

Business, Indigenous Peoples' Rights and Security in the Case Law of the Inter-American Court of Human Rights

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Abstract

The history of indigenous peoples from across the globe is marked by constant aggression, persecution and conflict. In these times, they are being obliged to confront the consequences of economic interests in their ancestral lands and natural resources, which often take the form of extractive projects conducted by corporate actors with the permission of governments. These abusive practices have led to a number of social, legal and political disputes, many of which have resulted in violence. All of this reveals that indigenous rights cases cannot be omitted in the study of the interrelation between business, human rights and security, since these three elements are present in many of them. In particular, the case law of the Inter-American Court of Human Rights needs to be closely examined, as it is considered to be the regional system of human rights protection that has played the most prominent role in delimitating indigenous property rights.

Keywords: harassment, land grabbing, right to life, right to personal integrity, state accountability

I. INTRODUCTION

Indigenous peoples throughout history have been the object of continuous aggression: from the conquest and subsequent invasion of their territories by European colonists¹ to the present-day abuses committed by some transnational corporations that prioritize economic benefits over the respect of these peoples' rights.² In the contemporary world, they have been deprived of large plots of land and of access to the natural resources they need to sustain their lives³ and, thus, their cohesion as distinct communities has been

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¹ See generally Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (New York: Transnational Publishers, 2006).

² A Martínez Jiménez and MM Vergara Céspedes, *La Jurisdicción Universal como Instrumento para la Protección de Pueblos Indígenas: Una Guía Práctica para Defensores de Derechos Humanos* (Copenhagen: IWGIA and Fundación Internacional Baltasar Garzón, 2015) 8.

³ It must be taken into account that the habitat of these peoples represents for them a cosmivision in which respect and protection of the environment reach deep levels related to the sacred. See generally Victoria Camarero Suárez,

damaged and the integrity of their cultures undermined.⁴ Their territories are currently threatened by unstoppable activities carried out by extractive companies⁵ or development projects that sweep away the environment and indigenous ways of life. These processes have led to a number of social, legal and political conflicts, many of which have resulted in violence.⁶ There is little question that indigenous populations are one of the most affected groups by business activities. It is therefore necessary to examine whether their security is also endangered as a consequence of the abuses committed by corporations on their territories when upholding their economic interests with the assistance of both private and public actors and security forces.

Over the last two decades, indigenous peoples' rights have achieved notable visibility and recognition internationally. Indigenous rights to land and natural resources have been among the most litigated indigenous-related issues throughout the world. That is why international human rights treaty monitoring bodies have developed a consistent body of jurisprudence based upon the international law instruments concerning them.⁷ In this regard, the Inter-American Court of Human Rights (hereinafter IACtHR or the Court) has proven to play a key role in the judicial recognition of indigenous peoples' rights⁸. Many cases under its jurisdiction deal with land and water grabbing conflicts on indigenous territories in which the lives and security of the members of the communities involved are exposed to danger as a direct result of their tireless efforts to defend their lands.

(*F'note continued*)

'Acaparamientos de Tierras y Aguas: Impacto sobre los Pueblos Indígenas y sus Convicciones Religiosas' (2018) 34 *Anuario de Derecho Eclesiástico del Estado*; María del Ángel Iglesias-Vázquez, 'El Hecho Religioso en las Comunidades Indígenas y la Jurisprudencia de los Tribunales Regionales de Protección de los Derechos Humanos. Especial Referencia a Europa' (2017) 33 *Anuario de Derecho Eclesiástico del Estado*.

⁴ S James Anaya, 'Los Derechos de los Pueblos Indígenas' in Mikel Berraondo (coord), *Pueblos Indígenas y Derechos Humanos* (Bilbao: Universidad de Deusto, 2006) 30. See also S James Anaya, *Indigenous Peoples in International Law*, 2nd edn (New York: Oxford University Press, 2004).

⁵ See generally FJ Zamora Cabot, 'Desarrollo Sostenible y Empresas Multinacionales: Un Estudio sobre los Acaparamientos de Tierra en Clave de Responsabilidad' in *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián*, XV (Navarra: Thomson Reuters Aranzadi, 2016); Victoria Camarero Suárez and FJ Zamora Cabot, 'El Acceso al Agua Limpia y al Saneamiento: Un Derecho Humano Crecientemente Asediado' in María Chiara Marullo and FJ Zamora Cabot (eds), *Empresas y Derechos Humanos: Temas Actuales* (Naples: Editoriale Scientifica, 2018).

⁶ Rodolfo Stavenhagen, 'Los Derechos de los Pueblos Indígenas: Esperanzas, Logros y Reclamos' in Mikel Berraondo (coord), *Pueblos Indígenas y Derechos Humanos* (Bilbao: Universidad de Deusto, 2006) 26. Recently, the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, has stressed that she continues to receive reports of 'escalations in conflicts and continued militarisation on indigenous peoples' ancestral lands; displacements, dispossessions and violence; peaceful mobilisations that are countered with attacks, criminalisation and harassments' and so on. As a result, these violations are part of the everyday lives of indigenous peoples and indigenous rights defenders across the world. See her statement at the 17th session of the United Nations Permanent Forum on Indigenous Issues (New York, 18 April 2018), <http://unsr.vtaulicorpuz.org/site/index.php/en/statements/225-statement-unpfi2018> (accessed 27 April 2018). See also Andrew Anderson, 'What is Happening Now Across the World is Nothing Less than a Systematic Attack on Peasant Communities and Indigenous Peoples', *Front Line Defenders* (August 2018), <https://mailchi.mp/rightsandresources/fld-espanol?e=791f76edda> (accessed 6 September 2018).

⁷ Jérémie Gilbert, *Strategic Litigation Impacts: Indigenous Peoples' Land Rights* (New York: Open Society Foundations, 2017) 23. See also Gaetano Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22:1 *The European Journal of International Law*; Soledad Torrecuadrada, 'Los Derechos Indígenas sobre sus Territorios y los Recursos que se Encuentran en Ellos' in *Los Derechos Económicos, Sociales y Culturales en Tiempos de Crisis*, Cursos de Derechos Humanos de Donostia-San Sebastián, XII (Navarra: Thomson Reuters Aranzadi, 2012).

⁸ María del Ángel Iglesias-Vázquez, 'La Protección de los Derechos de las Comunidades Indígenas en la Jurisprudencia de la Corte Interamericana de Derechos Humanos' (2016) 13:26 *Revista Principia Juris*.

This article aims at studying the recent case law of the IACtHR concerning the personal and communal security of indigenous peoples and the violation of their human rights in land grabbing conflicts affecting their territories, with a particular focus on their right to life. First peoples have constantly suffered – and are still suffering – threats, persecution and harassment which, in some cases, have eventually culminated in their own deaths.⁹ Hence, an analysis of the IACtHR rulings is required so as to ascertain the pattern it follows to hold states accountable for failing to provide adequate measures of prevention and protection which guarantee the security of the members of indigenous communities. This analysis will in turn be crucial to bring an answer to the question of whether the Court's interpretation of applicable international human rights instruments is effective in guaranteeing indigenous peoples' security in this type of conflict when states fail to protect and corporations fail to respect their human rights in contravention of the United Nations Guiding Principles on Business and Human Rights (UNGPs),¹⁰ which apply to all states and to all business enterprises.

The article is structured as follows. Section II provides insight into the most significant decisions the IACtHR has issued in relation to indigenous peoples' rights, especially with regard to their right to collective property and their right to free, prior and informed consent. The international human rights instruments on which the Court bases its decisions will also be outlined. In Section III, the focus is on a series of judgements of the IACtHR that will be under examination with the objective of identifying the reasons why the Court decides to hold states to account when members of indigenous communities lose their lives as a consequence of disputes over their lands against business corporations. The article will finish with some thoughts on its overall aim.

II. CASE LAW BACKGROUND AND REGULATORY FRAMEWORK

In the course of recent years, the central issue that has reached regional courts from around the globe is that of the existence or extent of indigenous peoples' rights over lands and natural resources, which are largely thought of as critical to the physical and cultural survival of these peoples as distinguished groups.¹¹ In this regard, the jurisprudence of the Inter-American Human Rights System¹² has contributed to the

⁹ See generally Amnesty International, *Report 2017/18: The State of the World's Human Rights* (London: Amnesty International, 2018). See also The International Center for Transitional Justice, 'Holding a Mirror to Society: Acknowledgment and the Struggle for Indigenous Peoples Rights' (8 August 2018), https://www.ictj.org/news/holding-mirror-society-acknowledgment-and-struggle-indigenous-peoples-rights?utm_source=International+Center+for+Transitional+Justice+Newsletter&utm_campaign=6937d4fb50-World_Report_June_2018_COPY_01&utm_medium=email&utm_term=0_2d90950d4d-6937d4fb50-246021761 (accessed 23 August 2018); Cultural Survival, 'Seven Human Rights Defenders in Guatemala Killed in the Last Month' (13 June 2018), <https://www.culturalsurvival.org/news/seven-human-rights-defenders-guatemala-killed-last-month> (accessed 17 August 2018).

¹⁰ Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011). See generally FJ Zamora Cabot, Lukas Heckendorn Urscheler and Stéphanie De Dycker (eds), *Implementing the U.N. Guiding Principles on Business and Human Rights: Private International Law Perspectives* (Zurich: Schulthess, 2017); Nadia Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap* (New York: Routledge, 2017).

¹¹ S James Anaya, 'Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend' (2005) 16 *Colorado Journal of International Environmental Law and Policy* 238.

¹² For a description of the Inter-American Human Rights System relating to indigenous peoples, see S James Anaya and Robert A Williams Jr, 'The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the

development of the minimum content of the right to collective property that indigenous peoples have over their territories, on the basis of the provisions contained in the international instruments that protect them, namely the ILO Convention No. 169,¹³ the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),¹⁴ the Draft American Declaration on the Rights of Indigenous Peoples¹⁵ and other relevant sources.¹⁶ All of it has formed a coherent *corpus iuris* that defines the obligations of the Organization of American States (OAS) Member states in relation to the protection of this right.¹⁷

In particular, the Inter-American Commission on Human Rights (hereafter IACHR or the Commission) and the Court have done ‘ground-breaking work’ in the extension of the scope of the right to property by taking into account the group identity. These bodies have understood that this right includes the communal property of indigenous and tribal peoples, whose identity is essentially defined by their intrinsic connection with their traditional lands.¹⁸ In addition, it is widely recognized that both the UNDRIP and the ILO Convention No. 169 have become Inter-American instruments on indigenous

(Footnote continued)

Inter-American Human Rights System’ (2001) 14 *Harvard Human Rights Journal*; Jo M Pasqualucci, ‘The Evolution of International Indigenous Rights in the Inter-American Human Rights System’ (2006) 6 *Human Rights Law Review*; Isabel Madariaga, ‘The Rights of Indigenous Peoples and the Inter-American Human Rights System’ (2005) 22:1 *Arizona Journal of International & Comparative Law*.

¹³ Indigenous and Tribal Peoples ILO Convention No. 169 (adopted on 27 June 1989, entered into force on 5 September 1991). For information regarding the process of adoption, see generally Patrick Macklem, ‘Indigenous Recognition in International Law: Theoretical Observations’ (2008) 30 *Michigan Journal of International Law*; Elina Mereminskaya, ‘El Convenio 169 de la OIT sobre Pueblos Indígenas y Tribales: Derecho Internacional y Experiencias Comparadas’ (2011) 121 *Estudios Públicos*. While having binding force, it has only been ratified by 23 countries and, thus, it cannot be regarded as an instrument of universal scope.

¹⁴ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), A/RES/61/295 (adopted on 13 September 2007). The Declaration was adopted with 144 votes in favour, 11 abstentions and four states against (Australia, Canada, New Zealand and the United States of America). A number of states have changed their stance later on, inclusive of the four which voted against but have now endorsed it. As an annex to a Resolution of the UN General Assembly, it technically has the effects derived from the instrument in which it is incorporated, that is, with non-legally binding nature. However, it contains rights and freedoms set out in binding international human rights treaty law and it reflects a global consensus on indigenous peoples’ rights. Therefore, the UNDRIP is worthy of the utmost respect and forms ‘an integral part of the evolving normative framework of indigenous peoples’ rights’ (Jérémie Gilbert and Cathal Doyle, ‘A New Dawn over the Land: Shedding Light on Collective Ownership and Consent’ in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing, 2011) 326). See generally United Nations Human Rights Office of the High Commissioner, *Indigenous Peoples and the United Nations Human Rights System*, Fact Sheet No. 9, Rev. 2 (New York and Geneva: UN, 2013).

¹⁵ Currently, American Declaration on the Rights of Indigenous Peoples, AG/RES 1851 (XXXII-O/02) (adopted on 15 June 2016).

¹⁶ The Inter-American Court has recognized the relevant contribution of instruments of ‘varied content and juridical effects’, which includes both legally binding international instruments and non-binding instruments such as declarations and recommendations. In this respect, see generally Mauro Barelli, ‘The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples’ (2009) 58 *International and Comparative Law Quarterly*; Megan Davis, ‘To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On’ (2012) 3 *Australian International Law Journal*; Emmanuel Voyiakis, ‘Voting in the General Assembly as Evidence of Customary International Law?’ in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing, 2011).

¹⁷ Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.LJ/II, Doc. 56/09, 30 December 2009.

¹⁸ Erika de Wet, ‘The Collective Right to Indigenous Property in the Jurisprudence of Regional Human Rights Bodies’ (2015) 40 *South African Yearbook of International Law* 3.

peoples' rights due to the efforts made by the Court in its judgements.¹⁹ The same applies to the American Convention on Human Rights (ACHR),²⁰ which contains no provisions regarding indigenous peoples.²¹ Despite this fact, since 2001, the IACtHR has been applying these instruments to indigenous peoples' rights cases in light of the general rules of interpretation established in Article 31 of the Vienna Convention on the Law of Treaties²² and in Article 29.b) of the American Convention.²³

It is hardly surprising that today land rights are still the main claim of first peoples,²⁴ as interest in natural resources exploration and exploitation on lands traditionally occupied by them gradually increases. It is in this context that several conflicts between governments and transnational corporations, on the one hand, and indigenous communities, on the other, are arising.²⁵ In this respect, it should be underlined that, even though the Court has only once made explicit reference to the UNGPs in its case law on indigenous peoples' rights,²⁶ the Inter-American System of Human Rights is not unfamiliar with the business and human rights discourse. Rather, it is concerned about promoting the implementation of the UNGPs and, following a mandate established by the OAS General Assembly, it has started to develop a study on inter-American standards on business and human rights based on an analysis of conventions, case law and reports set out by the Inter-American System.²⁷

As regards the property rights provided to indigenous peoples under the American Convention, the Court was called upon to rule on this matter for the first time in

¹⁹ Bartolomé Clavero, 'El Difícil Reto de la Declaración Americana sobre Derechos de los Pueblos Indígenas' (15 July 2016), <https://www.servindi.org/14/07/2016/el-difícil-reto-de-la-declaracion-americana-sobre-derechos-de-los-pueblos-indigenas> (accessed 16 January 2018). Also, see generally Rosmerlin Estupiñán Silva and Juana María Ibáñez Rivas, 'La Jurisprudencia de la Corte Interamericana de Derechos Humanos en Materia de Pueblos Indígenas y Tribales' in Jane Felipe Beltrão et al (coords), *Derechos Humanos de los Grupos Vulnerables* (Barcelona: Red de Derechos Humanos y Educación Superior, 2014); Luis Rodríguez-Pinero, 'The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing, 2011); Valerio de Oliveira Mazzuoli and Dilton Ribeiro, 'Indigenous Rights before the Inter-American Court of Human Rights: A Call for a *Pro Individual* Interpretation' (2015) 1:4 *Revista Jurídica Lusó-Brasileira*; International Labour Organization, *Application of Convention No. 169 by Domestic and International Courts in Latin America* (Geneva: ILO, 2009).

²⁰ American Convention on Human Rights 'Pact of San José, Costa Rica', UN Doc 1144 UNTS 123 (adopted on 22 November 1969, entered into force on 18 July 1978).

²¹ Clavero, note 19.

²² Article 31 of the Vienna Convention on the Law of Treaties, UN Doc 1155 No. 18232 (adopted on 23 May 1969, entered into force on 27 January 1980): '1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose [...]'.

²³ Article 29.b) ACHR: 'No provision of this Convention shall be interpreted as: [...] b. restricting the enjoyment or exercise of any 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'.

²⁴ Rodolfo Stavenhagen, 'Pueblos Indígenas: Retos después de la Batalla' in Felipe Gómez Isa and Mikel Berraondo (eds), *Los Derechos Indígenas tras la Declaración: El Desafío de la Implementación* (Bilbao: Universidad de Deusto, 2013) 16. Also, see generally Marco Aparicio Wilhelmi (ed), *Los Derechos de los Pueblos Indígenas a los Recursos Naturales y al Territorio: Conflictos y Desafíos en América Latina* (Barcelona: Icaria, 2011).

²⁵ Felipe Gómez Isa, 'El Derecho de los Pueblos Indígenas sobre sus Tierras y Recursos Naturales: Conflicto Social y Ambiental a la Luz del Caso Awas Tingni' (2012) 5:7 *Conflicto Social* 88.

²⁶ The Court specifically referred to the UNGPs when ruling on the affectation of indigenous peoples' rights by mining activities in the *Case of the Kaliña and Lokono Peoples v Suriname*, Inter-American Court of Human Rights, Judgement of 25 November 2015, Ser C, 309, para 224.

²⁷ OAS General Assembly, 'Promotion and Protection of Human Rights', AG/RES 2887 (XLVI-O/16) (14 June 2016). Available at: http://www.oas.org/en/sla/dil/docs/AG-RES_2887_XLVI-O-16.pdf (accessed on 10 September 2018).

2001.²⁸ In its landmark decision on the case of the *Mayagna (Sumo) Awas Tingni Community v Nicaragua*,²⁹ the Court held that the international human right to property, especially as affirmed in the American Convention, embraces the communal right of indigenous peoples to the protection of their customary land and natural resources tenure. The IACtHR also held that Nicaragua had violated the property rights of the community by granting a foreign company a concession to log within its ancestral lands and by failing to provide satisfactory recognition and protection of its customary tenure.³⁰

With this ‘revolutionary approach’³¹ to the interpretation of the right to property enshrined in Article 21 of the ACHR,³² this case represents ‘an international legal precedent with implications for indigenous peoples throughout the world’.³³ The decision marks a historic breakthrough in the recognition of this right of indigenous peoples and is based on the fact that indigenous peoples, by their very existence, have the

²⁸ Claudio Grossman. ‘Awas Tingni v. Nicaragua: A Landmark Case for the Inter-American System’ (2001) 8:3 *Human Rights Brief*. See also Jonathan P Vuotto, ‘Awas Tingni v Nicaragua: International Precedent for Indigenous Land Rights?’ (2004) 22 *Boston University International Law Journal*; María Luisa Acosta, *El Derecho de los Pueblos Indígenas al Aprovechamiento Sostenible de sus Bosques: El Caso de la Comunidad Mayangna (Sumo) de Awas Tingni*, 1st edn (Managua: Editarte, 2004).

²⁹ *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights, Judgement of 31 August 2001, Ser C, 79.

³⁰ S James Anaya and Claudio Grossman, ‘The Case of Awas Tingni v Nicaragua: A New Step in the International Law of Indigenous Peoples’ (2002) 19:1 *Arizona Journal of International & Comparative Law* 2.

³¹ Leonardo J Alvarado, ‘Prospects and Challenges in the Implementation of Indigenous Peoples’ Human Rights in International Law: Lessons from the Case of Awas Tingni v Nicaragua’ (2007) 24:3 *Arizona Journal of International & Comparative Law*. As regards the implementation of this decision (or lack thereof), see also Felipe Gómez Isa, ‘The Decision by the Inter-American Court of Human Rights on the Awas Tingni v Nicaragua Case (2001): the Implementation Gap’ (2017) 8 *The Age of Human Rights Journal* 69–91.

³² Article 21 ACHR: ‘1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society; 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law [...]’.

³³ Anaya and Grossman, note 30, 1. See also Robert T Coulter, ‘The Awas Tingni Case: The Inter-American Court of Human Rights and Indigenous Peoples’ Collective Right to their Lands and Natural Resources’, paper presented at the Meeting of the Working Group on the Fifth Section of the Draft American Declaration on the Rights of Indigenous Peoples with special emphasis on ‘Traditional Forms of Ownership and Cultural Survival. Right to Land and Territories’, held in Washington, DC on 7–8 November 2002 (OEA/Ser.K/XVI GT/DADIN/doc.97/02); Willem Van Genugten and Camilo Pérez-Bustillo, ‘The Emerging International Architecture of Indigenous Rights: The Interaction between Global, Regional, and National Dimensions’ (2004) 11 *International Journal on Minority and Group Rights* 400; Rodríguez-Pinero, note 19, 461; Alvarado, note 31, 613. The influence of this decision has been manifested not only in subsequent cases brought before the Inter-American Court (for instance, see *Case of the Kuna Indigenous People of Madungandi and the Embera Indigenous Peoples of Bayano and their Members v Panama*, Inter-American Court of Human Rights, Judgement of 14 October 2014, Ser C, 284; *Case of the Xucuru Indigenous People v Brasil*, Inter-American Court of Human Rights, Judgement of 5 February 2018, Ser C, 346) but also at the national level in the Americas, where the case of the *Awas Tingni* has contributed to the adoption of international law standards on indigenous peoples’ rights by domestic courts, most prominently in Belize (e.g., see *Case of the Maya Village of Santa Cruz v Attorney General of Belize*, Decision of the Supreme Court of Belize, A.D. 2007, Consolidated Claims Nos. 171 and 172 of 2007). As for Nicaragua, the *Awas Tingni* case gave rise to the enactment of an indigenous demarcation law (Law No. 445 of Communal Property Regime of the Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Rivers Bocay, Coco, Indio and Maíz) by the Nicaraguan National Assembly in 2003, as well as to an electoral Commitment Agreement between the Sandinista National Liberation Front (Frente Sandinista de Liberación Nacional, FLSN) and YATAMA (the indigenous political party that represents the indigenous peoples of the Atlantic Coast) that was aimed, *inter alia*, at supporting the process of demarcating and titling indigenous territories based on the aforementioned Law No. 445 and the criteria of the IACtHR included in the *Awas Tingni* case. After the victory of this coalition and its coming to power in January 2007, Nicaragua’s political scenario regarding the demarcation and titling process of indigenous territories on the Atlantic Coast received a significant boost (see Gómez Isa, note 31, 80).

right to live freely in their territories.³⁴ Accordingly, they do not have to tolerate illegitimate incursions of private corporations which, with the support of governments,³⁵ aspire to expel them from their own lands.

Equally important is the Court's development of the right to free, prior and informed consent (FPIC), which started to be delineated in the *Case of the Saramaka People v Suriname*.³⁶ This decision represents an example of 'practical operationalization' of this right that does not contradict the right to consultation laid down in Article 6 of the ILO Convention No. 169.³⁷ This is due to the fact that the Court distinguishes between consultation and consent and states that the latter is additional to the former and needs to be obtained in large development or investment projects that may have a profound impact on the property rights of a specific indigenous or tribal people.³⁸ A few years later, the *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*³⁹ made a significant contribution to the Court's doctrine on FPIC. It concluded that the obligation to consult is not only a conventional standard, but also a general principle of international law,⁴⁰ which implies that governments have the duty to carry out consultations, even if there is no international or national legal norm that provides for this obligation.⁴¹

The justification used by the Court in these critical decisions has been reproduced in numerous subsequent cases, some of which will be under examination in the following section as long as they concern endangerments of the lives and security of members of the communities involved as a result of land grabbing conflicts on their traditional territories.

III. CASE STUDIES

A. General Aspects

The infringement of indigenous property rights, as well as the consequences arising from the lack of access to their ancestral territories, may result in the violation of a series of

³⁴ *Case of Awas Tingni v Nicaragua*, para 149.

³⁵ This governmental aid can take the form of an active support, by providing enterprises with public security forces which are added to their own private security or by granting them fraudulent licenses with full legal effects, but it can also imply a passive support when public authorities overlook the incursions and abuses carried out by such enterprises and their personnel, which represents a way to ally with them at the cost of indigenous peoples' rights.

³⁶ *Case of the Saramaka People v Suriname*, Inter-American Court of Human Rights, Judgement of 28 November 2007, Ser C, 172.

³⁷ Luis Rodríguez-Pinero, note 19, 472, 473. See also Oswaldo Ruiz Chiriboga and Gina Donoso, 'Pueblos Indígenas y la Corte Interamericana: Fondo y Reparaciones' in Christian Steiner and Patricia Uribe (eds), *Comentario a la Convención Americana sobre Derechos Humanos* (Bolivia: Konrad-Adenauer-Stiftung, 2014).

³⁸ *Case of the Saramaka People v Suriname*, para 137.

³⁹ *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, Inter-American Court of Human Rights, Judgement of 27 June 2012, Ser C, 245.

⁴⁰ *Ibid*, para 164. See also Marta Bordignon, 'The State Duty to Consult and the Right to Consent of Indigenous Peoples: The Sarayaku Case in Ecuador' in Carmen Márquez Carrasco (ed), *Spain and the Implementation of the United Nations Guiding Principles on Business and Human Rights: Challenges and Opportunities* (Barcelona: Huygens, 2014).

⁴¹ Mario Melo, 'Indigenous Peoples Rights in the Jurisprudence of the Inter-American Court of Human Rights. Advances Achieved in the Case of the Kichwa Community of Sarayaku v Ecuador' (2014) VIII *Anuario Facultad de Derecho – Universidad de Alcalá*, 280. In this judgement, the Court constantly refers to the ILO Convention No. 169 (Arts 6 and 15) and the UNDRIP (Arts 19 and 32.2) as key points of reference in the normative development of the indigenous right to FPIC.

rights, among which the right to judicial protection and the rights to life and personal integrity are noteworthy.⁴² The right to life, as provided in Article 4 ACHR,⁴³ is of particular interest with regard to the personal and communal security of members of indigenous communities on account of their opposition to illegal sales of traditional lands. The Court has opted for a wide interpretation of this right that encompasses both the prohibition of the arbitrary deprivation of life and the obligation to ensure the conditions required for the attainment of a decent life.⁴⁴ This article will mainly focus on the first aspect of this right in cases in which community members have – or could have – lost their lives as a direct consequence of the disputes over their lands.

The rationale behind the selection of these specific cases is that all of them revolve around land conflicts in which the interrelation between business activities and their impact on indigenous peoples' rights and security is clearly evident. What is more, a fourth shared characteristic between these cases can be distinguished, as all of them have been brought before the IACtHR against states that allegedly failed to take the appropriate security measures that were expected in accordance with their duty to protect against human rights abuses within their territories⁴⁵ and that could reasonably have prevented such abuses. As a result, this section will look into the grounds on which the Court recognizes government accountability in this type of situation, most notably as concerns first peoples' right to life, in order to draw conclusions on whether the Court's interpretation of applicable international human rights instruments is efficient in safeguarding the actual security of these peoples when both states and corporations overlook their fundamental human rights.

B. *Kichwa Indigenous People of Sarayaku v Ecuador*

1. *Established Facts*

The Kichwa nation of the Ecuadorian Amazon consists of two peoples, the Napo-Kichwa People and the Canelo-Kichwa People, who share the same linguistic and cultural traditions. The Kichwa People of Sarayaku, which belongs to the latter, inhabits an area of tropical forest in the Amazon region of Ecuador along the banks of the Bobonaza River,⁴⁶ one of the most biodiverse areas of the entire planet. The intensification of oil exploration activities in Ecuador dates from the 1960s, when

⁴² Iglesias-Vázquez, note 8, 289.

⁴³ Article 4 ACHR: '1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life [...]. The right to life is also provided for in Article 7 UNDRIP ('1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person').

⁴⁴ Sergio G Ramírez, 'Los Indígenas en la Jurisprudencia de la Corte Interamericana de Derechos Humanos', paper presented at the conference 'Taller de Estrategias y Propuestas para la Defensa y Promoción de los Derechos de los Pueblos Indígenas', organized by the Mexican Academy of Human Rights on 13 September 2005.

⁴⁵ Guiding Principle 1, UNGPs, note 10. The security measures a government can take to prevent human rights abuses in its territory range from ensuring public security forces do not ally with businesses and actively control conflictual situations by assisting potential victims to establishing a strict licensing system that takes notice of international standards on business and human rights and that has to be complied with by private security contractors working for enterprises.

⁴⁶ Consejo de Desarrollo de Nacionalidades y Pueblos del Ecuador (CODENPE), 'The Kichwa Nation of the Amazon', http://www.puerta-yasuni.com/index.php?option=com_content&view=article&id=5&Itemid=8 (accessed 29 January 2018). See generally Gina Chávez, Rommel Lara and María Moreno, *Sarayaku: El Pueblo del Cenit, Identidad y Construcción Étnica. Informe Antropológico-jurídico sobre los Impactos Sociales y Culturales de la*

the first reserves of crude oil were detected. Even though the state had adjudicated an area of land in favour of the communities of the Bobonaza River under certain conditions, four years after the adjudication, the 'State Petroleum Company of Ecuador' and the consortium constituted by 'Compañía General de Combustibles, S. A.' (CGC) and 'Petrolera Argentina San Jorge, S.A.' signed a participation contract to execute hydrocarbon exploration and exploitation of crude oil in Block No. 23 in the Amazon region, which consisted of an area of 200,000 hectares inhabited by several indigenous groups.⁴⁷ Prior to the seismic prospecting activities and incursions into the Sarayaku's territory, the CGC oil company had allegedly tried, on numerous occasions, to negotiate their access to the lands and also to come to terms with the Community through a wide range of actions, such as offering money and personal benefits to individuals as well as to the groups.⁴⁸ As a consequence, quite a few neighbouring communities decided to sign agreements with the CGC and support its activity, whereas the Sarayaku firmly chose to reject the offer on grounds of their longstanding, deeply spiritual ties with their traditional territories. Given the Sarayaku's refusal, the new strategy of the oil company consisted in dividing the communities, manipulating their leaders and defaming them,⁴⁹ all of which led to conflicting situations among their own organizations.

Particularly remarkable are a series of events that happened in the following years and that are considered to have posed a threat to the security of the Sarayaku. Once the seismic prospecting phase started within its territory, there was an increase in the hostilities between members of that Community, the CGC workers and other indigenous groups inside Block No. 23.⁵⁰ The presence of the Armed Forces on the territory did not foster a climate of trust and mutual respect either.⁵¹ Between October 2002 and February 2003, CGC buried a total amount of 1433 kilograms of 'pentolite' explosives in the territories that embraced Block No. 23, which forced the Sarayaku to declare a state of emergency due to the evident risk for their lives it involved.⁵² Additionally, a number of alleged threats and harassment were reported to the detriment of leaders, community members and a Sarayaku lawyer.⁵³ One of the most conflictual incidents between

(*F*'note continued)

Presencia de la Compañía CGC en Sarayaku (Quito: Facultad Latinoamericana de Ciencias Sociales, Centro de Derechos Económicos y Sociales, 2005).

⁴⁷ *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, paras 58–65.

⁴⁸ Application filed by the Inter-American Commission on Human Rights with the Inter-American Court of Human Rights against the Republic of Ecuador, Case 12.465 '*Kichwa People of Sarayaku and its Members*' (26 April 2010), para 70. See also *Case of Sarayaku v Ecuador*, para 73.

⁴⁹ *Case of Sarayaku v Ecuador*, para 74, 75.

⁵⁰ Application filed by the IACHR with the IACtHR against the Republic of Ecuador, para 79, 81.

⁵¹ A Cooperation Agreement on Military Security between the Ministry of National Defence and the oil companies operating in Ecuador was signed in Quito on 30 July 2001, which showed that the state supported the oil exploration activities. Members of the Sarayaku Community pointed out that the purpose of their presence was to ensure the continuity of CGC work and that they represented CGC's public security. See *Case of Sarayaku v Ecuador*, para 78, 190–193. Pursuant to the Agreement, the state ordered a military presence in the Sarayaku territory and its neighbouring communities and, accordingly, four military bases were set up. See Application filed by the IACHR with the IACtHR against the Republic of Ecuador, para 80.

⁵² *Case of Sarayaku v Ecuador*, para 101. At the time of the judgement, the explosives had not been removed yet. See also Application filed by the IACHR with the IACtHR against the Republic of Ecuador, para 79.

⁵³ Complaint filed on 19 April 2004 for threats received via telephone and email; Complaint filed on 27 February 2003 by José Gualinga for an alleged false report on his death in a road accident; Complaint filed on 1 March 2004 by Marlon

adjacent communities took place on 4 December 2003, when approximately 120 Sarayaku, on their way to a ‘march for peace and life’ that was to be held in Puyo because of the danger of militarization in Block No. 23, were attacked with machetes, sticks, stones and firearms by members of the Canelos Peoples, in the presence of police officers who were simply looking on and whose number was clearly insufficient despite the fact that the government was aware of what was likely to happen in that encounter.⁵⁴

Although the list of established facts explained above could be widely extended, these are believed to be the most relevant facts that confirm the situation of constant pressure, threats and harassment that the Sarayaku had to endure as a consequence of the business interests over their ancestral lands.

2. Analysis of the Merits and Considerations

In spite of the state’s acknowledgement of international responsibility, the Sarayaku Community decided to wait for the judgement of the IACtHR in the expectation that it would bring about justice.⁵⁵ The lack of a valid and institutionalized process of consultation and participation of the Sarayaku People on the execution of a project that would have a direct impact on their territory is the central issue in this case, which, apart from constituting a human rights violation itself, also provokes the violation of other related rights, amidst which is the right to communal property and to cultural identity.⁵⁶ In this judgement, the Court examines, among other issues, whether the conduct of the state put not only community life at risk – typically analysed as a violation of the right to cultural identity –, but also the right to life and personal integrity of its members.

As far as the right to life is concerned, the Commission argued that Ecuador had failed to fulfil its obligation to guarantee the right to property by consenting to the burial of explosives in the Sarayaku territory, which in turn created a situation of permanent danger that threatened the life and survival of community members.⁵⁷ The representatives added that the state should be held responsible for placing the

(*F*note continued)

Santi over an alleged assault. Furthermore, José Serrano Salgado, then the lawyer and legal representative of the Sarayaku, reported on 23 April 2004 that he had been attacked and assaulted by three armed and hooded men who had warned him to stop defending the Sarayaku. See *Case of Sarayaku v Ecuador*, para 107, note 125.

⁵⁴ Prior to the attack, the Sarayaku had sent the Canelos People an invitation to join the march, in response to which the Canelos issued a press release declaring that they would not take part in the march nor would they allow freedom of movement within their territory for those who opposed the oil matter. As a result of the assault, up to twenty members of the Community got injured. See *Case of Sarayaku v Ecuador*, paras 107–113. See also Application filed by the IACHR with the IACtHR against the Republic of Ecuador, para 86.

⁵⁵ After nine years of denial of the facts of the case, Dr Alexis Mera (former Secretary for Legal Affairs of the Presidency of the Republic of Ecuador) acknowledged, during the Court’s visit to the Sarayaku territory, the international responsibility of the state for the events that occurred in 2003, namely the invasive acts, the actions of the Armed Forces and the acts of destruction of natural resources. Even though the Sarayaku appreciated this shift, they decided to wait for the judgement of the IACtHR and stated that they would only engage in a conversation with the state once the Court’s decision had been pronounced. See *Case of Sarayaku v Ecuador*, paras 23–28. See also Mario Melo, ‘El Caso Sarayaku Pone a Prueba la Democracia y el Estado de Derechos en el Ecuador’ (13 July 2012), <https://mariomelo.wordpress.com/2012/07/13/el-caso-sarayaku-pone-a-prueba-la-democracia-y-el-estado-de-derechos-en-el-ecuador/> (accessed 21 August 2018).

⁵⁶ *Ibid*, para 232. See also Mario Melo, note 41; Madariaga, note 12, 59–60. For detailed information regarding the right to free, prior and informed consent, see Amelia Alva Arévalo, *El Derecho a la Consulta Previa de los Pueblos Indígenas en Derecho Internacional* (Bilbao: Universidad de Deusto, 2014).

⁵⁷ In addition, the detonation of explosives had demolished forests, water sources and sacred sites and had endangered the Sarayaku’s right to transmit its cultural heritage. See *Case of Sarayaku v Ecuador*, para 233.

Sarayaku People at a serious risk because of 'the oil company's unconsulted incursion into their territory' and, in short, for allowing third parties to 'systematically violate' their human rights.⁵⁸ Likewise, tense relations between the Sarayaku and neighbouring communities, and within the community itself, had resulted in a disruption of the security, tranquillity and lifestyle of the Community.⁵⁹

In this respect, it should be noted that the Court has constantly emphasized that the right to life is fundamental in the American Convention, as the realization of the other rights depends on its safeguard.⁶⁰ That is why no restrictive approaches are admissible. Article 1.1 ACHR provides for the obligation of governments to respect and guarantee the human rights recognized therein. As regards the right to life, not only do these obligations imply that the state must respect them (negative obligation), but also require that the state adopt all appropriate measures to guarantee them (positive obligation). Taking into consideration that a state cannot be held accountable for every situation in which the right to life is at risk, and bearing in mind the difficulties in planning and executing public policies, these positive obligations cannot comprise the imposition of an impossible or disproportionate burden upon the authorities. Rather, for this positive obligation to arise, there must be evidence that, when the events took place, state authorities were or should have been aware of the existence of a situation 'that posed an immediate and certain risk to the life of an individual or of a group of individuals, and that the necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such risk'.⁶¹

Moreover, the IACtHR asserted that, in certain cases and under exceptional circumstances, it has been permitted to examine the violation of Article 4 ACHR with relation to persons who did not die but were instead placed in great peril.⁶² In this particular case, the presence of explosives represented a significant concern to the Sarayaku People and the detonation of these materials was deemed a 'real and potential danger' according to expert witnesses.⁶³ Although the Court ordered the state to adopt provisional measures and remove the explosive materials in June 2005, it had only

⁵⁸ Inter-American Commission on Human Rights, '*The Kichwa Peoples of the Sarayaku Community and its Members v Ecuador*', Admissibility Decision, Report No. 62/04, Petition 167/03 (13 October 2004), para 2.

⁵⁹ *Case of Sarayaku v Ecuador*, para 234.

⁶⁰ *Case of Pueblo Bello Massacre v Colombia*, Inter-American Court of Human Rights, Judgement of 31 January 2006, Ser C, 140, para 120; *Case of 19 Merchants v Colombia*, Inter-American Court of Human Rights, Judgement of 5 July 2004, Ser C, 109, para 153; *Case of Myrna Mack Chang v Guatemala*, Inter-American Court of Human Rights, Judgement of 25 November 2003, Ser C, 101, para 152; *Case of Juan Humberto Sánchez v Honduras*, Inter-American Court of Human Rights, Judgement of 7 June 2003, Ser C, 99, para 110; *Case of Niños de la Calle v Guatemala*, Inter-American Court of Human Rights, Judgement of 19 November 1999, Ser C, 63, para 144.

⁶¹ *Case of Pueblo Bello Massacre v Colombia*, para 123; *Case of the Savhoyamaxa Indigenous Community v Paraguay*, Inter-American Court of Human Rights, Judgement of 29 March 2006, Ser C, 146, para 155; *Case of Sarayaku v Ecuador*, para 245.

⁶² *Case of the 'Juvenile Reeducation Institute' v Paraguay*, Inter-American Court of Human Rights, Judgement of 2 September 2004, Ser C, 112, para 176; *Case of the Yakye Axa Indigenous Community v Paraguay*, Inter-American Court of Human Rights, Judgement of 17 June 2005, Ser C, 125, paras 160–178; *Case of the Massacre of La Rochela v Colombia*, Inter-American Court of Human Rights, Judgement of 11 May 2007, Ser C, 163, paras 123–128.

⁶³ According to Professor Shashi Kanth, 'the leaving behind of explosives, with visible detonation cables, poses a very serious situation because they can be triggered deliberately or accidentally' (Affidavit of 25 May 2011). Additionally, the expert witness William E Powers considered that the explosives abandoned in the Sarayaku territory constituted a 'latent danger' to them (Affidavit of 29 June 2011). See *Case of Sarayaku v Ecuador*, para 247, note 311.

withdrawn slightly more than ten per cent of the 150 kilograms found on the surface by the date of the judgement.⁶⁴ Therefore, this fact constituted a manifest and proven risk to the life and physical integrity of the Sarayaku Community and, consequently, the Court concluded that the state was responsible for ‘having gravely put at risk’ the rights to life and physical integrity of this indigenous community, recognized in Articles 4 and 5⁶⁵ of the American Convention, respectively, in relation to the obligation to guarantee the right to collective property under Article 21 ACHR.⁶⁶

As for the right to personal integrity in relation to the assault that took place on 4 December 2003, the Commission claimed that the state had failed to provide community members with adequate protection owing to the clear insufficiency of the contingent of police officers dispatched.⁶⁷ In addition, the representatives claimed that the government was responsible for failing to provide protection to members of the Community who had constantly been the object of threatening acts and harassment.⁶⁸ They also argued that the situation had created ‘distress, anxiety and fear’ among the Sarayaku People and had had a serious influence on their physical and psychological well-being.⁶⁹ Nonetheless, the Court considered that the state could not take responsibility for the violation of Articles 5 and 7⁷⁰ of the Convention in this regard, as the evidence produced was not sufficient.⁷¹

This judgement seems to merit a partially positive assessment in relation to the scope of this article. On the one hand, the analysis of the violations of the rights to life and personal integrity relating to the seismic prospecting must be regarded as adequate, inasmuch as the Court rightly acknowledges the manifest risk for the lives of the members of the Community that the presence of explosives involved, regardless of the fact that nobody eventually perished as a consequence of it. Moreover, the series of unlawful activities carried out by the company, along with the leaving behind of high explosives on indigenous territory, shows gross contempt not only for the collective dignity of the Sarayaku as a people, but also for the human dignity of its members. On the other hand, referring to the alleged threats and harassment which lacked sufficient evidence, it must be borne in mind that gathering convenient evidence may turn out to be an extremely difficult task given the context of generalized conflict and pressures at stake. Most of the acts of violence and threats suffered by community members were

⁶⁴ The latest official update dates from 22 June 2016, when the IACtHR issued a Resolution on oversight of compliance with the judgement declaring which reparations had been made and which had not, being one of the latter the state obligation to neutralize, deactivate and, if applicable, completely remove the pentonite in the territory. Available at: http://www.corteidh.or.cr/docs/supervisiones/sarayaku_22_06_16.pdf and <http://www.corteidh.or.cr/docs/supervisiones/SCS/ecuador/sarayaku/sarayakup.pdf> (accessed 7 November 2018).

⁶⁵ Article 5 ACHR: ‘Every person has the right to have his physical, mental, and moral integrity respected [...]’.

⁶⁶ *Case of Sarayaku v Ecuador*, paras 246–249.

⁶⁷ The Canelos Community had announced previously that they would not let the Sarayaku pass through its territory, which made it evident that a contingent of only ten police officers could not be capable of preventing acts of violence. See *Case of Sarayaku v Ecuador*, para 236, 237.

⁶⁸ These sorts of acts continue unabated even today. On 5 January 2018, Patricia Gualinga, a human rights Sarayaku defender and indigenous leader who played a key role in this process, was reportedly attacked at her own home in Puyo by a stranger who threw stones while shouting death threats. See Amnesty International, ‘Acción Urgente: Ataque contra Defensora Indígena’ AMR 28/7714/2018 (11 January 2018).

⁶⁹ *Case of Sarayaku v Ecuador*, para 241, 242.

⁷⁰ Article 7 ACHR: ‘Every person has the right to personal liberty and security [...]’.

⁷¹ *Case of Sarayaku v Ecuador*, para 254.

reported to the pertinent state authorities, who did little to properly investigate them. However, the Court considered that the state did not know they were facing a real, specific and immediate risk when the events took place and, consequently, opted for taking responsibility away from Ecuador. As to the incident with the Canelos People, the Court followed the same path and, although it recognized that the state could have adopted different measures,⁷² ruled that it had not been provided with documents that indicated state authorities could have determined the magnitude of the events beforehand.

According to the above, the preliminary conclusion to which the reasoning of the Court in this judgement leads is that it will not impute state responsibility unless there is no shadow of a doubt that the alleged human rights violations did occur. To this effect, the Court has to be provided with *sufficient* evidence by the indigenous communities affected, that is, by the victims. By requiring this, such reasoning fails to take account of the fact that the companies involved usually find themselves in a more advantageous situation due to all the means at their disposal, which allows them to prevent these groups from collecting suitable evidence and, thus, harming them in any form. Consequently, it needs to be examined whether this is an isolated case or whether this positioning is recurring throughout the Court's case law on this matter.

C. *Garífuna Communities v Honduras*

Honduras is a multi-ethnic and pluricultural state that is composed of *mestizos*, indigenous people and African descendants.⁷³ According to the census conducted by the National Institute of Statistics in 2013,⁷⁴ 43,111 people described themselves as Garífuna, whereas other sources estimate a much larger population.⁷⁵ The Garífuna People nowadays consists of approximately forty communities spread all along the Caribbean coast. Disputes over land go back to the early and mid-twentieth century, when the communities began to take steps in order to gain recognition of their rights over the lands they had traditionally used and occupied. A number of international organizations have expressed concern over the violence, persecution and harassment the Garífuna People has continually been subjected to for defending its lands.⁷⁶ So has the IACtHR, which, while monitoring the situation of human rights defenders in Honduras,

⁷² Ibid, para 251.

⁷³ *Case of Garífuna Community of Triunfo de la Cruz v Honduras*, Inter-American Court of Human Rights, Judgement of 8 October 2015, Ser C, 305, para 46; *Case of Garífuna Community of Punta Piedra v Honduras*, Inter-American Court of Human Rights, Judgement of 8 October 2015, Ser C, 304, para 82.

⁷⁴ National Institute of Statistics, '2013 Census of Population and Housing' <http://170.238.108.227/binhnd/RpWebEngine.exe/Portal?BASE=CPVHND2013NAC&lang=ESP> (accessed 23 January 2018).

⁷⁵ The World Bank Inspection Panel, 'Honduras: Land Administration Project (IDA Credit 3858-HO)', Investigation Report No. 39933-HN (12 June 2007) 16. According to the Project Appraisal Document of the Bank-financed, Honduras: Judicial Branch Modernization Project (IDA Credit No. 4098-HO approved by the Board of Directors on 7 July 2005), the Garífuna population is estimated between 100,000 and 190,000 people.

⁷⁶ See Amnesty International, 'Honduras: Justice Fails Indigenous People' AMR 37/10/99/s (September 1999), which shows its concerns about abuses against indigenous peoples in Honduras committed by individuals or groups allegedly linked to local authorities and the military (including references to Garífuna communities); Report of the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, 'Mission to Honduras' E/CN.4/2005/18/Add.5 (22 March 2005), para 19, which reveals that, due to their claims, Garífuna leaders are persecuted and even killed by politicians and the military, or by enterprises that have an interest in taking possession of their lands.

has received disturbing information about attacks, threats and harassment against social leaders and human rights defenders.⁷⁷

1. *Garífuna Community of Triunfo de la Cruz v Honduras*

1.1 *Proven Facts*

Following the commencement of the process of recognizing and titling the territory of the Community, there has been a variety of problematic issues around it. The controversy arose in 1969, when a company called ‘MACERICA, S.L.’ acquired a 50-hectare lot of land in the ancestral territory of the Community. The situation got much worse after 1990, when the authorities started granting title deeds of land traditionally possessed by the Community to tourism conglomerates and individuals. Between 1993 and 1995, the Municipality of Tela sold off around 44 hectares of ancestral lands of the Community to the company ‘Inversiones y Desarrollo El Triunfo, S.A.’ with a view to using that land to execute a tourism project called ‘Club Marbella’.⁷⁸ It is also relevant to note the creation of the ‘Punta Izopo National Park’ protected area on part of the territory historically occupied by the Community, which was an area ‘with a primarily tourism-oriented approach’.⁷⁹

In spite of the titles eventually granted by the state to the Triunfo de la Cruz Community in recognition of the ancestral possession of its territory, peaceful enjoyment has been unattainable partly because of the lack of effective protection by the government. What is more, Community authorities and leaders have reportedly been the target of countless threats, persecution and harassment that have even ended in their own deaths.⁸⁰ In particular, four members of the Community were murdered within the context underlying this case.⁸¹ Accordingly, the Court analyses in this judgement whether the state has violated their right to life under Article 4 ACHR.

1.2 *Analysis of the Merits and Considerations*

The IACtHR has continually pointed out that, as part of the above-mentioned guarantee obligations, the state has a legal duty to reasonably prevent violations of human rights, to seriously investigate them with the means available in order to identify those

⁷⁷ *Case of López Álvarez v Honduras*, Inter-American Court of Human Rights, Judgement of 1 February 2006, Ser C, 141, para 54.3, note 21.

⁷⁸ *Case of Triunfo de la Cruz v Honduras*, paras 58–89.

⁷⁹ See Executive Decree No. PCM-022-2005.

⁸⁰ Inter-American Commission on Human Rights, ‘*Garífuna Community of “Triunfo de la Cruz” and its members v Honduras*’, Report No. 76/12, Case 12.548 (7 November 2012), paras 180–189. Moreover, the Commission deems the arbitrary arrests of Garífuna leaders as a way to intimidate those engaged in activities in defence of their land.

⁸¹ The victims of these murders were Óscar Brega, Jesús Álvarez, Jorge Castillo and Julio Alberto Morales. According to a Memorandum of 9 October 1996 by the Principal Prosecutor addressed to the Office of the Prosecutor for Ethnic Groups, ‘Mr Óscar Brega was driving in his own vehicle toward the paved road when he was intercepted by unknown persons who shot and killed him inside his car’ (IACHR Report No. 76/12, para 181, note 243). With regard to Jesús Álvarez, as Deputy Mayor of the Community, he had previously been the victim of attempted murder due to his determined opposition to the illegal sales of traditional land. On 17 March 1995, he appeared before the Office of the Attorney General and stated that he believed ‘the instigator of the attack was Don Heriberto Díaz [former Mayor of Tela] because he was interested in the lands of Triunfo de la Cruz’. Two years after his statement, on 9 May 1997, unknown persons shot him and he died on 11 May 1997 as a result of that attack (IACHR Report No. 76/12, para 182, 183). As for Jorge Castillo and Julio Alberto Morales, their crimes had still not been investigated by the date of the judgement (IACHR Report No. 76/12, para 184).

responsible, to impose the pertinent sanctions and to assure the victim adequate reparation.⁸² This guarantee obligation extends beyond state agents and persons under its jurisdiction, including the duty to prevent third parties from violating protected legal rights in the private sphere. Nevertheless, a state's duty to adopt measures of prevention and protection are conditioned on the knowledge of a situation of real and immediate risk for a particular individual or group of individuals – or that the government should have known about that situation – and to the reasonable possibilities to prevent or avoid that risk.⁸³

In this specific case, the Court observed that there was no additional information concerning these murders⁸⁴ and, thus, it lacked sufficient evidence to establish whether the state had – or should have – been aware of a situation of real and immediate risk with reference to three of the murders. As for the homicide of the Deputy Mayor of the Community, even though the Court considered that the existence of a situation of real and immediate risk could have been inferred, there was not sufficient evidence that proved this risk during the period until his eventual death.⁸⁵ Consequently, the Court decided not to pronounce on the alleged violations of the right to life of these four members of the Community.⁸⁶ Referring to the right to judicial protection as regards the alleged threats and murders of community members, the Court ruled that the state had violated this right under Articles 8⁸⁷ and 25⁸⁸ ACHR, as it had failed both to carry out a serious and effective investigation of the numerous complaints filed with police and prosecutors by the Community and to initiate *ex officio* the investigation with regard to the deaths of the four Community members,⁸⁹ all of which had prevented the Triunfo de la Cruz Community from being heard in proceedings with due guarantees.

As in the previous case, the Court opts for staying on the sidelines owing to the lack of satisfactory evidence which sufficiently proves that the state knew about a situation of immediate risk with respect to these four members of the Community. Leaving aside the

⁸² *Case of Triunfo de la Cruz v Honduras*, para 208; *Case of Santo Domingo Massacre v Colombia*, Inter-American Court of Human Rights, Judgement of 30 November 2012, Ser C, 259, para 189; *Case of Velásquez Rodríguez v Honduras*, Inter-American Court of Human Rights, Judgement of 29 July 1988, Ser C, 04, para 174.

⁸³ *Case of Triunfo de la Cruz v Honduras*, para 209; *Case of Pueblo Bello Massacre v Colombia*, para 123; *Case of Luna López v Honduras*, Inter-American Court of Human Rights, Judgement of 10 October 2013, Ser C, 269, para 123.

⁸⁴ With regard to the murder of Óscar Brega, there was some information about it in the Memorandum referred to in note 81. With respect to Jorge Castillo and Julio Alberto Morales, there is an undated press release that does not provide information about their murders. However, the representatives' written request alleged that Jorge Castillo had suffered several anonymous threats and an attack the night before he died. *Case of Triunfo de la Cruz v Honduras*, para 210.

⁸⁵ According to the material in the case file, there was a document of 30 January 1995 addressed to the Prosecutor for Ethnic Groups by the Committee for the Defence of the Lands of Triunfo de la Cruz (CODETT) in which the investigation of the attempted murder of Jesús Álvarez was requested. See *Case of Triunfo de la Cruz v Honduras*, para 212.

⁸⁶ *Case of Triunfo de la Cruz v Honduras*, para 211, 214.

⁸⁷ Article 8 ACHR: 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law [...]'.

⁸⁸ Article 25 ACHR: 'Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention [...]'.

⁸⁹ *Case of Triunfo de la Cruz v Honduras*, para 253. According to the IACtHR Resolution on oversight of compliance with the judgement of 1 September 2016, the state had still not fulfilled its obligation to investigate the crimes in a reasonable period of time. Available at: <http://www.corteidh.or.cr/docs/supervisiones/SCS/honduras/gar%C3%ADfunatrinunfo/gar%C3%ADfunatriunfop.pdf> (accessed 7 November 2018).

situation of permanent conflict that the Community was suffering and the possible outcome that could logically derive from it, it can be understood that the government of Honduras was not aware of three of the imminent murders in particular. As noted above, states cannot be held accountable for every situation in which the right to life of their citizens is at risk and, thus, it seems coherent with the Court's doctrine that Honduras was released from liability in this regard. However, the same is not applicable to the homicide of the Deputy Mayor, who reported an attempted murder only two years before his death. What is more, it was believed that this attempted murder was a consequence of his determined opposition to the illegal sales of traditional land and that is why it was communicated to national authorities. Hence, it seems to be more than questionable that the state could not have prevented this from happening if it had taken the appropriate measures of prevention and protection that could have reasonably been expected.

The reasoning followed by the Court in the decisions examined so far raises questions as to the laxity of the standard applied in relation to the governments' position of guarantor as far as the right to life is concerned. Given the situation of conflict resulting from the land disputes and the numerous complaints filed with public authorities, any reasonable person would have noticed the logical consequences that were inexorably bound to happen in such context and would have adopted the necessary prevention measures so as to stop them. Thus, the application by the Court of an objective standard of reasonableness, with regard to the security of the communities involved in their entirety, would have given rise to a more rational judgement.

2. *Garífuna Community of Punta Piedra v Honduras*

2.1 *Proven Facts*

The process of recognition and titling of the territory this Community had historically occupied commenced at the beginning of the last century. Despite the fact that the government had recognized and granted titles by 1999,⁹⁰ the territory has been occupied, since 1993, by third parties known as the settlers of the Miel River, which has provoked a continuous climate of violence and insecurity in the Community that has been evidenced in the form of threats and assaults against the Garífuna of Punta Piedra. Before the Commission, the petitioner⁹¹ claimed that the National Agrarian Institute had granted legal titles to the settlers of the Miel River for plots of land that were then conveyed to an Armed Forces high command who likewise sold them to a palm tree processing company owner, Miguel Facussé,⁹² all of which reflects the business nature of the situation of conflict as a whole. In addition, in 2014, during the development of the

⁹⁰ The National Agrarian Institute granted two property titles to the Garífuna Community of Punta Piedra: the first one on 16 December 1993 (File No. 25239) for a surface area of approximately 800 hectares and the second one on 6 December 1999 (File No. 52147-10775) for a surface area of 1.513 hectares.

⁹¹ This case was brought to trial, and so was the previous case, by the Black Fraternal Organization of Honduras (OFRANEH).

⁹² See the Brief containing Pleadings, Motions and Evidence submitted by the Petitioners on 3 January 2014. Available at: http://www.corteidh.or.cr/docs/casos/comunidad_gar%C3%ADfuna_punta_piedra_hn/esap.pdf (accessed 7 September 2018). See also Inter-American Commission on Human Rights, '*Garífuna Community of "Punta Piedra" and its members v Honduras*', Report No. 30/13, Case 12.761 (21 March 2013), para 11, 12. Miguel Facussé was a Honduran businessman and landowner considered one of the three most powerful men in Honduras. See <http://www.dinant.com/index.php/en/biografia-don-miguel-facusse> (accessed 7 September 2018).

proceeding before the Court, a mining corporation called 'CAXINA, S.A.' was granted a mining concession to log within an area that covered part of the traditional territory of the community that had previously been recognized as such.⁹³

This case was thus instigated by the lack of peaceful possession of the Community's ancestral territory as a result of the invasion instigated by a member of the military and a renowned Honduran industrialist for business purposes. As a consequence of the land disputes, a community leader⁹⁴ was allegedly murdered at the hands of Miel River settlers, although no proper criminal investigation has been carried out to date.⁹⁵ In the same context, a member of the Community that witnessed the aforementioned murder has been targeted with constant death threats. The Commission decided to grant precautionary measures on his behalf and ordered the state to take protection measures so as to ensure his life and physical integrity. Nonetheless, these measures were never taken since the state asserted that no complaint had been made relating to these facts.⁹⁶ Furthermore, two complaints were filed with the Public Prosecutor's Office for threats against another member of the Community⁹⁷ and against the Community in its entirety, although the petitioner failed to provide the Court with sufficient evidence in relation with these facts.⁹⁸

2.2 Analysis of the Merits and Considerations

In its Judgement of 8 October 2015, the Court decided on the right to life in conjunction with the right to judicial protection. The representatives of the Community claimed that, in spite of acknowledging the existence of a situation of risk with regard to the members of the Community, the government did nothing in order to avoid the violent facts that generated the alleged violation of the right to life.⁹⁹ Moreover, the Commission considered that the state had failed to guarantee the peaceful possession of its ancestral lands, which resulted in an evident situation of permanent conflict and insecurity.¹⁰⁰ Nevertheless, the Court recalled its jurisprudence concerning the state's duty to adopt measures of prevention and protection and analysed whether in this case the requirements for the state's responsibility to arise were met.

⁹³ Honduran Institute of Geology and Mining, Resolution No. 105/12/2014 (4 December 2014). This concession expressly authorized the corporation to use the subsoil and to carry out mining activities and other works over the area of the concession. See *Case of Punta Piedra v Honduras*, para 125, 219.

⁹⁴ Félix Ordóñez Suazo was the Community Coordinator and died on 11 June 2007 due to three gunshots. According to the facts narrated by Marcos Bonifacio, the only witness, two Miel River settlers were the perpetrators of the crime as a result of the conflict over a plot of land. See *Case of Punta Piedra v Honduras*, para 138, 139.

⁹⁵ OFRANEH, 'Estado de Honduras Incumple Sentencias de la Corte IDH en relación a Comunidades Garifunas', Lista Informativa Nicaragua y Más (21 December 2016), <https://nicaraguaymasespanol.blogspot.com.es/2016/12/estado-de-honduras-incumple-sentencias.html> (accessed 25 January 2018); 'Comunidades Garifunas Exigen Cumplimiento de Sentencia de la CIDH sobre sus Territorios', Criterio.hn (11 October 2017), <https://criterio.hn/2017/10/11/comunidades-garifunas-exigen-cumplimiento-sentencia-la-cidh-territorios/> (accessed 26 January 2018).

⁹⁶ *Case of Punta Piedra v Honduras*, para 140, note 156.

⁹⁷ According to the complaint No. 0801-2010-12739 filed on 16 April 2010, two Miel River settlers had encroached on lands owned by the Community and, in particular, on a part of the territory given to Paulino Mejía for the purpose of working the land.

⁹⁸ *Case of Punta Piedra v Honduras*, paras 149–154.

⁹⁹ Petitioner's written statement submitted to the Commission on 14 June 2007. See *Case of Punta Piedra v Honduras*, para 257.

¹⁰⁰ IACHR Report No. 30/13, para 110.

First of all, the Court confirmed that the settlers of the Miel River had constantly threatened the Community by oral intimidation and use of weapons, which ended up in the development of widespread fears among its members and limited the peaceful use and enjoyment of its territory.¹⁰¹ The Court also verified that the state had failed to fulfil its duty to clear the titles of ownership granted to the Community, which led to a situation of general risk in the territory characterized by the threats and harassment mentioned above. In this context, the murder of the Community leader occurred. However, based on the information submitted to the Court, it appreciated that no authority was aware of a specific situation that placed the life of the community leader at risk and, consequently, a breach of the guarantee duty of the government had not been proven.¹⁰² As for the right to judicial protection regarding the investigation of this crime, the Court decided that Honduras was responsible for failing to conduct a thorough and diligent investigation of it from the very beginning and for the prolongation of the process.¹⁰³

It is worth emphasizing that, prior to the murder, up to thirteen government institutions had been informed about a number of components of the conflict situation,¹⁰⁴ but once again the evidence provided was regarded as insufficient. Thus, the Court considered that no public authority was aware of a situation that placed the lives of specific community members at immediate and real risk. Although the IACtHR could have remained mindful of the fact that the risk to the personal integrity of community members stood out in some of the documents filed before government authorities,¹⁰⁵ it is true that these documents contain general references to the situation of conflict as a whole and avoided referring to specific cases of imminent risk. That is why this judgement appears to have assessed the right to life in an appropriate way in accordance with the Court's case law.

However, the Court cannot let states go unpunished when they turn a blind eye to evident situations of risk to the lives of members of indigenous peoples involved in land disputes against business corporations. Hence, at this point, the question that arises is what will need to happen next so that indigenous communities are provided with adequate measures of protection and prevention in widespread conflict situations even when they have not reported particular acts of violence with regard to specific persons, as occurred in all the cases cited. Rather than having to wait until there is an immediate and certain risk for groups or individuals, a possible way forward would be to compel states to take these precautionary measures at an earlier stage. This should be when there are rational indications of sufficient magnitude and scope that an indigenous group is undergoing a generalized situation of continuous threats, harassment and conflict that poses a serious threat to its members' security and is highly likely to lead to undesirable

¹⁰¹ In accordance with some members' statements, 'Félix Ordóñez was a leader and that is why he was killed [...]. He defended his people with his life'; 'Strong armed men threaten us all the time, as if they were hunting animals. They drop by shooting in the bush'; 'Every day the sons of the Community are persecuted by the invaders'. See *Case of Punta Piedra v Honduras*, paras 266–269.

¹⁰² *Case of Punta Piedra v Honduras*, paras 270–279.

¹⁰³ *Ibid.*, 302. However, by 1 September 2016, the state had still not continued and concluded the investigation. IACtHR Resolution on oversight of compliance with the judgement accessible at <http://www.corteidh.or.cr/docs/supervisiones/SCS/honduras/gar%C3%ADfunapuntapiedra/gar%C3%ADfunapuntapiedrap.pdf> (accessed 7 November 2018).

¹⁰⁴ *Case of Punta Piedra v Honduras*, para 276.

¹⁰⁵ *Ibid.*, para 271, 273.

consequences. Otherwise, the immediacy and certainty of the risk that the Court has been demanding for state responsibility to arise may result in the adoption of security measures that come too late.

D. *Yakye Axa, Sawhoyamaxa and Xákmok Kásek Communities v Paraguay*

The three cases in this section present an intimate connection derived from the fact that the indigenous communities involved populate the same geographical area, the Paraguayan Chaco. Likewise, their respective claims focus on the violation of the right to communal property in relation to a series of rights such as the right to life or personal integrity.¹⁰⁶ Their background goes back to the late nineteenth century, when large plots of lands in the Paraguayan Chaco were acquired by British business owners through the London stock exchange without the permission or even the knowledge of the indigenous groups that inhabited the area.¹⁰⁷ The Anglican Church of England began to establish a vast array of missions and to ally with the then newly established 'International Products Corporation'. From then on, indigenous peoples' traditional lands have been transferred to and gradually divided among private non-indigenous owners.¹⁰⁸ In the 1990s, the three communities involved started their respective proceedings for claiming their traditional lands and natural resources before administrative bodies, all of which were then owned by corporate actors.¹⁰⁹

As a result of this progressive dispossession of their ancestral territories, these communities have been forced to move onto an adjacent area which did not allow them to practise their traditional subsistence activities.¹¹⁰ They have also been obliged to live in 'extremely destitute conditions' owing to the lack of land and access to natural resources as well as the precarious temporary settlement in which they have had to stay.¹¹¹ That is why the right to life in these three cases is analysed from a different perspective and, accordingly, the IACtHR examines whether the state must be held to account for failing to take suitable measures to ensure the right to a decent existence of the members of the communities regarding access to water, food, health care services and education. Moreover, the Court also decides on whether Paraguay must be held responsible for the deaths that occurred in the communities due to the severely deficient housing, sanitary and health conditions.¹¹²

¹⁰⁶ Iglesias-Vázquez, note 8, page 270.

¹⁰⁷ Mauricio Iván del Toro Huerta, 'Los Aportes de la Jurisprudencia de la Corte Interamericana de Derechos Humanos en la Configuración del Derecho de Propiedad Colectiva de los Miembros de Comunidades y Pueblos Indígenas' (2008) *Yale Law School SELA* 13.

¹⁰⁸ *Case of the Sawhoyamaxa v Paraguay*, para 73.4. See also 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' (2009) 27 *Wisconsin International Law Journal*.

¹⁰⁹ By the date of the judgements, the Yakye Axa Community's lands were owned by 'Florida Agricultural Corporation', 'Livestock Capital Group, Inc.' and 'Agricultural Development, Inc.'; the Sawhoyamaxa's lands were owned by 'Paraguay Steer Company, Inc.'; and the Xákmok Kásek's lands by 'Eaton y Cía, S.A.' and the 'Chortitzer Komitee Mennonite Cooperative'. See *Case of the Yakye Axa v Paraguay*, para 50.30; *Case of the Sawhoyamaxa v Paraguay*, para 73.27; *Case of the Xákmok Kásek*, para 69.

¹¹⁰ Thomas M Antkowiak, 'Rights, Resources and Rhetoric: Indigenous Peoples and the Inter-American Court' (2014) 35:1 *University of Pennsylvania Journal of International Law* 146.

¹¹¹ *Case of the Yakye Axa v Paraguay*, para 164. See also Andrés D Ramírez, 'El Caso de la Comunidad Indígena Yakye Axa vs. Paraguay' (2005) 41 *Inter-American Institute of Human Rights Journal*.

¹¹² *Case of the Yakye Axa v Paraguay*, paras 157–178; *Case of the Sawhoyamaxa v Paraguay*, paras 145–180; *Case of the Xákmok Kásek Indigenous Community v Paraguay*, Inter-American Court of Human Rights, Judgement of 24 August 2010, Ser C, 214, paras 183–234.

The innovative aspect of the first of these three judgements was that the Court also found a violation of the right to life beyond the violation of the right to collective property and the right to fair trial and to judicial protection.¹¹³ Nevertheless, it has been criticized due to the fact that, although the Court found a violation of the right to life to the detriment of the members of the Yakye Axa Indigenous Community for not adopting the appropriate measures that would have assured their decent existence,¹¹⁴ it also ruled that it did not have sufficient evidence to prove the violation of the right to life to the detriment of up to sixteen members of the Community that perished as a consequence of the deplorable conditions they had to live in.¹¹⁵ In doing so, it provided the interpretation of the right to life with a restrictive approach,¹¹⁶ contrary to its own case law, which advocates for the inadmissibility of this type of approach when the right to life is at stake.¹¹⁷ Nonetheless, this doctrine was later amended in the other judgements, in which the Court found a violation of the right to life of the members of the Sawhoyamaxa and Xákmok Kásek Indigenous Communities that lost their lives as a result of the displacement caused by disputes over their lands.¹¹⁸ As for the sphere of the right to life concerning the right to a decent existence, its violation is expressly recognized in all the aforementioned decisions.¹¹⁹

In addition, not only did these indigenous communities have to tolerate illegitimate encroachments on their lands, but also they were the object of constant threats and harassment. In the case of the Yakye Axa, community members submitted complaints before various state agencies, but there is no sign of any sort of investigation having begun since.¹²⁰ Like in other cases, the lack of guarantees concerning their right to communal property made the Community vulnerable to threats and harassments of others and caused a generalized state of ‘fear, unrest and concern’.¹²¹ As to the

¹¹³ Vasiliki Saranti, ‘International Justice and Protection of Indigenous Peoples – The Case-Law of the Inter-American Court of Human Rights’ (2012) 9:427 *US-China Law Review* 444.

¹¹⁴ *Case of the Yakye Axa v Paraguay*, para 176.

¹¹⁵ *Case of the Yakye Axa v Paraguay*, para 178. This clearly implies that the IACtHR’s positioning as regards the need for sufficient, suitable evidence coincides with the judgements already examined in this section.

¹¹⁶ Iglesias-Vázquez, note 8, 275. See also partially dissenting opinion of Judge A Abreu Burelli, separate dissenting opinion of Judges AA Cançado Trindade and ME Ventura Robles, and partly concurring and partly dissenting opinion of Judge Ramón Fogel on the *Case of the Yakye Axa v Paraguay*.

¹¹⁷ *Case of Niños de la Calle v Guatemala*, para 144; *Case of the Yakye Axa v Paraguay*, para 161. Judge Ventura Robles makes explicit reference to this fact in his separate opinion on the *Case of the Sawhoyamaxa v Paraguay*, the following judgement of this ‘trilogy’ of Paraguayan cases. He explains that the Court first advanced the interpretation of the right to life as encompassing not only the prohibition of the arbitrary deprivation of life, but also the obligation to assure the ‘conditions that guarantee a dignified existence’, in its renowned decision on the *Case of Niños de la Calle v Guatemala* (para 144). He argues that such interpretation of the right to life in that case was not restrictive, ‘as it was in the case of Yakye Axa’. See separate opinion of Judge Ventura Robles on the *Case of the Sawhoyamaxa v Paraguay*.

¹¹⁸ *Case of the Sawhoyamaxa v Paraguay*, para 178; *Case of the Xákmok Kásek*, para 234.

¹¹⁹ *Case of the Yakye Axa v Paraguay*, para 176; *Case of the Sawhoyamaxa v Paraguay*, para 156, 178; *Case of the Xákmok Kásek*, para 217.

¹²⁰ According to the testimony of Esteban López, alleged victim and community leader, the threats became constant after the beginning of the process of claiming their lands. One night, three dressed-up individuals entered the Community shooting with firearms and professed explicit death threats while slaughtering some hens and saying that would happen to Community leaders. That incident was also corroborated by the statement of Albino Fernández, who claimed to have seen acts of violence suffered by the Community. Moreover, in accordance with the testimony of Inocencia Gómez, an alleged victim, at Loma Verde estate, an individual known as the ‘killer’ spent his days walking alongside the fence with a shotgun threatening children and women who tried to cross it. See *Case of the Yakye Axa v Paraguay*, para 50.91, note 152.

¹²¹ *Case of the Yakye Axa v Paraguay*, para 50.108.

Sawhoyamaya, it was alleged that they were constantly threatened by the state management for having started to take legal actions in order to reclaim their lands.¹²² Furthermore, they also feared to be assaulted by 'white men or Paraguayan people' when they covertly tried to access their traditional territories to carry out their ancestral practices,¹²³ all of which proves that the violation of the indigenous right to communal property tends to go hand in hand with the violation of a number of related rights and, above all, with ceaseless acts of violence, harassment and widespread despair among the members of the affected communities.

IV. CONCLUSION

The aim of this article was limited to the study of a specific set of judgements issued by the Inter-American Court of Human Rights. What all of them had in common was the land grabbing practices that communities had to endure as a consequence of large-scale business activities on their ancestral lands. The direct effect of these practices was the violation of the right to collective property, which in turn entailed the violation of a series of related rights. It is in this regard that the personal and communal security of indigenous peoples in this sort of conflicts has especially been taken into account in cases in which the violation of the right to life was under examination. The work of the Court has not been straightforward, nor has the struggle of these peoples been unproblematic. The most serious obstacle they had to face was the gathering of sufficient evidence, which in the majority of cases was practically unachievable.

The immediate and certain risk doctrine which the Court has developed throughout the studied decisions was intended to avoid placing a disproportionate burden upon the authorities. However, it seems that efforts made in this respect have turned against the most vulnerable, i.e., those indigenous communities that not only had to experience the encroachment of their traditional territories but also had to demonstrate unequivocally, with the scant means available, the human rights violations to which they had been subjected as a result of those facts. This article has thus shown that this is one of the major barriers these communities have had to deal with so as to achieve the full recognition of their rights, which, in some of the analysed decisions, has not even been possible. In this respect, the application by the Court of an objective reasonableness standard would be positively appreciated, as should be states' duty to show in each case that a reasonable person could not have been aware of a situation of generalized insecurity within an indigenous community undergoing a land conflict that placed the lives of its members at serious risk. Likewise, it would be desirable for the IACtHR to firmly show its commitment to the UNGPs and to monitor their actual application in order that all states that fail to protect against human rights violations are held to account.

¹²² *Case of the Sawhoyamaya v Paraguay*, statement by Ms Elsa Ayala, alleged victim.

¹²³ *Ibid*, para 182. According to the statement rendered by Ms Gladys Benítez before a public official on 17 January 2006, they had to keep a low profile in these incursions since, if they turned out to be found, those so-called 'white men' shot at their heads, 'as it happened not long ago with a member of the Community'.

Notwithstanding the undeniably fundamental role that the Court has proven to play in the protection of indigenous peoples' human rights, a number of issues remain to be addressed regarding their right to life. The most preoccupying of all, as indicated above, refers to those widespread conflict situations in which, despite the absence of an immediate and certain risk for particular individuals or groups, the level of insecurity is severe enough for a government to take the appropriate protection and prevention measures in favour of the whole community, as precautionary measures that guarantee both their physical and psychological well-being and prevent further consequences. States have a vital role to play in this regard and it cannot be accepted that they turn a blind eye to flagrant violations of human rights within their territories when indigenous peoples' security and, therefore, their survival is at stake. Unless this type of measure is taken at an earlier stage, these peoples' fight will continue to confront the additional obstacle of the burden of proof, along with a number of undesirable, but inevitable, effects.