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**RIGHTS, RESOURCES, AND RHETORIC:
INDIGENOUS PEOPLES AND THE
INTER-AMERICAN COURT**

THOMAS M. ANTKOWIAK*

ABSTRACT

In 2012, the Inter-American Court of Human Rights handed down *Sarayaku v. Ecuador*, a crucial decision on indigenous rights. This Article considers how the *Sarayaku* judgment impacts the Court's case law on indigenous lands and resources, and evaluates that jurisprudence as a whole. Examining the cases, it becomes evident that the Tribunal now connects a number of key indigenous rights to the right to property, Article 21 of the American Convention on Human Rights. When traditional lands are involved, the right to property has become the Court's structural basis for indigenous rights.

For significant reasons, however, the right to property cannot serve as the conceptual stronghold for indigenous peoples' survival and development. First, the Court's approach limits the autonomy of indigenous peoples and their capacity for change. Second, the right to property inherently has difficulty providing even basic protection for ancestral lands because domestic and international law grants states wide latitude to interfere with property. Though the Court has attempted to create special 'safeguards' for indigenous lands and resources, they have proven inadequate.

In response, I urge a distinct way for the Court to conceptualize indigenous rights. The right to property must be subsumed by, and anchored to, a stronger configurative principle to defend indigenous peoples' livelihood. Other human rights regimes offer

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the right to self-determination or specific minority protections that can safeguard indigenous rights. The relevant Inter-American legal instruments fail to establish such principles. As a result, I propose that a broad right-to-life concept, known as *vida digna* in the Court's case law, serve as the new structural basis for an array of essential indigenous norms—including cultural integrity, nondiscrimination, lands and resources, social development, and self-government.

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[T]he destruction of the jungle erases the soul.

– Sabino Gualinga, a leader of the Sarayaku indigenous community of Ecuador.¹

[T]here may be nice rhetoric . . . that indigenous leaders repeat. We cannot hold [those] extremist positions We cannot be beggars sitting on a bag of gold. Those fundamentalisms, those dogmatisms just immobilize us.

– Rafael Correa, President of Ecuador²

1. INTRODUCTION

Latin American countries are in the midst of an unprecedented search for natural resources.³ This frenetic hunt has led directly to indigenous lands, which in many cases enjoy an abundance of oil, gas, and minerals, as well as pristine forest and waterways. In the region, even when indigenous communities possess title to their territories, the law often establishes state ownership over water and subsurface resources.⁴ Governments, in turn, grant concessions to companies for exploration and extraction. Across the Americas, extractive industries and hydroelectric projects account for billions of dollars in revenue and, in a number of countries, significant proportions of GNP.⁵

¹ *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 151 (June 27, 2012).

² President Rafael Correa Delgado, President of Ecuador, *Discurso en la Cumbre Presidencial y de Autoridades Indígenas y Afrodescendientes de la ALBA* at 13, 16 (June 25, 2010) available at http://www.presidencia.gob.ec/wp-content/uploads/downloads/2012/10/2010-06-25_alba.pdf.

³ Frank Bajak, *Indian Political Awakening Stirs Latin America*, *NEWSDAY* (Nov. 2, 2009, 12:03 AM), <http://www.newsday.com/business/indian-political-awakening-stirs-latin-america-1.1561067>.

⁴ See, e.g., INTER-AM. COMM'N ON HUM. RTS., *INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES: NORMS AND JURISPRUDENCE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* 74 (2009), [hereinafter *Inter-American Commission Thematic Report*], available at <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf>; Dinah Shelton, *Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon*, 105 AM. J. INT'L L. 60, 81 (2011) ("Subsurface mineral and water rights belong to the state in many countries, and even conveying title to indigenous peoples will not be sufficient to ensure that they are properly consulted and able to determine the nature and scope of projects affecting their lands.") [hereinafter *Shelton, Self-Determination*].

⁵ *Sarayaku*, Inter-Am. Ct. H.R. ¶ 60 (finding that, in 2005, sales of crude oil generated approximately one-quarter of Ecuador's GDP); Special Rapporteur on Indigenous Peoples, *Extractive Industries Operating within or near Indigenous*

Predictably, these epic financial interests and surging projects have left devastation in their wake. Indigenous peoples in the hemisphere face one of their worst crises since the arrival of European colonizers. To illustrate, in the Loreto region of the Peruvian Amazon, there were over one hundred oil spills between 2007 and 2011.⁶ Rivers have been contaminated and food sources poisoned.⁷ Twenty-five indigenous ethnic groups inhabit the Chaco, the second-largest forest in South America after the Amazon.⁸ Yet logging currently eradicates 1,000 hectares—equivalent to 1,000 soccer fields—of forest per day.⁹

In Colombia, construction of the El Cercado dam forcibly displaced numerous members of the Wiwa indigenous peoples.¹⁰ During the years preceding the dam's completion, Wiwa communities endured the destruction of their homes and sacred sites, as well as the assassination of several spiritual and community leaders.¹¹ In Ecuador, an Argentine oil company destroyed forests and blocked essential waterways while conducting exploration activities.¹² After going bankrupt, the company left behind powerful explosives in Sarayaku territory, as well as social turmoil among neighboring tribes.¹³

Territories, Human Rights Council, ¶ 53, U.N. Doc. A/HRC/18/35 (July 11, 2011) (by James Anaya) (“Several Governments highlighted the key importance of natural resource extraction projects for their domestic economies that, in a number of countries, reportedly account for up to 60 to 70 per cent of GNP.”).

⁶ Milagros Salazar, *Indigenous Consultations in Peru to Debut in Amazon Oil Region*, INTER PRESS SERV. NEWS AGENCY (Sept. 5 2012), <http://www.ipsnews.net/2012/09/indigenous-consultations-in-peru-to-debut-in-amazon-oil-region>.

⁷ The degree of toxicity is so high in some areas that bioremediation is impossible. *Id.*

⁸ Fionuala Cregan & Paul Kelly, *Indigenous Rights Placed above Private Interests at Long Last*, THE IRISH TIMES (June 7, 2012, 9:36 PM), <http://www.irishtimes.com/newspaper/world/2012/0607/1224317439421.html>. The Chaco covers swaths of Argentina, Paraguay, and Bolivia.

⁹ *Id.*

¹⁰ Amnesty Int'l, *Americas: Time and Again, Indigenous Rights Trampled for Development*, AI INDEX, AMR 01/005/2012, Aug. 8, 2012, <http://www.amnesty.org/en/news/americas-time-and-again-indigenous-rights-trampled-development-2012-08-08>.

¹¹ *Id.*

¹² *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 105 (June 27, 2012).

¹³ *See id.* ¶¶ 291–92.

These disturbing cases are found throughout the hemisphere, from Chile to Canada, and around the globe.¹⁴ They cast a dark shadow over the spectrum of indigenous rights—menacing their lives, lands, and everything in between. When communities protest, government and private security forces have responded

¹⁴ See, e.g., U.N. Permanent Forum on Indigenous Issues, International Expert Group Meeting on Extractive Industries, Indigenous Peoples' Rights and Corporate Social Responsibility, Manila, Phil., Mar. 27-29, 2009, *Report of the International Expert Group Meeting on Extractive Industries, Indigenous Peoples' Rights and Corporate Social Responsibility*, ¶ 14, U.N. Doc. E/C.19/2009/CRP. 8 (May 4, 2009) (highlighting problems around the world); AMNESTY INT'L, SACRIFICING RIGHTS IN THE NAME OF DEVELOPMENT: INDIGENOUS PEOPLES UNDER THREAT IN THE AMERICAS 3 (2011) (noting that, around the globe, states frequently pass laws and undertake development projects without regard for the affected indigenous peoples); *Bolivia Mine in Crisis after Protest Death*, UPI.COM, (July 10, 2012), http://www.upi.com/Business_News/Energy-Resources/2012/07/10/Bolivia-mine-in-crisis-after-protest-death/UPI-33651341927642 (describing the hostilities between the Quechua Indians, a Canadian mining company, and the Bolivian government); Suzanne Goldenberg, *Canadian Tar Sands Project Carries Huge Risks, Warn Environmental Activists*, THE GUARDIAN (Nov. 29, 2011, 5:56 PM), <http://www.guardian.co.uk/environment/2011/nov/29/tar-sands-canada-environmental-warning> (reporting that a Canadian tar sand project could devastate traditional indigenous lands); Sara Miller Llana & Sara Shahriari, *Bolivian Indigenous Struggle to be Heard—by Indigenous President Morales*, THE CHRISTIAN SCI. MONITOR, Oct. 5, 2011, <http://www.csmonitor.com/World/Americas/2011/1005/Bolivian-indigenous-struggle-to-be-heard-by-indigenous-President-Morales> (stating that there is increasing turmoil across Latin America as indigenous peoples demand greater participation in decisions that affect their territories); Nikolaj Nielsen, *MEPs Back YPF-Repsol, Despite Company Violations in Argentina*, EUOBSERVER.COM (Apr. 20, 2012, 8:03 PM), <http://EUobserver.com/foreign/115972> (describing the damages an energy firm caused to indigenous lands in Argentina); *OAS Human Rights Commission Grants Hearing on Hul'qumi'num Land Claim*, CAN. NEWSWIRE (Oct. 5, 2011, 12:36 PM), <http://www.newswire.ca/en/story/853935/oas-human-rights-commission-grants-hearing-on-hul-qumi-num-land-claim> (summarizing a petition before the Inter-American Commission against Canada for the destruction of ancestral lands); John Collins Rudolf, *Isolated Amazon Tribes Threatened by Logging, Groups Say*, N.Y. TIMES (Feb. 3, 2011, 8:21 AM), <http://green.blogs.nytimes.com/2011/02/03/isolated-amazon-tribes-threatened-by-logging-groups-say> (reporting on the potential extinction of an isolated tribe living in the Amazon rainforest due to illegal logging); Fawzia Sheikh, *Indigenous Peruvian Community Locked in Dispute with Oil Company*, INTER PRESS SERV. NEWS AGENCY (Oct. 22, 2012, 8:58 PM), <http://www.ipsnews.net/2012/05/indigenous-peruvian-community-locked-in-dispute-with-oil-company> (recounting that a Canadian oil company has caused damage to indigenous lands and internal strife among Amazonian tribes); Danilo Valladares, *Guatemalan Communities Have No Say in Exploitation of Resources*, INTER PRESS SERV. NEWS AGENCY (May 21, 2012, 9:53 PM), <http://www.ipsnews.net/2012/05/guatemalan-communities-have-no-say-in-exploitation-of-resources> (depicting a crackdown on the protests of indigenous peoples resisting the construction of a hydroelectric dam).

with brutal force.¹⁵ Moreover, human rights organizations have decried selective prosecutions of indigenous leaders who organize resistance movements.¹⁶

Yet many indigenous peoples are undeterred. They have resolutely challenged intrusions upon their lands and ways of life. Pan-indigenous conferences and the Internet, linking groups across national boundaries, have facilitated resistance.¹⁷ Sharing strategies, they have won significant cases and driven legal reform efforts.¹⁸ Nevertheless, there are all too many instances where indigenous rights are left “entirely unprotected.”¹⁹ As the UN Special Rapporteur on the rights of indigenous peoples has recently observed: “Major legislative and administrative reforms are needed in virtually all countries in which indigenous peoples live to adequately define and protect their rights over lands and resources and other rights that may be affected by extractive

¹⁵ See AMNESTY INT’L, SACRIFICING RIGHTS IN THE NAME OF DEVELOPMENT, *supra* note 14, at 8.

¹⁶ *Id.* at 8–9.

¹⁷ See, e.g., KAREN ENGLE, THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY 2–3 (2010) (“[T]hese networks [of indigenous social movements] and the exchange of ideas and strategies are greatly facilitated by the Internet and other forms of modern communication”); Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT’L L. 1141, 1144 (2008) (recognizing that modern communication technologies have helped unite indigenous communities); Bajak, *supra* note 3 (“[T]he Internet allows native leaders in far-flung villages to share ideas and strategies across international boundaries.”).

¹⁸ To cite only two examples, “[i]n August 2011, Peru approved a law on [i]ndigenous [p]eoples’ right to consultation when they are likely to be affected by development projects.” Amnesty Int’l, *Americas: Time and Again, Indigenous Rights Trampled for Development*, *supra* note 10. It is the first of its kind in the Americas; however, there has been controversy over implementation and other aspects. *Id.* at 8. On June 28, 2010, the Supreme Court of Belize issued a judgment affirming the traditional land rights of the Maya communities of southern Belize. *Maya Leaders Alliance v. Att’y Gen. of Belize*, No. 366 (Belize 2010) (unreported), available at http://www.law.arizona.edu/depts/iplp/international/maya_belize/documents/Claim%20366%20of%202008.pdf. The decision follows the Supreme Court’s landmark ruling of 2007 in favor of the two Maya communities of Santa Cruz and Conejo. Aurelio Cal *ex rel.* Maya Vill. of Santa Cruz v. Att’y Gen. of Belize, No. 171 (Belize 2007), available at http://www.law.arizona.edu/depts/iplp/international/maya_belize/documents/ClaimsNos171and172of2007.pdf. For more information, see generally, *Maya Communities of Southern Belize*, UNIV. OF ARIZ. INDIGENOUS PEOPLES LAW & POLICY PROGRAM, <http://www.law.arizona.edu/depts/iplp/international/mayaBelize.cfm> (last visited Oct. 7, 2013).

¹⁹ Special Rapporteur on the Rights of Indigenous Peoples, ¶ 58, Human Rights Council, U.N. Doc. A/HRC/21/47 (July 6, 2012) (by James Anaya).

industries.”²⁰ Without such drastic changes, governments and corporations will continue to pursue lucrative projects without regard for indigenous communities.

To overcome domestic obstacles, indigenous peoples have taken their complaints to international bodies. United Nations mechanisms have issued numerous communications in their favor. Within the Organization of American States (OAS), the Inter-American Commission and Court of Human Rights have increasingly heard the petitions of indigenous peoples. In 2010, the Inter-American Commission called on Guatemala to suspend operations at the Marlin gold mine after allegations made by communities that the mining had begun without their consent, seriously harming their lives, health, and property.²¹

In 2011, the Commission requested that Brazil halt construction on the Belo Monte hydroelectric power plant, a large initiative that endangered indigenous communities of the Xingu River Basin in Pará, Brazil.²² In response, the State “withdrew [its] ambassador from the OAS and stopped paying dues to the organisation.”²³ These and other Commission decisions have led to stinging criticism from a block of Latin American states, which has called for a sharp reduction in its powers.²⁴ Both the Marlin gold mine and the Belo Monte dam have continued operations.

²⁰ *Id.*

²¹ AMNESTY INT’L, SACRIFICING RIGHTS IN THE NAME OF DEVELOPMENT, *supra* note 14, at 10 (“In June 2011, the State declared that it would not comply with the Inter-American Commission’s order to suspend mining activities, and the mine continues to operate.”).

²² Inter-Am. Comm’n H.R., *Precautionary Measures: Indigenous Communities of the Xingu River Basin, Pará, Brazil*, PM 382/10 (Apr. 1, 2011), available at <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp>.

²³ *Chipping at the Foundations: The Regional Justice System Comes under Attack from the Countries whose Citizens Need it Most*, THE ECONOMIST, June 9, 2012, <http://www.economist.com/node/21556599/print>.

²⁴ This opposition owes to several issues, not only to decisions regarding indigenous peoples. See *id.* (noting that freedom of the press is a major point of contention). The block of states—among them Venezuela, Ecuador, Cuba, Nicaragua, and Bolivia—is known as *La Alianza Bolivariana para los Pueblos de Nuestra América* or ALBA. *Id.* In September of 2012, “Venezuela presented to the Secretary General of the Organization of American States a notice of denunciation of the American Convention on Human Rights.” Press Release, Inter-Am. Comm’n on Human Rights, IACHR Regrets Decision of Venezuela to Denounce the American Convention on Human Rights (Sept. 12, 2012), available at http://www.oas.org/en/iachr/media_center/PReleases/2012/117.asp.

The Inter-American Court, for its part, is the world's only human rights body to have issued legally-binding judgments on resource extraction in indigenous territories. In contrast, the Inter-American Commission and UN mechanisms are only capable of producing recommendations. The Court stands as a key guardian for indigenous rights in the hemisphere, especially with the Commission's mandate under fire. The Court's judgments are also noteworthy for their detailed nature, setting out elaborate safeguards and remedies for indigenous and tribal populations. Although it primarily interprets the American Convention on Human Rights, the Tribunal's influence has extended around the globe.

In fact, the UN Special Rapporteur on indigenous rights cites the Inter-American Court as a primary legal authority in defense of all indigenous communities threatened by commercial projects. The Court's landmark case on this topic, the 2007 judgment *Saramaka v. Suriname*, condemned logging and mining initiatives on traditional lands. The African Commission on Human and Peoples' Rights, among other bodies, has also been deeply influenced by *Saramaka* and other Court precedents.²⁵

In June of 2012, the Court handed down *Sarayaku v. Ecuador*, its most important decision on extractive industries and indigenous peoples since *Saramaka*. This article considers how the *Sarayaku* judgment impacts the Court's case law on indigenous lands and resources, and evaluates that jurisprudence as a whole. Examining the influential line of cases, it becomes evident that the Tribunal now closely binds a number of key indigenous rights—such as cultural identity, political participation, and juridical personality—to Article 21, the American Convention's right to property. When traditional lands are involved, the right to property has become the Court's structural basis for indigenous rights.

For significant reasons, however, the right to property cannot serve as the conceptual stronghold for indigenous peoples' survival and development. First, the Court's approach limits the autonomy of indigenous peoples and their capacity for change. Basing varied and essential rights on land as the Tribunal does

²⁵ See, e.g., Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v. Kenya, Comm. No. 276/2003, Afr. Comm'n on Human & Peoples' Rights (Feb. 4, 2010) (citing *Saramaka* for various propositions).

requires that indigenous peoples have a very specific, and often unrealistic, relationship to their territories.

Second, the right to property inherently has difficulty providing even basic protection for ancestral lands, because domestic and international law grants states wide latitude to interfere with property. In recent judgments, in fact, the Inter-American Court has debilitated the right even further, rendering Article 21 one of the most compromised provisions of the American Convention. While in *Saramaka* the Tribunal attempted to fashion special 'safeguards' for indigenous lands and resources under Article 21—such as requiring consultation with communities—these protections are too easily evaded by states. Moreover, after *Sarayaku*, the safeguards are in decline.

In response, I urge a distinct way for the Court to conceptualize indigenous rights. The right to property must be subsumed by, and anchored to, a stronger configurative principle to defend indigenous peoples' livelihood. Other human rights regimes offer the right to self-determination or specific minority protections that can safeguard indigenous rights. The American Convention and other Inter-American legal instruments fail to establish such principles. As a result, I propose that a broad right-to-life concept, known as *vida digna* in the Court's case law, serve as the framework for an array of essential indigenous norms—including cultural integrity, nondiscrimination, lands and resources, social development, and self-government.

The right to *vida digna*, often translated as 'the right to a dignified life,' offers a promising new structural basis for indigenous rights. It is a versatile, multidimensional right that has ascended in the Court's jurisprudence. The Tribunal has already used *vida digna* as a means to protect various human rights that it associates with a 'dignified life.' Of course, a right-to-life framework also reinforces that the communities' lives and livelihood are truly in jeopardy, and thus raises the standards for indigenous rights and remedies in the Inter-American system.

The Article follows this order: in Part 2, indigenous rights in international law are generally considered. Part 2 also introduces James Anaya's theory on self-determination as a central frame of reference for this work. Part 3 assesses key indigenous rights judgments of the Inter-American Court, underscoring the Tribunal's unique—and ultimately flawed—development of the right to property. Finally, in Part 4, I propose the shift to a right-to-

life approach and examine the implications of this reconceptualization.

2. INDIGENOUS RIGHTS IN INTERNATIONAL LAW

The following Section introduces certain international legal developments of crucial relevance to indigenous peoples. Such aspects include the ascent of the human rights paradigm in indigenous advocacy, as well as the central—and controversial— notion of self-determination. To frame and focus this discussion, I highlight the work of James Anaya, a leading scholar on indigenous rights and the current UN Special Rapporteur on the subject. In particular, I emphasize his self-determination theory, which offers a cogent interpretation of indigenous priorities and achievements.

2.1. Background

Indigenous rights in international law have risen to prominence in the last three decades.²⁶ Paternalistic and assimilationist norms are increasingly discarded in favor of a framework that grants greater control to indigenous peoples over their cultures, lands, and modes of governance.²⁷ In 1989, the

²⁶ See, e.g., S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 7 (2d ed. 2004) (affirming “results within the [legal] international system for indigenous peoples”); INT’L LAW ASSOC’N, *THE HAGUE CONFERENCE ON THE RIGHTS OF INDIGENOUS PEOPLES* 1–6 (2010), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> [hereinafter ILA Report] (stating that, over the last decades, the “shift away from positivist, state-dominated dialogue toward a more inclusive framework” has been more responsive to indigenous peoples’ concerns); WILL KYMLICKA, *MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY* 3 (2007) (arguing that intergovernmental organizations are recently “encouraging, and sometimes pressuring, states to adopt a more multicultural approach” in law and other areas); PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 20–32 (2002) (describing the growth of indigenous rights in international human rights law); Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 EUR. J. INT’L L. 141, 142 (2011) (“[I]n the 1980s and 1990s, [indigenous rights advocates] began to articulate their claims in human rights terms, particularly the human right to culture.”) [hereinafter Engle, *On Fragile Architecture*]; Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 100–110 (1999) (summarizing the varied roles of the International Labor Organization, the United Nations, the Organization of American States, and the World Bank with respect to indigenous rights over the last three decades).

²⁷ Cf. International Labour Organisation, *Indigenous and Tribal Populations Convention*, June 26, 1957, No. 107, 328 U.N.T.S. 247 (“[T]he adoption of general

International Labour Organisation took a major step by adopting the Indigenous and Tribal Peoples Convention.²⁸ In 2007, after years of negotiation, the United Nations introduced its Declaration on the Rights of Indigenous Peoples (“UNDRIP”).²⁹

James Anaya provides a compelling account of the foundations for indigenous empowerment in international law.³⁰ He begins by disapproving of the oft-cited sovereignty justification for ‘first nations.’³¹ That approach generally holds that indigenous peoples, as a legal matter, should be conceived as autonomous states whose original sovereignty over their territories and resources has been usurped by colonizing forces.³² To be sure, Anaya underscores – and discusses at length – the centuries of abuse and displacement inflicted by European settlers.³³ But he believes that a classic sovereignty argument suffers fatal limitations.³⁴ It must yield to

international standards on the subject will facilitate action to assure the protection of the populations concerned, their progressive integration into their respective national communities . . .”). The International Labour Organisation’s more recent Convention rejects this “assimilationist orientation” in its Preamble:

the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards . . .

International Labour Organisation, Indigenous and Tribal Peoples Convention, June 27, 1989, No. 169, 1650 U.N.T.S. 383, 384 [hereinafter ILO Convention No. 169]. *But see* Sharon Venne, *The New Language of Assimilation: A Brief Analysis of ILO Convention 169*, 2 WITHOUT PREJUDICE: EAFORD INT’L REV. RACIAL DISCRIMINATION 53, 53 (1989) (arguing that the ILO Convention No. 169 is still assimilationist and “far more destructive than its predecessor,” Convention No. 107).

²⁸ ILO Convention No. 169, *supra* note 27.

²⁹ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 12, 2007).

³⁰ See ANAYA, *supra* note 26, at 3–96.

³¹ See ANAYA, *supra* note 26, at 21. This is not to say that Anaya disapproves of the actual phrase “first nations.”

³² See ANAYA, *supra* note 26 at 6-7; Karen Engle, *Indigenous Rights Claims in International Law: Self-Determination, Culture, and Development*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 331, 333 (David Armstrong ed., 2009) [hereinafter Engle, *Indigenous Rights Claims*]; RONALD NIEZEN, *THE ORIGINS OF INDIGENISM: HUMAN RIGHTS AND THE POLITICS OF IDENTITY* 29–36, 40–52 (2003); Wiessner, *supra* note 17, at 1145–49.

³³ See generally ANAYA, *supra* note 26.

³⁴ *Id.* at 109 (identifying the limitations to be two-fold: (1) its tendency to maintain the “status quo of political ordering”; and (2) its restrictions upon “international competency”).

the longstanding international doctrine of state sovereignty, which excluded non-Europeans and jealously guards against political entities unrecognized by this archaic process.³⁵

Instead, Anaya focuses upon an international human rights discourse. Yet transposing communal principles of indigenous peoples into an individualistic rights framework is not a task to be taken lightly.³⁶ Few general human rights instruments champion collective or group rights.³⁷ Specific protections for minorities are

³⁵ See *id.* at 6-7 (tracking the historical tendency to favor colonization and classify non-European peoples as unqualified for statehood). For examples of this discriminatory approach, see LASSA OPPENHEIM, *INTERNATIONAL LAW*, VOL. 1: PEACE, § 27 (1905) (explaining that one condition for a new state to be admitted to the "Family of Nations" was that it, foremost, "be a civilised State which is in constant intercourse with members of the Family of Nations"). Antony Anghie has examined and criticized how the non-European world was excluded from 'international society.' Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 4 (1999). Others may continue to use the term sovereignty, although with nuanced or reconceptualized meanings. See, e.g., Federico Lenzerini, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples*, 42 TEX. INT'L L.J. 155, 189 (2006) (articulating a dynamic formulation of sovereignty that applies both to states and sub-state entities by which groups of people can exercise certain degrees of autonomy within the state); Wiessner, *supra* note 17, at 1170-76 (stating that sovereignty is synonymous with, and inseparable from, a sense of cultural identity).

³⁶ See, e.g., Engle, *Indigenous Rights Claims*, *supra* note 32, at 335 ("[E]levat[ing] the individual to the point that the group is forgotten' . . . would . . . threaten indigenous culture.") (alteration in original) (citation omitted); JÉRÉMIE GILBERT, *INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS* 115 (2006) (postulating that indigenous collective land ownership principles are in tension with an individualistic approach to property); Engle, *On Fragile Architecture*, *supra* note 26, at 151-55 (arguing that, in the cases cited, individual rights "trumped" collective rights). But several maintain that group rights are not incompatible with the contemporary human rights paradigm. See, e.g., Gillian Triggs, *The Rights of 'Peoples' and Individual Rights: Conflict or Harmony?*, in *THE RIGHTS OF PEOPLES* 141, 155-57 (James Crawford ed., 1988) (describing an interdependent relationship between group and individual rights); B. G. Ramcharan, *Individual, Collective and Group Rights: History, Theory, Practice and Contemporary Evolution*, 1 INT'L J. GROUP RTS. 27, 42 (1993) (concluding that collective rights are not inconsistent with individual human rights).

³⁷ Of course, there are exceptions, among them Common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which establishes that "[a]ll peoples have the right to self-determination." International Covenant on Civil and Political Rights, art. 1(1), *opened for signature* Dec. 16, 1966, S. Exec. E, 95-2 (1978), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 1(1), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3. The African Charter on Human and Peoples' Rights recognizes "peoples" rights for the first time in a multilateral human rights treaty. African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986),

also lacking in the major international and regional human rights conventions. The International Covenant on Civil and Political Rights (ICCPR) stands as the main exception. Yet initially its Article 27 was regarded as a mere non-interference provision, which only required the state's tolerance of a minority culture.³⁸

Despite these limitations, indigenous advocates have achieved a number of victories utilizing, and then expanding, the international human rights paradigm. Significant examples include the abovementioned ILO and UN texts, which contain provisions that moved beyond existing human rights norms to "express specific aspirations and self-understandings of indigenous groups."³⁹ Also, several regional and international

available at <http://www.achpr.org/instruments/achpr/>. Interestingly, Article 27 of the ICCPR takes a hybrid approach—a formulation that "hovered uneasily between an individual and a communal right," according to James Crawford. James Crawford, *The Rights of Peoples: Some Conclusions*, in *THE RIGHTS OF PEOPLES*, *supra* note 36, at 159, 162. In its general comment on Article 27, the Human Rights Committee stated that, "[a]lthough the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion." U.N. Human Rights Committee, Gen. Comment No. 23: The Rights of Minorities (Art. 27), ¶ 6.2, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994).

³⁸ See Ian Brownlie, *Rights of Peoples in Modern International Law*, in *THE RIGHTS OF PEOPLES*, *supra* note 36, at 1, 3 (positing that Article 27 does not require state positive action); Will Kymlicka, *Theorizing Indigenous Rights*, 49 *U. TORONTO L.J.* 281, 284 (1999) (stating that Article 27 has been understood to "include only negative rights of non-interference"). Nowak remarks that Article 27 "is the only provision in the Covenant with the typically negative formulation"; that is, individuals "shall not be *denied* the right." MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 657 (2nd rev. ed. 2005) (emphasis in original). An attempt failed to change the language to "[t]he States shall ensure," in order to obligate positive state measures. *Id.* In any event, Nowak points to reasons why even the negative formulation should result in positive state measures to combat discrimination. *Id.* at 658.

³⁹ Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 *N.Y.U. J. INT'L L. & POL.* 189, 238, 238 n.174 (2001) (citing, among others, provisions on self-government and "the right to maintain and strengthen their distinctive spiritual and material relationships with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibility to future generations in this regard") (citing Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Draft Declaration on the Rights of Indigenous Peoples, art. 25, 44th Sess., Agenda Item 14, at 50, Annex I, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993)). See also Lillian Aponte Miranda, *Indigenous Peoples as International Lawmakers*, 32 *U. PA. J. INT'L L.* 203, 207 (2010) ("[I]ndigenous peoples have played a significant role in changing the legal landscape of human rights . . .").

human rights bodies have generated jurisprudence to support indigenous rights, even when they interpret texts that fail to name such rights expressly.⁴⁰

Anaya assesses many of these decisions, principles, and discourse. At the heart of it all, he concludes, lies the concept of self-determination. Since the beginning, indigenous peoples have framed their demands within this precept.⁴¹ And, after strenuous political battles, the UNDRIP finally expressed their “right to self-determination” by which indigenous peoples “freely determine their political status and freely pursue their economic, social and cultural development.”⁴² The term is noticeably absent from the

⁴⁰ These bodies include the Inter-American Commission and Court of Human Rights (see Part III, *infra*, for a discussion of Court decisions) and the African Court and Commission on Human and Peoples' Rights. As for UN mechanisms, numerous treaty bodies have recently addressed the rights of indigenous peoples, including: the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee against Torture, the Committee on Elimination of Discrimination Against Women, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the Committee on the Rights of Persons with Disabilities. See 5 FOREST PEOPLES PROGRAMME, INDIGENOUS PEOPLES AND UNITED NATIONS HUMAN RIGHTS BODIES: A COMPILATION OF UN TREATY BODY JURISPRUDENCE, THE RECOMMENDATIONS OF THE HUMAN RIGHTS COUNCIL AND ITS SPECIAL PROCEDURES, AND THE ADVICE OF THE EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES (Fergus MacKay ed., 2011-12), available at <http://www.forestpeoples.org/sites/fpp/files/publication/2013/01/cos-2011-12.pdf> (compiling indigenous rights jurisprudence from all of these UN bodies).

⁴¹ See, e.g., ANAYA, *supra* note 26, at 97 (concluding that self-determination is “a principle of highest order” among indigenous peoples); THORNBERRY, *supra* note 26, at 4 (explaining that indigenous advocates have characterized self-determination as “their key to advancement”); Engle, *Indigenous Rights Claims*, *supra* note 32, at 333 (stating that self-determination was the prevailing discourse for indigenous advocates throughout the 1970s and into the late 1980s); Chairperson-Rapporteur of the U.N. Comm'n on Human Rights Working Group, *Indigenous Issues: Rep. of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, Comm'n on Human Rights, ¶ 38, U.N. Doc. E/CN.4/2000/84 (Dec. 6, 1999) (by Luis-Enrique Chávez) (affirming overwhelming indigenous support of the right to self-determination at the discussions around the drafting of the UN Declaration on the Rights of Indigenous Peoples); Kingsbury, *supra* note 39, at 216-17 (illustrating how indigenous representatives have pushed to include a right to self-determination).

⁴² United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295, at art. 3 (Sept. 13, 2007).

ILO Convention, which was drafted with less indigenous participation.⁴³

Self-determination is a jarring proposition for governments of multicultural states. If ethnic groups may “freely determine their political status,”⁴⁴ a state’s territorial and political integrity could be jeopardized. A leading provision establishing “the right of self-determination” to “all peoples,” in Article 1 of the ICCPR (replicated in Article 1 of the International Covenant on Economic, Social and Cultural Rights) (“Common Article 1”), was hotly contested during negotiations.⁴⁵ Out of the debates and varied interpretations, Manfred Nowak concludes that the “sole undisputed point is that peoples living under colonial rule or comparable alien subjugation” are entitled to the Covenant’s right.⁴⁶

Thus, the classic context for Common Article 1 consisted in colonies asserting their independence from external oppression. It did not specifically contemplate the struggles of indigenous communities.⁴⁷ Yet self-determination does not only refer to the creation of new states. Many authorities now recognize external and internal (or ‘strong’ and ‘weak’) forms of self-determination.⁴⁸

⁴³ See, e.g., ANAYA, *supra* note 26, at 59 (noting their “limited participation in the deliberations”); MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 10 (Claire Charters & Rodolfo Stavenhagen eds., Elaine Bolton trans., 2009) (“In a first for international law, the rights bearers, indigenous peoples, played a pivotal role in the negotiations on [the UN Declaration’s] content”); Kingsbury, *supra* note 39, at 238 (affirming limited involvement of indigenous peoples in the drafting of ILO Convention 169 in the 1980s). Still, as Dinah Shelton indicates, the ILO Convention advances several elements of internal self-determination without using the term. Shelton, *Self-Determination*, *supra* note 4, at 62.

⁴⁴ International Covenant on Civil and Political Rights, *supra* note 37, at art. 1(1); International Covenant on Economic, Social and Cultural Rights, *supra* note 37, at art. 1(1).

⁴⁵ See NOWAK, *supra* note 38, at 10 (“The historical background of Art. 1 in both Covenants is characterized by fundamental differences of opinion.”).

⁴⁶ *Id.* at 22 (emphasis omitted).

⁴⁷ See *id.* at 650; Engle, *Indigenous Rights Claims*, *supra* note 32, at 336; Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in THE RIGHTS OF PEOPLES, *supra* note 36, at 26–27.

⁴⁸ See, e.g., Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations: Final Rep. (Last Part)*, Comm’n on Human Rights, ¶ 109, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.6 (May 24, 1984) (by José R. Martínez Cobo) (stating that indigenous peoples attain “a necessary measure of autonomy or self-determination” through “[t]heir own forms of organization and internal control”); Brownlie, *supra* note 38, at 4 (emphasizing that self-

The latter does not require the fracturing of a state's political and territorial unity; rather, it alludes to alternate forms of autonomy within a nation's borders. In the words of the African Commission on Human and Peoples' Rights, internal self-determination can be realized through "self-government, local government, federalism . . . or any other form of relations that accords with the wishes of the people."⁴⁹

But several have noted a tipping point when external self-determination may be justified.⁵⁰ Secession and independence could be options in situations of severe human rights abuse, or when peoples are "denied the right to participate in government."⁵¹ Such an interpretation possesses logical and moral

determination is a dynamic rather than static concept, due to the contributions of human rights law); Crawford, *supra* note 37, at 162 (describing "other political forms" that do not require "complete independence"); R. Higgins, *Postmodern Tribalism and the Right to Secession*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 29, 31 (Catherine Brölmann et al. eds., 1993) (discussing differences between external and internal self-determination); Shelton, *Self-Determination*, *supra* note 4, at 62-81 (describing an internal form of self-determination in which indigenous peoples exercise autonomy through particular institutions, ways of life, and economic development within the state).

⁴⁹ Katangese Peoples' Congress v. Zaire, Afr. Comm'n on Hum. & Peoples' Rts., Comm'n No. 75/92, AHRLR 72 ¶ 4 (1995), available at <http://www.acphr.org/>.

⁵⁰ See, e.g., ANTONIO CASSESE, INTERNATIONAL LAW 61 (2d ed. 2005) ("Peoples under colonial domination have the right to external self-determination"); James Crawford, *The Right of Self-Determination in International Law: Its Development and Future*, in PEOPLES' RIGHTS 7, 64-65 (Philip Alston ed., 2005) [hereinafter Crawford, *Right of Self-Determination*] (considering that measures by the central government that grossly discriminate against a people may make a case for external self-determination); Willem van Genugten, *Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems*, 104 AM. J. INT'L L. 29, 40 (2010) (noting that external self-determination may be justified when the state denies a people participatory rights or other fundamental rights) (citing ANTONIO CASSESE, INTERNATIONAL LAW 119 (2d ed. 2005)). Note, however, that the International Court of Justice avoided resolving the matter of "remedial secession" and related topics in its recent advisory opinion on Kosovo. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 2, ¶¶ 82-83 (July 22), available at www.icj-cij.org.

⁵¹ See *Katangese*, *supra* note 46, ¶ 6 ("In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire."). Dinah Shelton remarks that the Commission "seemed to suggest . . . that as long as everyone was being treated equally

force; limiting the possibility of independence to overseas colonies—the “salt-water thesis” of Common Article 1—is arbitrary.⁵² National minorities and ethnic groups can be just as tyrannized as such colonies.⁵³ In this way, some indigenous advocates were dismayed when Article 46(1) was added to the UNDRIP.⁵⁴ The provision appears to forbid external self-determination by stating:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act . . . construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.⁵⁵

Anaya, for his part, resists the internal/external dichotomy for self-determination. He states that there are a number of ways individuals and communities associate in our era, “including but not exclusively those organized around the state.”⁵⁶ He prefers to conceive of self-determination as applying “throughout the spectrum of multiple and overlapping spheres of human association.”⁵⁷ His concept, then, appears very flexible with respect to how groups or “peoples” are defined; all such “segments of humanity” are entitled to self-determination.⁵⁸

According to Anaya, self-determination is “grounded in the idea that all are equally entitled to control their own destinies.”⁵⁹ Those who suffer violations to their self-determination are entitled

(poorly), no particular group had the right to escape.” Shelton, *Self-Determination*, *supra* note 4, at 66 n.42. See also, Crawford, *Right of Self-Determination*, *supra* note 50, at 65 (“Measures grossly discriminating against the people of a territory on grounds of their ethnic origin or cultural distinctiveness may . . . constitut[e] the case for external self-determination . . .”).

⁵² KYMLICKA, *supra* note 26, at 209; Kymlicka, *Theorizing Indigenous Rights*, *supra* note 38, at 284.

⁵³ Kymlicka, *Theorizing Indigenous Rights*, *supra* note 38, at 285.

⁵⁴ Engle, *On Fragile Architecture*, *supra* note 26, at 146.

⁵⁵ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 42, at art. 46(1).

⁵⁶ ANAYA, *supra* note 26, at 105.

⁵⁷ *Id.*

⁵⁸ *Id.* at 104.

⁵⁹ *Id.* at 98.

to redress. While independence was an appropriate remedy for colonization, Anaya hastens to add that "the remedial regime developing in the context of indigenous peoples is not one that favors the formation of new states."⁶⁰ Still, to redress violations to indigenous self-determination, structural remedies must be designed to respond to past abuses, as well as "to protect against current and potential future wrongs."⁶¹

2.2. Anaya's Five Core Principles

Anaya sets out core principles that "elaborate upon the requirements of self-determination."⁶² Self-determination is not merely a matter of political rights. Rather, it is comprised of five dimensions: "nondiscrimination, cultural integrity, lands and resources, social welfare and development, and self-government."⁶³

Anaya shows that these five principles have been emphasized by indigenous peoples and reinforced by international human rights authorities. All of these norms find support, to greater or lesser extent, in the ILO Convention and the UNDRIP. With respect to nondiscrimination specifically, Anaya also cites, among other sources, concluding observations and a general recommendation from the UN Committee on the Elimination of Racial Discrimination; these documents condemn pervasive discrimination against indigenous peoples, which endangers "their culture and their historical identity."⁶⁴

As mentioned above, the ICCPR's Article 27 ostensibly protects cultural integrity in the international legal landscape. Despite the provision's modest beginnings, the UN Human Rights Committee ("Human Rights Committee") has asserted that it in fact requires both negative and positive state obligations to protect minorities.⁶⁵ Anaya reviews cases where the Committee has applied Article 27

⁶⁰ *Id.* at 104.

⁶¹ *Id.* at 125. In recognition of the very right that was violated (self-determination), such remedial measures must be developed with the victims themselves. *See id.* at 113.

⁶² *Id.* at 129.

⁶³ *Id.*

⁶⁴ Rep. of the Comm. on the Elimination of Racial Discrimination, Annex V, ¶ 3, at 122, U.N. Doc A/52/18; GAOR 52d Sess., Supp. No. 18 (Sept. 26, 1997).

⁶⁵ The Rights of Minorities, *supra* note 37, ¶¶ 6.2, 7.

to safeguard the cultural integrity of indigenous communities.⁶⁶ In addition, he refers to global instruments that seek to protect national minorities.⁶⁷

As for the protection of ancestral lands and resources, the Inter-American system of human rights has taken a leading role.⁶⁸ Some of these cases are discussed in Anaya's work; several judgments are examined in detail below (*see infra* Part III). Concerning his category of "social welfare and development," Anaya highlights provisions from the UNDRIP (at that time in draft form) and the ILO Convention that seek to improve the life and work conditions of indigenous peoples.⁶⁹

Finally, "[s]elf-government is the overarching political dimension" of self-determination, following Anaya's framework.⁷⁰ Self-government consists of two facets. The first grants indigenous populations governmental autonomy at the community level, and the second ensures their effective participation within higher levels of state and national government. As an essential part of self-government, routine consultation with indigenous communities is increasingly demanded by human rights bodies and other international institutions, as Anaya shows and as is further considered below.⁷¹

2.3. Anaya in Perspective

In many instances Anaya asserts that his self-determination framework is already recognized in international law; his project

⁶⁶ See ANAYA, *supra* note 26, at 136 (noting that group interest in cultural survival make take priority).

⁶⁷ See *id.* at 131–40 (citing texts such as the Council of Europe's Framework Convention on the Rights of National Minorities).

⁶⁸ See *infra* Part III (providing analysis of several Inter-American Court judgments). See also ENGLE, *supra* note 17, at 167, 180 (highlighting decisions by the Inter-American Court); GILBERT, *supra* note 36, at 114 (pointing to the Inter-American system's leading decisions); Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, 6 HUM. RTS. L. REV. 281, 283 (2006) (lauding the "progressive case law" of the Inter-American Court and the Inter-American Commission on this topic).

⁶⁹ ANAYA, *supra* note 26, at 149–50.

⁷⁰ *Id.* at 150.

⁷¹ See *id.* at 153–56; *infra* Parts III and IV (examining the Inter-American Court's "right to consultation" and its pitfalls). See also Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10 NW. U. J. INT'L HUM. RTS. 54, 84 (2011) (providing a detailed study of this "developing norm").

aims to furnish the underlying theory for accepted doctrine and practice. Yet Will Kymlicka has objected that established international law fails to support some of his claims.⁷² Given Anaya's expansive thesis on the beneficiaries of self-determination, for example, non-indigenous groups would also have strong claims to self-determination under international law. But Kymlicka points out that this is not the case, alluding to legal instruments on "stateless nations," such as the Council of Europe's Framework Convention for the Protection of National Minorities.⁷³ These texts have "avoided any reference to territorial autonomy or political self-determination."⁷⁴

Similarly, Anaya argues that varied rights and "understandings" with respect to indigenous peoples have attained the lofty rank of customary international law.⁷⁵ This mandatory category "results from a general and consistent practice of states followed by them from a sense of legal obligation."⁷⁶ The principle of nondiscrimination has reached this level.⁷⁷ However, at the time of his book's publication (2004), before even the adoption of the UNDRIP, various precise aspects of indigenous rights were still developing (albeit rapidly) in the international sphere.⁷⁸ For example, the appealing indigenous right to "social

⁷² Kymlicka, *Theorizing Indigenous Rights*, *supra* note 38, at 299.

⁷³ *Id.* at 283.

⁷⁴ *Id.*

⁷⁵ ANAYA, *supra* note 26, at 72.

⁷⁶ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986). It continues:

For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law.

Id. at cmt. c. See also Statute of the International Court of Justice art. 38(1)(b), 59 Stat. 1055 (Apr. 18, 1946), available at <http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0> (last visited Oct. 17, 2013) (referring to "international custom, as evidence of a general practice accepted as law").

⁷⁷ See, e.g., Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003) ("[T]he fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.").

⁷⁸ Though Anaya acknowledges that "the specific contours of these norms are still evolving and remain somewhat ambiguous," he does describe certain rights as forming part of customary international law. ANAYA, *supra* note 26, at 72. It should be noted that, in 2010 (six years after Anaya's book and three years after

welfare and development," particularly at the time, represented more of an emerging norm than a globally-binding right.⁷⁹ Thus, Anaya's account may have overestimated the status of certain indigenous rights in international law.

In this respect, consider also the two principal international texts on indigenous rights. The ILO Convention, while a binding treaty, has only been ratified by twenty-two states worldwide since 1989.⁸⁰ Some indigenous groups, moreover, have expressed serious disappointment at the Convention's limits.⁸¹ For its part, the UNDRIP, although a significant accomplishment, is technically an unenforceable instrument. It only emerged after over twenty-five years of arduous negotiations and was forced to accept various revisions and compromises.⁸²

Even the UN Human Rights Committee, whose influential jurisprudence Anaya cites often, has evinced a restrained approach to indigenous rights—at least until recently.⁸³ Demonstrated harm

the adoption of the UNDRIP), the International Law Association found that "certain basic prerogatives that are essential in order to safeguard the identity and basic rights of indigenous peoples are today crystallized in the realm of customary international law." ILA Report, *supra* note 26, at 43.

⁷⁹ As for the indigenous right to "social welfare and development," Anaya argues, "[a]lthough there is controversy about the outer bounds" of the right, "a core consensus exists that states are in some measure obligated to that end." ANAYA, *supra* note 26, at 150. The ILA Report of 2010 does not indicate that such a sweeping right forms part of customary international law. ILA Report, *supra* note 26, at 43.

⁸⁰ Interestingly, most are from Latin America. See *Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989* (No. 169), INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 (last visited Oct. 17, 2013) (showing that Latin American states make up fifteen out of the twenty-two states that ratified the Convention).

⁸¹ See, e.g., Sharon Venne, *The New Language of Assimilation: A Brief Analysis of ILO Convention 169*, 2 WITHOUT PREJUDICE 53 (1989), available at http://www.eaford.org/publications/3/WITHOUT%20Prejudice%20Vol_II_No2.pdf. These disappointments led the Resolution of the Indigenous Peoples' Preparatory Meeting (Geneva, 1989) to call "upon indigenous peoples all over the world to seize every opportunity to condemn the ILO and the revision process" and to urge "states not to ratify the revised convention." *Id.* at 67.

⁸² See, e.g., Engle, *On Fragile Architecture*, *supra* note 26, at 144-51 ("[T]hat version included key compromises that . . . limited the right to self-determination as well as cultural and other collective rights."); van Genugten, *supra* note 50, at 34 (considering various state objections to the UNDRIP).

⁸³ See *Poma Poma v. Peru*, Views, U.N. Human Rights Committee, Comm'n No. 1457/2006, ¶ 7.7, U.N. Doc. CCPR/C/95/D/1457/2006 (Apr. 24 2009) (expressing notable support for "the way of life and culture" of the indigenous petitioner).

to cultural rights—such as logging or quarrying on traditional lands—is not enough to constitute an Article 27 violation; the Committee has required an outright “denial of the [authors’] right [to enjoy their own culture]” or an “impact [so] substantial that it does effectively deny” this right.⁸⁴ From its inception, moreover, the Committee has refused to entertain claims of self-determination under its individual communications procedure.⁸⁵

Major breakthroughs in binding international law owe to the Inter-American Court’s judgments, which were largely rendered since Anaya’s book was published.⁸⁶ As discussed below, these

⁸⁴ E.g., *Mavlonov and Sa’di v. Uzbekistan*, Views, U.N. Human Rights Committee, Commc’n No. 1334/2004, ¶ 8.7, U.N. Doc. CCPR/C/95/D/1334/2004 (Mar. 19, 2009) (“[T]he Committee refers to its jurisprudence, where it has made clear that the question of whether Article 27 has been violated is whether the challenged restriction has an ‘impact [...] [so] substantial that it does effectively deny to the [complainants] the right to enjoy their cultural rights [...]’.”) (alteration in original); *Länsman v. Finland*, Views, U.N. Human Rights Committee, Commc’n No. 1023/2001, ¶¶ 10.1, 10.3, U.N. Doc. CCPR/C/83/D/1023/2001 (Apr. 15, 2005) (“[T]he effects of logging carried out . . . have not been shown to be serious enough as to amount to a denial of the authors’ right to enjoy their own culture in community with other members of their group under article 27 of the Covenant.”); *Länsman v. Finland*, Views, U.N. Human Rights Committee, Commc’n No. 511/1992, ¶¶ 9.4, 9.6, U.N. Doc. CCPR/C/52/D/511/1992 (Oct. 26, 1994) (“[Q]uarrying . . . in the amount that has already taken place, does not constitute a denial of the authors’ right, under article 27, to enjoy their own culture.”). In another example of the Committee’s high threshold, even a Finnish district court had determined that logging would occur in an area “necessary for the authors to enjoy their cultural rights.” *Äärelä and Näkkäläjärvi v. Finland*, Views, U.N. Human Rights Committee, Commc’n No. 779/1997, ¶ 7.6, U.N. Doc. CCPR/C/73/D/779/1997 (Feb. 4, 1997). The district court’s finding was subsequently disputed, however, and the Committee ultimately rejected an Article 27 violation. *Id.*

⁸⁵ See, e.g., *Poma Poma v. Peru*, Views, U.N. Human Rights Committee, Commc’n No. 1457/2006, ¶ 6.3, U.N. Doc. CCPR/C/95/D/1457/2006 (Apr. 24, 2009) (“The Committee recalls its jurisprudence whereby the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated, but that these rights do not include those set out in article 1 of the Covenant.”). Note that:

After long hesitation about the application of the provisions on self-determination in Article 1 of the ICCPR to indigenous groups within independent states, the U.N. Human Rights Committee has begun, in dialogues with states parties under the reporting procedure, to express views under the self-determination rubric on the substantive terms of relationships between states and indigenous peoples.

Kingsbury, *supra* note 39, at 228 (citing as examples Concluding Observations on Canadian state reports).

⁸⁶ Although Anaya, in fact, litigated the first case, *Mayagna (Sumo) Awastingu v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001), *available at*

decisions strongly back several facets of indigenous rights. But the cases have also portrayed the wide ravine between state practice and supposed legal commitments—even in states, such as Ecuador and Paraguay, that ratified the ILO Convention. Recently Anaya, as UN Special Rapporteur, has himself noted these distressing disparities in the context of extractive industries affecting ancestral lands.⁸⁷ Thus, even when international tribunals or domestic laws shore up indigenous rights, implementation and enforcement often disappoint.⁸⁸

Another reservation to Anaya's framework takes a step back: why endorse the human rights movement at all? A persistent objection is that the international human rights paradigm channels Western imperialism and has little place in indigenous cultures. Supporting the paradigm, it is argued, privileges state sovereignty and individualistic philosophies that conflict with, and even directly threaten, indigenous concepts and forms of existence.⁸⁹ What results when indigenous traditions collide with central human rights principles, such as gender equality or democracy? The discourse of individual rights certainly places limits on indigenous concepts. To illustrate, the ILO Convention provides: "These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights."⁹⁰

http://www.escri-net.org/sites/default/files/seriec_79_ing_0.pdf. For an account of this litigation, see S. James Anaya & Maia S. Campbell, *Gaining Legal Recognition of Indigenous Land Rights: The Story of the Awas Tingni Case in Nicaragua*, in HUMAN RIGHTS ADVOCACY STORIES 117 (Deena R. Hurwitz & Margaret L. Satterthwaite eds., 2009).

⁸⁷ See *supra* Part I. Also, Anaya found that "a minimum level of common understanding" is lacking among both states and corporate actors. *Extractive Industries Operating within or near Indigenous Territories*, *supra* note 5, ¶ 68.

⁸⁸ See, e.g., van Genugten, *supra* note 50, at 47 (emphasizing "distance between the standards" on indigenous rights "legally binding or not—and day-to-day life").

⁸⁹ See, e.g., KYMLICKA, *supra* note 26, at 291-92; THORNBERRY, *supra* note 26, at 61-63; Engle, *Indigenous Rights Claims*, *supra* note 32, at 335; Engle, *On Fragile Architecture*, *supra* note 26, at 142, 151-52; Falk, *supra* note 47 at 24. Kingsbury has written that five conceptual structures can clash with each other: 1) human rights claims; 2) minority claims; 3) self-determination claims; 4) historic sovereignty claims; and 5) claims as indigenous peoples. Kingsbury, *supra* note 39, at 190.

⁹⁰ International Labour Conference, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Convention 169, 28 I.L.M. 1384, art. 8(2), (1989). As noted by Engle, "Indigenous rights are thus defined, explicitly or implicitly, with what the literature on colonial law refers to as the 'repugnancy

Despite its limitations and dilemmas, many like Anaya have opted for the human rights approach over secessionist models. In this vein, it is stated that indigenous communities are more focused on their lands, cultural integrity, and political empowerment than independent statehood.⁹¹ Perhaps this owes only to the fact that they are in crisis mode and can only react to the daily assaults upon their way of life. But Karen Engle and others have observed that Latin American indigenous groups have rarely demanded external self-determination and that it is unlikely they will do so in the future.⁹²

The human rights paradigm continues to evolve in response to diverse indigenous claims. Currently, it cannot be reduced to a right to cultural preservation, which requires only the tolerance of a people's heritage. In fact, the indigenous human rights movement has enjoyed much more success than minority rights frameworks in general, to the extent that such groups are seeking to portray themselves as 'indigenous' to obtain the expanding rights and protections associated with that status.⁹³

Anaya seizes upon this momentum and instills it with a normative force. His five principles configuring self-determination for indigenous peoples, while not mutually exclusive, have been perennially emphasized by both indigenous advocates and international human rights bodies. He does not avoid the indigenous mantra for self-determination; rather, he embraces it,

clause.'" Engle, *On Fragile Architecture*, *supra* note 26, at 162. That is, indigenous traditions are only allowed to a certain point. Engle cautions that paragraphs (2) and (3) of Article 46 of the UNDRIP "threaten to function in the same way as the repugnancy clause." *Id.*

⁹¹ See, e.g., Shelton, *Self-Determination*, *supra* note 4, at 62 ("[I]ndigenous and tribal peoples in Africa and the Americas have refrained from claiming independence, seeking instead to obtain internal self-determination and, in particular, control over their ancestral lands and resources."); Kingsbury, *supra* note 39, at 220-24 ("Most of the groups participating in the international indigenous peoples' movement . . . expect to continue in an enduring relationship with the state(s) in which they presently live.").

⁹² Engle, *Indigenous Rights Claims*, *supra* note 32, at 335.

⁹³ See KYMLICKA, *supra* note 26, at 284-87; Kingsbury, *supra* note 39, at 233 ("The remarkable evolution of international norm-making to the point where numerous state governments accept some concept of self-determination as a principle broadly applicable to indigenous peoples has not been paralleled even remotely in relation to minorities in general."); Gerald Torres, *Indigenous Peoples, Afro-Indigenous Peoples and Reparations*, in REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 117, 141 (Federico Lenzerini ed., 2008).

and defines it in a manner that unifies rather than divides. Self-determination as “human freedom,” equality, and cultural prosperity resonates with many, especially when secession is not an indispensable demand.⁹⁴

But this ‘shared values’ conception of self-determination is not merely a careful strategy to soothe anxious governments. For Anaya and like-minded colleagues, the choice is no longer between two extremes: self-determination vs. human rights discourses, or secession vs. a limited right to culture. Recasting self-determination in this way, as a bundle of diverse rights, makes many more demands upon the state than a typical right-to-culture approach. Anaya’s self-determination seeks to remediate broad social, economic, and political inequalities.

3. THE CASE LAW OF THE INTER-AMERICAN COURT⁹⁵

The next Section will examine how the Inter-American Court has assessed cases involving indigenous and tribal territories.⁹⁶ In

⁹⁴ ANAYA, *supra* note 26, at 98-99.

⁹⁵ This Section focuses on cases dealing with indigenous and tribal lands. There are a number of other Court judgments that refer to indigenous and tribal rights, such as: *Rosendo Cantú v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216 (Aug. 31, 2010); *Fernández-Ortega et al. v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215 (Aug. 30, 2010); *Chitay-Nech v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 212 (May 25, 2010); *Tiu-Tojín v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 190 (Nov. 26, 2008); *Escué-Zapata v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 165 (July 4, 2007); *López-Álvarez v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 141 (Feb. 1, 2006); *YATAMA v. Nicaragua*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127 (June 23, 2005); *Plan de Sánchez Massacre v. Guatemala*, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116 (Nov. 19, 2004); *Plan de Sánchez Massacre v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 105 (Apr. 29, 2004); *Bámaca-Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000); *Aloeboetoe v. Suriname*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15 (Sept. 10, 1993); *Aloeboetoe v. Suriname*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 11 (Dec. 4, 1991).

⁹⁶ For general analysis of the Court’s indigenous rights judgments, see LAURENCE BURGORGUE-LARSEN & AMAYA ÚBEDA DE TORRES, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY* 497-528 (Rosalind Greenstein trans., 2011); Oswaldo Ruiz-Chiriboga, *Los Pueblos Indígenas y Tribales ante la Corte Interamericana de Derechos Humanos in LA CONVENCION AMERICANA COMENTADA* (forthcoming 2013); Isabel Madariaga Cuneo, *The Rights of Indigenous Peoples and the Inter-American Human Rights System*, 22 ARIZ. J. INT’L & COMP. L. 53

these judgments, along with lands and resources, the Court has discussed nondiscrimination, cultural integrity, social welfare and development, and self-government—what Anaya has called the five core principles for indigenous peoples' self-determination. Over the years, the Court's interpretation of these elements has varied. The right to property in this context has undergone an especially interesting transformation: from an individual right, to a tentative communal right, and finally to a configurative principle—similar to Anaya's self-determination—that encompasses several key indigenous norms.

3.1. *Introduction and Early Judgments*

The Inter-American human rights system has increasingly addressed the rights of indigenous communities.⁹⁷ The Inter-American Commission has decided petitions on the merits, issued precautionary measures, held thematic hearings, and published reports concerning indigenous peoples throughout the hemisphere.⁹⁸ It has also referred various matters to the Inter-

(2005); Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, 6 HUM. RTS. L. REV. 281 (2006).

⁹⁷ For a concise and helpful account of the Inter-American human rights system, see Caroline Bettinger-López, *The Inter-American Human Rights System: A Primer*, 42 CLEARINGHOUSE REV. 581 (2009).

⁹⁸ For more information, see Inter-American Commission Thematic Report, *supra* note 4 (examining in great detail the rights of indigenous and tribal peoples in the Americas); Inter-Am. Comm'n H.R., *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II, Doc. 54 (Dec. 30, 2009), available at <http://www.cidh.org/countryrep/Venezuela2009eng/VE09.TOC.eng.htm> (referring to indigenous rights in Venezuela); Inter-Am. Comm'n H.R., *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*, OEA/Ser.L/V/II, Doc. 34 (June 28, 2007), available at <http://www.cidh.org/annualrep/2009eng/Chap.V.Toc.htm> (referring to indigenous rights in Bolivia); *Rapporteurship on the Rights of Indigenous Peoples*, INTER-AM. CT. H.R., <http://www.oas.org/en/iachr/indigenous/default.asp> (last visited Oct. 20, 2013) (presenting the work of both the Rapporteur on the Rights of Indigenous Peoples and the Commission as a whole on this subject). The Inter-American Commission has issued a number of significant decisions on indigenous petitions, among them: *Maya Indigenous Communities of Toledo Dist. v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1 (2004), available at <http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm> (concluding that the State of Belize violated the petitioners' rights to property, equality, and judicial protection enshrined in Articles XXII, II, and XVIII of the American Declaration); *Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1 (2002), available at <http://www.cidh.org/annualrep/2002eng/USA.11140.htm> (holding that the United States failed to ensure the petitioners' right to property under

American Court for binding resolution.⁹⁹ In response, the Court has issued provisional measures and judgments with respect to indigenous rights.¹⁰⁰ Though the Court has not provided a definitive and exhaustive definition of indigenous peoples, it has stressed that self-identification is important,¹⁰¹ and has offered characteristics that it finds significant: peoples who own “social, cultural and economic traditions different from other sections of the national community,” who “[identify] themselves with their ancestral territories,” and who “[regulate] themselves, at least partially, by their own norms, customs, and traditions.”¹⁰²

In 2001, the Inter-American Court issued its first judgment on indigenous land rights, *Mayagna (Sumo) Awas Tingni v. Nicaragua*.¹⁰³ The State had granted the *Sol del Caribe* logging

conditions of equality, in violation of Articles II, XVIII, and XXIII of the American Declaration); *Yanomami People v. Brazil*, Case 7.615, Inter-Am. Comm’n H.R., Report No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. 1 (1985), available at <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm> (concluding that Brazil violated the petitioners’ rights to life, liberty, personal security, residence, movement and health, under Articles I, VIII, and XI, respectively, of the American Declaration).

⁹⁹ For recent analysis on a variety of issues concerning the Inter-American Court, see BURGORGUE-LARSEN & ÚBEDA DE TORRES, *supra* note 96; LA CONVENCION AMERICANA COMENTADA (forthcoming 2013); JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* (2d ed. 2013); James L. Cavallaro & Stephanie Erin 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 (2008); Alexandra Huneeus, *Courts Resisting Courts: Lessons From The Inter-American Court’s Struggle To Enforce Human Rights*, 44 CORNELL INT’L L.J. 493 (2011); Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT’L L. 101 (2008).

¹⁰⁰ The Court’s provisional measures and judgments can be found at <http://www.corteidh.or.cr>.

¹⁰¹ See, e.g., *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 37 (Aug. 24, 2010) (“[F]rom its name to its membership . . . the Court and the State must restrict themselves to respecting the corresponding decision made by the Community; in other words, the way in which it identifies itself.”).

¹⁰² *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 79 (Nov. 28, 2007), interpreted by Inter-Am Ct. H.R. (ser. C.) No. 185 (2008). Note that these characteristics are contained in a judgment involving “tribal” peoples, not indigenous groups. However, the descriptors (borrowed from Article 1, ILO Convention No. 169) refer to characteristics shared by tribal and indigenous peoples, according to the Court.

¹⁰³ *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001). Back in 1991, with *Aloeboetoe et al. v. Suriname*, the Court heard its first case concerning the Saramakas, a tribal population that was not indigenous to Suriname. *Aloeboetoe v. Suriname*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 11 (Dec. 4, 1991). While it did not develop tribal or

company a concession to take timber from the community's traditional lands.¹⁰⁴ Despite provisions in Nicaraguan law that recognized communal properties on the Atlantic coast, the Awas Tingni lacked official title to their territory.¹⁰⁵ In its assessment, the Court largely adopted the arguments of the Inter-American Commission and the petitioners—principally, that Article 21 of the American Convention (right to property) protected the Awas Tingni's communal property rights.¹⁰⁶

In arriving at this conclusion, the Tribunal considered indigenous land tenure and property concepts. It stated:

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.¹⁰⁷

The Court then held that “possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition” of ownership.¹⁰⁸ As a result, the State was ordered to demarcate the territory; also, in the meantime, the Court required Nicaragua to ensure that nothing—including

indigenous rights in the merits decision (the State had accepted responsibility for the alleged facts), in its reparations judgment the Tribunal took pains to examine the social structure of the Saramaka tribe in order to identify the victims' successors. *Aloeboetoe et al. v. Suriname, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶¶ 59-66 (Sept. 10, 1993)*. For more commentary on *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, see Anaya & Campbell, *supra* note 86; S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1 (2002); Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities from Late 2000 Through October 2002*, 18 AM. U. INT'L L. REV. 651, 683-86 (2003).

¹⁰⁴ *Awas Tingni*, Inter-Am. Ct. H.R., No. 79, ¶ 153.

¹⁰⁵ *Id.* ¶¶ 103, 150.

¹⁰⁶ *See id.* ¶ 140 (summarizing the Commission's arguments before the Court); Anaya & Campbell, *supra* note 86, at 131 (noting that the Commission adopted as its own the position that had been advanced by the Awas Tingni lawyers, including their position on the right to property, and that this was the legal theory ultimately accepted by the Court).

¹⁰⁷ *Awas Tingni*, Inter-Am. Ct. H.R., No. 79, ¶ 149.

¹⁰⁸ *Id.* ¶ 151.

the actions of private parties—would “affect the existence, value, use or enjoyment of the property.”¹⁰⁹

Indigenous populations do not enjoy absolute rights to communal lands under this approach. The American Convention’s right to property, like that of all international instruments, is not sacrosanct; it frequently yields to public interests, as discussed below.¹¹⁰ Since the 2005 judgment *Yakye-Axa v. Paraguay*, the Court has explicitly applied an evolving test to assess state interferences upon traditional lands, considering the restriction’s legality, necessity and proportionality with a “legitimate objective in a democratic society.”¹¹¹

In any event, *Awás Tingni’s* ruling on an indigenous right to communal property was a first for an international human rights court. The African human rights courts¹¹² were not yet in

¹⁰⁹ *Id.* ¶ 153(b).

¹¹⁰ See *infra* Part IV.

¹¹¹ *Saramaka People v. Suriname, Merits, Reparations, and Costs*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 127 (Nov. 28, 2007). See also *Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 144 (June 17, 2005).

¹¹² The African Court on Human and Peoples’ Rights was established by a protocol to the African Charter on Human and Peoples’ Rights. Protocol to the African Charter on the Establishment of the African Court on Human and Peoples’ Rights, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev. 2 (entered into force Jan. 25, 2004), available at http://www.achpr.org/files/instruments/court-establishment/achpr_instr_proto_court_eng.pdf. Though the Protocol entered into force in 2004, little progress was made, and the first judgment was not issued until the end of 2009. *Yogogombaye v. Republic of Senegal*, Judgment, App. No. 001/2008, Afr. Ct. Human & Peoples’ Rights (Dec. 15, 2009), available at <http://www1.umn.edu/humanrts/africa/comcases/1-2008.pdf>. The African Union decided to fuse the Court with the AU Court of Justice. African Union, Assembly/AU/Dec.45 (III) Rev.1, 3d Sess., (July 6-8, 2004), available at http://www.au.int/en/sites/default/files/ASSEMBLY_EN_30%20%2031_JANUARY_%202005_AUC_THIRD_ORDINARY_SESSION.pdf. This merger, creating the African Court of Justice and Human Rights, will be complete after its founding treaty enters into force. African Union, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 11(1) (May 15, 2012), available at <http://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf>. See generally GEORGE MUKUNDI WACHIRA, MINORITY RTS. GROUP INT’L, AFRICAN COURT ON HUMAN AND PEOPLES’ RIGHTS: TEN YEARS ON AND STILL NO JUSTICE (2008) available at <http://www.refworld.org/pdfid/48e4763c2.pdf> (discussing the development of the African Court on Human and Peoples’ Rights and the challenges it faces). Note that, in 2013, the African Court on Human and Peoples’ Rights issued an important order for provisional measures to protect an indigenous community that faced eviction from its traditional lands. *Afr. Comm’n on Human & Peoples’ Rights v. Kenya, Order of Provisional Measures*, Afr. Ct. Human & Peoples’ Rights App. No. 006/2012 (Mar. 15, 2013), available at <http://www.african->

operation,¹¹³ and the European Court of Human Rights still has not rendered a comparable interpretation.¹¹⁴ The non-binding Human Rights Committee, for its part, does not even have competence to find violations of the right to property, because property was omitted from the ICCPR.

Certainly, the Inter-American Court's decision on indigenous lands was not assured. Article 21 was one of the most contested provisions of the American Convention. Negotiators debated several possibilities, including eliminating the right entirely.¹¹⁵ Instead of an earlier proposal stating "everyone has the right to private property,"¹¹⁶ the final version provides, in part, "[e]veryone has the right to the use and enjoyment of his property."¹¹⁷ The U.S. delegate had objected to these changes, opposing a more inclusive notion of property that would encompass "cooperative as well as private property."¹¹⁸

The final title of Article 21 in all official languages other than English remained "Right to Private Property," despite the removal of the term "private" from the Article's text, and the efforts of

court.org/en/images/documents/Orders-Files/ORDER_of_Provisional_Measures_African_Union_v_Kenya.pdf.

¹¹³ Of course, the African Commission on Human and Peoples' Rights was functioning at the time. For its relevant decision (non-binding) on the Ogoni People, issued only weeks after *Awas Tingni*, see Soc. & Econ. Rights Action Ctr. & Ctr. for Econ. & Soc. Rights v. Nigeria, Afr. Comm'n on Human and Peoples' Rights, No. 155/96 (2001), available at http://www.achpr.org/files/sessions/30th/communications/155.96/achpr30_155_96_eng.pdf.

¹¹⁴ See EUROPEAN COURT OF HUMAN RIGHTS, CULTURAL RIGHTS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS 19-21 (2011), available at <http://www.echr.coe.int>; Timo Koivurova, *Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects*, 18 INT'L J. ON MINORITY & GRP. RTS. 1, 33-37 (2011).

¹¹⁵ Juan Isaac Lovato, *Report of the Rapporteur of Committee I*, Doc. 60 (English) (Nov. 19, 1969).

¹¹⁶ Minutes of the Second Plenary Session of the Inter-American Specialized Conference on Human Rights, 316, Am. Comm'n H.R., OEA/Ser.K/XVI/1.2, Nov. 22, 1969 (Spanish) (translation by author), available at <http://www.corteidh.or.cr/tablas/15388.pdf> [hereinafter PLENARY].

¹¹⁷ Organization of American States, American Convention on Human Rights, art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

¹¹⁸ Report of the United States Delegation to the Inter-American Specialized Conference on the Protection of Human Rights, Apr. 22, 1970, 9 I.L.M. 710, 727-28 (1970). Moreover, the delegate argued that there is more to property than its mere "use and enjoyment." That is, by these terms, a state could allow use of property without ceding a full right to it. PLENARY, *supra* note 116, at 446 (translation by author).

various delegates to change the title to “Right to the Use and Enjoyment of Property (*Bienes*).”¹¹⁹ The official English title is the broader “Right to Property,” notwithstanding the United States’ position favoring the expression ‘private property.’¹²⁰ These inconsistencies were not explained in official documents.¹²¹

In the *Awes Tigni* judgment, the Court selectively emphasized that “private” had been removed from the text of Article 21, without substantively addressing the discrepancies in titles.¹²² As the Court presented it, the American Convention’s terms fully allowed for the possibility of collective property. Still, it decided to hedge its bets by recalling that “human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.”¹²³ For the Court, this interpretative principle would allow an expansion of Article 21 to include communal property, if it did not already form part of this right.¹²⁴

In further support of communal property, the Tribunal cited the Convention’s Article 29. This provision forbids interpretations of the Convention that restrict “the enjoyment or exercise of any

¹¹⁹ PLENARY, *supra* note 116, at 289 (noting the delegations of Brazil, Chile, Ecuador, Guatemala, Uruguay and Venezuela were involved in this proposal). *See also* Mayagna (Sumo) Awes Tigni Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶139-40 n.55 (Aug. 31, 2001).

¹²⁰ *See* Report of the United States Delegation to the Inter-American Specialized Conference on the Protection of Human Rights, *supra* note 118 (“By deleting the word ‘private’ . . . the article would be broader and would include cooperative as well as private property.”).

¹²¹ *See* Mayagna (Sumo) Awes Tigni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶139-40 n.55 (Aug. 31, 2001); Jo M. 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, 65 (2009-2010) [hereinafter Pasqualucci, *International Indigenous Land Rights*] (“The adjective ‘private’ was subsequently deleted without explanation.”).

¹²² *Awes Tigni*, Inter-Am. Ct. H.R. ¶ 145.

¹²³ *Id.* ¶ 146.

¹²⁴ The Court’s “evolutive” mode of interpretation derives from the case law of the European Court of Human Rights. *See, e.g.*, *Tyrer v. United Kingdom*, App. No. 5856/72, Eur. Ct. H.R., ¶ 31 (1978) (“[T]he Convention is a living instrument which . . . must be interpreted in the light of present-day conditions.”). According to the Inter-American Tribunal, such an approach “is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention.” *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A), No. 16 ¶ 114 (Oct. 1, 1999).

right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party."¹²⁵ Because Nicaraguan law, including its Constitution, recognized communal property, the Court reasoned that it could not exclude this dimension from Article 21.¹²⁶

These assorted lines of reasoning, each persuasive to varying degrees, nevertheless clouded the ultimate meaning of *Awás Tingni*. Would the Court have affirmed communal property in the American Convention if not already established in Nicaraguan domestic law?¹²⁷ At one point in the judgment, it made a significant pronouncement: "[t]he terms of an international human rights treaty have an autonomous meaning"; thus, "they cannot be made equivalent to the meaning given to them in domestic law."¹²⁸ But the Court kept referring back to domestic law when interpreting Article 21, sending a mixed message. In short, an insecure Tribunal, in efforts to establish a communal right to property, provided a number of rationales. Yet a crucial point, whether this right formed a permanent and unconditional component of Article 21, was left uncertain.

With the subsequent judgment *Moiwana Village v. Suriname*, the Court temporarily filled this gap in understanding.¹²⁹ In 1986, government and militia forces attacked Moiwana Village on the suspicion that community members were aligned with an insurgency movement.¹³⁰ During the attack, "state agents and collaborators killed at least 39 defenseless [Moiwana residents], including infants, women and the elderly, and wounded many others."¹³¹ Survivors fled the region and refused to return.¹³²

¹²⁵ American Convention on Human Rights, *supra* note 117, at art. 29(b).

¹²⁶ *Awás Tingni*, Inter-Am. Ct. H.R. ¶ 148.

¹²⁷ See Pasqualucci, *International Indigenous Land Rights*, *supra* note 121, at 65 ("Some doubt arises, however, whether the Inter-American Court will consistently recognize indigenous rights to communal property if the state's domestic law does not provide for communal land ownership, and the state has not ratified other treaties that provide for collective indigenous land ownership.").

¹²⁸ *Awás Tingni*, Inter-Am. Ct. H.R. ¶ 146.

¹²⁹ *Moiwana Cmty v. Suriname (Moiwana Village)*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005).

¹³⁰ *Id.* ¶¶ 86(12), 86(15), 86(27).

¹³¹ *Id.* ¶ 86(15).

¹³² *Id.* ¶¶ 86(15), 86(19).

Among other violations, the Court found a breach of the community members' right to communal property.¹³³ Yet the analysis did not rely upon domestic law or other international instruments. In fact, earlier in the judgment, the Tribunal had observed that Suriname's legislation omitted collective property rights.¹³⁴ Thus, *Moiwana Village* demonstrated that Article 21 unconditionally embraced communal rights to property.

The judgment rendered another notable interpretation of the Convention's right to property. The *Moiwana* villagers were not an indigenous population, but rather had settled in the area in the late nineteenth century.¹³⁵ According to the case's record, they were tribal peoples called Maroons, who descended from Africans forcefully taken to the region two-hundred years before.¹³⁶ The *Moiwana* inhabitants, known as *N'djuka*, were one of six Maroon groups.¹³⁷

The Court found that the *N'djuka*'s relationship to their territory contained many of the cultural, spiritual, and material elements discerned in *Awes Tigni*. It held that the community members:

possess 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. Thus, this Court's holding with regard to indigenous communities and their communal rights to property under Article 21 . . . must also apply to the tribal *Moiwana* community members: their traditional occupancy of *Moiwana Village* and its surrounding lands . . . should suffice to obtain State recognition of their ownership.¹³⁸

From this point on, the Court has considered indigenous and other "tribal" populations equivalently with respect to land rights, at least if they demonstrate an "all-encompassing relationship"

¹³³ *Id.* ¶ 135.

¹³⁴ *Id.* ¶ 86(5).

¹³⁵ *Id.* ¶ 86(1)-86(3).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* ¶ 133 (footnote omitted).

with their territories.¹³⁹ Of course, the decision prompts questions about the minimal requirements for such a relationship and 'traditional occupancy.' Once these elements are proven to the Court's satisfaction, they bring significant consequences, requiring property rights over potentially large and valuable tracts of land. I will revisit this issue below in discussions on *Sawhoyamaxa Indigenous Community v. Paraguay* and *Saramaka People v. Suriname*, another case concerning Maroon populations.

3.2. *The Paraguayan Trilogy of Cases: Reclaiming Lands and Vida Digna*

In *Yakye Axa Community v. Paraguay*, petitioners endured twelve years of delays while they attempted to reclaim their traditional lands through state administrative procedures.¹⁴⁰ Until their petition was resolved, they moved onto an area adjacent to their ancestral territories. However, the temporary settlement did not allow for the practice of traditional subsistence activities.¹⁴¹ Housing, sanitary, and health conditions were gravely deficient.¹⁴²

The Court began its assessment by recognizing the transversal nature of the equality principle, contained in Article 24 of the American Convention. Similar to Anaya's broad nondiscrimination principle, the Tribunal indicated that to ensure the Convention's rights to indigenous peoples, 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."¹⁴³ The indigenous cultural identity has a direct bearing on the Convention's "scope

¹³⁹ The Court has referred to Afro-Latin populations such as the Saramaka as "tribal peoples" that are "not indigenous to the region, but that share similar characteristics with indigenous peoples, such as having social, cultural and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions." *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 79 (Nov. 28, 2007), *interpreted by* Inter-Am. Ct. H.R. (ser. C) No. 185 (2008).

¹⁴⁰ *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005).

¹⁴¹ *Id.* ¶ 164.

¹⁴² *Id.*

¹⁴³ *Id.* ¶ 51.

and content," and leads to special state obligations and measures of protection.¹⁴⁴

The Tribunal later discussed state obligations to ensure the right to life (Convention Article 4): "the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk," such as indigenous peoples.¹⁴⁵ Here, the Court first applied its concept of "*vida digna*" (translated in the judgment as "decent life") to indigenous populations. Considering the community's abysmal living conditions and insufficient efforts by Paraguay to alleviate them, it found the State responsible for a violation of the right to *vida digna*; as a result, Article 4 of the Convention was breached.¹⁴⁶

Because of Paraguay's ineffective legal procedures for land claims, the Court held that the community's right to property was also violated.¹⁴⁷ Unfortunately, however, *Yakye Axa* muddled *Moiwana's* clear precedent on communal property and Article 21. The judgment alternately referred to the ILO Convention, which Paraguay had ratified, and domestic law to establish the contours of the petitioners' right to property in the case.¹⁴⁸ But the Tribunal should have clarified Article 21's minimum protections, the core content that can then be augmented by a state's national law and international commitments.

Another notable aspect to *Yakye Axa* was the Court's first recognition of the "right to cultural identity."¹⁴⁹ This right, which the Tribunal describes as a "basic" right, is not expressly named in the American Convention.¹⁵⁰ The judgment did not compare the right to the cultural integrity norm of Article 27 of the ICCPR, nor did it otherwise explain its content—except by noting the obvious: that disregarding indigenous lands "could affect" it.¹⁵¹ Separate opinions by Court judges hailed the right's recognition, and

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* ¶ 162.

¹⁴⁶ *Id.* ¶ 176.

¹⁴⁷ *Id.* ¶¶ 155-156.

¹⁴⁸ *Id.* ¶¶ 124-155.

¹⁴⁹ *Id.* ¶ 147.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* ¶¶ 147, 167.

considered that it was linked to several provisions of the Convention.¹⁵²

Sawhoyamaxa Indigenous Community v. Paraguay also concerned an indigenous community that sought to reclaim its lands while suffering harrowing living conditions. *Sawhoyamaxa* affirms *Moiwana's* unconditional acceptance of communal property as part of the American Convention.¹⁵³ It also provides a helpful synthesis of the Court's case law on ancestral lands. In doing so, the judgment contemplates additional, and essential, facets of this dynamic: conflicts between private landowners and indigenous groups, as well as disputes between indigenous communities. First, according to *Sawhoyamaxa*, "traditional possession" by indigenous communities "has equivalent effects to those of a state-granted full property title," and thus entitles such communities to demand state titling of their collective properties.¹⁵⁴ Second, communities

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; [Third, those] 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.¹⁵⁵

As a result, current possession is not at all necessary for indigenous communities to assert their land rights.

Sawhoyamaxa also attempts to identify what constitutes 'traditional possession' of ancestral lands; as long as this special

¹⁵² See *id.* (partially dissenting opinion of Judge Abreu Burelli); *id.* (dissenting opinion of Judges Caçado Trindade and Ventura Robles). These opinions supported the right to cultural identity, and dissented on other matters.

¹⁵³ See *Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 120 (Mar. 29, 2006) ("This notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention. Disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, 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.").

¹⁵⁴ *Id.* ¶ 128.

¹⁵⁵ *Id.*

connection exists, the community maintains a right to (re)claim its territory. The “unique” indigenous relationship with land “may be expressed in different ways, depending on the particular indigenous people involved and the specific circumstances surrounding it.”¹⁵⁶ The Tribunal offered examples: “spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of natural resources associated with their customs and any other element characterizing their culture.”¹⁵⁷

Yet such descriptors are extremely broad, and they do not necessarily distinguish indigenous populations from Latin American groups such as the Maroons of Suriname and certain other Afro-Latin populations.¹⁵⁸ Dinah Shelton has also pointed out that the *Sawhoyamaxa* judgment could incentivize state assimilation policies, if governments wished to weaken traditional ties to resource-rich lands.¹⁵⁹ Yet the Court does specify that, if communities have been “prevented” from maintaining such ties “for reasons beyond their control,” then “restitution rights shall be deemed to survive until said hindrances disappear.”¹⁶⁰

Xákmok Kásek Indigenous Community finalizes the trilogy of cases against Paraguay on displaced indigenous peoples.¹⁶¹ Like *Sawhoyamaxa*, the judgment bolsters communal rights to land under Article 21.¹⁶² The petitioners, a nomadic people, claimed over 41 square miles, or 10,700 hectares, of the Paraguayan Chaco.¹⁶³ In support of their historical use of the land, they

¹⁵⁶ *Id.* ¶ 131.

¹⁵⁷ *Id.*

¹⁵⁸ See, e.g., KYMLICKA, *supra* note 26, at 250, 300 (noting that minority groups often face different “standard threats”); RICHARD PRICE, RAINFOREST WARRIORS: HUMAN RIGHTS ON TRIAL 238 (2011) (“[A] one-size-fits-all argument for Afro-Descendants in the Americas . . . belies the variety of historical and ethnographic realities these diverse peoples represent.”).

¹⁵⁹ See Dinah Shelton, *Reparations for Indigenous Peoples: The Present Value of Past Wrongs in REPARATIONS FOR INDIGENOUS PEOPLES*, *supra* note 93, at 47, 69 [hereinafter Shelton, *Present Value of Past Wrongs*].

¹⁶⁰ *Sawhoyamaxa*, Inter-Am. Ct. H.R. ¶ 132. The Court gives examples of impermissible “hindrances” that would prevent communities from maintaining their ties: “acts of violence or threats.” Shelton rightly states that these examples could set the bar too high and allow for some types of state assimilation programs. See Shelton, *Present Value of Past Wrongs*, *supra* note 159, at 69.

¹⁶¹ *Xákmok Kásek Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214 (Aug. 24, 2010).

¹⁶² *Id.* ¶¶ 85-87.

¹⁶³ *Id.* ¶ 68.

presented witness testimony, expert statements, and anthropological reports, whose findings were not challenged.¹⁶⁴ Paraguay only responded that the land's restitution was impossible, since it now belonged to private parties, and proposed alternate properties.¹⁶⁵

In fact, the Court has not yet denied a claim that occupation was "in accordance with customary practices," nor have states offered much expert opinion to challenge such a finding.¹⁶⁶ Until states contest this essential point more vigorously, the Tribunal may be able to maintain the vague guidelines set out in *Sawhoyamaxa*. In *Xákmok Kásek*, absent substantive objections, the Court found that the territories in question were the community's "traditional lands and . . . are the most suitable for its settlement."¹⁶⁷

In finding a property violation, the Court noted damage to the community's "cultural identity" owing to its severance from ancestral lands and natural resources.¹⁶⁸ In this way, the Tribunal explicitly linked cultural identity to Article 21. The Court reinforces this connection in the judgments of *Saramaka People v. Suriname* and *Kichwa Indigenous People of Sarayaku v. Ecuador*, discussed below.

The Tribunal also returned to the concept of *vida digna* (translated as "right to a decent existence" in *Xákmok Kásek*).¹⁶⁹ It assessed a variety of conditions at the community's temporary settlement, such as access to water, food, health care, and education. The Court concluded that Paraguay did not furnish "the basic services to protect the right to a decent life of a specific

¹⁶⁴ *Id.* ¶¶ 103-106.

¹⁶⁵ *Id.* ¶ 106.

¹⁶⁶ In *Saramaka People v. Suriname*, Suriname used expert testimony but the evidence presented did not appear to relate directly to this subject. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 64-65 (Nov. 28, 2007), interpreted by Inter-Am. Ct. H.R. (ser. C) No. 185 (2008). In *Xákmok Kásek Indigenous Community*, the State's expert, Sergio Iván Braticević, actually confirmed the "traditional character" of the lands for the petitioners. *Xákmok Kásek*, Inter-Am. Ct. H.R. ¶ 102.

¹⁶⁷ *Xákmok Kásek*, Inter-Am. Ct. H.R. ¶ 107.

¹⁶⁸ *Id.* ¶¶ 174-182. The Court also reiterated that states must take into account the fundamental importance of ancestral territories when deciding land conflicts. Indigenous peoples' distinct relationship with their territories also must generally inform a state's agrarian policies; that is, productivity cannot serve as the only government priority for lands. *Id.* ¶ 182.

¹⁶⁹ *Id.* ¶¶ 193-217.

group of individuals in these conditions of special, real and immediate risk.”¹⁷⁰ In consequence, Article 4 was breached with respect to “all the members” of the Xákmok Kásek Community.¹⁷¹ Furthermore, the Court found an additional Article 4 violation for thirteen deaths, which were traced to the precarious health conditions. That is, the State was held directly responsible for the deaths, as it did not adopt the necessary measures “within its powers, that could reasonably be expected to prevent or to avoid the risk to the right to life.”¹⁷²

3.3. Resource Extraction Revisited: Saramaka and Sarayaku

3.3.1. Saramaka People v. Suriname

In 2007, the Maroons returned to the Tribunal with *Saramaka People v. Suriname*.¹⁷³ In *Saramaka*, the Court analyzes resource extraction from communal lands to a far more detailed extent than in the *Awas Tingni* judgment. The petitioners argued that the State’s concessions for logging and mining—granted to private companies on traditional lands, without adequately consulting the community—violated several rights.¹⁷⁴ As in *Moiwana*, Suriname

¹⁷⁰ *Id.* ¶ 217.

¹⁷¹ *Id.*

¹⁷² *Id.* ¶ 234.

¹⁷³ *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007), interpreted by Inter-Am. Ct. H.R. (ser. C) No. 185 (2008). For more commentary on the *Saramaka* judgment, see PRICE, *supra* note 158; Lisl Brunner, *The Rise of Peoples’ Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights*, 7 CHINESE J. INT’L L. 699 (2007); Ariel E. Dulitzky, *When Afro-Descendants Became “Tribal Peoples”: The Inter-American Human Rights System and Rural Black Communities*, 15 UCLA J. INT’L L. & FOREIGN AFF. 29 (2010); 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 (2008); Pasqualucci, *International Indigenous Land Rights*, *supra* note 121; Gaetano Pentassuglia, *Towards a Jurisprudential Articulation of Indigenous Land Rights*, 22 EUR. J. INT’L L. 165 (2011); Richard Price, *Contested Territory: The Victory of the Saramaka People vs. Suriname*, SIMPÓSIO INTERNACIONAL: TERRITÓRIOS SENSÍVEIS: DIFERENÇA, AGÊNCIA E TRANSGRESSÃO (June 15, 2009), available at <http://www.corteidh.or.cr/tablas/r22784.pdf>; Dinah Shelton, *Human Rights and the Environment*, 18 Y.B. INT’L ENVTL. L. 163, 168-69 (2007); Ward, *supra* note 71.

¹⁷⁴ *Saramaka*, Inter-Am. Ct. H.R. ¶ 124 (2007).

had not officially recognized the communal rights of indigenous and tribal populations over their lands and resources.¹⁷⁵

The Court began by studying the communal right to property under Article 21. Despite its confirmed case law on the point, and the fact that *Moiwana* had resolved the same issue with respect to similar communities, the Tribunal essentially started from scratch. Even more surprising was its line of reasoning. Suriname had ratified both the ICCPR and the ICESCR; at the urging of petitioners, the Court turned to Common Article 1 on self-determination and the ICCPR's Article 27 on cultural integrity.¹⁷⁶ The Tribunal recalled that it could use these instruments to interpret the right to property following Article 29(b), the provision that prevents restrictive interpretations of Convention rights.¹⁷⁷ For the Court, reading all of these terms together

supports an interpretation of Article 21 of the American Convention to the effect of calling for the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied.¹⁷⁸

This view radically expands the content of Article 21. Not only does the provision protect communal property rights, but it now would effectively become the self-determination norm of the American Convention, which does not—at least expressly—contain this right.

Like Anaya's configurative principle of self-determination, the *Saramaka* judgment attributed a number of rights to Article 21. These include the many rights associated with the ability "to freely determine and enjoy their own social, cultural and economic development."¹⁷⁹ Later in the judgment, the Court offered another

¹⁷⁵ *Id.* ¶¶ 98-99.

¹⁷⁶ See Pleadings, Motions and Evidence of the Victim's Representatives, ¶ 71, *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007) (urging the Court to consider these UN human rights instruments), available at <http://www.corteidh.or.cr>.

¹⁷⁷ *Saramaka*, Inter-Am. Ct. H.R. ¶ 93 (2007).

¹⁷⁸ *Id.* ¶ 95.

¹⁷⁹ *Id.*

endorsement of self-determination. It held that states should ensure that indigenous and tribal communities “may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected.”¹⁸⁰ Still, the Tribunal appeared to stop short of recognizing all elements of the self-determination definition found in the ICCPR, ICESCR, and the UNDRIP. Those instruments also protect the ability to “freely determine . . . political status.”¹⁸¹

The protection of the *Saramaka* communal lands under Article 21 was “necessary to guarantee their very survival”; furthermore, the Court held that the right to the land itself would be “meaningless” without rights to the natural resources therein.¹⁸² As a result, Article 21 also protects those “resources traditionally used and necessary for the very survival, development and continuation of such people’s way of life.”¹⁸³ Notably, to recognize the special importance of lands and resources to indigenous populations, the *Saramaka* judgment added an additional condition to its usual proportionality test for property interferences: the state restriction cannot constitute “a denial of [the community’s] traditions and customs in a way that endangers the very survival of the group and of its members.”¹⁸⁴

To comply with this condition, following *Saramaka*, states must implement at least three “safeguards.”¹⁸⁵ First, “the State must ensure the effective participation of the members of [the community], in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan . . . within [their] territory.”¹⁸⁶ Second, the state must guarantee that the community will receive “a reasonable benefit”

¹⁸⁰ *Id.* ¶ 121.

¹⁸¹ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 1, U.N. GAOR, 61st Sess., Supp. No. 53, U.N. Doc. A/Res/61/295, at 3 (Sept. 13, 2007); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 53 (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 49 (Dec. 16, 1966).

¹⁸² *Saramaka*, Inter-Am. Ct. H.R. ¶ 122 (2007).

¹⁸³ *Id.*

¹⁸⁴ *Id.* ¶ 128.

¹⁸⁵ *Id.* ¶ 129.

¹⁸⁶ *Id.*

from any such project.¹⁸⁷ Third, states must prevent concessions “unless and until independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment.”¹⁸⁸ These safeguards will be examined below (*see infra* Part IV). At this point, it is sufficient to note that the safeguards reflect components of Anaya’s self-determination principle, such as social development and self-government.

Ultimately, however, *Saramaka*’s limited acknowledgment of self-determination is undermined by its emphasis on ‘cultural survival.’ On numerous occasions in the judgment, the Tribunal justified the right to communal property as “essential for the survival of their way of life.”¹⁸⁹ Similar phrases were also employed, such as “necessary for their physical and cultural survival.”¹⁹⁰ On the one hand, such remarks were not overstated; they emphasized the fundamental nature of lands and resources to the Saramaka people.

Yet the Court also used the term “survival” in a different way: as a benchmark for state obligations, leading to invidious consequences.¹⁹¹ It holds that *only* those lands and resources “essential for the survival of their way of life” are protected under Article 21.¹⁹² As a basis for such statements, the *Saramaka* judgment cited to the UN Human Rights Committee and its interpretations of Article 27. The Committee’s jurisprudence, especially those cases referenced by the Inter-American Tribunal, set out a conservative view of cultural integrity. In fact, the *Saramaka* Court interpreted one decision, *Länsman et al. v. Finland*, to allow states

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *See, e.g., id.* ¶ 123.

¹⁹⁰ *Id.* ¶ 122.

¹⁹¹ In subsequent proceedings to clarify the judgment, the petitioners complained that the State had taken advantage of the Court’s “survival” terminology. They charged that Suriname had interpreted it to mean that commercial projects merely must not endanger lives. While the Court replied that “survival” means “much more than physical survival,” such an obvious pronouncement is no great consolation for indigenous and tribal peoples, and doubts linger as to what precisely remains protected. *Saramaka People v. Suriname*, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 37 (Aug. 12, 2008). Adding to the confusion, the 2007 judgment in English occasionally translates “*subsistencia*” (subsistence) as “survival.” *See, e.g., Saramaka*, Inter-Am. Ct. H.R. ¶¶ 96, 120 (2007).

¹⁹² *Saramaka*, Inter-Am. Ct. H.R. ¶ 123 (2007) (emphasis added).

“to pursue development activities that limit the rights of a minority culture as long as the activity *does not fully extinguish the indigenous people’s way of life.*”¹⁹³

Saramaka’s interpretations permit commercial projects that do not “fully extinguish” a way of life, or that do not endanger the “very survival” of a people. Such minimalist standards collide with the Court’s radical affirmation of Article 21 as a self-determination principle “calling for [a people’s right] to freely determine and enjoy their own social, cultural and economic development.”¹⁹⁴ They also conflict with earlier case law, which, *inter alia*, required special measures of protection to achieve a *vida digna* for indigenous populations.

Anaya’s cultural integrity norm, a pillar of his self-determination principle, demands more than mere cultural survival and defense. Similarly, the Court was building the right to self-determination in *Saramaka*. It should have conceived of cultural survival as only the first step on the path toward cultural integrity. Cultural integrity, along with other rights, then leads to a complete architecture for self-determination. Yet, when translating these concepts into its standards for the judgment, the Tribunal remained on the first step.¹⁹⁵

3.3.2. *Kichwa Indigenous People of Sarayaku v. Ecuador*

Kichwa Indigenous People of Sarayaku v. Ecuador, handed down in 2012, concerned an indigenous community from the Ecuadorian Amazon. While the State had granted a communal property title to the Sarayaku, it reserved a number of rights, including rights to

¹⁹³ *Id.* ¶ 126 n.126 (emphasis added). The HRC actually did not make this statement. See *Länsman v. Finland*, Views, U.N. Human Rights Committee, Comm’n No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (Oct. 26, 1994).

¹⁹⁴ *Saramaka*, Inter-Am. Ct. H.R. ¶ 95 (2007).

¹⁹⁵ The discussion on equality principles also did not lead far. The judgment paid lip service to a state’s “positive obligation to adopt special measures that guarantee members of indigenous and tribal peoples the full and equal exercise of their right to the territories they have traditionally used and occupied.” *Id.* ¶ 91. See also *id.* ¶ 85. But, in the end, the decision did not depict equality and cultural integrity principles building a robust notion of self-determination. Rather than an order to ensure “the full and equal exercise” of their numerous rights, the judgment ultimately resembled a modest instruction that Suriname simply respect the *Saramakas’* cultural survival. See *Dulitzky*, *supra* note 173, at 71-72 (criticizing the Court’s restrained approach on discrimination issues).

subsurface natural resources.¹⁹⁶ Ecuador eventually signed a contract with a foreign company to initiate oil exploration.¹⁹⁷ The Sarayaku resisted these activities, which damaged their lands and threatened their way of life.¹⁹⁸

The judgment began by confirming that Article 21 protected rights to communal property; fortunately, this permanent aspect of the Convention is no longer in doubt. Also of great significance, the Court, for the first time, held that the indigenous community itself suffered the collective property violation.¹⁹⁹ The Tribunal decided that the Sarayaku, as a group, experienced other rights violations as well.²⁰⁰ In previous judgments, the Court had only found violations “to the detriment of the [individual] members” of a community, even if the right to communal property was breached.²⁰¹ Such a formulation recognized the Convention’s Article 1, the central provision that obligates States Parties to respect and ensure the treaty’s rights to “all persons subject to their jurisdiction” — “person” defined as “every human being.”²⁰² In this sharp break with the past, the *Sarayaku* Court has apparently adopted a wider definition of “person,” following the views of

¹⁹⁶ *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 61-72 (June 27, 2012).*

¹⁹⁷ *Id.* ¶ 64.

¹⁹⁸ *Id.* ¶¶ 92-123.

¹⁹⁹ *Id.* ¶ 341(2). See also Lisl Brunner & Karla Quintana, *The Duty to Consult in the Inter-American System: Legal Standards after Sarayaku*, 16 AM. SOC’Y OF INT’L L. 35 (Nov. 28, 2012), available at <http://www.asil.org/sites/default/files/insight121128.pdf> (discussing, briefly, the outcome and some implications of the *Sarayaku* judgment). Note that, because of a translation error (in English version), *Xákmok Kásek* appears to be the first judgment to consider the indigenous community *per se* as victim. *Xákmok Kásek Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 337 (Aug. 24, 2010)*. But the original text in Spanish actually refers to the individual members of the community.

²⁰⁰ See *Sarayaku, Inter-Am. Ct. H.R. ¶ 341* (“The State is responsible for the violation of the right to judicial guarantees and to judicial protection recognized in Articles 8(1) and 25 of the American Convention . . . to the detriment of the Kichwa Indigenous People of Sarayaku.”). The Court’s findings also shaped its reparations orders, as remedies were directed to the community as a whole. *Id.*

²⁰¹ See *Xákmok Kásek, Inter-Am. Ct. H.R. ¶ 170* (concurring opinion of Judge Vio Grossi) (noting that the Court “declared violations of human rights to the detriment of the members of the indigenous peoples, without, however, doing so, at least directly and explicitly with regard to them as such; in other words, as a whole or as different ethnic groups or human collectivities with international legal personality”).

²⁰² American Convention on Human Rights, *supra* note 117, at art. 1.

bodies such as the U.N. Committee on Economic, Social and Cultural Rights.²⁰³

The Court distanced itself from other key aspects of *Saramaka*. Common Article 1 of the ICCPR and ICESCR no longer served as a reference point, despite the fact that Ecuador had ratified both treaties well before the case's facts.²⁰⁴ In fact, the Court avoided the term 'self-determination' altogether.²⁰⁵ The judgment acknowledged *Saramaka's* three safeguards: effective participation, reasonable benefits, and the impact assessment. Nevertheless, it did not examine the concept of benefits. Also of deep concern, the Court's standard on consent was completely ignored. *Saramaka* had held that, in specific circumstances, the "effective participation" of the indigenous community actually required the group's consent for a project to move forward.²⁰⁶

Still, *Sarayaku* devoted a great deal of attention to the baseline of effective participation: the state obligation to consult indigenous populations before projects begin. *Saramaka* had already asserted that this constituted a "right to consultation" for communities whose traditional lands were threatened.²⁰⁷ The Court in *Sarayaku* noted that Ecuadorian law "fully recognized this right."²⁰⁸ *Sarayaku* then surveyed regional law on this subject, and recognized its status in international instruments such as the ILO No. 169. The Court's assessment sought to establish the right to consultation not only as a norm protected in the American Convention, but also as a "general principle of international law."²⁰⁹

²⁰³ See Comm. on Econ., Soc. and Cultural Rights, Gen. Comment No. 21: Right of Everyone to Take Part in Cultural Life, ¶ 9, UN Doc. E/C.12/GC/21, (Dec. 21, 2009) ("[T]he Committee recognizes that the term 'everyone' in the first line of article 15 may denote the individual or the collective . . .").

²⁰⁴ Common Article 1 was only mentioned in a footnote. *Sarayaku*, Inter-Am. Ct. H.R. ¶ 171 n.223.

²⁰⁵ In a footnote, the Court only observed that Ecuador's Constitution recognizes the right to self-determination. *Id.* ¶ 217 n.288.

²⁰⁶ See *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 134 (Nov. 28, 2007), interpreted by Inter-Am. Ct. H.R. (ser. C) No. 185 (2008) ("[R]egarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent . . .").

²⁰⁷ *Id.* § E.2.a ("Right to consultation, and where applicable, a duty to obtain consent.") (emphasis added).

²⁰⁸ *Sarayaku*, Inter-Am. Ct. H.R. ¶ 168.

²⁰⁹ *Id.* ¶ 164.

After portraying it as such, *Sarayaku* expanded the applicability of this principle. *Saramaka* had mainly focused on the state obligation to ensure consultations before resource extraction and other forms of commercial development. But *Sarayaku* underscored that the right to consultation extends to “any administrative and legislative measures that may affect [indigenous and tribal] rights, as recognized under domestic and international law.”²¹⁰ Anaya also urges broad consultation requirements “in all matters affecting” indigenous peoples, not merely property rights.²¹¹ As noted earlier, he considers consultation and participation essential components of “self-government”—one of his primary norms constituting self-determination.²¹²

Also of interest is *Sarayaku*'s return to the “right to cultural identity,” originally articulated in *Yakye Axa*.²¹³ *Sarayaku* held that the right to cultural identity is a “fundamental right . . . [that] should be respected in a multicultural, pluralistic and democratic society.”²¹⁴ The judgment tracked the development of the principle in global instruments, such as the UNDRIP and the ILO Convention, as well as in international case law. For the Tribunal, consultations with indigenous communities on any issue relevant to their cultural or social life will protect and ensure their collective right to cultural identity.²¹⁵ The judgment concluded that the community's lack of participation with respect to the oil exploration activities led to severe consequences for its lands and cultural identity.²¹⁶

Sarayaku traces many of these norms—cultural identity, social welfare, lands and resources, political structure—back to Article

²¹⁰ *Id.* ¶ 166. See also *id.* ¶¶ 160, 167.

²¹¹ ANAYA, *supra* note 26, at 156.

²¹² *Id.* at 150.

²¹³ *Sarayaku*, Inter-Am. Ct. H.R. ¶ 217.

²¹⁴ *Id.*

²¹⁵ See *id.* (“This means that States have an obligation to ensure that indigenous peoples are properly consulted on matters that affect or could affect their cultural and social life, in accordance with their values, traditions, customs and forms of organization.”).

²¹⁶ See *id.* ¶ 220 (noting that the lack of consultation with and lack of respect for the indigenous peoples “caused great concern, sadness, and suffering among them”).

21, the right to property.²¹⁷ In one of the judgment's operative paragraphs, where the Court summarizes its conclusions, it finds Ecuador responsible for "the violation of the rights to consultation, to indigenous communal property, and to cultural identity, in the terms of Article 21 of the American Convention."²¹⁸ *Sarayaku* even linked rights to life and personal integrity (Articles 4 and 5 of the Convention, respectively) to Article 21.²¹⁹

A few years before, the *Saramaka* judgment offered another prominent example of this approach; its operative section stated violations of juridical personality (Article 3 of the Convention) and judicial protection (Article 25) "in relation to the right to property recognized in Article 21."²²⁰ In fact, as indicated earlier, *Saramaka* connected Article 21 to the numerous rights associated with the community's ability "to freely determine and enjoy [its] own social, cultural and economic development."²²¹ Thus, the Court regards Article 21 as a repository of essential indigenous rights, much as Anaya attributes such rights to the overarching principle of self-determination. The following Section will consider the implications of the Court's unique use of the right to property.

4. SHIFTING FROM PROPERTY RIGHTS TO *VIDA DIGNA*

The Court's line of cases on indigenous peoples, after twists and turns, at last has fully established the right to communal property under Article 21 of the Convention. Of course, collective property itself has diverse forms, not all of them of a sacred and

²¹⁷ See *id.* ¶ 146 ("[The] connection between territory and natural resources that indigenous and tribal peoples have traditionally maintained and that is necessary for their physical and cultural survival and the development and continuation of their worldview must be protected under Article 21 of the Convention to ensure that they can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States.").

²¹⁸ *Id.* ¶ 341(2).

²¹⁹ *Id.* ¶ 341(3) ("The State is responsible for severely jeopardizing the rights to life and to personal integrity, recognized in Articles 4(1) and 5(1) of the American Convention, in relation to the obligation to guarantee the right to communal property, in the terms of Articles 1(1) and 21 thereof, to the detriment of the members of the Kichwa Indigenous People of Sarayaku . . .").

²²⁰ *Saramaka People v. Suriname, Preliminary Objections, Reparations, Merits, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 214(2) (Nov. 28, 2007), interpreted by Inter-Am. Ct. H.R. (ser. C) No. 185 (2008).*

²²¹ *Id.* ¶ 95.

ancestral nature.²²² However, it was clearly this vital connection between traditional territories and indigenous ways of life that inspired the recognition of communal land rights in the Inter-American System.

This case law has undoubtedly served indigenous interests to the extent that it reaffirms and protects their territories and resources under domestic law. But the Court has become trapped in its own discourse on indigenous lands. Whenever it has found a right to communal property, as a manner of justification, it has emphasized how the right is inextricably linked to other norms essential for indigenous peoples: cultural identity, social welfare, political participation, juridical personality, etc. It all started with *Awas Tingni*: "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."²²³ The various norms are closely related, of course, but this does not mean that property should serve as a configurative principle for indigenous rights.

Despite caution occasionally expressed along the years,²²⁴ the Court's posture has solidified with *Sarayaku*. Judgments now directly attest to Article 21 as a structural basis for indigenous rights. The ramifications of the Tribunal's property approach are unsettling.

4.1. Disadvantages of a Property Approach

4.1.1. Overly-Narrow Concept that Limits Autonomy

The Court's narrow approach limits the autonomy of indigenous peoples and their capacity for change.²²⁵ Often,

²²² E.g., WILLIAM STOEBUCK & DALE WHITMAN, *THE LAW OF PROPERTY* 225 (3d ed. 2000).

²²³ *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 ¶ 149 (Aug. 31, 2001) (emphasis added).

²²⁴ See, e.g., *Sawhoymaxa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 16 (Mar. 29, 2006) (separate opinion of Judge García-Ramírez) ("The idea of putting the indigenous form of ownership . . . on the same footing as that of the civil law also preserved under Article 21 of the Convention may prove extremely disadvantageous to the legitimate interests and lawful rights of the indigenous people.").

²²⁵ See ENGLE, *supra* note 17, at 162-182; PRICE, *supra* note 158, at 238-39 (finding "disturbingly essentialist" *Saramaka's* requirement that natural resources must be "traditionally used" for Article 21 protections); DULITZKY, *supra* note 173,

indigenous peoples are expected to follow an uncompromising 'cultural script' with numerous parts: strict observer of customary practices, guardian of nature, and even steward of non-capitalist economies.²²⁶ But 'traditional' or environmentally-sound modes of subsistence and production may currently be inadequate to sustain communities.²²⁷ As a result, communities could choose to allow resource extraction and other development activities on their territories, or they may decide to sell ancestral land, partially or in full.²²⁸

In doing so, the community risks endangering the many rights that the Court associates with its right to property. The Court, state authorities, or others might consider that the community has forfeited these fundamental norms, including its very indigenous identity.²²⁹ A similar, and quite common, problem occurs with those indigenous populations who have left or been displaced from their ancestral lands, possibly many years ago.²³⁰ Thus, if the 'traditional' connection is severed, or as Engle states, "when they do not behave toward the land in the idealized manner that has

at 42 (explaining that to obtain property protection, groups are pressured to show the Court an "essentialized and frozen culture").

²²⁶ See United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, ¶ 22, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I, (Aug. 12, 1992) ("Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development."); ENGLE, *supra* note 17, at 169, 220 ("Because of their apparent special relationship to the land, [indigenous peoples] are expected to be its protectors and guardians . . . indigenous peoples are situated to be the stewards, not only of the environment but also of non-capitalist economies."); GILBERT, *supra* note 34, at 139; Falk, *supra* note 47, at 23 ("The Aboriginal viewpoint corresponds closely with the ecological perspective, and is at odds with developmental and growth perspectives of modern industrializing societies."); KYMLICKA, *supra* note 26, at 250 ("[M]embers of indigenous communities are expected to 'act Indian' []—that is, to follow 'authentic' cultural practices . . ."); PRICE, *supra* note 158, at 238-39 ("For decades, anthropologists and historians have been criticizing such . . . Western ideas that essentialize 'culture' (and 'cultures') and that put a prime on 'tradition' as the central diacritic of cultural authenticity.").

²²⁷ See ENGLE, *supra* note 17, at 196.

²²⁸ See *id.* at 179-81 (acknowledging that such a decision could lead to negative consequences, including damage to identity, culture, and political and economic power).

²²⁹ See *id.* at 168-70.

²³⁰ See *id.*

come to be expected of them," they may no longer be regarded as "real Indians."²³¹

In sum, basing varied and essential rights on land requires that indigenous peoples have a particular, and often unrealistic, relationship to their territories. Only a narrow category of contemporary indigenous peoples may have such a relationship.²³² Moreover, even for that limited category, the approach is inadequate. For the numerous rights associated with land to remain intact, the peoples' choices for development and market participation could be severely restricted.²³³

4.1.2. Other Limitations of the Court's Property Approach

4.1.2.1. Text and Current Interpretations of Article 21

The Court's property approach is fundamentally flawed, including for those 'idealized' indigenous peoples who sustain themselves pursuing only 'traditional' relationships with ancestral lands—that is, those communities who do not wish to change significantly, or who lack options for change.²³⁴ The property approach is defective even if one relaxes the 'cultural script' and uses a definition of 'traditional' that can evolve over time, allowing for shifting realities or the adoption of modern technologies.²³⁵ This is all because the right to property itself—a conditional precept, commonly infringed upon by states—is too weak to provide adequate protection for norms indispensable to indigenous peoples' survival and development.

²³¹ *Id.* at 170.

²³² *See id.* at 170, 181.

²³³ *See id.* at 182 ("If they aim to participate in the market with regard to land, they go against their culture, potentially losing their claim to indigenesness."); PRICE, *supra* note 158, at 238 (making a similar observation); Dulitzky, *supra* note 173, at 42, 47, 78 (stating, *inter alia*, that limiting tribal and indigenous peoples to "traditional" modes of production and subsistence constrains their economic power).

²³⁴ To the contrary, anthropologist Richard Price points out that "all societies change and develop through time." PRICE, *supra* note 158, at 239.

²³⁵ For an example of this approach, see *Länsman v. Finland*, Views, U.N. Human Rights Committee, Comm'n No. 511/1992, ¶ 9.3, U.N. Doc. CCPR/C/52/D/511/1992 (Oct. 26, 1994) ("Article 27 does not only protect traditional means of livelihood of national minorities Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27").

The text of Article 21, as well as the Court's interpretations of that language, illustrate the right's many deficiencies. Article 21(1) provides "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."²³⁶ Article 21(2) establishes that deprivation of property is only permissible "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."²³⁷ These two provisions, read together, indicate that both property deprivations and interferences are fully permitted under a wide variety of circumstances.

The Tribunal has avoided explaining the precise differences between deprivations and other kinds of interference to property.²³⁸ Consequently, a property owner is in peril that the Court will find a mere interference, leaving her without a right to compensation. When deprivation is found, the Court holds "just compensation" must be "prompt, adequate and effective."²³⁹ But the Inter-American criteria may not be as supportive of property owners as it first appears. According to the recent judgment *Salvador-Chiriboga v. Ecuador*, for "adequate" compensation in expropriation matters, states must contemplate the property's market value, as well as provide a "fair balance between the general interest and the [owner's] interest."²⁴⁰ The "fair balance"

²³⁶ American Convention on Human Rights, *supra* note 117, at art. 21(1).

²³⁷ *Id.*

²³⁸ For example, in *Chaparro-Álvarez v. Ecuador*, the Court held that the failure to return seized company property "had an impact on [the company's] value and productivity, which, in turn, prejudiced its shareholders." *Chaparro-Álvarez v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 170, ¶ 209 (Nov. 21, 2007). The Tribunal characterized these facts "as an arbitrary interference in the 'enjoyment' of the property under the provisions of Article 21(1)." *Id.* No further explanation was offered. On the other hand, in the same judgment, the State's failure to return an unlawfully-seized private car constituted a "deprivation" pursuant to Article 21(2). *Id.* ¶ 218. An apparent difference here is corporate versus private property, but the Tribunal did not clarify the difference.

²³⁹ *Salvador-Chiriboga v. Ecuador*, Preliminary Objection and Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 179, ¶ 96 (May 6, 2008). This is a demanding standard known as the Hull formula, which since the 1930s has been contested by communist regimes and several developing countries. Ursula Kriebaum & August Reinisch, *Right to Property in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* ¶ 24 (2009) (noting the prompt, adequate, and effective compensation standard found in the Hull formula).

²⁴⁰ *Salvador-Chiriboga*, Inter-Am. Ct. H.R. ¶ 98 (2008). The Court added that interest should also be paid from the "date that the victim actually lost the right to

factor, which originates in European Court jurisprudence, adds to the calculus an element of arbitrariness.²⁴¹

Pursuant to Article 21(2), deprivation of property is only acceptable "in the cases and according to the forms established by law." However, *Salvador-Chiriboga* showed a malleable approach to this provision as well. There, the Tribunal held that "it is not necessary that every cause for deprivation or restriction to the right to property be embodied in the law"; however, "it is essential that such law and its application respect the essential content of the right to property."²⁴² This pliable reading does not seem warranted by the Convention's terms.

Salvador-Chiriboga's interpretations signal increasing deference to states.²⁴³ At this point in time, the Inter-American protections for property rights are possibly at their weakest. These protections will only further erode if the Inter-American Tribunal continues to be influenced by the European Court. Protocol 1 to the European Convention formulates a more constrained right than its analogue of the American Convention.²⁴⁴ The European Court, interpreting those terms, has permitted states wide latitude to infringe upon the right.²⁴⁵

enjoy possession of the property." *Salvador-Chiriboga v. Ecuador, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 222 ¶ 100 (Mar. 3, 2011).*

²⁴¹ See Alejandra Gonza, *El Artículo 21: Derecho a la Propiedad*, in LA CONVENCION AMERICANA COMENTADA (forthcoming 2013). The "fair balance" test derives from the European Court's case law and distinct circumstances. See, e.g., DAVID HARRIS, MICHAEL O'BOYLE, COLIN WARBRICK, & CARLA BUCKLEY, HARRIS, O'BOYLE & WARBRICK: LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 680-81 (2d ed. 2009) (describing the "fair balance" test). Protocol 1 to the European Convention does not expressly provide for compensation, and the Strasbourg Tribunal accordingly grants much latitude to states with respect to their assessments of appropriate grants compensation and property value, if compensation is required at all. *Id.* In contrast, Article 21, although it was debated extensively, was eventually designed to guarantee 'just compensation' upon the deprivation of many forms of property. Thus, the Inter-American Tribunal should exercise caution in applying European standards in this area.

²⁴² *Salvador-Chiriboga*, Inter-Am. Ct. H.R. ¶ 65 (2008).

²⁴³ Even the European Court, which grants states much flexibility in this area, insists that property interferences be based on national law and that the legislation in question be "accessible, precise, and foreseeable." See e.g., *Carbonara & Ventura v. Italy*, 2000-VI Eur. Ct. H.R. ¶64 (2000), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58595>.

²⁴⁴ For more information on the drafting of Protocol 1, see 8 COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 126-140 (1985).

²⁴⁵ See, e.g., *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) (1986) (recognizing that states have significant leeway to interfere with property rights);

4.1.2.2. *The “Safeguards” of Saramaka People v. Suriname*

Fundamental indigenous rights, then, have been placed within one of the most compromised Articles of the American Convention. The *Saramaka* judgment, nevertheless, tried to mitigate damage by adding protections for traditional lands. Under Article 21, as noted above, Suriname was required to implement three safeguards in conjunction with development projects: “effective participation” of the community, reasonable benefits, and an impact assessment.²⁴⁶ However, not only are the safeguards too easily evaded by states, they have already started to deteriorate with *Sarayaku v. Ecuador*.

The Court has taken pains to explain its concept of “effective participation.”²⁴⁷ It has held that states have “a duty to actively consult” with the indigenous community, which requires “good-faith” efforts starting at the “early stages” of the development plan.²⁴⁸ The consultations “should take account” of “traditional methods of decision-making.” For example, it is the indigenous

HARRIS, O’BOYLE & WARBRICK, *supra* note 241, at 694–695 (noting the European Court’s extensive deference to the decisions of national bodies).

²⁴⁶ *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 129 (Nov. 28, 2007), *interpreted by* Inter-Am. Ct. H.R. (ser. C) No. 185 (2008).

²⁴⁷ *Id.* ¶133.

²⁴⁸ *Id.* In its 2008 judgment interpreting the *Saramaka* decision, the Court clarified that the original judgment had required the State to consult with the Saramaka people:

regarding at least the following six issues: (1) the process of delimiting, demarcating and granting collective title over the territory of the Saramaka people; (2) the process of granting the members of the Saramaka people legal recognition of their collective juridical capacity, pertaining to the community to which they belong; (3) the process of adopting legislative, administrative, and other measures as may be required to recognize, protect, guarantee, and give legal effect to the right of the members of the Saramaka people to the territory they have traditionally used and occupied; (4) the process of adopting legislative, administrative and other measures necessary to recognize and ensure the right of the Saramaka people to be effectively consulted, in accordance with their traditions and customs; (5) regarding the results of prior environmental and social impact assessments, and (6) regarding any proposed restrictions of the Saramaka people’s property rights, particularly regarding proposed development or investment plans in or affecting Saramaka territory.

Saramaka People v. Suriname, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 16 (Aug. 12, 2008).

community, not the state, who must decide which person or persons will represent the community in the process.²⁴⁹ Consultations are also the state's responsibility and cannot be delegated to corporations.²⁵⁰

Though the consultations must have "the objective of reaching an agreement," *Saramaka* only required states to obtain actual consent in certain circumstances.²⁵¹ With regard to "large-scale development or investment projects that would have a major impact" within indigenous territory, states have "a duty not only to consult" with the affected community, "but also to obtain [its] free, prior, and informed consent, according to [its] customs and traditions."²⁵² The Court alternately described such projects as "major development or investment plans that may have a profound impact on the property rights of [the community] to a large part of their territory."²⁵³ *Saramaka's* standard on consent, while still deferential to states, was at the vanguard of international law. The UNDRIP established consent as the "objective" of consultations, but only expressly required it in a couple of drastic scenarios: when the project will result in a community's "relocation" from its traditional lands, and in situations involving the storage or disposal of toxic waste within territories.²⁵⁴

Impact assessments, according to the Tribunal, "must conform to the relevant international standards and best practices," such as

²⁴⁹ *Saramaka*, Inter-Am. Ct. H.R. ¶ 133 (2007).

²⁵⁰ *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 187 (June 27, 2012). Still, this standard should be articulated more clearly by the Court.

²⁵¹ *Saramaka*, Inter-Am. Ct. H.R. ¶ 133 (2007).

²⁵² *Id.* ¶ 134.

²⁵³ *Id.* ¶ 137. The Court offered a third formulation in its interpretation of the judgment: "when large-scale development or investment projects could affect the integrity of the *Saramaka* people's lands and natural resources." *Saramaka*, Inter-Am. Ct. H.R. ¶ 17 (2008).

²⁵⁴ United Nations Declaration on the Rights of Indigenous Peoples, art. 10, 29(2) U.N. Doc. A/61/L.67 (Sept. 13, 2007). See also Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Human Rights Council, ¶ 47, U.N. Doc. A/HRC/12/34 (July 15, 2009) (by James Anaya) [hereinafter *Promotion and Protection of all Human Rights*] ("[T]he Declaration recognizes two situations in which the State is under an obligation to obtain the consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultations.").

the Akwé: Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments.²⁵⁵ They must respect the traditions and culture of indigenous communities, and be concluded “prior to the granting” of state concessions.²⁵⁶ If subcontracted, the studies should still be supervised by state authorities.²⁵⁷ In addition, the assessments should always consider accumulated impacts from past, current, and proposed projects.²⁵⁸

While these two safeguards—“effective participation” and impact assessments—have been developed in some detail, there is still uncertainty about when they should be applied. At the outset, *Saramaka* required effective participation “regarding any development, investment, exploration or extraction plan . . . within Saramaka territory.”²⁵⁹ But later the Court implied that non-“traditional” resources, when not affecting “vital” community resources, could possibly be extracted freely by states.²⁶⁰ This ambiguity may encourage governments to procure assessments denying the “traditional” character of certain resources, in order to initiate projects without even consulting indigenous communities.²⁶¹ Yet the nature and importance of the resources could only be determined by fully consulting the communities. And potential consequences of projects could only be assessed by examining a thorough impact analysis.

In this way, when states plan to initiate projects on ancestral lands, it is difficult to imagine how consultation and impact

²⁵⁵ *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 206 (June 27, 2012); *Saramaka People v. Suriname*, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 41 n.23 (Aug. 12, 2008).

²⁵⁶ *Saramaka*, Inter-Am. Ct. H.R. ¶ 41 (2008).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 129 (Nov. 28, 2007), *interpreted by* Inter-Am. Ct. H.R. (ser. C) No. 185 (2008).

²⁶⁰ *Id.* ¶ 155 (stating that the safeguards should apply to “other concessions within Saramaka territory involving natural resources which have not been traditionally used by members of the Saramaka community, but that their extraction *will necessarily affect other resources that are vital to their way of life*”) (emphasis added).

²⁶¹ *Contra Saramaka*, Inter-Am. Ct. H.R. ¶ 16 (2008) (creating a potentially more demanding standard requiring consultation “regarding any proposed restrictions of the Saramaka people’s property rights, particularly regarding proposed development or investment plans in or affecting Saramaka territory”).

assessments could ever justifiably be omitted. Yet the Court has left the door open. Also surprisingly, the Court has not emphasized the significance of a prompt impact assessment. An assessment clearly must be finished as soon as possible, in order to fully inform the indigenous community's intervention. Otherwise, its decisions could be based upon incorrect or incomplete information. But the Tribunal's language requires the completion of the impact assessment merely at some point before the state's issuance of a concession.²⁶²

Another major uncertainty involves when 'good-faith' and 'active' consultations harden into a requirement for 'free, prior, and informed consent' ("FPIC"). This controversial matter is particularly doubtful after *Sarayaku*. The judgment, despite *Saramaka's* precedent and the petitioners' demands for consent standards,²⁶³ ignored the principle completely. Clearly, there is powerful state and corporate opposition to an indigenous 'veto power.'²⁶⁴ Nevertheless, both indigenous leaders and a variety of other actors around the globe increasingly support FPIC.²⁶⁵

²⁶² See *id.* ¶ 41 ("[Environmental and Social Impact Studies] must be completed prior to the granting of the concession . . ."); *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 206 (June 27, 2012)* ("[E]nvironmental impact assessments must be . . . completed before the concession is granted . . .").

²⁶³ See *Sarayaku*, Inter-Am. Ct. H.R. ¶ 127 (noting the petitioners' argument that Ecuador "incurred international responsibility for violating Articles 21, 13 and 23 of the Convention" because Ecuador did not obtain prior consent for its oil venture).

²⁶⁴ See, e.g., *Promotion and Protection of all Human Rights, supra* note 254, ¶ 48.

²⁶⁵ See, e.g., Rep. of the Int'l. Expert Grp. Meeting on Extractive Indus., Indigenous Peoples' Rights and Corporate Social Responsibility, Permanent Forum on Indigenous Issues, May 18-29, 2009, 8th Sess. ¶ 84, U.N. Doc. E/C.19/2009/CRP.8 (May 4, 2009) (recommending that states "[e]nsure that the legislation governing the granting of concessions includes provisions on consultation and FPIC, in line with international standards and which recognize the right of Indigenous Peoples to say no . . ."); Rep. of the Office of the U.N. High Comm'r for Human Rights, *International Workshop on Natural Resource Companies, Indigenous Peoples and Human Rights: Setting A Framework for Consultation, Benefit-Sharing and Dispute Resolution*, Human Rights Council, Dec. 3, 2008-Dec. 4, 2008, ¶ 15, A/HRC/EMRIP/2009/5 (July 3, 2009) ("Efforts should be made to respect the principles of good faith and of free, prior and informed consent of indigenous peoples."); MARIANNE VOSS & EMILY GREENSPAN, OXFAM AMERICA RESEARCH BACKGROUND SERIES, COMMUNITY CONSENT INDEX: OIL, GAS AND MINING COMPANY PUBLIC POSITIONS ON FREE, PRIOR, AND INFORMED CONSENT (FPIC) 1, 12-16 (2012), available at <http://www.oxfamamerica.org/files/community-consent-index.pdf> (arguing that indigenous peoples have an international "right to free, prior, and informed" consent); but see *Promotion and Protection of all Human Rights, supra* note 254, ¶ 65 (suggesting that the current UN Special Rapporteur

Recently, the UN Human Rights Committee²⁶⁶ and the African Commission set out standards in strong support of the requirement.²⁶⁷ Even international finance institutions and industry associations have adopted FPIC.²⁶⁸

takes a more moderate approach: “indigenous consent is presumptively a requirement for those aspects of any extractive operation that takes place within the officially recognized or customary land use areas of indigenous peoples, or that has a direct bearing on areas of cultural significance, in particular sacred places, or on natural resources that are traditionally used by indigenous peoples in ways that are important to their survival”).

²⁶⁶ See *Poma Poma v. Peru*, U.N. Human Rights Committee, Commc’n No. 1457/2006, ¶ 7.6, U.N. Doc. CCPR/C/95/D/1457/2006 (Apr. 24, 2009). This case holds:

the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community.

Id.

²⁶⁷ See African Comm’n on Human and Peoples’ Rights [ACHPR], *Resolution on a Human Rights-Based Approach to Natural Resources Governance*, 51st Sess., Apr. 18-May 2, 2012, available at <http://www.achpr.org/sessions/51st/resolutions/224> (“[A]ll necessary measures must be taken by the State to ensure participation, including the free, prior and informed consent of communities, in decision making related to natural resources governance.”); *Ctr. for Minority Rights Dev. (Kenya) v. Kenya*, Afr. Comm’n on Human & Peoples’ Rights, Comm. No. 276/2003, ¶ 291 (Feb. 4, 2010) (holding that, with respect to “any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions”).

²⁶⁸ See, e.g., INT’L. FIN. CORP., *PROGRESS REPORT ON IFC’S POLICY AND PERFORMANCE STANDARDS ON SOC. AND ENVTL. SUSTAINABILITY, AND ACCESS TO INFO. POLICY* ¶ 58 (2010), available at www1.ifc.org (noting that banks such as the European Bank for Reconstruction and Development, Inter-American Development Bank, Asian Development Bank, International Fund for Agricultural Development, as well as industry associations, such as Hydropower Association, have adopted or are planning to adopt FPIC principles); Fergus MacKay, *Indigenous Peoples and International Financial Institutions*, in *INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW* 312 (Daniel D. Bradlow and David B. Hunter eds., 2010) (indicating that some “major donation institutions such as the UNDP, IFAD, the European Commission” and others require FPIC); VOSS & GREENSPAN, *supra* note 265, at 13–14 (“[D]iscussion of the FPIC principle among international institutions has moved beyond questions of whether it should be implemented to discussions of how it should be implemented.”); *Position Statement: Mining and Indigenous Peoples*, INT’L COUNCIL ON MINING &

The Court's 'right to consultation' is not enough. Even if it were a "general principle of international law," the concept rapidly dissolves into empty rhetoric.²⁶⁹ There are too many opportunities for exploitation, despite the Court's efforts to establish specific guidelines. In fact, all three safeguards are limited. A state might conduct 'active' consultations, commission an impact study, and even provide the affected community 'reasonable benefits.' It could then largely ignore the information gathered and inflict significant damage on ancestral lands and resources, all the while complying with the Court's requirements. Furthermore, even the *Saramaka* consent standard, "large-scale development or investment projects that would have a major impact," offers inadequate protection for indigenous peoples.²⁷⁰ A small-scale operation that destroys a sacred site would have devastating consequences for a community, yet it would not require consent by the Court.²⁷¹

Thus, rather than address these deficiencies, *Sarayaku* mostly decreased protections. The judgment left out the key condition of prior, informed consent. 'Reasonable benefits' from projects were also ignored, under the pretense that they lacked relevance to the case. It is true that *Sarayaku* expanded the right to consultation to include matters beyond lands and resources. At the same time, if it curtailed the right to consent, this restriction would seriously impact all indigenous rights. Furthermore, casting doubt on 'reasonable benefits' from resource extraction projects would, at

METALS, May 2008, at 1, available at <http://www.icmm.com/document/293> (stating that indigenous peoples have the right to be informed and heard regarding projects that may adversely affect their interests).

²⁶⁹ See Farith Simon, *Obligación democrática*, EL COMERCIO, Oct. 29, 2012, http://www.elcomercio.com/farith_simon/Obligacion-democratica_0_800320071.html (arguing that because the Inter-American Court preferred consultation rights over consent rights, Ecuador effectively won the *Sarayaku* case).

²⁷⁰ See Pasqualucci, *International Indigenous Land Rights*, *supra* note 121, at 98 ("[The standard] seems to give states leeway to grant smaller for-profit logging and mining concessions that could still negatively impact indigenous communities.").

²⁷¹ See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (providing a real example of such a scenario). In *Lyng*, the U.S. government sought to build a short road through sacred sites of Native Americans. Justice Brennan, in a blistering dissent, wrote: "I find it difficult, however, to imagine conduct more insensitive to religious needs than the Government's determination to build a marginally useful road in the face of uncontradicted evidence that the road will render the practice of respondents' religion impossible." *Id.* at 477.

minimum, severely constrain the social welfare and development of indigenous peoples.

In this way, the safeguards, never strong enough, are now in decline. Rather than meaningfully restricting development options, they still provide states many opportunities to pursue lucrative projects. It must be emphasized, however, that isolated attempts to fortify the safeguards will likely not solve the fundamental problem. Stronger protections, under Article 21, will yield little fruit when a state ignores them it will ultimately amount to a simple property infringement—a small price to pay for a literal gold mine.²⁷² In fact, under a property paradigm, a violation may not be found at all, especially if states begin to defend themselves vigorously before the Court. The Court, like numerous tribunals, will presume that many state land actions are permissible.²⁷³ This presumption readily manifests itself in the Court's minimalist language, despite its three safeguards. Recall *Saramaka*, the very source of these three protections: only those lands and resources “essential for the survival of their way of life” are protected by Article 21.²⁷⁴

4.1.3. Conclusion

As a former Court President remarked, placing indigenous land rights “on the same footing” as private property rights “may prove extremely disadvantageous to the legitimate interests and lawful rights of the indigenous people.”²⁷⁵ If Article 21, by itself, cannot adequately protect traditional lands, it certainly cannot

²⁷² Although note that, currently, indigenous communal property violations still can lead to significant reparations orders from the Inter-American Court. See *infra* Part IV: Shifting from Property Rights to Vida Digna.

²⁷³ See, e.g., HARRIS, O'BOYLE & WARBRICK, *supra* note 241, at 694–95 (describing European Court's significant deference to states on property matters); Lynda J. Oswald, *The Role of Deference in Judicial Review of Public Use Determinations*, 39 B.C. Env'tl. Aff. L. Rev. 243, 245 (2012) (noting “the traditional deference given by [U.S.] courts to legislative determinations of the need to take property by eminent domain”); Shelton, *Self-Determination*, *supra* note 4, at 77 (“[G]overnments routinely claim that a public interest in economic development overrides indigenous property rights.”).

²⁷⁴ *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 123 (Nov. 28, 2007), *interpreted by* Inter-Am. Ct. H.R. (ser. C) No. 185 (2008) (emphasis added).

²⁷⁵ *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶16 (Mar. 29, 2006) (separate opinion of Judge García-Ramírez).

serve as the overarching principle for indigenous rights. In these circumstances, the right to property is a constituent right that must be anchored to a stronger, deeper configurative principle to protect indigenous peoples' way of life.

The challenge, then, is to find this superior principle in the American Convention and the Court's case law. As discussed, Anaya generally has employed self-determination as an overarching structure for indigenous rights. Yet neither the Convention nor the American Declaration of the Rights and Duties of Man²⁷⁶ establishes a right to self-determination.²⁷⁷ Further, the rare reference to the concept, in the *Saramaka* decision, was later spurned by *Sarayaku*. Even the Draft American Declaration on the Rights of Indigenous Peoples, currently under negotiation, has left the language on self-determination in brackets.²⁷⁸

4.2. Alternative Frameworks for Indigenous Rights

The Court has had a number of opportunities to develop alternative conceptions for its indigenous rights framework. To illustrate, in *Sarayaku*, the Inter-American Commission and the petitioners alleged, among others, violations of Articles 13 (Freedom of Expression), 23 (Political Rights), and 26 (Social, Economic and Cultural Rights) of the American Convention.²⁷⁹

²⁷⁶ See Organization of American States, *American Declaration of the Rights and Duties of Man*, May 2, 1948, OEA/Ser.L.V/II.92, doc. 31 rev. 3 (serving as a non-binding legal instrument of the Organization of American States).

²⁷⁷ Three decades ago, the Inter-American Commission acknowledged that international law recognizes a right to self-determination, but the Commission denied its applicability to the Miskito of Nicaragua, explaining that "this does not mean . . . that it recognizes the right to self-determination of any ethnic group as such." Organization of American States, Rep. on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, Inter-Am. Comm'n H.R., at Part II, B(9), OEA/Ser.L./V.II.62, doc. 10 rev. 3 (Nov. 29, 1983).

²⁷⁸ See Organization of American States, *Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples*, Twelfth Meeting of Negotiations in the Quest for Points of Consensus, Nov. 30-Dec. 2, 2009, Draft Article 3, OEA/Ser.K/XVI/GT/DADIN/doc.334/08 rev. 5 (Dec. 3, 2009). Interestingly, the right to self-determination is found in the Preamble to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador." Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), pmbll., OAS Treaty Series, no. 69, 28 I.L.M. 156 (Nov. 16, 1999).

²⁷⁹ *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 126-27, 137 (June 27, 2012).

They argued for breaches of Articles 13 and 23 because the community was not appropriately consulted, and it was deprived of key information about the resource extraction projects. The Tribunal curtly responded that “the facts have been sufficiently analyzed and the violations conceptualized under the rights to communal property, consultation and cultural identity . . . in the terms of Article 21.”²⁸⁰

As for employing cultural rights as a framework, the Court has made specific reference to these rights in assorted indigenous cases (see Part III, *supra*).²⁸¹ Generally, according to Engle, cultural rights “have provided the dominant framework for indigenous rights advocacy since at least the 1990s.”²⁸² As considered earlier, bodies such as the UN Human Rights Committee have preferred claims of cultural integrity over those of self-determination. Yet Engle cautions that cultural rights frameworks, similar to property rights approaches, have often proven deleterious: they threaten “to limit the groups that might qualify for protection, force groups to overstate their cultural cohesion, and limit indigenous economic, political and territorial autonomy.”²⁸³

Despite these dangers, one still may be surprised that Article 26—the Convention’s primary social and cultural rights provision²⁸⁴—has not been discussed more often by the Court in its judgments on indigenous communities. Article 26 states as follows:

[t]he States Parties undertake to adopt measures . . . with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural

²⁸⁰ *Id.* ¶ 230.

²⁸¹ See also Marco Odello, *Indigenous Peoples’ Rights and Cultural Identity in the Inter-American Context*, 16 INT’L J. HUM. RTS. 25, 34–41 (2012) (discussing the Inter-American case law on cultural rights and cultural identity).

²⁸² ENGLE, *supra* note 17, at 1.

²⁸³ *Id.* at 13.

²⁸⁴ American Convention on Human Rights, *supra* note 117, at art. 26. Other provisions of the American Convention have social, economic and/or cultural dimensions. For example, Article 19 provides “Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.” *Id.* at art. 19. Article 17, for its part, provides for the “Rights of the Family.” *Id.* at art. 17.

standards set forth in the Charter of the Organization of American States²⁸⁵

However, the Court has viewed the 'progressive development' standard as a major constraint. It has directly considered Article 26 in only two judgments and has never found a violation of the provision.²⁸⁶ In *Sarayaku*, the Tribunal rejected the arguments for an Article 26 violation without discussion. Though it appears to regard Article 26 as justiciable,²⁸⁷ the Court's restrictive approach has stalled the development of the provision and the elaboration of its constituent rights.

4.3. *Vida Digna* as a Structural Basis for Indigenous Rights

4.3.1. Introduction to the Court's *Vida Digna* Concept

The Court's *vida digna* doctrine, often translated as 'the right to a dignified life' or 'the right to a dignified existence,' is primarily grounded in the American Convention's Article 4 (Right to Life). The Tribunal introduced the concept in 1999, with the seminal judgment *Villagrán-Morales et al. v. Guatemala*, and has further developed the principle in subsequent decisions.²⁸⁸ For both

²⁸⁵ *Id.* at art. 26.

²⁸⁶ The Inter-American Court examined Article 26 in only two judgments: *Five Pensioners v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 98 (Feb. 28, 2003); *Acevedo-Buendía v. Peru*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 198 (July 1, 2009). In *Sarayaku*, it simply held that it was "not appropriate" to consider an Article 26 violation. *Kichwa Indigenous People of Sarayuku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 341(5) (June 27, 2012).

²⁸⁷ The Tribunal stated that "the progressive implementation of said measures may be subjected to accountability and, if applicable, compliance . . . may be demanded before instances called to decide on possible human rights violations"; furthermore, it held that a state's regression in the protection of social, economic and cultural rights is "actionable" under Article 26. *Acevedo-Buendía v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 198, ¶¶ 102-103 (July 1, 2009). Also, Judge García-Ramírez, in his Concurring Opinion, stated that the Court had affirmed the justiciability of Article 26. *Id.* ¶¶ 15-21 (concurring opinion of Judge García-Ramírez).

²⁸⁸ See generally Steven R. Keener & Javier Vasquez, *A Life Worth Living: Enforcement of the Right to Health through the Right to Life in the Inter-American Court of Human Rights*, 40 COLUM. HUM. RTS. L. REV. 595 (2009); Jo M. Pasqualucci, *The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System*, 31 HASTINGS INT'L & COMP. L. REV. 1 (2008) [hereinafter Pasqualucci, *Right to a Dignified Life*].

practical and conceptual reasons, *vida digna* offers a promising structural basis for indigenous rights.

Villagrán-Morales involved the shocking murder of five street children at the hands of the Guatemalan national police. The Court asserted that states should seek to provide “at-risk children” with the “minimum conditions for a dignified life,” promoting the “full and harmonious development of their personality.”²⁸⁹ Five years later, *Juvenile Reeducation Institute v. Paraguay* held that states have the duty to ensure that incarcerated persons (both adults and children) can still enjoy a *vida digna*.²⁹⁰ Detention conditions must allow for “opportunities for exercise or recreation,” education, and “prompt and proper medical, dental and psychological care.”²⁹¹

In *Yakye-Axa*, as described above, an indigenous community was denied entrance to its traditional territories for farming, hunting, and fishing. Health conditions and temporary housing were miserable. The Court condemned this infringement upon their *vida digna*:

Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human

²⁸⁹ *Villagrán-Morales v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 191 (Nov. 19, 1999).

²⁹⁰ *Juvenile Reeducation Institute v. Paraguay*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 176 (Sept. 2, 2004).

²⁹¹ *Id.* ¶¶ 164-166. Because the conditions were seriously deficient in *Juvenile Reeducation Institute*, the Court found Paraguay in breach of both Articles 4 and 5 (Right to Humane Treatment) with respect to all inmates—over three thousand children and young adults. While many of the detained were adolescents, the “decent living conditions” described are required for all incarcerated individuals. For example, the Tribunal stated “the Court must establish whether the State, in fulfillment of its role of guarantor, took measures to ensure to all inmates at the Center—adults and children alike—the right to live with dignity and thus help them build their life plan, even while incarcerated.” *Id.* ¶ 164. The Court requires additional protections for detained children. *Id.* ¶ 176. Similarly, the Human Rights Committee has employed the ICCPR’s right to life provision to demand proper medical treatment and sanitary conditions for detainees. *Lantsova v. Russian Fed’n*, U.N. Human Rights Committee, Comm’n No. 763/1997, U.N. Doc. CCPR/C/74/D/763/1997 (Mar. 26, 2002). See also Martin Scheinin, *Human Rights Committee: Not Only a Committee on Civil and Political Rights*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* 540, 548 (Malcolm Langford ed., 2008).

rights, such as the right to education or the right to cultural identity.²⁹²

Because the State had not taken sufficient “measures regarding the conditions that affected their possibility of having a decent life,” the Court held that Article 4 was abridged.²⁹³ The Court made a similar pronouncement with respect to the community in *Xákmok Kásek*.²⁹⁴

In this way, the Inter-American Court has recognized the rights to health, education, food, and clean water under the framework of *vida digna* and protected by Article 4, and, occasionally, Article 5 (Right to Humane Treatment). The Court has also directly applied the doctrine to indigenous peoples; in one instance, cited above in *Yakye Axa*, cultural identity was even linked to *vida digna*. Thus, the Court regards *vida digna* as a means to protect a range of rights – including those of a social, economic, and cultural nature – under the right to life.

4.3.2. Brief Context for *Vida Digna*

Human dignity has served as the central basis for the international human rights movement, laying the foundation for the American and Universal Declarations of Human Rights, as well as the diverse instruments that followed.²⁹⁵ Variations on the

²⁹² *Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 167 (June 17, 2005).*

²⁹³ *Id.* ¶ 176. The Human Rights Committee has comparably remarked that homelessness and health problems engage states’ duties to ensure the right to life. U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee, Canada*, U.N. Doc CCPR/C/79/Add. 105 (Apr. 7 1999); U.N. Human Rights Comm., *General Comment No. 6: Article 6 (Right to Life)*, ¶ 5 (Apr. 30, 1982) in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), 176-78 (May 27, 2008) [hereinafter *General Comment No. 6*]. For its part, the European Court of Human Rights found degrading treatment, a violation to Article 3 of the European Convention, when it observed that dire living conditions had a “detrimental effect on the applicants’ health and well-being.” *Moldovan v. Romania* (No. 2), 2005-VII Eur. Ct. H.R. ¶ 110. The case originated in an attack upon a Roma community; the community was forced from its homes and lived in a destitute state for ten years. *Id.* ¶¶ 18-19.

²⁹⁴ *Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 217 (Aug. 24, 2010).*

²⁹⁵ For example, see Organization of American States, *American Declaration of the Rights and Duties of Man*, O.A.S. G.A. Res. XXX, Preamble & art. XXIII, O.A.S. Doc. OEA/Ser.L.V./II.82 doc.6 rev.1 (1948), which states:

concept reach far back in history; the Roman philosopher Cicero prominently advocated that human beings have special worth simply by virtue of being human.²⁹⁶

Christopher McCrudden writes that religious, philosophical and historical “strategies” have been employed to explain the basis for human dignity.²⁹⁷ The enduring concept, championed by figures as diverse as Grotius, Kant, and Bolivar, has played a key role in influential social movements and political writings.²⁹⁸ The Catholic Church holds that “the dignity of the human person” owes to humanity’s creation in the image of God.²⁹⁹

Yet with so many ways to define and explain human dignity, some of them conflicting, there is concern that the concept serves as a mere placeholder.³⁰⁰ Of course, the term’s versatility and general appeal provided a much-needed basis for the foundational

All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another . . . Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

Id. See also, e.g., Universal Declaration of Human Rights, GA Res 217 (III) A, U.N. Doc A/RES/217(III), at 72 (Dec. 10, 1948) (stating “[w]hereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom”).

²⁹⁶ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 657 (2008).

²⁹⁷ *Id.* at 658.

²⁹⁸ *Id.* at 658-61.

²⁹⁹ ROMAN CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH pt. 3, § 1, ch. 1, art. 1 (1994). available at http://www.vatican.va/archive/ccc_css/archive/catechism/p3s1c1a1.htm.

³⁰⁰ See McCrudden, *supra* note 296, at 698 (“All that is left of dignity, it might be said, is the relatively empty shell provided by the minimum core”). But see Paolo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 EUR. J. INT’L L. 931, 935 (2008) in which Carozza disputes this characterization and argues:

this status and basic principle of human dignity are not merely fatuous or insignificant. Even stated at very high levels of generality and incompleteness, they have served to catalyse political action for human rights and their recognition in positive law. They are widely accepted and employed by judges in interpreting that law. And they are sufficiently robust in substance to challenge and undermine the legitimacy of a wide array of political and economic systems which at different times have wielded power in ways systematically contrary to the good of human persons.

human rights texts. On the Universal Declaration, McCrudden remarks that “[e]veryone could agree that human dignity was central, but not why or how” – so they simply inserted their own theory.³⁰¹ Because of this adaptability, the concept is open to judicial discretion, allowing for the extension of existing rights and the creation of new ones.³⁰²

Dignity’s flexibility has its pitfalls,³⁰³ but it also provides significant opportunities for indigenous peoples in the Inter-American context. It furnishes a multidimensional principle that carries significant weight for the Inter-American Court. The Court’s judges, most often of Latin American origin, are well acquainted with concepts of dignity – and not just because of international human rights texts and Bolivar’s stance against slavery. Catholic and social democratic influences were powerful in Central and South America, cementing human dignity in the constitutions of the Americas.³⁰⁴ The Inter-American Court counts as only one of many international and national tribunals receptive to human dignity arguments, and it is certainly not the first to link dignity to the right to life.³⁰⁵

4.3.3. Application of the *Vida Digna* Framework

In his separate opinions for *Yakye-Axa* and *Sawhoyamaya*, Judge Cançado-Trindade suggested a couple of elements for my

³⁰¹ McCrudden, *supra* note 296, at 678.

³⁰² *Id.* at 721.

³⁰³ In general, Kingsbury urges caution with flexible approaches to indigenous advocacy that are “far from the absolutism of rights” and permit “evasion and abuse.” Kingsbury, *supra* note 39, at 249.

³⁰⁴ McCrudden, *supra* note 296, at 664.

³⁰⁵ See generally ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON (2013) (discussing how courts around the world interpret dignity). According to the European Court of Human Rights, “the very essence of [the European Convention system], as the Court has often stated, is respect for human dignity (see, *inter alia*, *Pretty v. the United Kingdom*, . . . and *V.C. v. Slovakia*).” Case of *Vinter v. United Kingdom*, Eur. Ct. H.R. ¶ 113 (2013). The Indian Supreme Court interpreted the Constitutional guarantee of life and personal liberty to contain “the right to live with human dignity and all that goes along with it . . . such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.” McCrudden, *supra* note 296, at 693 (citing *Mullin v. The Administrator, Union Territory of Delhi*, AIR 1981 SCR (2) 516, at 518 (1981)). This connection also often appears in political discourse; for example, Nelson Mandela has declared the “right to dignity and a decent life” to be “fundamental human rights.” *Id.* at 663.

proposed framework. In *Yakye-Axa*, writing with Judge Ventura-Robles, he stated that the indigenous right to property “is directly related to full enjoyment of the right to life including conditions for a decent life [*vida digna*].”³⁰⁶ In *Sawhoyamaxa*, Judge Cañado-Trindade posited that “[c]ultural identity is a component of, or an addition to, the fundamental right to life in its wider sense.”³⁰⁷ Combining and further developing these ideas could lead to a more protective and cogent framework for indigenous rights. A broad right-to-life concept could serve as the Court’s configurative principle, a structural basis for indigenous rights to property, cultural identity, and many others. Consonant with the cases discussed above, the right to life in its wider sense is represented by the Court’s *vida digna*.

Owing to the unique characteristics of indigenous peoples, one would expect that their requirements for a ‘dignified life’ would vary from other sectors of the general population. Here, the five core elements of Anaya’s framework could serve as the parameters: nondiscrimination, cultural integrity, lands and resources, social welfare and development, and self-government. Whenever such norms are breached with respect to an indigenous community, I propose that a violation of Article 4 should result.

To illustrate, consider unauthorized resource extraction upon ancestral territories. At a minimum, the communal right to property would be violated along with the right to *vida digna*. In the Court’s language, Article 21 would be breached in conjunction with Article 4. Despite the numerous drawbacks of Article 21, a violation to communal property still must be recognized. This recognition would compel the state to undertake restitution, titling, and/or other necessary procedures under domestic property law. However, states would need to respect the traditional lands at a higher level—an Article 4 (Right to Life) standard rather than an Article 21 (Right to Property) standard.

Similarly, in the indigenous context, violations of self-government or equality principles would lead to breaches of appropriate Convention provisions—such as Article 23 (Right to

³⁰⁶ *Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 20 (June 17, 2005) (dissenting opinion of Judges Cañado-Trindade and Ventura-Robles).

³⁰⁷ *Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 28 (Mar. 29, 2006) (separate opinion of Judge Cañado-Trindade).

Participate in Government) and Article 24 (Right to Equal Protection), respectively—in conjunction with Article 4. To reiterate, traditional lands and resources need not be involved in a case for the *vida digna* framework to apply. For a norm such as cultural integrity, which the Court has established, but is not found in the Convention, Article 4 would be violated by itself.³⁰⁸ Overall, this approach seeks to increase the level of protection for each constitutive right of *vida digna*. Thus, where indigenous peoples are concerned, these component rights (e.g., political rights, land rights) would be more demanding than when applied to other individuals.

This approach is not unlike the ICCPR regime, which differentiates the rights provided in Article 27 from other rights in the Covenant. According to the Human Rights Committee:

The protection of these [Article 27] rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned Accordingly, . . . these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant.³⁰⁹

As a result, the Article 27 right of minorities “to profess and practise their own religion,”³¹⁰ for example, should require distinct, and more vigorous, state protection than the Covenant’s ordinary freedom of religion provision (Article 18 of the ICCPR).³¹¹

The Court’s underdeveloped view on nondiscrimination offers a roughly similar way of conceptualizing my proposed framework. Recall its statement on the equality principle’s transversal character: the indigenous cultural identity impacts the Convention’s “scope and content,” and leads to special state

³⁰⁸ Here, I am not necessarily supporting the creation of new rights in addition to what are already enumerated in the American Convention. However, my *vida digna* proposal has the additional benefit of making the right to cultural integrity, which is already recognized by the Court, more tangible and translatable to the Convention.

³⁰⁹ The Rights of Minorities, *supra* note 37, ¶ 9.

³¹⁰ International Covenant on Civil and Political Rights, art. 27, Dec. 16, 1966, 999 U.N.T.S. 171.

³¹¹ See NOWAK, *supra* note 38, at 658.

obligations and measures of protection.³¹² The concept certainly has power in the Inter-American jurisprudence: the Court has declared that “the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.”³¹³ That is, it regards the principle as “a peremptory norm of general international law . . . from which no derogation is permitted.”³¹⁴

Nevertheless, I believe that *vida digna* and the right to life provide a more apt conceptual vehicle, as we are truly addressing indigenous peoples’ lives, their “survival and continued development.”³¹⁵ Moreover, the Court has already used *vida digna* as a configurative principle, a repository of several rights. Nondiscrimination, following Anaya, should instead be placed within the framework.³¹⁶

4.3.4. *Vida Digna and Remedies*

Another advantage of transferring indigenous rights from Article 21 to *vida digna* is to safeguard extensive remedies. Rights directly relate to remedies, and different rights violations will require distinct remedial responses.³¹⁷ If indigenous norms are located in a multidimensional right to life, multifaceted reparations are facilitated. In contrast, tethering varied indigenous rights to Article 21 could limit communities to typical property remedies and nothing more. When restitution is not possible, the common remedy for a property violation is monetary compensation.³¹⁸ Yet,

³¹² *Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶151 (June 17, 2005).

³¹³ *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003). See also Sarah Paoletti, *Human Rights for All Workers: The Emergence of Protections for Unauthorized Workers in the Inter-American Human Rights System*, HUM. RTS. BRIEF, at 5, 6 (Fall 2004) (explaining the importance of this advisory opinion).

³¹⁴ Vienna Convention on the Law of Treaties, art 53, May 23, 1969, 1155 U.N.T.S. 331.

³¹⁵ *The Rights of Minorities*, *supra* note 37, ¶ 9.

³¹⁶ It should be noted that several consider that the typical requirements for equality and non-discrimination of a classic international human rights approach are too limited for indigenous peoples and their “special set of demands and grievances.” Falk, *supra* note 47, at 31.

³¹⁷ See John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 281 (2000); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857 (1999) (emphasizing that rights and remedies are “interdependent and inextricably intertwined”).

³¹⁸ E.g., RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79E.01-.02 (Michael Allan Wolf ed., 2009).

as emphasized by many indigenous statements and actions, compensation alone could not remotely restore the *status quo ante* when ancestral lands have been taken or permanently damaged.³¹⁹

Until now, the Court's remedial approach has generally sidestepped the limits of Article 21 and ordered sweeping reparations for indigenous communities. To illustrate, it has required restitution and cleanup of ancestral lands, community development funds, apologies, legislative and institutional reforms, and material damages.³²⁰ It is true that some of these remedies correspond to rights violations other than communal property. In fact, broad Court orders for "educational, housing, agricultural and health projects" correlate with social, economic, and cultural norms, as well as the defined civil and political rights of the American Convention.³²¹

Thus, the Court's current remedial framework supports a range of rights for indigenous peoples, attending to several aspects of a 'dignified life.' On the remedial side, then, the Court already promotes a robust concept of *vida digna* for indigenous communities. Though there are certainly shortcomings to its approach, primarily involving insufficient monetary

³¹⁹ See, e.g., STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 50 (2012) (explaining that while the Sioux were offered \$100 million by the U.S. government in compensation for the loss of their Black Hills territory, most have refused to accept the compensation because they only want their land back); Ana F. Vrdoljak, *Reparations for Cultural Loss*, in *REPARATIONS FOR INDIGENOUS PEOPLES*, *supra* note 93, at 197, 219-20 ("[T]he intrinsic importance of traditional lands to . . . indigenous communities makes monetary redress, in lieu of restitution, problematic and untenable.").

³²⁰ See *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 285-323 (June 27, 2012) (ordering a wide array of remedies); Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 *STAN. J. INT'L L.* 279, 300-301 (2011) (considering compliance with Court remedies for indigenous communities); Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 *COLUM. J. TRANSNAT'L L.* 351, 384-386 (2008) (outlining principal forms of remedies for such communities).

³²¹ These programs were ordered in *Saramaka*, among other judgments. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 201 (Nov. 28, 2007), *interpreted by* Inter-Am. Ct. H.R. (ser. C) No. 185 (2008). See Iris T. Figueroa, *Remedies without Rights?: Reparations and ESC Rights in the Inter-American System*, (May 2010) (unpublished student note), available at http://works.bepress.com/iris_figueroa/1 (arguing that the Court "refuses to acknowledge violations of [social, economic and cultural] rights while at the same time awarding a broad array of reparations to plaintiffs").

compensation,³²² the Tribunal's reparations foster several norms that undergird Anaya's self-determination principle.

Formally placing the various indigenous rights within Article 4 would further legitimate the Court's reparative approach. For example, states may question socioeconomic remedies in judgments where the Court does not declare a violation of Article 26, the Convention's provision on the subject. But if the Court regularly clarifies that such remedies follow from a violation to the multidimensional *vida digna* principle, it would more precisely match remedies with rights. Creating substantive-remedial symmetry would shield the Tribunal from criticism that it is overreaching in its reparations orders. It would also likely reduce the danger that this multifaceted remedial approach would disappear under more conservative judges.

4.4. Potential Objections to a *Vida Digna* Approach

It may appear that *vida digna* could not be equated to Anaya's self-determination principle. The community of *Yakye Axa*, for instance, was in a state of utter deprivation. In demanding *vida digna*, one might argue that the Court merely was requiring the most basic of services—not considerable empowerment on many fronts. That is, rather than the ceiling, the doctrine represents the floor, and thus could not possibly demand a wide spectrum of indigenous rights. In some contexts, this is an accurate portrayal of *vida digna*. The Court has pointed to a state's obligation of "generating minimum living conditions that are compatible with the dignity of the human person."³²³

However, when considering "the existing international *corpus juris* regarding the special protection required" for indigenous peoples, the *Yakye Axa* judgment discussed a wide range of legal norms.³²⁴ These included "the duty of progressive development" of Article 26; the rights to health, "a healthy environment," food, education, and "the benefits of culture" from the Additional Protocol to the American Convention; and "the pertinent provisions" from ILO Convention No. 169, without specifying further.³²⁵ In the judgment concerning the Sawhoyamaya

³²² This is a focus of my current research on the Inter-American Court.

³²³ *Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 162 (June 17, 2005).

³²⁴ *Id.* ¶ 163.

³²⁵ *Id.*

community, Judge García-Ramírez wrote in a separate opinion that the right to life

is more than just a right to subsist, but is rather a right to self-development, which requires appropriate conditions. In such a framework, a single right with a double dimension is set, like the two-faced god Janus: one side, with a first-generation legal concept of the right to life; the other side, with the concept of a requirement to provide conditions for a feasible and full existence.³²⁶

The Court may have already outlined, then, far more than minimal life conditions for *vida digna*. Essential requisites for indigenous “self-development” and a “full existence” are emerging under Article 4.

A further objection to the *vida digna* approach concerns norm dilution. If Article 4 becomes a main stronghold of indigenous rights, Court judgments will find more violations of the provision—possibly diluting the meaning of the right to life.³²⁷ Yet some commentators have embraced the use of *vida digna* to hold states accountable for breaches of social, economic, and cultural rights.³²⁸ For now at least, Article 4 violations confer additional gravitas upon Court judgments. This demands the attention of offending states and the media, thus bolstering victims’ efforts to obtain redress.³²⁹

I am sympathetic to worries about norm dilution. But I am more concerned about the weak conceptual basis for indigenous rights in the Inter-American system, and, clearly, the pervasive

³²⁶ *Sawhoyamaya Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 18 (Mar. 29, 2006) (concurring opinion of Judge García-Ramírez).*

³²⁷ Tara J. Melish, *The Inter-American Court of Human Rights: Beyond Progressivity*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW* 372, 407 (Malcolm Langford ed., 2008) (discussing a “threat of serious norm dilution” in reference to Article 4 of the Convention).

³²⁸ James L. Cavallaro & Emily Schaffer, *Rejoinder: Justice Before Justiciability: Inter-American Litigation and Social Change*, 39 *N.Y.U. J. INT’L L. & POL.* 345, 382 (2006) (“The key, as we explain in our initial piece, is to find ways to use this right-to-life focus to advance other aspects of social justice campaigns—including ESC rights.”); James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 *HASTINGS L.J.* 217, 272 (2004).

³²⁹ See Cavallaro & Schaffer, *Rejoinder: Justice Before Justiciability*, *supra* note 328, at 381–82; Cavallaro & Schaffer, *Less as More*, *supra* note 328, at 272–81.

violations suffered by communities in the region. Currently, *vida digna* provides the most viable alternative to self-determination. And, in fact, if both principles were available, a right-to-life framework would possibly be more respected by states than the abstract, and often contentious, right to self-determination.³³⁰

Finally, a more basic question asks: What difference would a transfer of ancestral land rights and other indigenous norms to Article 4 actually make? Perhaps the shift is simply a matter of semantics, especially if the Court already grants significant remedies to indigenous communities. Yet the ramifications could actually be quite concrete.

By affirming to states that a collective right to life is truly at stake in these cases, presumptions would be reversed. Petitioners would escape the domain of property rights, where restrictions are routine and states are granted wide latitude. The state would be held to a rigorous standard, and when violations occur, reparations would be maintained at a high level. The Court's approach in these cases may evolve over time, as is common. Yet it always must be consonant with upholding the Convention's Article 4—not property rights, not cultural rights, but the right to life.

To return to traditional land rights, a *vida digna* standard could require effective participation, impact assessments and mutually-acceptable—not merely 'reasonable'—benefits for *all* projects to proceed on indigenous territories. Effective participation, furthermore, must require the free, prior, and informed consent of the communities concerned. The consent requirement is only logical, as a state could not merely 'consult' a community about an initiative that impacts its right to life. When a community does consent to a project, the state must monitor progress and bring operations to a halt if the company exceeds the community's acceptable level of impact.

Anaya's other core norms—nondiscrimination, cultural integrity, social welfare and development, and self-government—would also require enhanced protections for indigenous peoples. As noted, the Court already has expressed special concern for

³³⁰ It should be noted that the Human Rights Committee—and the several other human rights bodies that interpret instruments that contain the right to life—could also adopt a similar framework. The Committee has already advanced broad interpretations of this right. See, e.g., *General Comment No. 6*, *supra* note 293, ¶ 5 (“[T]he right to life has been too often narrowly interpreted . . . [it] cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.”).

indigenous populations. But it makes such general statements in reference to a number of vulnerable groups.³³¹ The *vida digna* approach outlined here would seek to ensure that a core group of indigenous rights is consistently protected.³³² Suggesting detailed requirements for all of Anaya's five core principles falls out of this article's scope, and necessitates further development.³³³ Still, demanding FPIC before commercial projects (based on the results of appropriate impact assessments), as well as mutually-acceptable benefits, would likely strengthen many of these key indigenous rights.³³⁴

³³¹ See, e.g., *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 162 (June 17, 2005) (holding that the state "has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority"); *Ximenes-Lopes v. Brazil*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 103 (July 4, 2006) ("[A]ny person who is in a vulnerable condition is entitled to special protection, which must be provided by the States if they are to comply with their general duties to respect and guarantee human rights.").

³³² In a specific case, if those precise norms are not as important to the petitioners, the Court could make appropriate adjustments.

³³³ As for "social welfare and development," Anaya himself acknowledges that the boundaries of this category remain nebulous. See ANAYA, *supra* note 26, at 150. It is a particularly difficult matter considering that millions of indigenous peoples languish below the poverty line in the Americas. Would they all be entitled to an Article 4 claim before the Inter-American System? Of course, if they wished to litigate the claim, as an initial matter it would be necessary to comply with admissibility requirements. Once the petition is deemed admissible, Jo Pasqualucci has discussed a three-part test to assess potential violations:

[One, proof that petitioners] lack the basic necessities of life and that they belong to a vulnerable group . . . [Two,] evidence that the State had actual knowledge or reason to know of the alleged victims' living situation; [and Three, proof that] "their situation is the result of State action, negligence or omission.

Pasqualucci, *Right to a Dignified Life*, *supra* note 288, at 28-29. While such petitions could overwhelm the Inter-American System, the Inter-American Commission would likely process them in a strategic fashion. Such litigation could eventually induce states to improve indigenous policies and programs to avoid repeated – and costly – appearances before the Inter-American Court.

³³⁴ Engle is skeptical even of consent requirements, because they "assume that indigenous peoples are in a position to make meaningful choices." ENGLE, *supra* note 17, at 205. Informed by indigenous peoples and others, the Inter-American Court will need to clarify further how states may obtain legitimate consent. Through coercion, fraud and illicit payments, corporate and government representatives have usurped traditional decision-making processes and divided communities in attempts to secure approval for projects. See, e.g., *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 186, 194, 203 (June 27, 2012).

5. CONCLUSION

Pervasive intrusions upon ancestral lands and assaults to indigenous peoples' ways of life have led to crisis in the hemisphere. Nevertheless, the Inter-American Commission and Court have softened their positions. The Inter-American Commission, for example, recently withdrew its calls to suspend operations at the Guatemalan gold mine and the Brazilian dam.³³⁵ And, as discussed above, the Court eluded consent requirements and other protections in the *Sarayaku* judgment.³³⁶

The Inter-American human rights system cannot relent to the current political and corporate pressures. The Court has overcome significant challenges before, and can do so again.³³⁷ To galvanize indigenous rights in the region, the Tribunal should adopt the proposed *vida digna* framework. A new structural basis for indigenous rights is necessary. The Court's current property approach, even with *Saramaka's* 'safeguards,' ultimately provides only a rhetorical defense for indigenous peoples.

³³⁵ See Indigenous Communities of the Xingu River Basin, Pará, Brazil, Inter-Am. Comm'n H.R., Precautionary Measures No. 382/10 (2011), available at <http://www.oas.org/en/iachr/decisions/precautionary.asp>; Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala, Inter-Am. Comm'n H.R., Precautionary Measures No. 260/07 (2010), available at <http://www.oas.org/en/iachr/decisions/precautionary.asp>.

³³⁶ It should also be noted that, in 2010, the Court rejected a request for provisional measures to protect the Ngöbe indigenous communities of Panama. The communities had protested that a dam would flood their ancestral lands. *Four Ngöbe Indigenous Communities v. Panama, Request for Provisional Measures, Order of the Court, Inter-Am. Ct. H.R. (May 28, 2010)*, available at http://www.corteidh.or.cr/docs/medidas/ngobe_se_01_ing.pdf.

³³⁷ For example, Peru under Alberto Fujimori "attempted to withdraw from the jurisdiction of the Inter-American Court without denouncing the American Convention." PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 99, at 145. The Tribunal rejected this attempt, and continued to consider Peruvian cases before it. In 2001, after a change in government, Peru announced that it considered itself fully subject to the Court's jurisdiction. See, e.g., *id.* at 145-46.

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