Article

ISSN 0927-460X

MERKOURIOS
Utrecht Journal of International and European Law

Collective Reparations for Indigenous Communities Before the Inter-American Court of Human Rights

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Keywords
IACtHR, Collective Reparations, Right to an Adequate Remedy, Indigenous Peoples, Human Rights.

Abstract
Recent case law from international courts shows an increased willingness to grant collective reparations. This article focuses on how the Inter-American Court of Human Rights has recently been involved in granting a variety of collective reparations to indigenous groups. Moreover, it illustrates the diverse nature of collective reparations, and why there is a need for them.

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Merko*urios* 2010 – Volume 27/Issue 72, Article, pp. 04-17.
URN: NBN:NL:UI:10-1-100923
ISSN: 0927-460X
URL: www.merkourios.org
Publisher: Igitur, Utrecht Publishing & Archiving Services

I. Introduction: The Inter-American Court of Human Rights - A Cutting Edge Approach towards Reparations

International human rights documents proclaim the right of every victim to effective reparations (remedies).[1] However, the provision of reparations for international crimes is a recent development. For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which were established in 1991 and 1994 respectively, provide reparations for victims of crimes within their jurisdictions, but their approach is very limited.[2] However, this is not the case for the International Criminal Court (ICC) and the Extraordinary Chambers in the Court of Cambodia (ECCC), established in 2002 and 2006 respectively.[3]

Thus, increasingly, international criminal justice is seen not only as a means for prosecuting and punishing perpetrators, but also as a way to provide victims with adequate recognition and to redress the harm endured.[4]

International human rights law, by means of court cases, provides examples of the types of collective reparations that can be awarded to victimised groups. The Inter-American Court of Human Rights' case law is highly instructive in this regard. Therefore, this article traces the right to an effective judicial remedy for human rights violations in the Inter-American system, and illustrates, through a number of cases involving indigenous communities, that such remedies often have a collective dimension**.**

Although the codification of the right to a remedy (or reparation) dates back to the Post-War international human rights system and has been reinforced in subsequent human rights instruments, the approaches of the Inter-American and European systems quite substantially differ.[5]

Compared to the European Court of Human Rights (ECtHR), the jurisprudence on reparations granted by the Inter-American Court of Human Rights (IACtHR) is more progressive and likely to be the more instructive to International Criminal Tribunals that adjudicate crimes of a similar scale to those examined by the IACtHR over the last two decades. While the ECtHR, based on Article 41 of the European Convention, rarely awards any remedy other than monetary compensation,[6] the IACtHR, pursuant Article 63(1) of the American Convention on Human Rights, has granted

1 See S Dinah, *Remedies in International Human Rights Law* (2nd edn Oxford University Press 2005) 23; UN Sub-Commission on the Promotion and Protection of Human Rights, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms : final report / submitted by Theo van Boven, Special Rapporteur.*, 2 July 1993, E/CN.4/Sub.2/1993/8, available at: <http://www.unhcr.org/refworld/docid/3b00f4400.html> accessed 8 February 2011, paras 13-14.

2 The penalties section of the Statute of the ICTY lays down in the penalties' provision that 'in addition to imprisonment, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners' (Article 24(3)). Similarly, Article 23(3) of the Statute of the ICTR provides the Tribunal with the authority to order 'any return of property and proceeds'. Therefore, the statutes do not sufficiently empower the ICTY and the ICTR to address victim's concerns. It should be pointed out that both the Special Tribunal for Lebanon and the Special Court for Sierra Leone also fail to award reparations to victims of crimes within their jurisdictions.

3 See *Rome Statute of the International Criminal Court* (hereinafter *Rome Statute*) opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) , Art. 75 (2); Rules of Procedure and Evidence of the ICC, Rule 97 (1) and (3); ECCC's Statute, Art. 39.

4 This has been enshrined in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 21 March 2006. See, *inter alia,* para 11: 'Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to … (b) Adequate, effective and prompt reparation for harm suffered.'

5 The reparations granted by the IACtHR are aimed to reintegrate (oft-marginalised) victims into society in order to end social exclusion while the ECtHR has restricted reparations to a 'mere satisfaction'. It is also noteworthy that the ECtHR may refer reparations to the national systems, while the IACtHR will resolve the cases before it and its respective reparations exclusively. This could be explained by the political situation of several State Parties to the Organization of American States during the first working years of the IACtHR. At the time of entry into force of the Inter-American Convention several States, namely, Argentina, Bolivia, Brazil, Chile, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay were under dictatorial governments and the IACtHR played an important role in the democratic transition that these countries undertook. Conversely, being a democracy is the first membership requirement for the Council of Europe.

6 Article 41 ECHR provides: 'If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party'. It is worth pointing out that the ECtHR has intended to change its traditional practice of granting compensation as the only form of reparation. The change can be seen in the cases: *Assanidze v Georgia* (2004) 39 EHRR 653 and *Ilascu v Moldova* (2005) 40 EHRR 46, where both cases related to unlawful detention. The ECtHR, in both cases, explicitly declared that compensation sometimes is completely inadequate to redress a violation of the Convention and considered that *the State must secure the applicant's release at the earliest possible date.* Since it is for the State to decide, along with the Council of Ministers, the best mechanism to redress a wrong, the State is not bound to follow such recommendation. The ECHR has also upheld *pilot judgments* when declaratory relief and individual compensation was insufficient to deal with the volume of complaints where violations of the Convention were systematic. These *pilot judgments* aim at a collective restitution of the enjoyment of specific rights. See *Broniowski v Poland* (2005) 40 EHR 21 and *Hutten-Czapska v Poland* (2007) 45 EHRR 4.

groundbreaking reparations. These reparations include: orders to investigate and punish those responsible for human rights violations,[7] orders to award the victim a fellowship for pursuing advanced University studies,[8] orders to remove the name of the victim off the Register of Previous Criminal Convictions,[9] the creation of a genetic information system to permit identification for family reunification,[10] the identification of victim's bodies so that the bodies could be properly buried,[11] orders for the construction of a monument for the victims,[12] orders for the improvement of better living conditions for collective victims such as the reopening of a school and the establishment of a medical dispensary,[13] orders for release from prison,[14] the reforms of national laws,[15] and the adoption of training programs for human rights for police and armed forces.[16]

The approach taken by the IACtHR over the last two decades has serious implications regarding the adequate interpretation and application of the reparations in international criminal law. This is especially important because the Rome Statute requires that international criminal law should be interpreted and complied in a manner consistent with international human rights law.[17] When these two approaches conflict, it would seem that the movement in international human rights law toward granting orders for collective reparations should be taken in consideration when deciding the appropriate reparations for victims in international criminal law proceedings.

At the same time, difficult questions arise when human rights are violated. It is important to emphasize that the lack of explicit principles and clear provisions governing reparations provide judges of both regional human rights courts and international criminal courts with quite some discretion over the manner of reparations. Issues remain, such as: Is monetary compensation sufficient?; and, When the violation is committed against a community, are individual reparations adequate?

The IACtHR has also not only attempted to repair the direct consequences of a violation, but also to improve the social conditions of the victims. This is because these victims are usually the poorest, most vulnerable and discriminated people and their situations deteriorate even further because of the violations of their rights.[18] In this light the Peruvian Truth and Reconciliation Commission established that indigenous populations, who tend to suffer severe discrimination and poverty, amounted to 75% of the victims during the conflict in Peru.[19]

As to the question of the adequacy of monetary remedies, the IACtHR has ordered non-monetary remedies in a wide variety of situations. Gross and systematic abuses challenged the IACtHR to more closely examine whether traditional individual monetary reparations were adequate. In Judge Cançado Trindade's words on the limits of traditional monetary remedies: 'reparations for human rights violations only provide the victims the means to attenuate their suffering, making it less unbearable, perhaps bearable.'[20]

An area in international law where the need for collective reparations is particularly apparent is cases involving indigenous peoples. The IACtHR in particular has recently produced a line of cases dealing with indigenous peoples, collectively victimised, and has awarded a variety of remedies tailored to the demands of these vulnerable groups.

7 *Velásquez-Rodríguez v Honduras*, IACtHR Judgment of July 1988; *El Amparo v Venezuela*, IACtHR Judgment of 14 September 1996; *Neira Alegría v Peru*, IACtHR Judgment of 19 September 1996; *Caballero Delgado and Santana v Colombia*, IACtHR Judgment of 29 January 1994.

8 This was precisely the project that the victim had been denied through unlawful imprisonment. *Cantoral Benavides v Perú,* IACtHR Judgment of 3 December 2001.

9 *Serrano Cruz Sisters v El Salvador,* IACtHR Judgment of 1 March 2005, paras 192-194.

10 The main reason for this form of reparations was family reunification due to the disappearance of children in El Salvador's internal conflict. See *Suarez Rosero v Ecuador*, IACtHR Judgment of November 1997.

11 *Bámaca-Velásquez v Guatemala,* IACtHR Judgment of November 2000; *Neira Alegría v Peru* (n 7).

12 *Cantoral Benavides v Peru* (n 8).

13 *Aloeboetoe v Suriname,* IACtHR Judgment of 10 September 1996, para 96.

14 *Loayza Tamayo v Peru*, IACtHR Judgment of 17 September 1997.

15 *Loayza Tamayo v Peru*, IACtHR Judgment of 27 November 1998; *Barrios Altos v Perú*, IACtHR Judgment of 30 November 2001; *Hilaire, Constantine and Benjamin et al. v Trinidad y Tobago*, IACtHR Judgments of 21 June 2002.

16 *Tibi v Ecuador*, IACtHR Judgment of 7 September 2004.

17 *Rome Statute*, Art. 21 (3).

18 Professor Rodrigo Uprimny at his inaugural lecture accepting the UNESCO Chair of 'Education for Peace, Human Rights and Democracy', 21 October 2009, Utrecht, the Netherlands.

19 ibid.

20 *Bulacio v Argentina*, IACtHR Judgment of September 2003, Reasoned Opinion *Judge Cançado Trindade*, para 25.

II. Background: Indigenous Peoples in International Law - The Broader Context and Key Issues

1. Indigenous Peoples' Rights in Relation to the Right to an Adequate Remedy under International Law

Before going into the specifics of the IACtHR's cases on indigenous land rights, it is necessary to explain the development of indigenous peoples' rights in international law. When indigenous peoples frame their claims in the language of human rights, these are often claims of a distinctly collective nature, and, in that way, they appear to be somewhat at odds with traditional individual human rights. Furthermore, this section shows that IACtHR takes into account the broader body of international law when dealing with these cases.

Public international law, in its pure post-Westphalian form is created by sovereign nation states. Human rights law, in its predominant perception since the end of the Second World War, has been concerned with protecting the individual. The primary concern with the State and the individual in international law is challenged by the emerging legal framework on the protection of intermediate, vulnerable groups. This development has been a rather slow one, and has been opposed by many states on the basis of arguments related to inter-group conflict, secession and controversy over the collective nature of the claimed standards.[21]

Despite this opposition, a substantial body of both *generic* and *targeted* legal norms pertaining to the protection of certain (ethno-cultural) groups has developed.[22] Generic protection of these groups in international law centres around Article 27 of the International Covenant on Civil and Political Rights, which protects the right to culture.[23] Targeted norms focus on specific types of groups[24] within the broader framework of minority protection, e.g. national minorities, immigrants, and indigenous peoples. The last four decades have witnessed the emergence of a considerable body of (quasi-)legal norms pertaining specifically to this latter group. Indigenous peoples have sought international legal protection, since states are often the violators of their asserted rights.

While official statistics remain contested, indigenous peoples make up approximately 6% of the world's population (some 370 million individuals) and encompass around 5000 distinct peoples in over 72 countries. They represent about 80% of the world's cultural diversity and their environments comprise approximately 80% of the globe's biological diversity.[25] Although there is no single official definition in international law, relevant characteristics of indigenous peoples are that they are culturally distinct from the majority population, they have retained some or all of their own governmental and cultural structures (and are willing to preserve those), and often have a special, spiritual relation with their lands. Well-known working definitions focus on objective criteria and on subjective elements, whereas self-identification as indigenous is considered a fundamental criterion.[26] Unfortunately, indigenous peoples are often also among the most marginalised in society, and have been victimised in many ways. They have suffered from historical injustice due to colonisation, oppression by the majority, forced integration, forced relocation, and often are vulnerable groups in the larger states in which they live. Indigenous peoples suffer disproportionately from poverty.

21 On the debate over collective or cultural rights, in general see W Kymlicka, *Multicultural Citizenship* (Oxford University Press 1995). See also C Kukathas, 'Are There Any Cultural Rights?' (1992) 20 (1) Political Theory 105. See also H I Roth, 'Collective Rights, Justifications and Problems' (1999) Centre for Multiethnic Research, Uppsala University. For a more communitarian perspective, see C Taylor, 'The Politics of Recognition' in A Gutmann (ed), *Multiculturalism, Examining the Politics of Recognition* (Princeton University Press 1995) 25 - 73. See also V van Dyke, 'The Individual, the State, and Ethnic Communities in Political Theory' (1977) 29 (3) World Politics 343. For a comprehensive theoretical exposition, see M Galenkamp, *Individualism versus Collectivism: the Concept of Collective Rights* (Dissertation, Erasmus Universiteit, Faculteit der Wijsbegeerte, Rotterdam, 1993).

22 See e.g. W J M van Genugten et. al, The United Nations of the Future, Globalisation with a Human Face (KIT publishers 2006).

23 It is noteworthy that Article 27 does not confer genuine collective rights to groups, but refers to their individual members. Nevertheless, Article 27 has provided the basis for a series of cases on the legal protection of (members belonging to) minorities and the Human Rights Committee has expressed its willingness to accept collectively submitted communications. See *Lubicon Lake Band v Canada*, Communication no. 16/1984 (26 March 1990). UN Doc. Supp. No. 40 (A/45/40); *Sandra Lovelace v Canada*, Communication no. 24/1977 (29 December 1977) UN Doc. A/36/40; *Apirana et al v New Zealand*, Communication no. 547/1993; UN Doc. CCPR/C/70/D/547/1993 (2000). See also *Ilmari Länsman et al. v Finland*, HRC, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994); *Jouni Länsman et al. v Finland*, Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996).

24 W Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press 2007).

25 See Official Website of the United Nations Permanent Forum on Indigenous Issues (UNPFII), <http://www.un.org/esa/socdev/unpfii/> accessed 12 May 2010.

26 See J R Martínez Cobo, Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations, E/CN.4/Sub.2/1983/21/Add.8 page 50 at 379 and page 5 at 21 and 22. See also ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session, (entry into force 5 September 1991) Article 1.

The first international legal document dealing specifically with indigenous peoples is the International Labour Organisation's Convention No. 107 of 1957 (ILO 107),[27] which was replaced in 1989 by ILO Convention No. 169 (ILO 169).[28] While ILO 107 is officially still in force, it was replaced because it focused not so much on the rights of indigenous peoples in the light of preserving their culture, but had a more assimilative approach, aiming at progressive integration into the majority culture as the appropriate solution to combat discrimination and poverty.[29] Replacing ILO 107 with ILO 169 reflected a broader shift in legal and political thinking toward indigenous peoples.[30] The emphasis on integration and non-discrimination slowly shifted towards less patronizing ideas of self-determination, equal participation and cultural integrity.[31] The climate changed in the 1970s, partly under the influence of the 1966 Human Rights Covenants,[32] and partly due to indigenous peoples themselves making their voices heard in the international arena.[33]

Thus, instead of emphasising non-discrimination and integration, the focus shifted towards self-determination and cultural integrity, towards accepting that indigenous peoples have their own cultures, distinct from the larger political order. It entails the belief that the right of indigenous peoples to freely practice their culture and traditions in accordance with their own institutional structures and customs, is invaluable in protecting them, and that in order to achieve this, indigenous peoples should be able to fully participate in the relevant decision-making processes.[34] Indigenous peoples, as distinct peoples, are to be self-determining actors/subjects instead of merely object of protection.[35] This change in perception can be described as the move towards 'accommodation' and away from 'integration'.[36]

Eventually, this shift in thinking would pave the way for the adoption of the U.N. Declaration on the Rights of Indigenous Peoples (the Declaration).[37] Although ILO 169 remains the only legally binding instrument (together with ILO 107, which is still in force for some countries), the Declaration is the most widely supported document dealing specifically with indigenous

27 ILO Convention No. 107 1957 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (entry into force 2 June 1959).

28 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session (entry into force 5 September 1991).

29 Paragraph 46 of the 1986 report of the Meeting of Experts described the need for replacement quite lucidly: 'The integrationist language of Convention No. 107 is outdated, and that the application of this principle is destructive in the modern world. In 1956 and 1957 it was felt that integration into the dominant national society offered the best chance for these groups to be part of the development process of the countries in which they live. This had, however, resulted in a number of undesirable consequences. It had become a destructive concept, in part at least because of the way it was understood by governments. In practice it had become a concept which meant the extinction of ways of life which are different from that of the dominant society, (...) policies of pluralism, self-sufficiency, self-management and ethno-development appeared to be those which would give indigenous populations the best possibilities and means of participating directly in the formulation and implementation of official policies'. ILO Conventions are legally binding. Up until now, however, ILO Convention 169 has only been ratified by 21 States.

30 The provisions and principles of ILO Convention 169 were substantially influenced by the Martínez Cobo Study. For the final report, see Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations, E/CN.4/Sub.2/1983/21/Add.8.

31 S James Anaya, *Indigenous Peoples in International Law* (2nd edn, Oxford University Press 2004).

32 International Covenant on Civil and Political Rights (GA res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, UN Doc A/6316 (1966), 999 UNTS. 171, entered into force 23 March 1976); International Covenant on Economic, Social and Cultural Rights (GA res 2200A (XXI), 21UNGAOR Supp (No. 16) at 49, UN Doc A/6316 (1966), 993 UNTS. 3, entered into force 3 January 1976). See A Eide, 'Rights of Indigenous Peoples, Achievements in International Law during the Last Quarter of a Century' (2006) XXXVII Netherlands Yearbook of International Law 163.

33 S James Anaya, the current U.N. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, distinguishes between two significant developments: after the end of the Cold War and the decolonisation period. Relating to the decline of the Soviet authoritarian system, a renewed world-wide faith in non-authoritarian democratic institutions arose. Moreover, the idea of subsidiarity gained ground; the conviction that decisions can often best be made at the most local level (bottom-up instead of top-down approaches). The second development Anaya mentions can be characterised as the embrace of cultural pluralism, brought about by the fading classic notion of the culturally or ethnically homogenous nation-state. See S James Anaya, *Indigenous Peoples in International Law* (n 31).

34 In other words, where ILO Convention No 107 was still 'about them, without them', the newer instruments are more a result of a cooperative effort, in which indigenous representatives have a say in what kind of measures, rights or policies they need.

35 It is noteworthy that this concept of indigenous self-determination does not, in contemporary international law, focus on secession and independent statehood (external self-determination), but on forms of autonomy or self-government and effective participation in the larger political order (a distinct form of internal self-determination). See A Cassese, *Self-Determination of Peoples, a Legal Reappraisal*, (Cambridge University Press 1995, reprinted in 1996). See also J Summers, *Peoples and International Law, How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, (Martinus Nijhoff Publishers 2007).

36 W Kymlicka, 'The Internationalization of Minority Rights' (2008) 6 (1) International Journal of Constitutional Law 1. Kymlicka argues that potentially self-governing groups, like indigenous peoples, should get similar tools of nation-building to those of states. See W Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press 2007).

37 United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, adopted by the General Assembly on Thursday September 13, by a vote of 144 in favour, 4 against and 11 abstentions. The final text was the result of a process of nearly 25 years of drafting and discussion.

peoples and some of its articles can be perceived as reflective or generative of customary international law.[38]

The Declaration's articles and preamble paragraphs reflect the main areas of concern for indigenous peoples and seek to protect, in addition to individual rights, a substantial number of collective rights.[39] Recognition of such collective rights is perceived as essential to guarantee the continuing cultural survival of indigenous peoples as distinct collectives.[40] It is increasingly acknowledged that a number of issues are difficult to approach under a solely individual human rights regime, since they specifically pertain to indigenous peoples as collectives.

Indigenous peoples' protection is a relatively new area in international human rights law, and it is characterised by the distinctly collective nature of a large part of the asserted rights involved. This collective element necessarily influences the type of remedies that courts should offer when these rights are infringed. Therefore, the third part of this article will examine the way the IACtHR handles such reparations, particularly regarding a number of cases dealing with land rights of victimised indigenous communities. It is within this setting that a number of the most cutting edge developments are taking place.

2. Human Rights Law and the UN Basic Principles on the Right to a Remedy

As previously stated, traditionally, public international law was primarily concerned with inter-state responsibility.[41] From this perspective, only a state could prosecute another state and demand reparations for the injuries caused to its citizens. However, this changed as international human rights law emerged and state responsibility towards individuals became an international concern. Now, under international law, a violation of any human right, in principle, gives rise to a right to reparation for the victim.[42] However, international legal instruments themselves lack specific guidance on the means by which states should repair violations.[43] This gap leaves open questions of why and to what extent international bodies should give orders for reparations.[44]

In order to address this lack of guidance and to reaffirm the existence of victims' rights to redress violations, the United Nations adopted the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', (hereinafter UN Basic Principles). The UN Basic Principles outlines 5 types of reparations: restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition.[45] The UN Basic Principles explicitly states that 'victims are persons who individually or collectively suffered harm'.[46] Additionally, in international transitional justice situations, it is common to distinguish between symbolic[47] and material[48] reparations, as well as between individual and collective reparations.[49] Further,

38 A Eide, 'Rights of Indigenous Peoples, Achievements in International Law during the Last Quarter of a Century' (n 34) 207.

39 These rights are to be read in conjunction with the broader framework of human rights protection, see Preamble and *inter alia* Article 46(2) of the United Nations Declaration on the Rights of Indigenous Peoples A/RES/61/295).

40 The collective provisions in the Declaration flow from some of the most pressing issues for indigenous peoples: threats to their lands, conflicts over resources, exclusion from decision-making and the lack of self-determined development. See eg W van Genugten, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems' (2010) 104 *American Journal of International Law* 29 and S Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples' (2008) 41 Vanderbilt Journal of Transnational Law 1141.

41 Under the International Law of Injury of Aliens, a State violates an international obligation owed to another State when it injures a citizen of that State. See *The Mavrommatis Palestine Concessions Case* (Greece v Britain), Permanent International Court of Justice, Judgment of August 1924.

42 This right is enshrined in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, American Convention on Human Rights, European Convention on Human Rights, Rome Statute. This right has also been recognised in several decisions of international courts such as the Inter-American Court of Human Rights and the European Court of Human Rights.

43 Particular attention must be paid to reparations of gross violations of human rights and fundamental freedoms.

44 D L Shelton *Remedies in International Human Rights Law* (Oxford University Press 2006) 837.

45 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (n 4) adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005. This is a not binding document, nevertheless, it has already exerted an impact upon the right of victims. It also should be pointed out that in the drafting of this document, Theo van Boven turned to established principles in international law, namely to the International Law Commission Draft Articles on State Responsibility (ILC Draft Articles).

46 UN Basic Principles (n 4) para 8.

47 This type of reparation refers to measures aimed at restoring the dignity of victims and survivors such as apologies, burials, memorials and monuments and the renaming of streets.

48 Meaning that the reparation is based on financial compensation of economic losses.

49 R Rubio Marín, 'Gender and Collective Reparations in the Aftermath of Conflict and Political Regression', in W Kymlicka and B Bashir (eds.) *The politics of reconciliation in multicultural societies* (Oxford University Press 2008) chapter 9.

some truth and reconciliation commissions have recommended collective reparations along with individual reparations in order to redress communities which were victims of war and political repression.[50] Thus, despite the lack of specific guidance in some international legal instruments, collective reparations are an important type of remedy with implications for both international and the municipal law.[51]

3. Enforcing the Right to an Adequate, Effective and Prompt Remedy: The Option of Collective Reparations

As Uprimny and Nelson have stated, collective reparations seek to re-establish the linkage between State and community by transforming the social situations of the community victims of human rights violations.[52] This type of reparation not only results in redress for a given community but also in the major realization of the so-called second generation of human rights: economic, social and cultural rights, which are interlinked to the full enjoyment of the first generation human rights in which the right to a remedy is embedded.[53]

However, collective reparations face a number of conceptual problems. One must take into account that individual reparations seem to be the most appropriate reparation for cases involving a small number of victims and their next of kin, and that collective reparations, on the other hand, seem to be the most appropriate remedy only in cases involving large groups of individual victims. The first conceptual problem when making this basic distinction is the reluctance to accept 'collective victims' or 'groups' as holders of human rights.[54] Secondly, the recognition of collective victims implies that every member of the group should receive reparations, regardless of the degree of individual suffering endured. This brings in problems of fair distribution of reparations, as well as the issue of whether each person claiming reparation has adequately met the established burden of proof. Thirdly, there is the conceptual problem with the types of rights the violation of which most frequently leads to where collective reparations. On this point, the major line of criticism to the collective reparations programmes implemented in Peru and Morocco is that collective reparations can be seen as sneaking in the justiciability of economic, social and cultural rights. In other words, the criticism is that the use of collective reparations is done, not as means of a providing a more effective remedy for existing, well-established first generation human rights, but rather as a way to bring new, arguably not sufficiently established rights, and arguably rights inherently needing a widespread social legislative program, under the control of (international) judges.[55]

III. Discussion: The Inter-American Court of Human Rights' Approach Towards Collective Reparations

1. Reparations Ordered by the Inter-American Court of Human Rights

It is a fundamental principle of international law that *'every violation of an international obligation which results in harm creates a duty to make adequate reparation'*.[56] This is reflected in the IACtHR's basic statutory power over reparations in Article 63 (1) of the American Convention on Human Rights (ACHR):

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

50 The following truth and reconciliation commissions have recommended these kinds of reparations: Guatemala, Peru, East Timor, Sierra Leone, Morocco and Liberia.

51 At the international level it represents a great challenge to provide universal parameters to absolutely different conflicts, whereas at the national sphere it could represent a complete change in public policies aimed at the improvement of social conditions.

52 R Uprimmy and N Camilo, 'Propuestas para una restitución de tierras transformadoras', in *Tareas pendientes para la transformación de políticas públicas de preparación en Colombia,* International Center for Transitional Justice Colombia 2010.

53 ibid para 196.

54 However, groups as holder of human rights have been recognised explicitly and implicitly on two occasions. The IACtHR in the *Yakye Axa Case*, IACtHR Judgment of 15 June 2005 stated: 'that the indigenous Community has ceased to be a factual reality to become an entity with full rights, not restricted to the rights of the members as individuals, but rather encompassing those of the Community itself, with its own singularity. Legal status, in turn, is a legal mechanism that grants them the necessary status to enjoy certain basic rights, such as communal property, and to demand their protection when they are abridged.' The Colombian Constitutional Court in its judgment C-169 of 2001 also upheld that Colombian communities are holders of fundamental rights.

55 Social programmes as a form of reparation for human rights violations not only benefit the victims but also the community as a whole. This method of reparation, in order for it not to lose its relevance, is frequently granted along with symbolic reparations.

56 *Velásquez-Rodríguez v Honduras* (n 7) para 25.

As such, providing reparations is a legal, political and ethical duty of the responsible state as part of protecting human rights. Although compensation is the only type of reparation specifically mentioned, the provision identifies the same five types of reparation in the UN Basic Principles: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Orders for reparation often occur in judgments of the IACtHR. Articles 67 and 68 of the ACHR provide that these reparation orders are 'final and not subject to appeal'[57] and are binding on the States Parties.[58]

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

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

A. Orders by the IACtHR Involving Reparations to Indigenous Peoples

The principle of *restiutio in integrum* states that victims should receive full reparation; therefore, States should make all efforts to restore the victim to the situation they were in before the crime occurred. However, this principle is often difficult to apply in cases dealing with a variety of violations, such as, *inter alia*, extrajudicial killings, forced disappearances or violations of the right to life. Nonetheless, when appropriate, the IACtHR has ordered restitution of property or restoration of rights to communities. [64]

Overall, the IACtHR has been sensitive toward victims' needs and has supported a fair deal of their requests.[65] The IACtHR has ordered return of property, both to individuals with official property title[66] and to groups with no official property title.[67] In the landmark case of *Awas Tingni Community v. Nicaragua*, which will be discussed at more length below, the IACtHR recognised that indigenous groups are entitled to special protection:

> Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognised and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.[68]

Similarly, in cases of massacres the IACtHR has ordered the restoration of the right to property.[69] For instance, in *Moiwana v. Suriname*, the IACtHR ordered the State to take legislative, administrative, and any other necessary measures to ensure the property rights of the members of the *Moiwana* community in relation to the traditional territories from which they were

57 American Convention on Human Rights, Art. 67.

58 The State Parties to the Convention undertake to comply with the judgment of the IACtHR in any case to which they are parties. American Convention on Human Rights, Article 68(1).

59 *Cantoral-Benavides v Peru,* IACtHR Judgment of 20 November 2009, para 9.

60 *Baena-Ricardo,* IACtHR Judgment of 28 November 2003, para 82.

61 *Cantoral-Benavides v Peru* (n 59). The IACtHR also invites the victims' representatives and the Inter-American Commission on Human Rights to present observations on reports submitted by the State. If necessary, the IACtHR also could send communications to the responsible State to urge it to comply with specific reparation measures.

62 Full compensation payments have been made in a number of cases, such as: *Velásquez Rodríguez v Honduras,* IACtHR Judgment of 17 August 1990; *Loayza Tamayo v Peru,* Judgment 27 November 1998, para 6; *El Amparo v Venezuela,* IACtHR Judgment of 28 November 2002.

63 Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, (Cambridge University Press 2003) 339-40.

64 In the *Mapiripán Massacre v Colombia Case*, IACtHR judgment of 15 September 2005, the, IACtHR ordered the State of Colombia to 'ensure security conditions for the next of kin of the victims, as well as other inhabitants of Mapiripán who had been displaced, to be able to return to Mapiripán, if they wish to do so'.

65 It is worth pointing out that the progressive interpretation of the IACtHR is due, to some extent, to the great advocacy of the lawyers representing the victims before it.

66 *Cantoral Huamaní and García Santa Cruz v Peru,* IACtHR Judgment of 28 January 2008.

67 The IACtHR has recognised the collective right of indigenous communities to their traditional lands because of its cultural dependence on them regardless of the existence of an official property life. *Mayagna (Sumo) Awas Tingni Community v Nicaragua,* IACtHR Judgment of 31 August 2001, para 149.

68 ibid.

69 *Moiwana Community v Suriname*, IACtHR Judgment of 15 June 2005.

expelled.[70] These measures were intended to allow the community to return to their land.

When measures of restitution are not possible, the most common mode of reparation is the restorative/compensatory approach seen in Article 63(1) ACHR.[71] As such, the vast majority of IACtHR judgments in which there was an award for the claimant still involved only monetary compensation. However, this section will focus on cases in which groups or communities were awarded reparations. In assessing the proportionality of the harm suffered and the adequate compensation necessary, the IACtHR has embraced a wide variety of concepts of material damages, ranging from loss of earnings as a result of the violation to compensation for lost opportunities.

Precise calculations for loss of earnings are usually determined on a case-by-case basis. However, the IACtHR has devised several approaches to calculate those damages. The first approach is to determine earning projections based on the victim's current salary, age, and life expectancy,[72] but if this is not possible, the IACtHR will base its calculation on the minimum wage.[73] When these two criteria cannot be applied, the IACtHR will base its calculation on the actual economic and social situation of the victims.

When addressing massacre cases that occurred in rural areas dependent on agricultural activities,[74] the IACtHR has awarded lost wages calculated either by using the minimum wages[75] or by using equitable principles in connection with agricultural activities.[76]

The IACtHR has adopted a cutting edge and for us appropriate approach to material damages in relation to lost earnings when the violations occur against communities with both a subsistence and spiritual connection to the land. For example, in the case of the *Moiwana Community*, the IACtHR noted that the group had been violently removed from their lands and then suffered 'poverty and deprivation' as a result of their inability 'to practice their customary means of subsistence and livelihood'.[77] Similarly, in *Plan de Sánchez*, the IACtHR presumed material damages from the displacement of a community of indigenous people. This displacement resulted in their inability to support themselves.[78] Additionally, the IACtHR has also ordered collective rehabilitation measures for indigenous peoples. In the *Aloeboetoe Case*, the IACtHR ordered a medical dispensary to be re-opened in the village.[79] Further, the IACtHR established that a judgment 'is in itself a type of reparation and moral satisfaction of significance and importance for the families of the victims'.[80] However, it has generally considered that this is not sufficient to redress the violations committed against victims, in particular for collective victims. The IACHR has always afforded moral satisfaction in conjunction with another modality of reparation because of the need to balance restorative and distributive justice.

In this light, the IACtHR has developed consistent case law regarding the investigation, identification and punishment of those responsible for human rights violations as means of a satisfaction measure. The IACtHR has also reiterated that states should 'abstain from using amnesties and prescription, and the establishment of measures designed to exclude responsibility, or measures intended to prevent criminal prosecution or suppress the effects of a conviction'.[81]

On the same token, public apologies are an essential form of satisfaction that go beyond the right to an investigation and the right to truth,[82] as they provide the victim or his relatives with an acknowledgement of state responsibility for the violations.

70 ibid para 3; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 70) paras 3-4.

71 Article 63(1) ACHR provides: 'If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.' According to the UN Basic Principles, compensation is granted for material and non-material damages. However, the IACtHR uses the following wordings instead: pecuniary and non-pecuniary damages.

72 *El Amparo v Venezuela,* IACtHR Judgment of 14 September 1996, para 28.

73 ibid paras 28-29.

74 *Mapiripán Massacre v Colombia* (n 64) para 96*; Pueblo Bello v Colombia,* IACtHR Judgment of 31 January 2006, para 95 (21).

75 *Mapiripán Massacre v Colombia* (n 64) paras 78-79.

76 *Pueblo Bello v Colombia,* (n 77) para 248.

77 *Moiwana Community v Suriname,* IACtHR Judgment of 15 June 2005, para 187.

78 *Massacre of Plan de Sánchez v Guatemala,* IACtHR Judgment of 19 November 2004, paras 73-74.

79 *Aloeboetoe et al v Suriname*, IACtHR Judgment of 10 September 1993, para 96.

80 *Velásquez-Rodríguez v Honduras*, IACtHR, Judgment of 21 July 1989, para 36.

81 *Caracazo v Venezuela,* IACtHR Judgment of 29 August 2002, para 119*; Barrios Altos v Peru Case,* IACtHR Judgment of 14 March 2001, para 41; *Massacre of Plan de Sánchez v Guatemala Case* (n 78) para 99; *"Las Dos Erres" Massacre v Guatemala Case*, IACtHR Judgment of 24 November 2009, para 129.

82 This right has been developing in the Inter-American system in recent years. The concept of this right is based on the accumulative interpretation of Article

In a number of cases of violations against indigenous peoples, the IACtHR has requested states to take into account their traditions and customs in those public acts and to translate the judgments into the relevant indigenous language.[83]

In addition to the measures ordered above, the IACtHR has afforded 'symbolic' forms of reparation such as public commemoration to honour both individual victims and groups of victims. These have consisted of the naming of a street, the inauguration of an educational centre with the names of the victims[84] or the erection of public monuments, often in cases of violations against a large number of persons such as massacres, as a collective form of reparation.[85]

Unlike other regional bodies, the Inter-American IACtHR has regularly ordered guarantees of non-repetition as a measure which 'benefits society as whole' by ordering States to amend or adopt their laws.[86] This type of reparation is particularly relevant in the context of collective reparations for victims of gross violations of human rights.

2. Substantive Issues and Corollary Reparations in the IACtHR's Cases on Indigenous Peoples: Recognition of Judicial Capacity, Collective Property and Survival.

This section will go more in depth into a number of cases before the Inter-American Court of Human Rights (IACtHR) dealing with indigenous peoples and collective land rights in order to illustrate the substantive issues that form the foundation for granting a diverse array of reparations. As explained before, indigenous peoples appeal to international human rights law for remedial measures. Both the Commission and the IACtHR have produced series of cutting edge and for us appropriate decisions dealing with indigenous peoples' land rights.

After a close examination of the substantive issues in *Awas Tingni v. Nicaragua*, the remedies in the follow-up cases of *Sawhoyamaxa* and *Yakye Axa* will be briefly explained. Finally, some more attention will be given to *Saramaka People v. Suriname*.[87] These decisions will serve to illustrate the IACtHR's method of dynamic, or evolutionary, interpretation of human rights provisions, first and foremost related to the right to property. Subsequently, this section will demonstrate how this expanded interpretation leads to collective elements in the remedies the IACtHR offers. Finally, this section concludes that interpreting human rights in a more collective way is beneficial and even essential for the protection of vulnerable indigenous communities.

A. The Organization of American States and Indigenous Peoples

The protection of indigenous peoples is an area of special concern for the entities of the Inter-American Human Rights System. In 1972, based on historical, humanitarian and moral principles, the Commission stated that states have a 'sacred compromise to provide special protection for indigenous peoples'. Since the 1980s, the Inter-American Human Rights bodies have focused on indigenous peoples' protection through the case and report system.[88] A Special Rapporteurship on the Rights of Indigenous Peoples was established in 1990 with the purpose to bring the vulnerable position of indigenous peoples in the Americas under attention.[89] The Commission expressed particular concern for the rights of indigenous peoples to their lands and resources, since the protection of these rights does not only imply the protection of an economic unit, but also aims at shielding a community from outside interference with their cultural and social development, which is inextricably linked to their relationship with their lands. The Commission's concern for indigenous peoples' land and property rights is perhaps best illustrated in the 1993 report on the human rights situation of the Maya communities in Guatemala: 'from the standpoint of human rights, a small corn field deserves the same respect as the private property of a person that a bank

25, Artt. 1(1), 8, and 13 of the American Convention on Human Rights.

83 *Massacre of Plan de Sánchez Case* (n 78) paras 101-102.

84 *Villagrán Morales v Guatemala*, IACtHR, Judgment of November 19, 1999 (Street Children); *Trujillo-Oroza v Bolivia*, IACtHR, Judgment of 27 February, 2002.

85 *Barrios Altos v Peru*, IACtHR Judgment of November 30, 2001, para 5; *Mapiripán Massacre v Colombia,* IACtHR, Judgment of 15 September, 2005, paras 10-13; *Moiwana Community v Suriname,* Judgment of June 15, 2005, paras 2-7; *"Las Dos Erres" Massacre v Guatemala*, IACtHR, Judgment of November 24, 2009, para 265.

86 *Trujillo-Oroza v Bolivia*, IACtHR, Judgment of February 27, 2002, para 110; *Trujillo Oroza v Boliva*, IACtHR Judgment of 27 February, 2002, para 98; *Loayza Tamayo v Peru*, IACtHR, Judgment of November 27, 1998, para 5.

87 *The Mayagna (Sumo) Awas Tingni Community v Nicaragua,* (n 67); *Yakye Axa Indigenous Community v Paraguay*, IACtHR, Judgment of 17 June, 2005; *Sawhoyamaxa Indigenous Community v Paraguay,* IACtHR, Judgment of March 29, 2006; *Saramaka People v Suriname,* IACtHR, Judgment of 28 November, 2007.

88 Annual Report of the Inter-American Commission on Human Rights 2007, OEA/Ser.L/V/II.130, Doc 22, rev. 1, 29 December 2007 (Original: Spanish) point 56.

89 ibid point 55.

account or a modern factory receives'.[90]

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

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

In the opinion of the IACtHR, the State of Nicaragua violated the property rights of the *Awas Tingni* Community when it granted logging concessions for the community's territory to a foreign company and also failed to provide effective protection and recognition of the community's customary land tenure system.[93] The Community members found out about these logging concessions only when they discovered loggers already logging *on Awas Tingni* territory. When the *Awas Tingni* community petitioned the Commission in 1995, it revealed problems persisted for the *Mayagna, Miskito* and other indigenous peoples in the coastal region, even though Nicaragua formally recognised indigenous peoples' land tenure in its Constitution and laws.[94]

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

Most significantly, the IACtHR held that the concept of property under Article 21 of the Convention means a communal property right for indigenous peoples. The IACtHR stated: 'Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community.'[97] This form of collective property 'transcends' the traditional conception of private property[98] because '[t]he close ties of indigenous people with the land must be recognised and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.'[99]

90 OEA/Ser.L/V/II.83, Doc 16 rev, June 1, 1993, Fourth Report on the Situation of Human Rights in Guatemala, Chapter III, The Guatemalan Maya-Quiche Population and their Human Rights (Original: Spanish).

91 *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, (n 67). Noteworthy, the *Awas Tingni Case* is the IACtHR's only case dealing with communal property for indigenous communities where the State has fully complied with the IACtHR's order. In December 2008, after a long implementation process, the official titling of the territory of the Awas Tingni community was concluded. For the implementation process, see Leonardo J Alvarado, '*Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of Awas Tingni v Nicaragua*' [2007] 24 Arizona Journal of International and Comparative Law 3.

92 S J Anaya & C Grossman, '*The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*' [2002] 19 Arizona Journal of International and Comparative Law 1, 1.

93 ibid 2.

94 The Nicaraguan government *de facto* continued to regard the indigenous lands as state-owned, which subsequently did not pose an obstacle for granting the concessions. While the State agreed to a friendly settlement, as suggested by the Commission, no progress was made and after two years the Commission made a determination of state responsibility and submitted its confidential report to the government. Nicaragua subsequently failed to indicate its willingness to implement the Commission's recommendations regarding securing the Awas Tingni traditional lands, and the Commission submitted the case to the Inter-American Court of Human Rights in June of 1998. See, *inter alia,* S J Anaya, '*Indigenous Peoples in International Law*' (Oxford University Press 2004) 2, 267. S J Anaya & C Grossman, (n 92) 3.

95 A Page, 'Indigenous Peoples' Free, Prior and Informed Consent in the Inter-American Human Rights System', [2004] Sustainable Development, Law and Policy, 16.

96 *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, (n 67) para 173. The IACtHR acknowledged that the implementation of domestic legal protections for indigenous peoples is an obligation arising under the American Convention on Human Rights and that states may suffer international responsibility if they fail to effectuate these rights. See S J Anaya & C Grossman, (n 92) 12.

97 *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, (n 67) paras 149 and173.

98 ibid para 173. Concurring Opinion of Judge Hernán Salgado Pesantes, para 2.

99 ibid para 149, 173. Similarly, José Martinéz Cobo, observed in 1983, in his influential study, that: 'It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions, and culture. For such people, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely'; Martinés Cobo, '*Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations*', E/CN.4/Sub.2/1983/21/Add.8, 26 at 197.

In reaching this decision, the IACtHR assumed the emergence of elements of new international customary norms.[100] In establishing this revolutionary reasoning on the concept of communal property, the IACtHR looked into recent developments in international law and stated that such international legal conceptions have an 'autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law'.[101] The IACtHR inquired into the core values of the American Convention's property provisions seen in light of the underlying values of the O.A.S. Human Rights System. Moreover, the IACtHR took into account the broader body of international law and contemporary developments within this field.[102] Amongst others, the ICCPR (mainly Articles 1 and 27) and ILO Convention No. 169 were considered as additional sources for interpreting the rights of the indigenous community.[103] For the first time, the IACtHR referred to a violation of human rights principles, as set forth in the American Convention, from the standpoint of collective property rights of indigenous peoples as subjects of international law.[104]

For the remedy the IACtHR found that in order to fulfil its obligations under the Convention, Nicaragua was required to: 'Carry out the delimitation, demarcation and titling of the corresponding lands of the members of the *Awas Tingni Community,* within a maximum term of 15 months, with full participation by the Community and taking into account its customary law, values, customs and mores.'[105] Thus, titling of the land could only proceed with the participation of the Community and in accordance with its customary laws. Furthermore, the IACtHR ordered Nicaragua to pay $50,000 as reparation for immaterial damages, to be used for the collective benefit of the community.[106]

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

C. Step Two: The Twin Cases of Yakye Axa and Sawhoyamaxa

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

As for the *Yakye Axa Case*, the IACtHR declared that the restitution of land for indigenous populations must be guided primarily by the meaning of the land for them.[112]

100 A Eide, 'Rights of Indigenous Peoples, Achievements in International Law during the Last Quarter of a Century', [2006] Netherlands Yearbook of International Law, 174.

101 *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, (n 67) para 146.

102 S J Anaya, 'Divergent Discourses About International Law, Indigenous Peoples, and Land Rights over Lands and Natural Resources: Towards a Realist Trend ', [2005] 16 Colorado Journal of International Environmental Law and Policy 16, 253.

103 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entery into force* 23 March 1976) and ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session (*entry into force* 5 September 1991).

104 L J Alvarado, (n 91) 612.

105 ibid para 164 (emphasis added).

106 *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, (n 67) para 173.

107 ibid para 148. On evolutionary, dynamic or purposive judicial law-making, see eg. A Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005).

108 S James Anaya, 'Divergent Discourses About International Law, Indigenous Peoples, and Land Rights over Lands and Natural Resources: Towards a Realist Trend', [2005] 16 Colorado Journal of International Environmental Law and Policy 253.

109 *cf* ibid 258. Current UN Special Rapporteur James Anaya remarks that: 'Formalist and backward-looking postmodern critical approaches largely overlook the evolution in values and power relationships at the expense of genuine problem solving that could be achieved on the basis of cross-cultural understanding.'

110 *Yakye Axa Indigenous Community v Paraguay*, IACtHR, Judgment of 17 June, 2005. *Sawhoyamaxa Indigenous Community v Paraguay,* Judgment of 29March, 2006.

111 For a more elaborate overview of the *Yakye Axa* and *Sawhoyamaxa* cases, see G Citroni and K I Quintana Osuna, *Reparations for Indigenous Peoples in the Inter-American Court*, in: F Lenzerini, *Reparations for Indigenous Peoples, International and Comparative Perspectives* (OUP, 2008). See also S Keener & J Vasquez, 'A Life Worth Living: Enforcement of the Right to Health Through the Right to Life in the Inter-American Court of Human Rights' [2008-2009] 40 Colum. Hum. Rts. L. Rev 3., 595.

112 *Yake Axa Indigenous Community v Paraguay*, IACtHR, Judgment of 17 June, 2005 (Merits, Reparations and Costs), para 149.

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

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

D. Step Three: Saramaka People v. Suriname: Land Rights as a Precondition to the Survival of a People

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

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

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

In the *Saramaka Case*, the IACtHR emphasises the importance of having collective juridical capacity as a precondition for effective participation and the exercise of the collective right to property. Furthermore, it expands its reasoning and applicable remedies in relation to the property rights of indigenous communities. Next to the requirements of delimitation, demarcation and titling of indigenous territory, the IACtHR ordered Suriname to: (a) amend its legislation impeding the

113 ibid para 33.

114 ibid para 242. *Sawhoyamaxa Indigenous Community v Paraguay,* IACtHR, Judgment of 29 March, 2006, para 248.

115 *The Saramaka People v Suriname*, IACtHR, Judgement of 28 November, 2007. Like in the *Awas Tingni Case*, the IACtHR ordered the State to delimit, demarcate and title the territories of the community with their full participation.

116 The other five Maroon peoples are: the Aucaner, the Paramaka, the Aluku, the Kwinti and the Matawai People. Together they form a population of approximately 60.000 individuals. Suriname is also home to four distinct indigenous peoples: the Kalinya, Lokono, Trio and Wayana People. They number about 20.000 individuals. Maroons are the descendants of escaped African slaves who were brought to Suriname by the colonial powers and regained their freedom (from the Dutch) in the 18th Century. Their freedom and autonomy was recognised in treaties concluded with the Dutch and through more than two hundred years of colonial administrative practice. See Forest Peoples Programme and Association of Saramaka Authorities, *Free, Prior and Informed Consent: Two Cases from Suriname*, 2007, 2.

117 *The Saramaka People v Suriname*, (n 115) para 84. The IACtHR assessed that the members of the Saramaka People, although not indigenous to the region they inhabit, make up a tribal community: 'Whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms customs and/or traditions.'

118 ibid para 86. The IACtHR also referred to the *Moiwana*, where another Maroon community was granted the same special protection as Indigenous Peoples were. See *The Moiwana Community v Suriname*, IACtHR, Judgment of June 15, 2005, Series C No. 124 paras 132-133.

119 Full assessment of the IACtHR's analysis in this respect falls outside the scope of this paper. For the IACtHRs analysis on the Saramaka customary patterns of land use, see *Saramaka People v Suriname*, (n 115) paras 77-101.

120 *The Saramaka People v Suriname*, (n 115) para 90: 'The close ties of indigenous peoples with the land must be recognised and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, their relationship with the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy to preserve their cultural legacy and transmit it to future generations.'

121 ibid paras 97-107. See also M A Orellana, '*Saramaka People v Suriname*', [2008] 3 American Journal of International Law 102, (note). Orellana states that the IACtHR, in considering that Suriname had not ratified ILO Convention No. 169 and its legislation did not recognise a right to communal property, utilised systemic interpretation techniques (analysing the matter in light of Articles 1 and 27 of the ICCPR) to overcome this hurdle.

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

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

IV. Conclusion

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

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

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

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

122 *The Saramaka People v Suriname,* (n 115) para 214.