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# From *terra nullius* to Indigenous collective land rights: cases before the Inter-American Court of Human Rights

Tania Giovanna Vivas-Barrera, Gabriel Alejandro Quintero-Sánchez and Bernardo Pérez-Salazar 

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## Abstract

Since 2001, the Inter-American Court of Human Rights has issued 14 sentences requiring the states to protect collective land ownership rights of Indigenous peoples and tribal groups that descend from the syncretism of Indigenous and African peoples. The objective is to assess the level of compliance of international responsibilities by offending states and the main difficulties that have hindered the process up to now. An initial set of typologies of the outcomes is presented, together with some general patterns concerning the challenges that remain for the effective legal protection of collective land ownership rights in Central and South America. Findings are based on the analysis of the documentation produced by the Court concerning these cases. Presently, Nicaragua is the only state that has completely fulfilled its orders.

## Keywords

collective land rights, human rights, Indigenous peoples, Inter-American Court of Human Rights, right to property

## Introduction

In the western legal tradition, a deed is a written legal document that provides proof of ownership and gives a specified natural or legal person control or stipulated rights over an asset. Generally, deeds are presumed to be valid based on the legal right or power of the granting agent to award the special rights and privileges to the grantee. Legal systems determine the conditions and capacities necessary to receive and handle deeds and related rights. Legal systems determine the conditions and capacities necessary to receive and handle deeds and related rights (Berman, 1983). Private property of landholdings forcefully dispossessed from Aboriginal peoples by colonial settlers in the Americas was originally recognized by colonial and later republican legal systems based on title deeds whose original validity rested upon the legal fiction of *terra nullius*, a Latin term meaning *land belonging to no-one*. Land laws established on this claim justified acquisition of Aboriginal lands without treaty or payment, denying their prior occupation and connection to Indigenous peoples (Gilbert, 2003; Miller et al., 2010; Scott, 1934).

In this tradition, the recognition, regulation, and protection of private property constitute one of cardinal faculties and obligations of sovereign states. The application of international law instruments to regulate the right to property is an issue that many view as undue interference of state sovereignty. Neither the *International Covenant on Civil and Political Rights* (1966), nor the *International Covenant on Economic, Social and Cultural Rights* (1966), include the right to private property as a universally protected right (Engle, 2013). However, decisions by regional multilateral organizations such as the European

Court of Human Rights, the Inter-American Court of Human Rights (I/A Court H. R.), and the African Court of Human Rights, have nudged states to reform national legal systems in this respect (Vivas-Barrera et al., 2012).

In the Americas, the I/A Court H. R. has ordered states in more than a dozen judgments to acknowledge Indigenous rights and amend exclusionary legal structures to judicially protect their collective right to land ownership (Cotula, 2015; Engle, 2013; Vivas-Barrera, 2018). In its first case, *Mayagna-Sumo Awas Tingni community v Nicaragua* [2001], involving Indigenous communities in the country's northern Caribbean coast, the I/A Court H. R. ordered the state to judicially protect the land rights of the Indigenous community in the northeastern region of the country and to establish domestic law provisions to guard their traditional landholding from intrusion of extractive forest industries by means of an effective procedure to delimit, demarcate, and grant title deeds legally acknowledging their collective property rights of their communal lands. The I/A Court H. R. decided that the protection of private property contained in article 21 of the 1969 American Convention on Human Rights (ACHR) also covers the protection of collective property of Indigenous peoples, recognizing the close relationship between the cultural integrity of Indigenous peoples and the ancestral territories they occupy.

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This case law of the I/A Court H. R. concerning the duty of states to protect the right to collective land ownership of Indigenous communities and tribal peoples of Latin America, is considered among the most innovative jurisprudence in the field of human rights (Estupiñan-Silva, 2014; Gilbert, 2013). Nine states in the region, among them, Nicaragua in 2001; Suriname in 2005, 2007, and 2015; Paraguay in 2005, 2006, and 2010; Ecuador in 2012; Colombia in 2013; Panama in 2014; Honduras in 2015 in two separate cases; Brazil in 2018; and Argentina in 2020, have been found internationally responsible in 14 separate cases for failing to properly protect and safeguard collective land ownership rights of Indigenous and tribal peoples (Martínez-Espinoza, 2015).

We discuss elsewhere (Vivas-Barrera et al., 2019), how judgments on this matter are shaping Indigenous movements in Latin America and their strategies to define and advance their political objectives in the future. The scope of this I/A Court H. R. jurisprudence is yet to be properly assessed in terms of its effectiveness to safeguard Indigenous territories and the judicial protection of their rights to collective land ownership. This article specifically offers and analyzes evidence of how the authority of these legal decisions may be undermined by lack of enforceability to ensure their timely compliance. We examine the timeframes in which these 14 cases proceeded once submitted to the Inter-American Human Rights System, as well as the duration of the timespan taken by the offending states to comply with the Court’s orders between 2001 and 2020.

In the next section, we offer some methodological definitions concerning the duration of the different procedural stages followed during the judgment in the Inter-American Human Rights System. We also discuss some aspects that are relevant to discuss the timeframes set by the I/A Court H. R., after handing down its orders, to verify compliance by offending states. Based on these elements, we proceed to analyze the findings obtained from the I/A Court H. R. database. We dedicate special attention to factors that influence compliance of specific measures

concerning the protection of Indigenous collective land ownership, as well as the implementation of restitution measures. We conclude with some thoughts about the significance of the lack of enforceability of these decisions and its undermining effects.

### Methods

The main sources consulted by this study are documents and other information available at I/A Court H. R.’s official website ([www.corteidh.or.cr](http://www.corteidh.or.cr)). Contents and dates of judgments as well as information concerning procedural stages and resolutions that review the compliance of restitution orders were obtained from this source. The study includes cases involving offending states found in breach of the right of Indigenous communities and tribal peoples to collective ownership of the ancestral territories protected by Article 21 of the ACHR with decisions on the merits recorded until the cutoff date for this study, at the end of December 2020. The internal statutes of the I/A Court H. R. and the Inter-American Commission on Human Rights (IACHR) provide guidance in the analysis of the cases under consideration.

Once data were organized, tabulated, processed, and plotted, the following operations were carried out:

1. Estimation of the duration of each procedural step in the cases with judgment on the merits (Figure 1).
2. Analysis of the timeframes of the I/A Court H. R. supervisions after judgment to verify compliance of the orders in 13 cases that are pending compliance (Figures 2 and 3).
3. General analysis of some factors affecting compliance of specific measures concerning the protection of Indigenous collective land ownership and the implementation of restitution measures for damages caused to Indigenous communities due to insufficient judicial protection of the right to collective land ownership.

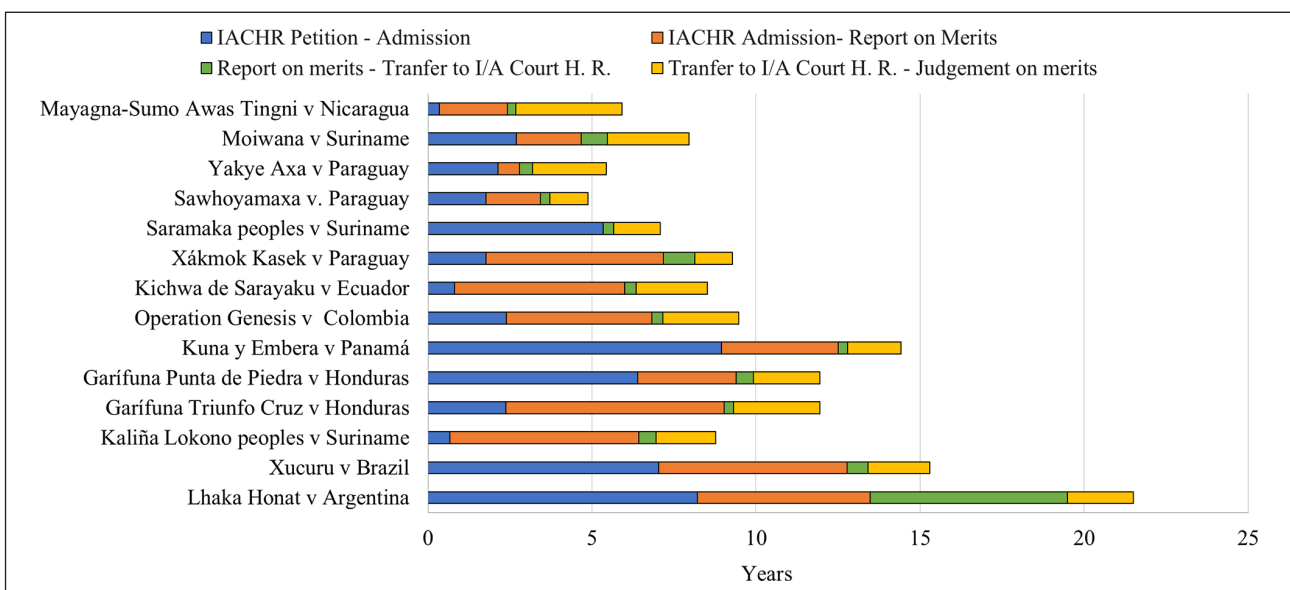
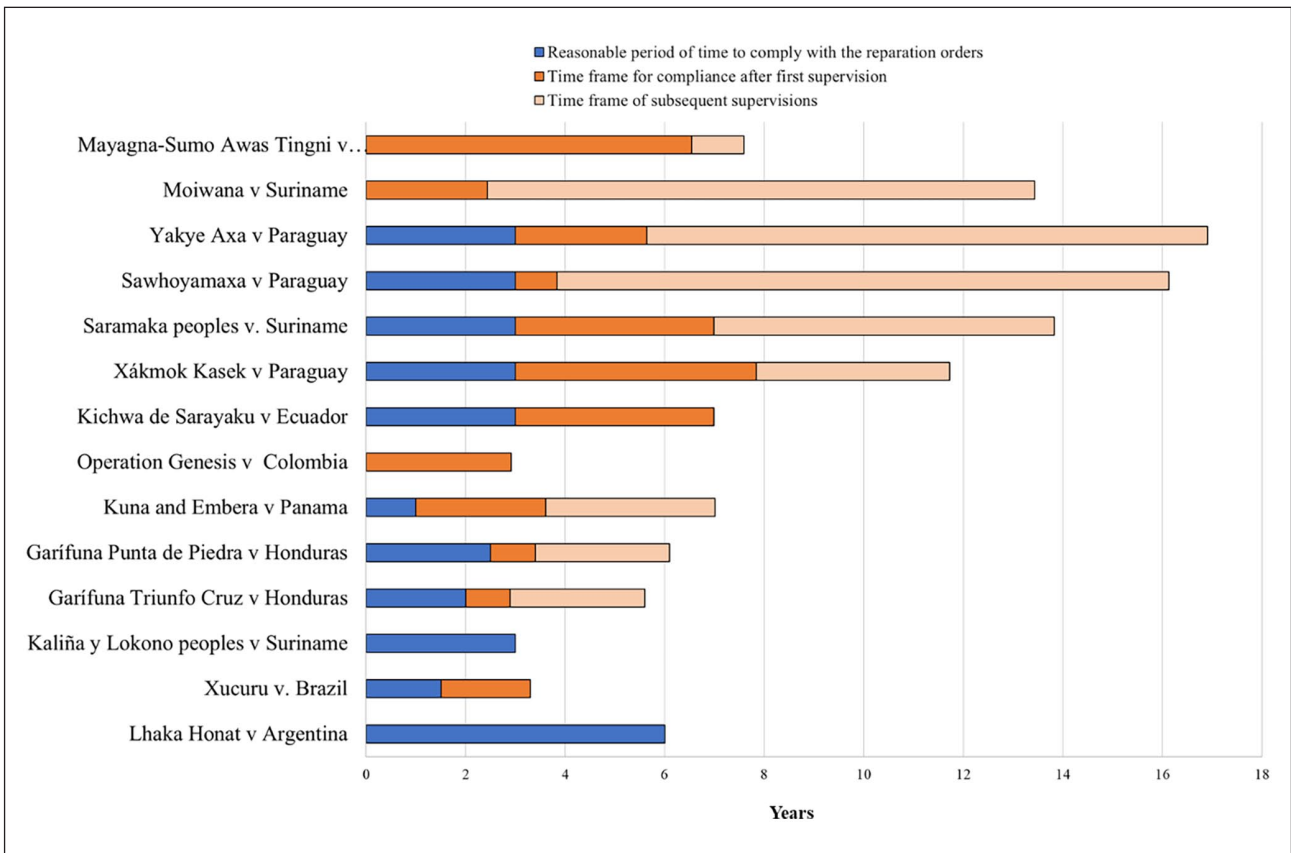


Figure 1. (Continued)

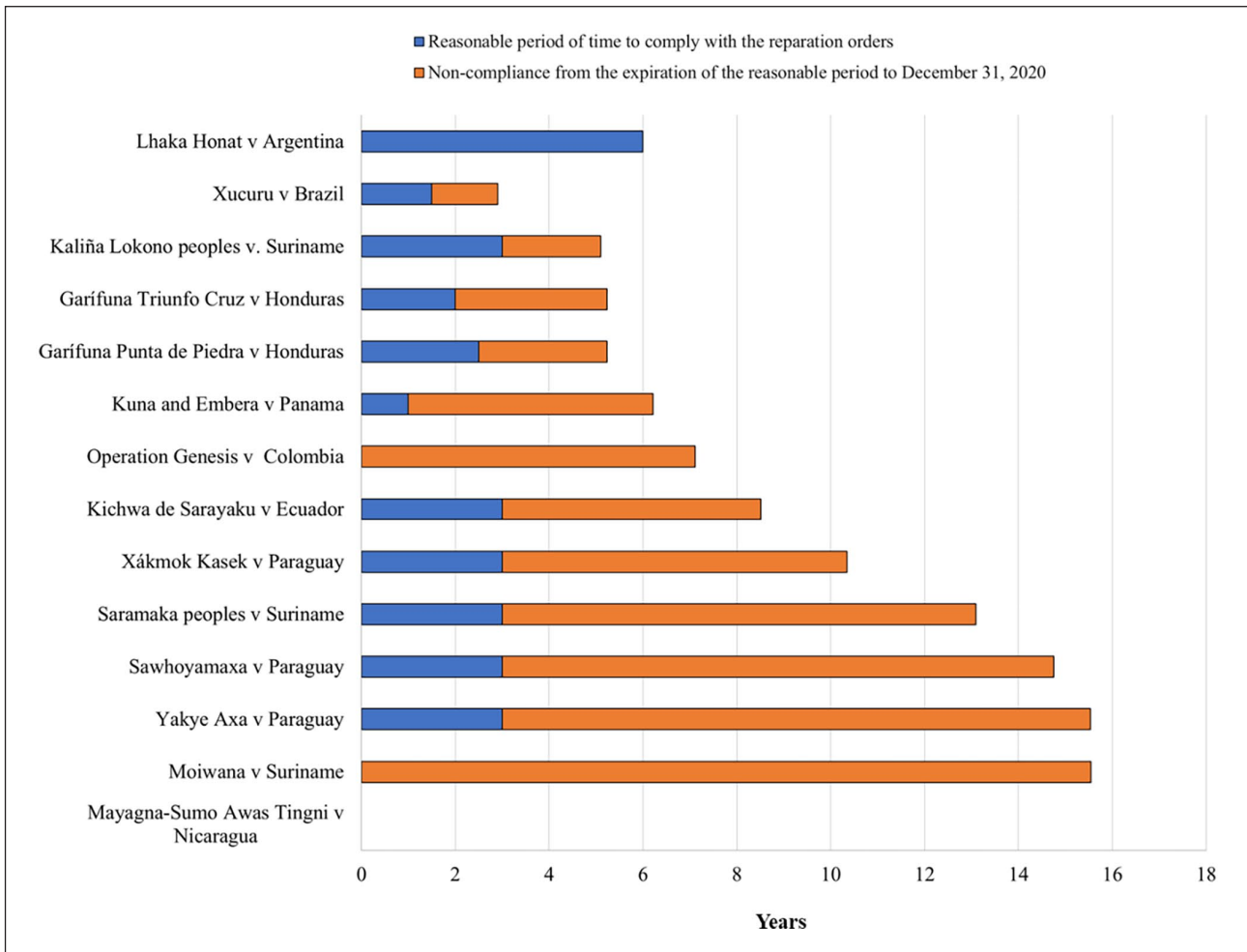
**Figure 1.** Inter-American Commission on Human Rights and Inter-American Court of Human Rights: procedural timespan of cases concerning protection of collective property rights of Indigenous territories, 1995–2020.

IAHCHR = Inter-American Commission on Human Rights; I/A Court H. R. = Inter-American-Court of Human Rights; Mayagna-Sumo Awas Tingni = Indigenous communities from the Northern Atlantic Autonomous Region of the Atlantic Coast of in the northern Caribbean coast of Nicaragua; Moiwana = tribal group located in eastern Suriname; Yakye Axa = Indigenous community that belongs to the Southern Lengua Enxet people in the Paraguayan Chaco; Sawhoyamaxa = Indigenous semi-nomad community located in the Paraguayan Chaco; Saramaka = tribal group located on the Upper Suriname River basin; Xákmok Kásek = Indigenous semi-nomad located in the Paraguayan Chaco; Kichwa de Sarayaku = Indigenous community located in the territory of the Amazon region of Ecuador; Operation Genesis = paramilitary operation that affected the Caracica tribal people in northwest Colombia, included in the case name of this judgment; Kuna = Indigenous community located in the region of the Bayano, Panama; Embera = Indigenous people originally based in the Chocó region in northwest Colombia, now settled in Panama in the province of Darien; Garífuna Punta Piedra = tribal group located in the northeastern Caribbean coast of Honduras; Garífuna Triunfo de la Cruz = tribal group located in the northwestern Caribbean coast of Honduras; Kaliña-Lokono = Indigenous communities located in northeast of Suriname; Xucuru = Indigenous community located in Pernambuco, northeastern Brazil; Lhaka Honat = numerous Indigenous communities located in the Chaco Salteño region, in Argentina’s northern border with Paraguay.



**Figure 2.** Inter-American Court of Human Rights: timeframes of supervisions after judgment for breaching collective property rights of Indigenous territories, 2001–2020.

Mayagna-Sumo Awas Tingni = Indigenous communities from the Northern Atlantic Autonomous Region of the Atlantic Coast of in the northern Caribbean coast of Nicaragua; Moiwana = tribal group located in eastern Suriname; Yakye Axa = Indigenous community that belongs to the Southern Lengua Enxet people in the Paraguayan Chaco; Sawhoyamaxa = Indigenous semi-nomad community located in the Paraguayan Chaco; Saramaka = tribal group located on the Upper Suriname River basin; Xákmok Kásek = Indigenous semi-nomad located in the Paraguayan Chaco; Kichwa de Sarayaku = Indigenous community located in the territory of the Amazon region of Ecuador; Operation Genesis = paramilitary operation that affected the Caracica tribal people in northwest Colombia, included in the case name of this judgment; Kuna = Indigenous community located in the region of the Bayano, Panama; Embera = Indigenous people originally based in the Chocó region in northwest Colombia, now settled in Panama in the province of Darien; Garífuna Punta Piedra = tribal group located in the northeastern Caribbean coast of Honduras; Garífuna Triunfo de la Cruz = tribal group located in the northwestern Caribbean coast of Honduras; Kaliña-Lokono = Indigenous communities located in northeast of Suriname; Xucuru = Indigenous community located in Pernambuco, northeastern Brazil; Lhaka Honat = numerous Indigenous communities located in the Chaco Salteño region, in Argentina’s northern border with Paraguay.



**Figure 3.** Inter-American Court of Human Rights: timeframe of pending compliance orders issued 2001–2020.

Lhaka Honhat = numerous Indigenous communities located in the Chaco Salteño region, in the country’s northern border with Paraguay; Xucuru = Indigenous community located in Pernambuco, northeastern Brazil; Kaliña and Lokono = Indigenous communities located in northeast of Suriname; Garífuna Triunfo de la Cruz = tribal group located in the northwestern Caribbean coast of Honduras; Garífuna Punta Piedra = tribal group located in the northeastern Caribbean coast of Honduras; Kuna = Indigenous community located in the region of the Bayano, Panama; Embera = Indigenous people originally based in the Chocó region in northwest Colombia, now settled in Panama in the province of Darien; Operation Genesis = paramilitary operation that affected the Cararica tribal people in northwest Colombia, included in the case name of this judgment; Kichwa de Sarayaku = Indigenous community located in the territory of the Amazon region of Ecuador; Xákmok Kásek = Indigenous semi-nomad located in the Paraguayan Chaco; Saramaka = tribal group located on the Upper Suriname River basin; Sawhoyamaxa = Indigenous semi-nomad community located in the Paraguayan Chaco; Yakye Axa = Indigenous community that belongs to the Southern Lengua Enxet people in the Paraguayan Chaco; Moiwana = tribal group located in eastern Suriname; Mayagna-Sumo Awas Tingni = Indigenous communities in the northern Caribbean coast of Nicaragua.

The examination of the duration of the different procedural stages in each case, follows the guidelines established in ACHR (1969), Part II on the Means of Protection, concerning competent organs and procedures. Only state parties and the IACHR have the right to submit cases to the I/A Court H. R. Therefore, complaints of violation of the ACHR by any state party that are not lodged by a state party must be first presented before the IACHR. After examining the matter to verify the facts, the IACHR may carry out an investigation, requesting the states concerned to furnish all pertinent information and necessary facilities. With a view to reach friendly settlements of the matter based on the human rights contained in the ACHR, the IACHR convenes the parties to reach an agreement and draws up a report with a brief description of the facts and the agreed solution. If a settlement is not reached, the

IACHR prepares a merits report stating the facts. Its conclusions and recommendations are transmitted to the concerned states. If within 3 months the matter has not been settled or submitted by the state to the I/A Court H. R., the IACHR may do so. Based on the report on merits, the I/A Court H. R. proceeds to consider the case and deliver its judgment. States parties to the ACHR undertake to comply with the judgment of the I/A Court H. R. in cases to which they are parties. After the decision is delivered, the I/A Court H. R. establishes a reasonable term for states to comply with its orders. Onsite visits are generally scheduled by the I/A Court H. R. after this term to verify the implementation of measures by the offending state to comply with orders contained in the judgment. Full compliance is declared by the I/A Court H. R. in a final supervision report.

## Findings: timeframes in judgments and supervision of compliance of I/A Court H. R. orders

Between 1995 and 2020, the I/A Court H. R. delivered 14 decisions with orders to protect the right to collective ownership of Indigenous territories and to implement restitution measures. Figure 1 shows the different procedural stages followed by these cases up to the delivery of judgment and compares the time frames in which each of these stages was completed in the 14 cases observed in this lapse.

A more detailed description of each stage is provided in the following paragraphs, with comments concerning some context aspects that help understand the outlier timeframes.

### Stage 1: petition to admission by the IACHR

The starting point for cases that are lodged before the IACHR is the petition and presentation stage that involves the examination of admissibility of each case (ACHR, 1969). On average, this stage extends for about 2 years. However, this timespan was visibly exceeded in the following cases: *Garífuna Punta Piedra Community and its members v Honduras* [2015], involving a tribal group in the country's northeastern Caribbean coast that descends from a syncretism of Indigenous and African peoples; *Indigenous Community Members of the Lhaka Honhat—Nuestra Tierra v Argentina* [2020], concerning numerous Indigenous communities located in the Chaco Salteño region in the country's northern border with Paraguay; *Kuna Indigenous People of Madungandí and the Embera Indigenous People of Bayano and their members v Panama* [2014], which include Indigenous community located in the region of the Bayano, Panama together with Indigenous people originally based in the Chocó region in northwest Colombia, now settled in Panama; and *Xucuru Indigenous People v Brazil* [2018], affecting an Indigenous community located in Pernambuco, in the country's northeast (Figure 1).

In all four cases, the extraordinary length of the initial stage was due to the IACHR's attempts to come to a friendly settlement between the injured party and the state, which were ultimately unsuccessful. During the friendly settlement proceedings, the states of Argentina, Brazil, Honduras, and Panama hesitated to accept their duty to protect the right of Indigenous peoples to enjoy and use of natural resources to which they have traditionally had access such as rivers, lakes, beaches, coastal seas and hydrobiological resources when these were in areas not exclusively occupied by Indigenous communities. Subsequently, the abovementioned judgments established this international obligation, further developing the I/A Court H. R.'s jurisprudence on the matter (Herencia-Carrasco, 2018).

### Stage 2: admission to report on merits by IACHR

During this stage the IACHR and the parties involved gather and provide information and evidence on the facts of the case. The median duration of this stage, which ends

with the preparation of a background report, is approximately 4 years for the 14 cases in study. Records show extensive delays during this stage in the following cases: *Garífuna Triunfo de la Cruz Community and its members v Honduras* [2015], another tribal group located in the country's northwestern Caribbean coast; *Kaliña and Lokono Peoples v Suriname* [2015], concerning Indigenous communities located in the in the extreme northeast of the country; *Xákmok Kásek Indigenous Community v Paraguay* [2010], which include Indigenous semi-nomad communities located in the Paraguayan Chaco; and *Xucuru Indigenous People v Brazil* [2018]) (Figure 1).

Variations in the duration of this phase were found to be related with institutional inertia and resistance within national legal systems that benefit the *status quo*, delays connected to electoral processes that renew national administrations, and generally, absence of political support from significant social groups to pressure defendant states to find appropriate solutions to conflicts that breach the Indigenous people's collective land rights, among others.

### Stages 3 and 4: IACHR transfers report on merits to I/A Court H. R. and judgment on merits is delivered

Stage 3 consists in the formal referral of the IACHR's substantive report to the I/A Court H. R. for judgment. This generally happens in a period of 4 months. The case of *Indigenous Community Members of the Lhaka Honhat—Nuestra Tierra v Argentina* [2020] is the outlier in this stage, due to 22 successive extensions that IACHR granted the State of Argentina to comply with its recommendations, in an unsuccessful attempt to prevent judgment (Figure 1).

Decisions of judgment on merits by the I/A Court H. R. are generally delivered after an average of 2 years. The judgment stage in the *Mayagna-Sumo Awas Tingni community v Nicaragua* [2001] stretched out for more than 3 years, as the I/A Court H. R. studied in detail its first decision protecting the right to collective land ownership of Indigenous territories, formally acknowledging permanent communal links of Indigenous people with their territories as the customary basis that grants their right to claim collective land ownership rights (Figure 1).

### Stage 5: I/A Court H. R. judgment to first supervision

The I/A Court H. R. never defined a *reasonable term* to comply with the restitution order in the case of the *Mayagna-Sumo Awas Tingni Community v Nicaragua* [2001]. In this case, the I/A Court H. R. imposed precautionary measures on the State of Nicaragua to guarantee compliance with provisions concerning reparations and costs. Between 2002 and 2007 the I/A Court H. R. carefully monitored these measures, as recorded in its supervisory report, *Mayagna-Sumo Awas Tingni Community v Nicaragua* [2008]. The case was closed in 2009 (*Mayagna-Sumo Awas Tingni Community v Nicaragua* [2009]).

Compliance supervision is not explicitly contained in the ACHR. The I/A Court H. R. made it a standard practice with the adoption of regulations approved at its LXXXV Regular Session held between November 16 and 28, 2009, enacting supervisory activities initiating in 2010 (I/A Court H. R., 2009). After judgment decisions are handed down, the I/A Court H. R. grants state parties a reasonable term, on average of 3 years, to comply with its orders. The timeframe of first supervisions comprises from the date of judgment to the date of the first follow-up report (Figure 2).

The I/A Court H. R. made its first onsite visit to supervise the following three cases: *Sawhoyamaxa Indigenous Community v Paraguay* [2006], involving an Indigenous semi-nomad community located in the Paraguayan Chaco; *Yakye Axa Indigenous Community v Paraguay* [2005], concerning an Indigenous community that belongs to the Southern Lengua Enxet people in the Paraguayan Chaco; and, *Xákmok Kásek Indigenous Community v Paraguay* [2010]. This supervision took place almost 5 years after judgment was delivered on the last of these cases. It addressed the delays to comply the I/A Court H. R.'s orders, which were attributed to electoral processes that renewed Paraguay's national government, as well as to the corrupt diversion of public funds earmarked for the acquisition of alternative lands to repair semi-nomad Indigenous peoples previously dispossessed of their territories (*Yakye Axa, Sawhoyamaxa and Xákmok Kásek Indigenous communities v Paraguay* [2015]). At the end of 2020, the monitoring stage had been underway for more than 5 years in these cases. During this period, three monitoring reports were issued by the I/A Court H. R. concerning compliance of restorative measures (*Yakye Axa, Sawhoyamaxa and Xákmok Kásek Indigenous communities v Paraguay* [2016], [2017]; *Yakye Axa Indigenous Community v Paraguay*, [2019]) (Figure 2).

Supervision in the case of *Yakye Axa Indigenous Community v Paraguay* [2005], has been ongoing since 2008, when the I/A Court H. R. first issued a follow-up report (*Yakye Axa Indigenous Community v Paraguay* [2008]). In the case of *Sawhoyamaxa Indigenous Community v Paraguay* [2006], at the cutoff date of this study in December 2020, the duration of the supervisory stage summed almost 14 years (*Sawhoyamaxa Indigenous Community v Paraguay* [2007]) (Figure 2).

The implementation of the I/A Court H. R.'s restitution orders to protect the right to collective land ownership of Indigenous communities in Paraguay appropriately illustrates the difficulties faced by states in achieving full compliance of some of these orders. In the case of *Yakye Axa Indigenous Community v Paraguay* [2005], I/A Court H. R. supervisory records show progress between 2006 and 2007, with the enactment of administrative and judicial measures seeking to purchase lands originally belonging to this semi-nomad community (*Yakye Axa Indigenous Community v Paraguay* [2008]). Other significant advances include the budget allocation for this purchase and the establishment of precautionary measures on these lands. In response to the legal opposition by private third parties that resisted selling these lands, between 2010 and 2014 the Paraguayan state advanced numerous administrative and

judicial actions to acquire and adapt alternative lands for the Yakye Axa community, as the I/A Court H. R. reports in the above-mentioned monitoring resolutions (*Yakye Axa, Sawhoyamaxa and Xákmok Kásek Indigenous communities v Paraguay* [2016], [2017]; *Yakye Axa Indigenous Community v Paraguay*, [2019]) (Figure 2).

In the case of *Sawhoyamaxa Indigenous Community v Paraguay* [2006], the state enacted in 2014 an expropriation law allowing restoration of Indigenous ancestral territories legally held by private third parties (*Yakye Axa, Sawhoyamaxa and Xákmok Kásek Indigenous communities v Paraguay* [2016]). In the case of the *Xákmok Kásek* community, there are significant advances in the implementation of restitution orders by the State of Paraguay, which reported full compliance of the restitution order concerning the delimitation, demarcation, and a collective property title issued to an estate named February 25, acquired by means of negotiation with other Indigenous communities. As for the orders dealing with the delimitation, demarcation, and granting of a collective property title deed for another 10,700 hectares, the State of Paraguay reported that these lands are legally held by private third parties. To remedy this situation, an area of 7,700 hectares was acquired. The corresponding cash outlay was processed and approved before the Ministry of Finance to transfer the agreed payment in 2016. By the same token, the state reports that the remaining 3,000 hectares are in negotiation (*Yakye Axa, Sawhoyamaxa, and Xákmok Kásek Indigenous communities v Paraguay* [2017]).

A similar situation is observed in the case of *Garífuna Triunfo de la Cruz Community and its members v Honduras* [2015]. In a supervision of the implementation of the I/A Court H. R.'s orders in 2019, the State of Honduras requested a formula to deliver alternative territories to the tribal peoples because the present holders of their ancestral territories resisted any action by state authorities to materialize the delimitation, demarcation, and granting collective property titles to the Indigenous community (*Garífuna Triunfo de la Cruz Community and its members v Honduras* [2019]).

In Suriname, the I/A Court H. R.'s supervision is presently frozen in the cases of *Moiwana Community v Suriname* [2005], involving a tribal group that located in the eastern region, and *Saramaka People v Suriname* [2007], which include tribal groups located on the Upper Suriname River basin. This is due to the lack of state reports on the implementation of the imposed remedial measures (*Moiwana Community v Suriname* [2007], [2010]; *Saramaka People v Suriname* [2011], [2013]). The I/A Court H. R. has not set a reasonable term for the State of Suriname to comply with the restitution order in neither case, acknowledging that the persistence of the internal armed conflict in that country represents an insurmountable impediment for the state to make progress in the implementation of restitution orders (*Moiwana Community v Suriname* [2018]; *Saramaka People v Suriname* [2018]). In these monitoring reports, the I/A Court H. R. enabled both tribal communities to express whenever they may consider to be safe to return to their territories. Consequently, by the cutoff date of this study in December 2020, more than

15 years had gone by without any updated information on the status of compliance with the measures initially imposed on the State of Suriname in 2005 (Figure 2).

In the case of the Kaliña and Lokono peoples v Suriname [2015], the I/A Court H. R. ordered the state to demarcate, delimitate and issue collective property land titles to these tribal groups. At the cutoff date of this study of December 2020, no record was found of implementation or compliance supervision reports by the I/A Court H. R. (Figure 2).

The I/A Court H. R. ruled on of the Kichwa Indigenous People of Sarayaku v Ecuador [2012] case, involving an Indigenous community located in the territory of the Amazon region of Ecuador, issuing a supervisory resolution 4 years later (Kichwa Indigenous People of Sarayaku v Ecuador [2016]). At the cutoff date of this study in December 2020, there was no implementation report from the state (Figure 2).

In the case of Afro-descendant communities displaced from the Cacarica River Basin—Operation Genesis v Colombia [2013], concerning tribal groups that descend from the syncretism of Indigenous and African peoples, located in northwest Colombia, the I/A Court H. R. has not set a reasonable term to comply with the restitution order. In recognition of the fear expressed by members of these communities due to the presence of non-state armed actors, the I/A Court H. R. subsequently issued a supervisory resolution ordering the state to guarantee adequate security and basic living conditions before restoring these territories to those communities who hold the legal collective property land rights. The order establishes that the state must periodically send its agents to verify conditions on the ground in these territories (Afro-descendant communities displaced from the Cacarica River Basin—Operation Genesis v Colombia [2016]).

The case of the Indigenous Community Members of the Lhaka Honhat—Nuestra Tierra v Argentina [2020], is the I/A Court H. R.'s most recent decisions concerning these matters, so the reasonable term for compliance granted for the implementation of the measures imposed is still in course.

In summary, Figure 3 shows the timeframes of pending state compliance orders issued by the I/A Court H. R. Eight offending states remain in a non-compliance status, by the December 2020 cutoff date. Until then, the I/A Court H. R. had delivered 14 judgments against nine Latin American states for breaching Indigenous communities' collective land ownership rights of their ancestral territories. To that date, 12 of those deliveries had supervision reports. The two judgments that lack supervision reports are the Kaliña and Lokono Peoples v Suriname [2015], which include an Indigenous communities located in the in the extreme northeast of Suriname, bordering with French Guiana, and the case Indigenous Community Members of the Lhaka Honhat—Nuestra Tierra v Argentina [2020]. These remained with no supervision at the cutoff date of December 2020.

Finally, the I/A Court H. R. assesses the implementation of measures imposed on states based on an *all or nothing* criterion. This requires full compliance of all measures imposed on the offending states, before declaring their closure in the annual report to the General Assembly of the Organization of American States (ACHR, 1969; Basch

et al., 2010; Cubides & Vivas, 2016; Fortas, 2015; González-Salzberg, 2010; Hennebel, 2007; Hennebel & Tigroudja, 2009; Vivas-Barrera, 2015).

## Discussion

States that are parties to the ACHR are held accountable before the I/A Court H. R. to fulfill their obligation to remedy circumstances that represent threats to the judicial protection of Indigenous collective land rights, such as:

1. Lack of recognition of legal status of Indigenous communities and tribal peoples by the offending state party, as in the cases of Kaliña Lokono Peoples v Suriname [2015] and Saramaka People v Suriname [2007].
2. Previous dispossession of ancestral territories, as in the case of Sawhoyamaya Indigenous Community v Paraguay [2006].
3. Spoliation of ancestral territories through the sale to third parties by the offending state party, as in the cases of Yakye Axa v Paraguay [2005], Sawhoyamaya Indigenous Community v Paraguay [2006], and Xákmok Kásek Indigenous Community v Paraguay [2010].
4. Prior concession of grants for exploration and exploitation of natural resources in ancestral territories by the offending state party, as in the case of Saramaka People v Suriname [2007].
5. Compulsory relocation of Indigenous communities related to development projects and public works, as in the case of Kuna Indigenous People of Madungandí and the Indigenous People of Embera de Bayano and their members v Panama [2014].
6. Restitution of lands from which Indigenous or tribal communities were forcibly displaced due to internal armed conflicts, as in the cases of Moiwana Community v Suriname [2005], and Afro-descendant communities displaced from the Cacarica River Basin—Operation Genesis v Colombia [2013].
7. Weak judicial protection of Indigenous collective land property rights when opposed by third parties, as in the case of Xucuru Indigenous people v Brazil [2018].

## Reparation measures

To enforce reparation of damages caused to Indigenous communities and acknowledge their right to collective land ownership stemming from ancestral occupation, the I/A Court H. R. monitors the compliance of the comprehensive restitution orders imposed on the offending state party (Burgogue-Larsen & Ubeda de Torres, 2011; López-Escarcena, 2015a,b; López-Murcia & Maldonado-Colmenares, 2009). To this end, the I/A Court H. R. shapes its jurisprudence according to the specific circumstances of each case. Restitution measures may involve:

- (a) Restitution of ecologically equivalent public lands by means of delimitation, demarcation, and title deed issuance, as one of the cases of Kaliña Lokono



Peoples v Suriname [2015] and Community Triunfo de la Cruz Community and its members v Honduras [2015].

- (b) Restitution of land in hands of private individuals, as in the cases of *Yakye Axa v Paraguay* [2006], *Sawhoyamaxa Indigenous Community v Paraguay* [2006], and *Xákmok Kásek Indigenous Community v Paraguay* [2010].
- (c) Reversal of concessions for the exploration and exploitation of resources on ancestral lands, as in the cases of *Mayagna-Sumo Awas Tingni v Nicaragua* [2001] and *Saramaka People v Suriname* [2007].
- (d) Restitution of lands from which Indigenous or tribal communities were forcibly displaced due to internal armed conflicts, as in the cases of *Moiwana Community v Suriname* [2005] and *Afro-descendant communities displaced from the Cacarica River Basin—Operation Genesis v Colombia* [2013].
- (e) Cases involving several or all the previously mentioned forms of restitution as in the case of *Garífuna Triunfo de la Cruz and its members v Honduras* [2015].
- (f) Relocation of third parties that are settled on Indigenous lands, and the implementation of legal, administrative, judicial, or any other relevant measure necessary to restore, demarcate, delimitate, and to issue a unique collective land title deed, as in the case of *Xucuru Indigenous people v Brazil* [2018].

### Other remedial measures

In addition to land restitution measures, sentencing against offending state parties may involve a wide variety of remedial measures. These include:

- (a) Pecuniary compensation and/or other compensatory measures for material and moral damages (Otis, 2009).
- (b) Measures of satisfaction and non-repetition, including publication and dissemination of the judgment, public acts of recognition of responsibility, and provision of basic goods and services, among others (González, 2012).
- (c) Measures to reform and adjust administrative procedures and standards, such as mechanisms to reclaim ancestral lands, regulation for the implementation of prior and informed consultation with Indigenous communities, and warrants in administrative and contentious-administrative proceedings (Bernal-Camargo, 2013; Gilbert, 2013).
- (d) Measures to modify and eradicate unlawful practices that violate human rights, such as failure to conduct prior and informed consultation before initiating development projects and public works that affect Indigenous peoples' territories, as well as ending practices based on stereotypes that reproduce social, cultural and political discrimination (López-Murcia & Maldonado-Colmenares, 2009).

### Conclusion

The purpose of this investigation is twofold. First, to specify the level of compliance of restitution orders protecting the right of Indigenous communities to collective land ownership rights of their ancestral territories. Second, to examine some factors associated with the non-compliance in the implementation of restorative measures by offending states, in processes that by end of 2020 had drawn-out for nearly a decade after sentencing in the majority of the 14 cases considered in this article.

The decision of the I/A Court H. R. to reinterpret Article 21 of the ACHR and, in this light, to acknowledge the duty of states to respect and protect the right of Indigenous communities and tribal peoples to collective land ownership, is a significant and bold step for the preservation of cultural diversity in the Americas (Arlettaz, 2014). The decision establishes the obligation of states not only to safeguard Indigenous territories but also to implement restitution measures for damages caused to Indigenous communities due to insufficient judicial protection of the right to collective land ownership. It acknowledges the use and collective enjoyment of territory as a necessary condition for the maintenance of the way of life and survival of Indigenous peoples (Del Toro-Huerta, 2010; Gajardo-Falcón, 2015).

The conventional individual-state dichotomy, on which republican legal systems are founded, is insufficient to contain the cosmivision of Indigenous peoples (Dávila-Figueroa, 2013). In this context, Indigenous identity and belonging are not anchored to individual rights and values, but to a special relationship between community and territory which serves as mediating reference for its maintenance as a permanent *collective entity*; one that is founded on customary activities such as hunting, fishing, and seasonal or nomadic gathering, and in general, the use and control of their natural resources, which bond and underlie the ceremonial and spiritual practices that sustain and give meaning to their traditional beliefs and livelihoods (Echeverry-Osorio & Díaz-Ricardo, 2016; Merino-Acuña, 2014).

The scope of this innovative line of jurisprudence is yet to be clearly examined, particularly in the context of a continent of national legal systems that stem from military conquest, violent dispossession of Aboriginal lands and goods, and their submission to different forms of exploitation and forced labor (Martínez-Montufar & Noguera, 2017). The complexity of the restorative measures that offending states must comply in the implementation of these decisions is noteworthy, particularly in the legal systems that formally ignore the plural ethno-cultural composition of their population, as well as the right of Indigenous peoples to collective land ownership (Llano-Franco, 2016). Historical loss or deprivation of ancestral territorial possessions represents an additional difficulty faced by states attempting to comply with the restorative measures imposed by the I/A Court H. R.

In sum, this study found that by the end of 2020, according to the *all or nothing* criterion used by the I/A Court H. R. in its supervisory reports, 13 of the 14 judged cases remain in non-compliance concerning the implementation of the

restitution measures. This outcome confirms the complexity of fulfilling these measures by the offending states. Major difficulties in the implementation of restitution measures have been documented in the Court's supervisory reports. For example, in the cases of *Yakye Axa v Paraguay* [2006], *Sawhoyamaxa Indigenous Community v Paraguay* [2006], *Xákmok Kásek Indigenous Community v Paraguay* [2010], and *Kuna Indigenous People of Madungandí and the Embera Indigenous People of Bayano and their members v Panama* [2014], the offending states have reported the provision of public money to purchase land legally in hands of private third parties to comply with the restitution orders. However, completion of administrative procedures has not been fully attained in these cases, due to incoming new central government administrations. Contingencies of this sort generally represent significant delays in the completion of reparation measures ordered.

In this respect, some cases included in this study suggest that implementation can face tough setbacks when land designated to comply with restitution orders belongs to the offending state. Preliminary progress reports submitted by the State of Honduras in relation to the cases of the *Garifuna Triunfo de la Cruz and its members v Honduras* [2015], express difficulties in the implementation of restitution measures ordered because part of the land claimed by these communities as ancestral territories overlaps with national natural parks or are under special administrative regimes that hinder their recovery by the state.

Ongoing internal armed conflicts represent another challenging context. In the cases of *Operation Genesis v Colombia* [2013], *Moiwana Community v Suriname* [2006] and *Saramaka People v Suriname* [2007], this is a major driver in the eviction and displacement of Indigenous and tribal peoples from their ancestral territories. Implementation of restitution measures is hampered here by the lack of territorial control by the states, which is an essential condition to warrant civil, political, social and cultural rights. Also, internal armed conflicts forcefully restrain the implementation of the restitution orders by offending states.

The absence of supervisory monitoring by the I/A Court H. R. negatively influences the states' commitment to comply with restitution orders, particularly in those cases with scarce progress in their implementation. In the cases reviewed in this study, the absence of supervision predictably translates in poor compliance of restitution measures ordered to protect the right of Indigenous peoples to collective land ownership of ancestral territories. Also, the absence of coercive measures available to the Court, such as monetary fines, represents a major drawback to hold offending states responsible for complying with judgment. Most states willingly bear the international political cost of remaining non-compliant. As judged cases in this status continue to accumulate, this outcome may have lasting harmful effects to the legitimacy of the ACHR and the Court.

The twisting path followed in international law to regulate and protect private property during the second half of the 20th century, suggests that the jurisprudential creation by the I/A Court H. R. of collective rights in this matter will

continue to face formidable resistance within national legal systems. This is confirmed by the precarious results in compliance of Court orders to restore the collective right of Indigenous and tribal communities in Central and South America. Given the litigious disposition of stakeholders that oppose the implementation and compliance of the Court's orders on the matter, it is possible that their eventual contempt by state parties will delegitimize this jurisprudential right, as well as the I/A Court H. R. itself. In this scenario, perhaps it is worth reviewing the viability of the commitment made by Indigenous movements in the Americas regarding the use of judicial strategies in international instances as constitutive elements of their struggles and cultural identities to advance their political priorities in the future.

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## Glossary

Cacarica	tribal group that descends from the syncretism of Indigenous and African peoples, located in north west Colombia
Embera	Indigenous people originally based in the Chocó region in northwest Colombia, now settled in Panama in the province of Darien
Garifuna Punta Piedra	tribal group that descends from the syncretism of Indigenous and African peoples located in the northeastern Caribbean Coast of Honduras
Garifuna Triunfo de la Cruz	tribal group that descends from the syncretism of Indigenous and African peoples located on in the northwestern Caribbean Coast of Honduras
Kaliña-Lokono	Indigenous communities located in the in the extreme northeast of Suriname, bordering with French Guiana
Kichwa	Indigenous community located in the Amazon region of Ecuador
Kuna	Indigenous community located in the region of the Bayano, Panama
Lhaka Honhat	numerous Indigenous communities located in the Chaco Salteño region, Rivadavia, Argentina
Mayagna-Sumo Awás Tingni	Indigenous communities in the northern Caribbean coast of Nicaragua
Moiwana	tribal group that descends from the syncretism of Indigenous and African peoples located in eastern Suriname
Saramaka	tribal group that descends from the syncretism of Indigenous and African peoples located on the Upper Suriname River basin
Sawhoyamaxa	Indigenous semi-nomad community located in the Paraguayan Chaco
Xákmok Kásek	Indigenous semi-nomad community located in the Paraguayan Chaco
Xucuru	Indigenous community located in Pernambuco, northeastern Brazil
Yakye Axa	Indigenous community that belongs to the Southern Lengua Enxet people in the Paraguayan Chaco

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