public and private spheres." [FN197]

VI. Some Tentative Conclusions

The inter-American system has established itself as a permanent and prominent actor in the discussion of the protection of indigenous and Afro-descendant collective territorial rights. It has done so principally through decisions of the Court and the Commission, which have in the last decade demonstrated receptivity to the territorial demands of indigenous and Afro-descendant peoples. For this reason, analysis and discussion of the ambivalences, contradictions, and existing gaps in jurisprudence presented by the articulation and adjudication of territorial claims at the inter-American level are necessary to consider the potential benefits and limitations offered by an international judicial mechanism to protect these collective rights.

The decisions show an evolution in the resolution of territorial claims by indigenous and certain Afro-descendants groups in Latin America with respect to their traditional territories, from a dyadic interaction between indigenous peoples' land tenure systems and formal state law, to a more complex interaction between indigenous peoples' land tenure systems, formal state law, and formal human rights law. [FN198]

In the case of Afro-descendants, the inter-American system has so far advanced only because it has assimilated their territorial claims into those articulated by indigenous peoples, and only insofar as the Afro-descendant communities could be considered "tribal peoples." Through a display of specific cultural traits, this process reproduces the phenomenon that has occurred in distinct Latin American countries, which has been designated the "ethnicization" of the Afro-descendants under the model of indigenous ethnicity. [FN199] It leads the Afro-descendant rural communities to affirm their ***78** identities as "tribal people" in the terms required by the Court. In this sense, the Afro-descendants are asked to present themselves and their relationship with the State using the model of the indigenous movement. [FN200] The Court's protection of traditional land is considered merely because it contributes to or facilitates the realization or enjoyment of indigenous or Afro-descendant cultures, rather than to economic power. [FN201]

Various authors understand that, at a national level, this strategy of culturalization of claims under the indigenous model, and the abandonment of claims based on race and racial discrimination perspective has enabled them to be effective in their claims for territorial security. [FN202] Although the positive assessment of the culturalization strategy for territorial claims may be descriptively correct, it is no reason to fail to recognize that a racial discrimination perspective would surpass the limitations of the cultural approach to territory and natural resources. The approach also permits contextualization of collective land claims within structural problems of marginalization, exclusion, and structural racism.

In fact, it appears that the Court lacks an inclusive category that recognizes all of the rights of Afro-descendant people in the Americas. However, it may be recalled that the international legal order did not always recognize indigenous peoples as bearers of distinct rights vis-à-vis those of states, individuals, or minorities either. In fact, the emergence of indigenous peoples as subjects of international law did not become part of international law discourse until the latter part of the twentieth century. [FN203] I am not endorsing "the idea of a one-size-fits-all argument for Afro-Descendants in the Americas (who range all the way from President Obama to Saramakas)" that "belies the variety of historical and ethnographic realities these diverse peoples represent," as has been charged. [FN204] To the contrary, I suggest that the Court should contextualize the cases, recognizing that violations occur in a context of, because of, and aggravated by structural racism and pervasive inequalities throughout Latin America. As such, understanding the claims of Afro-descendants from the perspective of non-discrimination, and ***79** articulating a jurisprudential response to that inequality, would act as a complement the cultural approach, and would extend the protection and recognition of collective and individual rights to other Afro-descendant communities and individuals.

Postscript

On August 20, 2010, after the writing of this Article, the Court ruled on a new indigenous territorial claim, the Xakmok Kasek case. [FN205] Since, at the time of this writing, there is no official English translation of the decision, only some brief reflections will be included here.

In Xakmok Kasek, the Court maintained its cultural approach to the territorial claim of the community. [FN206] In fact, the Tribunal several times criticized Paraguay for considering indigenous claims to land exclusively from a "productivity" perspective, or from the agrarian framework, without considering the particularities of those indigenous claims. [FN207] This critique is very important in two ways. First, the Tribunal clarified in detail how the State should resolve and balance the claims of indigenous peoples to lands that are in private hands. The Court's approach is much more protective than the one taken in Sawhoyamaxa, which is criticized in this Article. Nevertheless, the Court did not go so far as to require the State to give prevalence to the indigenous claim, nor to consider that the alternative lands should be granted to the community and not to the private landholder. The Court only required that the State, in adopting a new legislative framework, consider the importance of traditional lands to indigenous peoples. That is not enough. Lands in private hands are being productively exploited in denial of indigenous claims. Finally, the Tribunal required that a judicial authority should be empowered to rule on those conflicts. [FN208]

The Court's critique of Paraguay's purely economic approach to the land claim highlights the need to adopt a complementary approach to territorial rights, which is discussed in this Article. In other words, it is not adequate for the protection of the collective rights of indigenous and Afro-descendant peoples to adopt either a cultural approach (as the Court does) or an economic one (as Paraguay does). There is a need to understand the cultural value of the land as well as its economic potential.

***80** The Tribunal also reiterated that the violations that the Court found were of the rights of the members of the community, rather than of the rights of the community itself. [FN209] This decision merited a strong concurring opinion by Judge Vio Grossi urging the Court to change its approach and consider the community as the victim.

In terms of reparations, the Court persisted in the same mistakes of Saramaka, Sawhoyamaxa, and Yakye Axa. The Tribunal ordered the establishment of a development fund to be invested in certain areas and administered not by the community but by a tripartite committee. [FN210]

The most important development that Xakmok Kasek brings to the inter-American case law is the finding that Paraguay is in violation of its duty not to discriminate against the members of the community. To reach this conclusion, the Tribunal considered the condition of extreme and special vulnerability of the members of the community. The factors leading to that condition were the lack of effective remedies to protect indigenous rights, the weak provision of social services, including adequate food, drinkable water, health care, and education, and the prevalence of the protection of private property over indigenous territorial claims. [FN211]The Court ruled that this situation constitutes de facto discrimination, and that the State did not adopt the necessary positive measures to reverse the marginalization and exclusion of the community. [FN212]

This crucial step of the Court in the right direction did not translate in any specific new order of the Tribunal.In effect, in the reparations section, the Court awarded exactly the same type of remedies found in all of the previous cases reviewed in this Article.More troubling is the fact that the Court did not address the claims by the representative of the community that there is a "policy of discrimination" and a "systemic pattern" of discrimination against indigenous peoples.The denial of protection of the lands of the Xakmok Kasek community, according to its representatives, is nothing other than the implementation of a "racist and discriminatory policy" that had been in place in the past and that has not changed in the present. [FN213]

In sum, the Xakmok Kasek case represents a positive step for the Court, clearly finding a violation of the non-discrimination clause of the American ***81** Convention. Nevertheless, the case still follows the limited cultural approach framework. As such, it continues to provide only patchwork protection to territorial claims in the context of structural discrimination and racism.

[FN1]. I would like to thank James Anaya, Oswaldo Ruiz, Daniel Bonilla, Fergus MacKay, James Cavallaro, and Judith Schönsteiner; the participants on the Panel: International Law and Latin America: Rethinking Inequality in Universal Values, State Independence, and Human Rights (1810-2010?) at the 2009 Congress of the Latin American Studies Association, Rio de Janeiro, Brazil June 11-14, 2009; and the Panel: Contemplating Individual and Collective Rights Issues Under the UN Declaration on the Rights of Indigenous Peoples at the UCLA Symposium on "Indigenous Peoples' Rights in the International

Human Rights Framework--A Comfortable Fit?" January 22, 2010, for their comments, reflections, and critiques of the original ideas and preliminary versions of this Article. Special thanks to Karen Engle, my colleague at the School of Law at the University of Texas. After the completion of the manuscript of this Article, Karen's book, The Elusive Promise of Indigenous Development(Duke 2010), was published. While I benefited enormously from an ongoing dialogue with Karen, I was not able to provide references to her book, which would have improved this Article. As always my conversations with Denise Gilman help to sharpen my ideas. Special recognition to Meghan Vail and Cindy Blanco for their assistance in translating my English into real English and to Pat Nealon for a final reading of the draft. Of course, all errors are my exclusive responsibility.

[FN2]. The Court, together with the Inter-American Commission on Human Rights ("IACHR," "the Commission," or "the Inter-American Commission"), comprises what is called the Inter-American Human Rights System, created within the Organization of American States (OAS).See Robert K. Goldman, History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights, 31 Hum. Rts. Q. 856 (2009) and Cecilia Medina & Claudio Nash, Sistema Interamericano de Derechos Humanos: Introducción a sus Mecanismos de Protección (2007).

[FN3]. Maroon societies are communities formed by escaped slaves in the Caribbean, Latin America, and the United States. These societies ranged from small groups of runaway slaves that survived less than a year to powerful societies encompassing thousands of members and surviving for generations and even centuries. Today, their descendants still live in autonomous enclaves in several countries of the Americas. See Maroon Societies: Rebel Slave Communities in the Americas 8 (Richard Price ed., John Hopkins Univ. Press 3rd ed. 1996) (1973).

[FN4]. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C)No. 172, P 82 (Nov. 28, 2007). The case concerned logging and mining concessions awarded by the Government of Suriname in the territory claimed and inhabited by the Saramaka people without their prior consultation.

[FN5]. Id. at P84.

[FN6]. Id. at P 82.

[FN7]. Id. at P 86.

[FN8]. According to Busso, Cicowiez, and Gasparini, there are more than 50 million indigenous people and more than 120 million Afro-descendants in Latin American and the Caribbean. This represents almost 33% of the total population of the region. The heterogeneity in ethnic/racial structure between countries, however, is great. In Bolivia, Guatemala, Peru, and Ecuador, more than 25% of the total population is indigenous, whereas in Panama, Brazil, and Nicaragua more than 25% of the population is Afro-descendant. On the other hand, in some other countries, such as Argentina and Uruguay, only a small percentage of the population is indigenous or Afro-descendant. Matías Busso et al., Ethnicity and the Millennium Development Goals 38 (2005).

[FN9]. See e.g., Isabel M. Cuneo, The Rights of Indigenous Peoples and the Inter-American Human Rights System, 22 Ariz. J. Int'l & Comp. L. 53 (2005); Jo M. Pasqualucci, The Evolution of International Indigenous Rights in the Inter-American Human Rights System, 6 Hum. Rts. L. Rev. 2 (2006).

[FN10]. Isabel Madariaga, Relatoría sobre los Derechos de los Pueblos Indígenas de la Comisión Interamericana de Derechos Humanos, delivered to the Instituto Interamericano de Derechos Humanos, available at http://www.iidh.ed.cr/comunidades/diversidades/docs/div_enlinea/ponencia%20iii%C20curso%C20interamericano%madariaga.htm [hereinafter Instituto Interamericano].

[FN11]. There is no official information on the number of petitions and cases related to Afro-descendant people pending in the Commission. Telephone Interview with Inter-American Commission on Human Rights Commission Member (May 21, 2010).

[FN12]. See Eva T. Thorne, The Politics of Afro-Latin American Land Rights (Apr. 3, 2008) (unpublished manuscript), available at http:// www.allacademic.com/meta/p267621_index.html (stating that Afro-descendant communities have mobilized for state recognition and titling of land and territory that they have traditionally occupied. Rural blacks have pressed for land rights in Brazil, Colombia, Ecuador, Honduras, Nicaragua, and Guatemala. These groups have occupied their traditional lands in mountains and forests, and along rivers and coasts, for a number of generations, often since the colonial era, and usually prior to the abolition of slavery.).

[FN13]. See Eric Dannenmaier, Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine, 86 Wash. U. L. Rev. 53 (2008).

[FN14]. "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. Usury and any other form of exploitation of man by man shall be prohibited by law." Organization of American States, American Convention on Human Rights, Pact of San José, Costa Rica, art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[FN15]. Mayagna (Sumo) Awas Tigni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79,P 148 (Aug. 31, 2001). The case concerned the concession granted by the Government of Nicaragua to a Korean-based logging company within the territory of the Awas Tingni, a Sumo Mayagna indigenous community on the Atlantic Coast of Nicaragua, without the community's prior consultation and consent.

[FN16]. Id.

[FN17]. Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005) and Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006). The Yakye Axa and Sawhoyamaxa communities are indigenous communities belonging to the Lengua Enxet Sur people, who lost their traditional territories. While awaiting restitution, both communities settled on strips of land between a public road and the fence of their claimed land. Those roadside settlements suffered from precarious living conditions, including a lack of clean water, sanitation, and access to medical care.

[FN18]. Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005). The Moiwana case deals with the massacre on November 29, 1986 of at least thirty-nine N'djuka Maroon residents of the village of Moiwana by Surinamese government and militia forces. The village has been abandoned, since the operation also destroyed village houses, and most of the survivors left the community and crossed the border into French Guiana, where they have lived ever since.

[FN19]. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

[FN20]. Claudio E. Nash Rojas, Los Derechos Humanos de Los Indígenas en la Jurisprudencia de la Corte Interamericana de Derechos Humanos, in Derechos Humanos y Pueblos Indígenas: Tendencias Internacionales y Contexto Chileno 29-43 (José Aylwin O. ed., 2004), available at http:// www.cdh.uchile.cl/articulos/Nash/ponencia%20UFRO-%20C.%20NASH.pdf.

[FN21]. Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 146, P 120.

[FN22]. Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124, P 149.

[FN23]. Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, P 135; see also Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am.Ct. H.R. (ser. C) No. 146, P 118.

[FN24]. Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, P 216.

[FN25]. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79,P 149.

[FN26]. Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, P 155; see also Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am.Ct. H.R. (ser. C) No. 146, P 143.

[FN27]. Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am.Ct. H.R. (ser. C) No. 146, P 222.

[FN28]. Id. at P 128.

[FN29]. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382.

[FN30]. Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124, P 133, P 86.

[FN31]. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, P 84.

[FN32]. Id.

[FN33]. Id. at P 86.

[FN34]. The Court understood that the right to property protected by Article 21 of the American Convention should be interpreted in light of the rights recognized in Articles 1 and 27 of the International Covenant on Civil and Political Rights. The Court followed the United Nations Human Rights Committee in using Article 27 of the Covenant to maintain that "individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture [which] may consist in a way of life which is closely associated with territory and use of its resources...." U.N. Human Rights Committee, General Comment 23: The Rights of Minorities (Art. 27), P 1 & P 3.2, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Aug. 4, 1994).Similarly, it understood that Article 1 of the Covenant recognizes the indigenous peoples' right to self-determination in accordance with the principle that peoples can "pursue their economic, social, and cultural development" and can "freely dispose of their natural wealth and resources" so as not to deprive them of "their own means of subsistence." Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, P 93. So far, the Human Rights Committee, which was created specifically in order to monitor compliance with the Covenant, has avoided extending the principle of self-determination of the peoples in Article 1 to indigenous peoples. Interestingly, in the Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and of the Draft Inter-American Convention on Human Rights, it was argued that the self-determination of peoples recognized in Article 1 of the Covenants should not be included in the American Convention because "it is not an individual right but a principle" and that Article 27 of the Covenant should not be included in the American Convention because it is "unnecessary" as the "prohibition that it claims to secure is already included in the article on the equality of all before the law." Inter-American Commission on Human Rights [IACHR], P 47 & 75, OEA/Ser.L/V/II.19, Doc. 5 (prepared by the Rapporteur for the subject), reprinted inInter-American Y.B. on Human Rights 18 (1968). See also Ludovic Hennebel, La Convención Americana de Derechos Humanos y la Protección de los Derechos de los Pueblos Indígenas, 127 Boletín Mexicano de Derecho Comparado 131, 133 (2010).

[FN35]. Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 142,P 34 (Feb. 6, 2006).

[FN36]. Id. at P 35.

[FN37]. Id. at P 34.

[FN38]. Id. at P 33.

[FN39]. Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, P 151 (June 17, 2005).

[FN40]. Id. at P151.

[FN41]. Id. at P 148.

[FN42]. Id. at P 149.

[FN43]. Id. at P 137.

[FN44]. Id. at P 137.

[FN45]. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79, P 140k.

[FN46]. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79,P 153b.

[FN47]. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, P 129.See also Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 P 142 (2004).

[FN48]. The Court established that the consultation with the community should be carried out in good faith and in conformity with the customs and traditions of the affected people. The State has a duty to provide information to foster constant communication between the parties. Consultations can only be in good faith if they are carried out at the early stages of formulating or planning a development or investment plan. The State should ensure that members of the respective people are aware of possible risks, including environmental and health risks. The State should guarantee that decisions regarding plans for development or investment in their territories are undertaken according to the people's own customs and traditions. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, P 133.

[FN49]. The Tribunal clarified that the State should reasonably share the benefits of the plan with the affected people. The Court understood that Article 21.2 of the Convention, which decrees that no one can be deprived of his property, except upon payment of just compensation, applies in this case to the exploitation of natural resources in collective territories, and to the right of the respective people to participate in the benefits as a form of reasonable and equitable compensation deriving from the exploitation of its lands and natural resources. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, PP 138-39.

[FN50]. According to the Court, the State should guarantee that no concessions within the territory will be granted unless and until independent technically capable entities, under the supervision of the State, perform a preliminary study on social and environmental impact. The studies should evaluate the possible damage or impact that a development or investment plan can have on the property or community in question. It should be carried out in compliance with international standards and best practices and should respect the traditions and culture of the people involved. The studies should measure the cumulative impact that existing plans have generated and the impact generated by the existing plans that have been proposed. Finally, the studies should analyze the level of impact, ensuring the plan does not diminish the capacity of the members of the group to survive as a people.

[FN51]. Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124, P 209.

[FN52]. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79,P 135.

[FN53]. Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, P 102.

[FN54]. Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am.Ct. H.R. (ser. C) No. 146, P 109.

[FN55]. Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, P 102.

[FN56]. Id.

[FN57]. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79,P 167; Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, PP 205-06; Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124, PP 214-15; Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am.Ct. H.R. (ser. C) No. 146, PP 224-25; and Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, PP 201-02.

[FN58]. Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124, P 210.

[FN59]. Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am.Ct. H.R. (ser. C) No. 146, P 233.

[FN60]. This approach is not unique to indigenous rights. See Amy J. Cohen, Thinking with Culture in Law and Development, 27 Buff. L. Rev. 511 (1992) (describing and raising questions about the recent turn to culture in law and development).

[FN61]. Sally Engle Merry argued that conceptions of culture as a static tradition are fundamental to contemporary transnational human rights discourse and not limited to indigenous claims. Sally Engle Merry, Human Rights Law and the Demonization of Culture (And Anthropology Along the Way), 26 Pol. and Legal Anthropology Rev. 55, 58 (2003).

[FN62]. Odile Hoffmann, Conflictos Territoriales y Territorialidad Negra, Afrodescendientes en las Américas. Trayectorias sociales e identitarias 351 (2002).

[FN63]. We refer to this and other cases pending or decided by the Commission as the Commission follows the case-law of the Court in this area and because in order to get a case to the Court, the Commission needs to rule first on the claim.

[FN64]. Gerald Torres, Indigenous Peoples, Afro-Indigenous Peoples and Reparations, in Reparations for Indigenous Peoples: International and Comparative Perspectives 117, 117-42 (Federico Lenzerini ed., 2008).

[FN65]. Right of Black Colombians to Collectively Own and Occupy their Ancestral Lands, Law No. 70 (1993) (Colom.) available at http:// www.benedict.edu/exec_admin/intnl_programs/other_files/bc-intnl_programs-law_70_of_colombia-english.pdf.

The cultural approach is present throughout the law. Article 1 of Law 70 establishes that the object of the Law is "to recognize the right of the Black Communities that have been living on barren lands in rural areas along the rivers of the Pacific Basin, in accordance with their traditional production practices, to their collective Property" and "to establish mechanisms for protecting the cultural identity and rights of the Black Communities of Colombia as an ethnic group." Article 2 contains several definitions from a cultural approach. For example, section 5 defines a Black Community as "the group of families of Afro-Colombian descent who possesses its own culture, shares a common history and has its own traditions and customs within a rural-urban setting and which reveals and preserves a consciousness of identity that distinguishes it from other ethnic groups." Section 6 understands collective settlement as the "historic and ancestral settling of Black Communities in lands for their collective use, lands that constitute their habitat, and where they currently develop their traditional practices of production." Similarly, section 7 defines traditional practices of production as the "the technical, agricultural, mining, forestall extractions, grazing, hunting, fishing, and general harvesting activities of natural resources, customarily used by the Black Communities to guarantee the conservation of their lives and their self-sustaining development." Among the requirements to fill a request for the recognition of collective rights to land, Article 9 requires "'ethno-historic antecedents" (section b) and a description of "traditional practices of production" (section d).

[FN66]. Law No. 70 art.5 (1993) (In order to receive adjudicable lands as collective property, each community will form a Community Council as its internal administrative body whose functions will be determined by National Government ruling.)

[FN67]. See Corte Constitucional [C.C.] [Constitutional Court], Octubre 17, 2003, M.P: A. Galvis, Sentencia T-955/03, Gaceta de la Corte Constitucional [G.C.C.] (Colom.). Of course, in the aforementioned case, the problem was exacerbated by the displacement of multiple members of the community due to internal armed conflict. See the footnote on page 88, where Professor Odile Hoffman is cited pointing out among other things that the concept of ethnic territory in Colombia "was not recognized as such in Pacífico before Law 70." (author translation).

[FN68]. The cultural approach to territory also excludes the collective claims involving rural populations that lack the cultural features that have been stressed by the inter-American system. Up until now, the inter-American system has not extended the reach of the right to property to a population that is completely rural but is neither indigenous nor Afro-descendant, but rather mestiza or ladina. In the Chengue massacre case, the Commission declared admissible a case involving a massacre of 27 peasants in Colombia. As a result of the massacre, 100 families were displaced and they abandoned their rural properties. In certain aspects, these facts are similar to those of the Moiwana against Suriname in that there was a massacre and subsequent displacement of the survivors from their rural properties. But the Commission admitted the case for the potential violation of Article 21, Right to Property, only with regard to the allegation that more than twenty families' houses were sacked and destroyed by the perpetrators of the massacre. See Colombia Petition 1268-05, Chengue Massacre, Inter-Am. C.H.R., Report No. 45/07, OEA/Ser.L./V/II.130, doc. 22 (2007). As the Chengue community only claims an economic relationship to the land, the Commission did not admit the case with regard to the land lost due to the displacement. Similarly, in the Mapiripán, Pueblo Bello, and Ituango cases, all involving massacres in rural areas in Colombia that have generated the displacement of peasant families with the consequent loss of their properties, the Court has made no special consideration with respect to the protection of these territories. See Mapiripán Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005); Pueblo Bello Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 140 (July 1, 2006); and Ituango Massacres v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006). The only difference with the Moiwana massacre was that these communities were attached to the land for their economic value but not for their cultural value.

[FN69]. See Bettina Ng'weno, Can Ethnicity Replace Race? Afro-Colombians, Indigeneity and the Colombian Multicultural State, 12.2 J. Latin Am. & Caribbean Anthropology 414 (2007).

[FN70]. Catherine Boone, Property and Constitutional Order: Land Tenure Reform and the Future of the African State, 106 Afr. Aff. 557, 561 (2007).

[FN71]. Jan Hoffman French, Ethnoracial Land Restitution: Finding Indians and Fugitive Slave Descendants in the Brazilian Northeast, in Restoring What was Ours: The Rights and Wrongs of Land Restitution, 129 (Derick Fay and Deborah James eds., 2009) (explaining how in the case two ethnically and racially similar neighboring communities, Xoco and Mocambo in the Sergipe State in northeast Brazil, the former was classified as an indigenous community and the latter as a quilombo or Afro-descendant community).

[FN72]. Id. at 123.

[FN73]. See also Derick Fay and Deborah James, supra, note 71, at 2.

[FN74]. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, P 122.

[FN75]. Id. at P 126.

[FN76]. Id.

[FN77]. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, P 122. This appears to also be the approach that the

Human Rights Committee has taken. In a series of cases, the Committee made references to the type of economic activities engaged in by indigenous communities that receive covenant protection. In the Lubicon Band case, the Committee said that the rights protected by Article 27 of the ICCPR "include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong." Human Rights Comm., Lubicon Lake Band v. Canada, Communication No. 167/1984, P 32.2, U.N. Doc. CCPR/C/38/D/167/1984 (May 10, 1990). In Kitok, the Committee insisted that the protection of Article 27 applies only if a given economic activity is "an essential element in the culture of an ethnic community." Human Rights Comm., Kitok v. Sweden, Communication No. 197/1985, P 9.2, U.N. Doc. CCPR/C/33/D/197/1985 (July 27, 1988). See similarly Human Rights Comm., Jouni Länsman et al. v. Finland, Communication No. 1023/2001, P 10.1, U.N. Doc. CCPR/C/83/D/1023/2001 (Mar. 17, 2005).

[FN78]. Daniel Bonilla Maldonado, La Constitución multicultural 240 (Siglo del Hombre Editores 2006) (author translation).

[FN79]. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, P 83.

[FN80]. Id. at P 141.

[FN81]. Id. at P 155.

[FN82]. Id. at P 434.

[FN83]. See James Anaya and Maia Campbell, Gaining Legal Recognition of Indigenous Land Rights: The Story of the Awas Tingni Case in Nicaragua, in Human Rights Advocacy Stories, 147 (Deena R. Hurwitz, Margaret L. Satterthwaite eds., 2008).

[FN84]. See Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Monitoring Compliance with Judgment. Inter-Am. Ct. H.R. (May 7, 2008).

[FN85]. Leonardo Alvarado, Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons From the Case of Awas Tingni v. Nicaragua, 24 ARIZ. J. INT'L & COMP. L. 609, 623-24 (2007) [hereinafter Alvarado, Prospects].

[FN86]. Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124, P 210.

[FN87]. 2 Carlos Beristaín, Diálogos sobre la reparación. Experiencias en el sistema interamericano de derechos humanos 531, 548 (Mabel Morvillo ed., Instituto Interamericano de Derechos Humanos 2008).

[FN88]. Id. at 518.

[FN89]. Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125. See note 23 and the accompanying text.

[FN90]. Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am.Ct. H.R. (ser. C) No. 146, P 214.

[FN91]. Yakye Axa Indigenous Community, Inter-Am. Ct. H.R. (ser. C) No. 142, P 26.

[FN92]. Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am.Ct. H.R. (ser. C) No. 146, P 212.

[FN93]. Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, P 149.

[FN94]. Aloeboetoe et al. v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 15,P 103 (Sept. 10, 1993).

[FN95]. Id. at P 105.

[FN96]. Id. at P 106.

[FN97]. Velásquez-Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 7, P 58 (July 21, 1989).

[FN98]. This was a setback from Awas Tingni, where the Court simply decreed that the State should invest funds in "works or services of collective interest for the benefit of the Awas Tingni Community, by common agreement with the Community ..." Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79, P 167.

[FN99]. Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124, P 214.

[FN100]. Id. at P 214.

[FN101]. Id. at P 215.

[FN102]. Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, PP 205-06.

[FN103]. Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am.Ct. H.R. (ser. C) No. 146, PP 224-25.

[FN104]. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, PP 201-02.

[FN105]. It could be argued that the Court keeps in mind that indigenous and Afro-descendant communities have been manipulated, defrauded, and deceived in the past, and thus it is necessary to establish a tripartite committee. If this was the motive, which is still paternalistic, the Court could have considered less intrusive methods that are more respectful of the indigenous and Afro-descendant communities themselves, such as the creation of a community council chosen by the community itself, the designing of accountability or oversight mechanisms, or the establishment of a more direct supervisory mechanism by the Court. Additionally, this rationale also assumes that the State will offer a greater guarantee [of what?] when the State itself failed to recognize or did not guarantee the right to collective property in the first place.

[FN106]. Of course, one can argue that the presence of a State representative would make sense given that some of the programs are public works that the State should carry out. This is true, but the same criteria should apply to many other economic or non-material reparations that the Court stipulates when it does not order the creation of a tripartite committee.

[FN107]. Again, one can defend the Court's decision, understanding that the areas of investment determined by the Court depend upon the violations it encounters and the allegations made by the parties and the evidence provided. But this explanation fails to explain the similarity of the areas chosen by the Court with regard to very different communities such as Saramaka, Moiwana, Yakye Axa, and Sawhoyamaxa. Neither does it correspond with the factual determinations of the Court, nor, in many cases, with the issues discussed by the parties.

[FN108]. In another case involving a massacre of indigenous peoples in Guatemala, the Court appeared to be willing to return to the Moiwana approach. Nevertheless it was precluded from doing so due to questions related to its temporal jurisdiction. See "Las Dos Erres" Massacre v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 211, P 222 (Nov. 24, 2009).

[FN109]. Plan de Sánchez Massacre v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 116, P 85 (Nov. 19, 2004).

[FN110]. The programs ordered were: a) study and dissemination of the Maya-Achí culture in the affected communities

through the Guatemalan Academy of Mayan Languages or a similar organization; b) maintenance and improvement of the road systems between the said communities and the municipal capital of Rabinal; c) provision of a sewage system and potable water supply; d) supply of teaching personnel trained in intercultural and bilingual teaching for primary, secondary, and comprehensive schooling in these communities; and e) the establishment of a health center in the village of Plan de Sánchez with adequate personnel and conditions, as well as training for the personnel of the Rabinal Municipal Health Center so that they can provide medical and psychological care to those who have been affected and who require this kind of treatment. Id. at P 110.

[FN111]. Yatama v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 127, P 225 (June 23, 2005).

[FN112]. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, P 84.

[FN113]. "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the [Inter-American] Commission." Pact of San José, Costa Rica, supra note 14, at art. 44.

[FN114]. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, PP 22-24.

[FN115]. Id.

[FN116]. Id. at P 133.

[FN117]. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79,P 155; Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, P 156; Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am.Ct. H.R. (ser. C) No. 146, P 144; and Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124, P 135.

[FN118]. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, P 158.

[FN119]. See Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am.Ct. H.R. (ser. C) No. 146, P 204; Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124, P 177.The only exception was in the Saramaka case, where the Court, due to the size and geographic diversity of the people and the "collective nature of the reparations," did not require individualization. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, P 188.However, even in the Saramaka case, the Court considered "the members of the Saramaka people" to be the victims of the case.Id.atP 189.Also of note, the Inter-American Commission did not demand this identification in indigenous cases.

[FN120]. Oswaldo Ruiz Chiriboga, The Right to Cultural Identity of Indigenous Peoples and National Minorities: A Look from the Inter-American System, Sur Int'l J. on Hum. Rts., 42, 46-47 (2006) (Alex Ferrara trans.).

[FN121]. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79,PP 116-18, P 148, P 153; Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, P 74, P 79, P 138; and Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am.Ct. H.R. (ser. C) No. 146, P 122, P 143.

[FN122]. Juliet Hooker, Indigenous Inclusion/Black Exclusion: Race, Ethnicity and Multicultural Citizenship in Latin America, 37 J. Latin Am. Stud. 285, 285-310 (2005).

[FN123]. José Aylwin, El Derecho de los Pueblos Indígenas a la Tierra y al Territorio en América Latina: Antecedentes Históricos y Tendencias Actuales (Oct. 2002) (unpublished research paper, available at http://www.utexas.edu/law/centers/humanrights/events/adjudicating/papers/dctoseminariooeatierrasyterritorios.doc).

[FN124]. See Constitution of Ecuador art. 58;Constitution of Bolivia art. 32.

[FN125]. See Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124, P 86(5). (Despite the fact that individual members of the indigenous and tribal communities are recognized as persons in the Constitution of Suriname, the State's legal order does not recognize these communities as legal entities. Likewise, national legislation does not establish collective rights to property). See Jo Pasqualucci, International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in light of the United Nations Declaration on the Rights of Indigenous Peoples, 27 Wis. Int'l L.J. 51, 66 (2009).

[FN126]. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, PP 93-95.

[FN127]. See Pasqualucci, supra note 124.

[FN128]. System of Communal Ownership of Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Bocay, Coco, and Indo Maíz River Basins, Gaceta Diario Oficial, Law No. 445 (2003) (Nicar.).

[FN129]. Cal et. al. v. Attorney General of Belize and Minister of Natural Resources and Environment Claims, No. 171 and 172 (2007) (Belize.).

[FN130]. Maya Indigenous Communities of the Toledo District, Inter-Am. C.H.R., Report No. 40/04.

[FN131]. See generally Charles Sabel & William Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 Harv. L. Rev. 1015 (2004)(explaining how, in stigmatizing the status quo, the domestic court's intervention opens the defendant institution up to participation of previously marginalized stakeholders and clears the way for the redefinition of relations among more established ones).On Latin America see Victor Abramovich, Courses of Action in Economic, Social and Cultural Rights: Instruments and Allies, 2 Sur Int'l J. on Hum. Rts. 180 (2005) (identifying legal strategies used to open institutional forums for dialogue, the establishment of their legal frameworks and procedures, or the guarantee that potentially affected persons may participate in these forums, under equal conditions).On the inter-American system, see Ariel E. Dulitzky, The Inter-American Commission on Human Rights, in Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America 129-50 (Due Process of Law Foundation, 2008) (explaining that one of the goals of the inter-American system is the legitimization of actors and victims).

[FN132]. James Anaya, Indigenous People in International Law 270-71 (2004).

[FN133]. Nancy Fraser, From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age, 212 New Left Rev. 68, 73 (July-August 1995) [hereinafter Fraser, From Redistribution]; Nancy Fraser, Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation, Lecture at Stanford University (April 30-May 2, 1996), at 13[hereinafter Fraser, Social Justice].

[FN134]. Fraser, Social Justice, supra note 133, at 7.

[FN135]. Fraser, From Redistribution, supra note 133, at 73.

[FN136]. Id.at 73.

[FN137]. Fraser, Social Justice, supra note 133, at 7.

[FN138]. Id.

[FN139]. Juanita Sundberg, Placing Race in Environmental Justice Research in Latin America, 21 Soc'y & Nat. Resources 569 (2008).

[FN140]. Fraser, From Redistribution, supra note 133, at 90.

[FN141]. Id.

[FN142]. Id. at 92.

[FN143]. See e.g., Antonio Giuffrida, Racial And Ethnic Disparities In Health In Latin America and The Caribbean: A Survey, at 1 (Antonio Giuffrida ed., 2007) (explaining that Indigenous and Afro-descendant groups in Latin America experience dramatically differences in health status and access to health services); Edward E. Telles, Incorporating Race and Ethnicity into the UNMillenniumDevelopmentGoals, Inter-American Dialogue Race Report,Inter-American Dialogue, (Jan. 2007), available at http:// www.thedialogue.org/PublicationFiles/telles.pdf, (indicating that available data suggest that Afro-descendant and indigenous populations in Latin America are far more likely than citizens of European origin to live in poverty, be illiterate, die at a younger age, reside in substandard housing, and suffer from police abuse).

[FN144]. Rodolfo Stavenhagen, La Diversidad Cultural en el Desarrollo de las Américas: Los Pueblos Indígenas y los Estados Nacionales en Hispanoamérica, at 25 (Organización de Estados Americanos, Cultural Studies Series No. 9, 2001), available at http://www.oas.org/udse/wesiteold/estudios-cult.html.

[FN145]. David Kennedy, The International Human Rights Movement: Part of the Problem?, 15 Harv. Hum. Rts. J. 101, 110 (2002).

[FN146]. Kitok v. Sweden, Communication No. 197/1985, supra note 77, at P 9.3.

[FN147]. In deciding a claim brought by the members of the Rehoboth Baster Community, who are descendants of Indigenous Khoi and Afrikaans settlers, the Human Rights Committee made a distinction between economic activities that are culturally embedded, and purely economic activities, which are not protected under the Article 27 of the ICCPR. The members of the Rehoboth Baster Community claimed their right to land based on their traditions of cattle herding. In rejecting the claim, the Committee stated, "although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture." J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia, U.N. Human Rights Comm. [HRC], Commc'n No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 P 10.6 (July 25, 2000). In their individual opinion, Committee members Evatt and Medina Quiroga explained in more detail that issues related to economic activities and their relationship with culture:

> are more readily resolved in regard to indigenous communities which can very often show that their particular way of life or culture is, and has for long been, closely bound up with particular lands in regard to both economic and other cultural and spiritual activities, to the extent that the deprivation of or denial of access to the land denies them the right to enjoy their own culture in all its aspects. In the present case, the authors have defined their culture almost solely in terms of the economic activity of grazing cattle. They cannot show that they enjoy a distinct culture which is intimately bound up with or dependent on the use of these particular lands, to which they moved a little over a century ago, or that the diminution of their access to the lands has undermined any such culture. Their claim is, essentially, an economic rather than a cultural claim."

Id.Individual opinion of Elizabeth Evatt and Cecilia Medina Quiroga (concurring).

[FN148]. James Cavallaro & Stephanie Brewer, Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court, 102 Am. J. Int'l L. 768, 777 (2008).

[FN149]. Id. at 807.

[FN150]. Id. at 777-78.

[FN151]. Id. at 813.

[FN152]. Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, Afr. Comm'n on Human & People's Rights, P 148, (Feb. 4, 2010).

[FN153]. Id.

[FN154]. Id. at P 149.

[FN155]. African Commission on Human and People's Rights [ACHPR], Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (adopted at the 28th Ordinary Session, 2005).

[FN156]. Centre for Minority Rights Development v. Kenya, 276/2003, Afr. Comm'n on Human & People's Rights, P 150 (emphasis added).

[FN157]. Centre for Minority Rights Development v. Kenya, 276/2003, Afr. Comm'n on Human & People's Rights, P 187 (emphasis added).

[FN158]. For example, the Court ordered that Nicaragua demarcate and title lands.Previously, the country relied on a constitutional system that recognized collective ownership. Awas Tingni Case, P 173.4. Almost identically, the Tribunal required that Suriname "delimit, demarcate, and grant collective title over the territory," despite the fact that the Surinamese Constitution did not even completely recognize private ownership. Saramaka Case, P 214.5.

[FN159]. Roque Roldan Ortiga, Models for Recognizing Indigenous Land Rights in Latin America (World Bank Env't Dep't, Biodiversity Series No. 99, 2004).

[FN160]. Id. at 25.

[FN161]. Carlos Romero Bonifaz, La Gestión Integrada de los Recursos Naturales como Fundamento de la Territorialidad Indígena, Año 1, No.1 Derechos Humanos y Acción Defensorial: Revista Especializada del Defensor del Pueblo de Bolivia 151, 180 (2006) (Bol.).

[FN162]. Boone, supra note 69, at 558.

[FN163]. Ariel E. Dulitzky, A Region in Denial: Racial Discrimination and Racism in Latin America, in Neither Enemies Nor Friends: Latinos, Blacks, Afro-Latinos 39 (Anani Dzidzienyo & Suzanne Oboler, eds., 2005).

[FN164]. Maya Indigenous Communities of the Toledo District, Inter-Am. C.H.R., Report No. 40/04, at P 170.

[FN165]. See Communities in Alcántara v. Brazil, Petition 555-01, Inter-Am. Comm'n H.R., Report No. 83/06, OEA/Ser.I./V/II.06, doc. 4 rev. 1 P 66 (2007) ("Being Afro descendants communities involved, which allege an inadequate protection of their rights, the IACHR considers motu proprio that the facts could characterize a violation of Article 24, in connection with 1.1."); Marino López, et al. (Operation Genesis) v. Columbia, Petition 499-04, Inter-Am. Comm'n H.R., ReportNo. 86/06, P 59 (2006) ("[G]iven the characteristics of the affected population and of the allegations contained in the petition, the Commission believes that this issue should be examined in light of Article 24 of the Convention during the merits phase"); Members of the Indigenous Community of Ananás, et al. v. Brazil, Petition 62-02, Inter-Am. Comm'n H.R., Report

No. 80/06, Petition 62-02,P 31 (2006) ("[S]hould the facts put forward be proven regarding the violation of ... equal protection ... and to nondiscrimination, with prejudice to the members of the Indigenous Community of Ananás..." "... there is the possibility of a violation of Article ... of the Convention").

[FN166]. "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." Pact of San José, Costa Rica, supra note 14, at art. 24.

[FN167]. "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." Pact of San José, Costa Rica, supra note 14, at art. 1.1.

[FN168]. Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, P 51 and Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am.Ct. H.R. (ser. C) No. 146, P 59.

[FN169]. Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am.Ct. H.R. (ser. C) No. 146, P 120.

[FN170]. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79,PP 148-49, P 151; Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am.Ct. H.R. (ser. C) No. 146, PP 118-21, P 131; Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, P124, P 131, PP 135-37, P 154; Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, P 85, P 91, P 103.

[FN171]. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, P 91.

[FN172]. Id. at P 103.

[FN173]. Id. at P 175. Emphasis added.

[FN174]. Id. at P 214, Declarations 1, 2, and 3.

[FN175]. Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, P 51.Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am.Ct. H.R. (ser. C) No. 146, P 60.

[FN176]. Corte Constitucional [C.C.] [Constitutional Court], Septiembre 10, 1996, Sentencia T-422/96, Gaceta de la Corte Constitucional [G.C.C] (Colom.).

[FN177]. Fay and James, supra note 73, at 3.

[FN178]. Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, P 216.

[FN179]. Richard Price, Contested Territory: The Victory of the Saramaka People vs. Suriname, Paper Prepared for Simpósio Internacional: Territórios Sensíveis: Diferença, Agência e Transgressõ, Museu Nacional, Rio de Janeiro, Brazil (June 15, 2009).

[FN180]. The equal protection, non-discrimination approach could also open the possibility for other communities that are in materially the same situation as indigenous or Afro-descendant communities, and are suffering the problems and consequences of unfair distribution of land, to bring their claims to the inter-American system. But, for those purely rural communities, the equal protection argument would be solely based on the unfair distribution of land, and not on racial or ethnic disparities nor on the lack of recognition of collective forms of land tenure.

[FN181]. Again, looking at the precedents of other human rights bodies could help the Court to make an equal protection analysis. At least in one case, the Human Rights Committee, in the context of an indigenous claim, has observed that "historical inequities" constitute a violation of Article 27 "so long as they continue." Lubicon Lake Band v. Canada, Communication No. 167/1984, supra note 77, P 33.

[FN182]. Ariel E. Dulitzky, El Principio de Igualdad y No Discriminación. Claroscuros de la Jurisprudencia Interamericana, 3 Anuario de Derechos Humanos 15 (2007).

[FN183]. González et al. ("Cotton Field") v. Mexico, Merits, Reparations and Costs, Preliminary Objection, Inter-Am. Ct. H.R. (ser. C) No. 205, P 450 (Nov. 16, 2009).

[FN184]. Id. at P 450.

[FN185]. Id. at P 451.

[FN186]. Maria Paula Saffon & Rodrigo Uprimny, Reparations for Land Dispossession and Distributive Justice in Columbia, Int'l Peace Research Inst. (June 2009).

[FN187]. Fraser, From Redistribution, supra note 133, at 82.

[FN188]. Id. at 82.

[FN189]. Garrido and Baigorria v. Argentina, Reparations, and Costs, Judgment, Inter-Am. C.H.R. (ser. C) No. 39, P 44 (Aug. 27, 1998).

[FN190]. Judith Schönsteiner, Dissuasive Measures and the "Society as a Whole:" A Working Theory of Reparations in the Inter-American Court of Human Rights, 23 Am. U. Int'l L. Rev 127, 149 (2007).

[FN191]. Myrna Mack-Chang v. Guatemala, Inter-Am. C.H.R. (ser. C) No. 101, P 274 (Nov. 25, 2003) (reaffirming the theory that next of kin and "society as a whole" have the right to know the truth regarding human rights violations, and that this right is an important form of reparation).

[FN192]. Schönsteiner, supra note 190, at 149.

[FN193]. Saffon and Uprimny, supra note 186.

[FN194]. Id. at 2.

[FN195]. Fay and James, supra note 73, at 3.

[FN196]. Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, P 216.

[FN197]. González et al. ("Cotton Field") v. Mexico, Merits, Reparations and Costs, Preliminary Objection, Inter-Am. Ct. H.R. (ser. C) No. 205, at P 495.

[FN198]. Lillian Aponte Miranda, Uploading the Local: Assessing the Contemporary Relationship Between Indigenous Peoples' Land Tenure Systems and International Human Rights Law Regarding the Allocation of Traditional Lands and Resources

in Latin America, 10 Or. Rev. Int'l L. 419, 421 (2008) [herein after Aponte, Uploading].

[FN199]. Mark Anderson, When Afro Becomes (Like) Indigenous: Garífuna and Afro-Indigenous Politics in Honduras, 12 J. Lat. Am. & Caribbean Anthropology 384, 387-93 (2007).

[FN200]. Eduardo Restrepo, El "Giro al Multiculturalismo" desde un Encuadre Afro-Indígena, 12(2) J. Latin Am. & Caribbean Anthropology475, 476 (2007).

[FN201]. Margot E. Salomon, Socio-Economic Rights as Minority Rights, in Universal Minority Rights 431, 433 (Marc Weller ed., 2007).

[FN202]. See Anderson, supra note 198, n. 115, p. 393; Hooker, supra note 121, at 305; Tianna Pashcel and Mark Sawyer, Contesting Politics as Usual: Black Social Movements, Globalization and Race Policy in Latin America, 12(3) Souls 197, 209 (2008).

[FN203]. Aponte, Uploading, supra note 197, at 425.

[FN204]. Price, supra note 179, at 11.

[FN205]. Xákmok Kásek Indigenous Community v. Paraguay, Inter-Am. C.H.R. (ser. C) No. 214 (Aug. 24, 2010).

[FN206]. Id. at P 85.

[FN207]. Id. at PP 146, 170, 182.

[FN208]. Id. at P 310.

[FN209]. See, e.g., id.at P 278.

[FN210]. Id. at PP 323-24.

[FN211]. Id. at P 273.

[FN212]. Id. at P 275.

[FN213]. Id. at P 266.

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