

Inter-American Human Rights System and Indigenous Peoples

Talking Points

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I. Overview

- Since its creation, the Inter-American Commission on Human Rights (IACHR) has paid special attention to the protection of indigenous peoples in the Americas. The IACHR declared, in 1971, that indigenous peoples have a right to special legal protection because they have historically endured severe discrimination; and in 1972, that States are under the “sacred obligation” of protecting indigenous peoples in their territories, for historical reasons and because of moral and humanitarian principles. Since then, through its different means of action, the IACHR has dealt with hundreds of cases related to the protection of individual and collective rights belonging to aboriginal groups in every OAS country where they are present.
- The Rapporteurship on the Rights of Indigenous Peoples was created in 1990 as a specialized section of the IACHR in charge of developing, systematizing, reinforcing and consolidating the Commission’s work for the protection of indigenous peoples’ rights. The Rapporteurship on the Rights of Indigenous Peoples is the first of the nine thematic Rapporteurships that the IACHR has at this moment. This reflects the special status granted within the inter-American system to indigenous peoples’ rights.
- The IACHR, through the Rapporteurship and other specialized groups, carries out its mandate with regard to indigenous peoples’ rights through different tools and instruments, which include:
 - (1) The individual petition system, which deals with specific cases presented to the IACHR whenever there appears to be a violation of the human rights protected under the American Declaration of the Rights and Duties of Man or the American Convention on Human Rights.
 - (2) The granting of precautionary measures in urgent and serious cases of threats to the life or integrity of persons;
 - (3) The development of specialized in-depth studies and reports on particular issues or topics dealing with indigenous peoples’ rights. There are usually preceded by *in loco* and on-site visits, or special thematic hearings. Specifically, between 1983 and 2010, the IACHR had issued six thematic reports regarding indigenous peoples in various countries in the region, such as Nicaragua, Guatemala and Bolivia; the Commission has also issued reports on general issues, such as the compilation of sources of domestic and international law for the draft American Declaration on the Rights of Indigenous Peoples, and more recently, the systematization of inter-American jurisprudence regarding the rights of indigenous peoples

over their ancestral lands and natural resources¹. The IACHR is also about to publish a report on *Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas*, identifying the main threats these peoples face and the actions required to ensure the full respect of their human rights and their physical and cultural survival. The IACHR is also currently working on reports related to the situation of the human rights of indigenous peoples in Guatemala and the murder and disappearances of aboriginal women in Canada.

- (4) The inclusion of special chapters on indigenous peoples in the Commission's country reports. In particular, starting in the 1980s the IACHR started incorporating specific chapters in its country reports, which has become a common practice today.²
 - (5) A general monitoring of the situation of indigenous peoples throughout the Americas, accompanied by urgent requests for information and/or action to States in situations that merit them.
 - (6) Acting as a specialized consulting body for States and OAS organs; and participating in the elaboration of international legal instruments, including the proposed American Declaration on the Rights of Indigenous Peoples; among others.
- In addition to its different tools of action, the IACHR and its Rapporteurship on the Rights of Indigenous Peoples have strived to increase indigenous peoples' knowledge of the Inter-American system for the protection of human rights and access thereto; conducting and taking part in specialized seminars, courses and training programs at the national level throughout the Americas.
 - The work of the IACHR, through its different mechanisms, has aimed to make a difference on the ground in the lives of indigenous peoples and their members. It has also contributed to the development of international human rights law in this field, and to the adaptation of domestic legal systems to States' international human rights obligations. Among its contributions, one could include the production of final reports on individual cases which have led States to compensate victims, cease human rights violations and modify their legal systems; the provision of effective protective measures for indigenous leaders and activists at risk due to the development of their work as human rights defenders; the subscription of friendly settlement agreements which have resulted, *inter alia*, in the granting and demarcation of indigenous lands or in the initiation of social assistance programs for indigenous communities; and the production of legal materials that promote legal certainty with regard to extremely complex issues in the region.

II. Relevant Jurisprudence

- The petition and case system has been the arena where the Inter-American Commission and Court have developed most standards regarding the rights of indigenous peoples. Among the cases decided by the organs of the inter-American system, one can find cases in which the indigenous character of

¹ These reports are: Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin (1993), Special Report on the Human Rights Situation in the so-called "Communities of Peoples in Resistance" in Guatemala (1994), The Human Rights Situation of Indigenous People in the Americas (2000), Authorities and precedents in international and domestic law for proposed American Declaration on the Rights of Indigenous Peoples (2001), Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco (2010), and Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources (2010).

² See, e.g., Report on the Situation of Human Rights in Colombia (1981), Chapter VII, Section D; Third Report on the Situation of Human Rights in Guatemala (in Spanish only) (1985), chapter III; Forth Report on the Situation of Human Rights in Guatemala (1993), chapters III and VIII; Second Report on the Situation of Human Rights in Colombia (1993), chapter XI; Report on the Situation of Human Rights in Ecuador (1997), chapter VIII; among others.

the victim has been taken into account for purposes of, for instance, reparations, such as in the case of *Bámaca Velásquez v. Guatemala*, decided by the Inter-American Court on November 25, 2000. In addition, they have decided cases relating to massacres against indigenous communities or peoples, such as those committed against the Maya people of Guatemala, in the case of *Plan de Sánchez Massacre v. Guatemala*, and more recently in the *Case of the Río Negro Massacres v. Guatemala*, or against the maroon people of the Moiwana village in Suriname. Similarly, there are cases regarding forced disappearances and the execution of indigenous leaders,³ the criminalization of leaders based on their defense or ancestral community lands;⁴ cases of sexual violence against indigenous women and children;⁵ as well as impediments to the political participation of an indigenous political party.⁶

- Undoubtedly, however, the most attention of the organs of the system has been directed to the right to property of indigenous peoples over their ancestral territories and the natural resources found therein. That is because “its enjoyment involves not only protection of an economic unity but also protection of the human rights of a collectivity whose economic, social and cultural development is based on its relationship with the land.”⁷
- The following are some examples or representative cases that have been decided by the Inter-American Commission and the Inter-American Court on Human Rights. The list is not comprehensive, but rather illustrative of some of the most significant and recurrent issues that petitioners bring to the inter-American system of human rights.

- Mayagna (Sumo) Awas Tingni community v. Nicaragua (2001): Property rights

In 1998, the IACHR submitted the case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua to the Inter-American Court of Human Rights. The case related to judicial guarantees and the right to consultation of indigenous peoples in their territories, as well as the lack of demarcation and official recognition of the community’s territory. In 2001, the Inter-American Court issued the judgment in this landmark case, stating that Article 21 of the American Convention protects the right to property in a sense that encompasses, among other things, the rights of the members of indigenous communities in the framework of communal property.⁸ In many respects, this seminal judgment established the basis

³ I/A Court, Case of Chitay Nech et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs. Excepciones Preliminares. Judgment of May 25, 2010. Serie C No. 212/I/A Court H.R., Case of Escué-Zapata v. Colombia. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 165; I/A Court H.R., Case of Tiu-Tojín v. Guatemala. Merits, Reparations and Costs. Judgment of November 26, 2008. Series C No. 190.

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I/A Court H.R., Case of López-Álvarez v. Honduras. Merits, Reparations and Costs. Judgment of February 01, 2006. Series C No. 141.

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I/A Court H.R., Case of Fernández-Ortega et al. v. Mexico. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 30, 2010. Series C No. 215; I/A Court H.R., Case of Rosendo-Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2010. Series C No. 216.

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I/A Court H.R., Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127.

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CIDH, Arguments before the Inter-American Court of Human Rights in I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, par. 120(c).

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Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention -which precludes a restrictive

for inter-American jurisprudence on the subject of indigenous peoples' rights. In relation to the official recognition of the ownership of the lands and territories possessed by the indigenous peoples, the Court established that possession of ancestral lands should suffice for purposes of official recognition, taking into account the indigenous peoples' customary law. The Court recognized the importance of indigenous peoples being able to enjoy fully their lands in order to preserve their cultural and spiritual legacy, and transmit them to their future generations, since the relationship they have with the land is not purely a question of possession and production.⁹

- Three cases against Paraguay (2005-2010): Property rights

These three cases arose from the same set of facts: the sale of vast indigenous lands by the government of Paraguay in the London stock exchange in the 19th century.

(i) In *Yakye Axa People v. Paraguay*, decided by the IACHR in 2002, and subsequently by the Court in 2005, the Court emphasized that the communal property of the indigenous peoples' ancestral lands is indispensable for the maintaining, preservation and transmission of their culture: "...this Court has underlined that the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations."¹⁰ The Court also stated that the culture of the members of indigenous communities relates to their particular way of life in terms of being, viewing, and acting in the world. This way of life results from their close relationship with the traditional territories and the resources found therein, which not only provides the indigenous people's primary means of subsistence, but also constitutes an integral element for their worldview, religiosity, and therefore, cultural identity.¹¹

(ii) In *Sawhoyamaxa Community v. Paraguay* (IACHR report 2004; I/A Court judgment 2006), one of the principal themes was that the special significance of land for indigenous peoples in general, and for the members of the Sawhoyamaxa Community in particular. This special relationship implies that any denial of the enjoyment or exercise of the territorial rights carries with it a curtailing of very important values for the members of said peoples. If such territorial rights are undermined, the indigenous peoples run the risk of losing or suffering irreparable damages to their life, identity, and the cultural heritage to be transmitted to future generations.

(iii) *Xákmok Kásek Indigenous Community v. Paraguay* also related to the dispossession of indigenous lands by the Paraguayan State in the 19th Century, and the terrible present living

interpretation of rights-, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua. I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 148.

⁹ I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 149. See also I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay, par. 131. "For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations." I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 149.

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I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 131.

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I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 135.

conditions of the community. The Court held in 2010 that the State had violated the indigenous peoples by not respecting their rights over their ancestral lands and territories. In this case the Court also found, among other things, that Paraguay violated the Xákmok Kásek Community's property rights when it declared part of their territory a nature reserve without consulting the community, as required by the American Convention and Inter-American jurisprudence.¹²

- Case of Twelve Saramaka Clans v. Suriname (2007): Free, prior and informed consultation and consent

This case dealt with the consequences of a wood exploitation concession in lands occupied by the Saramaka people in Suriname. In this case, the organs of the Inter-American System affirmed the right of indigenous peoples not only over their lands, but also over their natural resources. The CIDH and the Inter-American Court pointed out that the lack of consultation with indigenous peoples regarding the protection of the environment in their territories and contiguous areas, as well as the omission of an adequate environmental impact assessment in connection with the exploitation of natural resources located within indigenous or tribal lands, are facts that tend to violate the right to property of the respective peoples, in contravention of Article 21 of the American Convention, read in light of Article 1.1 of that treaty. The Court also stated that when it comes to "large-scale development or investment projects that would have a major impact within [indigenous or tribal] territory, the State has a duty, not only to consult with the [people concerned], but also to obtain their free, prior, and informed consent, according to their customs and traditions."¹³ (para. 134). The IACHR issued its report in this case in 2006, and the Inter-American Court's rendered its judgment in 2007.

- Kichwa People of Sarayaku v. Ecuador (2012): Free, prior and informed consultation and consent

In this case, the Court analyzed, among other things, whether the State of Ecuador had violated the property rights of the Kichwa people of Sarayaku by awarding an oil exploration and exploitation concession to a private company partially in lands claimed by the Kichwa people of Sarayaku as their ancestral lands, without having conducted a consultation process or obtained their free, prior and informed consent. The Court conducted a meticulous analysis of the consultation process, focused on the following five components: (i) the prior nature of the consultation; (ii) good faith and attempts to reach agreement; (iii) appropriate and accessible consultation; (iv) environmental impact assessments; and (v) informed consultation. The Court found, based on the evidence submitted, that Ecuador did not carry out an effective and appropriate consultation process: the "consultation" was not conducted prior to commencing the project; it was not done in good faith, as there were repeated attempts to corrupt indigenous leaders; (iii) the process did not respect traditional decision-making processes of the Sarayaku; (iv) the environmental impact assessments—which were conducted by a private company and not by State agencies—did not take into account cultural and social impacts of the project on the Sarayaku people; and (v) the Sarayaku did not receive adequate information about the proposal. In its reasoning, the Court emphasized "effective participation" as the bedrock principle underlying the right to consultation.

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I/A Court H.R., Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, paras. 155-162.

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I/A Court H.R., Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172, para. 134; see also para. 133.

- These cases illustrate some of the most recurrent problems that indigenous peoples face in the Americas: the lack of certainty of ownership and control over their ancestral lands, territories and natural resources, which in turn threatens their physical and cultural existence as peoples.
- With the development of the contents of the right to indigenous property, the organs of the Inter-American system of human rights have turned to the obligations established in inter-American instruments to grant protection to both the indigenous communities and peoples who have directly resorted to them, as well as the rest of the communities and peoples indirectly by the effect of their pronouncements. In this way, the jurisprudence has attempted to fill the important gaps caused by the lack of an international instrument specifically on the subject in the Americas,¹⁴ and become the driver of the legal process within States and the international organs in charge of complementing the process. Despite the huge challenges currently faced by the system, it may well be the regional human rights mechanism that provides the greatest protection to the rights of indigenous peoples.

III. Precautionary Measures

- In addition to the petition and case system, in situations in which there is a grave and imminent risk of irreparable harm, the IACHR may request States to adopt precautionary measures to protect potential victims of human rights violations. By way of example, the IACHR has issued precautionary measures in the following situations:

- **Harassment and attacks against indigenous community leaders**

Qom Navogoh Indigenous Community of "La Primavera," Argentina. On April 21, 2011, the IACHR granted precautionary measures for the members of the Qom Navogoh indigenous community of "La Primavera," in Formosa, Argentina. The request for precautionary measures alleged that members of the security forces had perpetrated a series of acts of violence against members of the community and that as a result, leader Félix Díaz and his family were forced to move to another region. The Inter-American Commission requested the State of Argentina to adopt any necessary measures to guarantee the life and physical integrity of the members of the "La Primavera" community against possible threats, attacks, or acts of harassment on the part of members of the police, law enforcement officers, or other State agents, as well as to implement any necessary measures so that Félix Díaz and his family can return to the community under safe conditions.

- **Murders, attempted murders and other threats to members of indigenous peoples**

Members of the Awá Indigenous People of the Departments of Nariño and Putumayo, Colombia. On March 16, 2011, the IACHR granted precautionary measures for the members of the Awá indigenous people of the departments of Nariño and Putumayo, Colombia. According to the request for precautionary measure and information from various sources, the Awá people have been the target of numerous attacks, murders, and threats in the context of the armed conflict in Colombia. The

¹⁴ One of the important debts of the continent to indigenous peoples is the approval of the Draft American Declaration on the Rights of Indigenous Peoples. In 1989, the OAS General Assembly requested that the Inter-American Commission prepare a legal document regarding the rights of indigenous "populations." After undertaking a series of national and regional consultations with indigenous organization, experts on the subject, and governments, in 1997 the IACHR approved the "Draft American Declaration on the Rights of Indigenous Peoples, and submitted it to the General Assembly of the OAS. Fifteen years later, the text has not been approved by the Member States to date.

information indicated that clashes between the Army and irregular armed groups have taken place recently in the Chinguirito Mira indigenous reserve, leaving members of the Awá people caught in the middle of the crossfire. The Inter-American Commission requested that the State of Colombia adopt measures, agreed upon with the beneficiaries, to guarantee the life and physical integrity of the members of the Awá indigenous people of the departments of Nariño and Putumayo, including landmine removal from their ancestral territory and landmine risk education for the members of the Awá people.

- Threats against cultural and natural environment

Ngöbe Indigenous Communities et al., Panama. On June 18, 2009, the IACHR granted precautionary measures for members of the indigenous communities of the Ngöbe people, who live along the Changuinola River in the province of Bocas del Toro, Panama. The request for precautionary measures alleged that in May 2007, a 20-year concession was approved for a company to build hydroelectric dams along the Teribe-Changuinola River, in a 6,215-hectare area within the Palo Seco protected forest, which would flood the area in which four Ngöbe indigenous communities have been established with a population of approximately 1,000. The IACHR requested that the State of Panama suspend construction and other activities related to the concession until the bodies of the inter-American human rights system can adopt a final decision on the matter raised in Petition 286/08, which alleges violations of the rights protected under Articles 5, 7, 8, 13, 19, 21, 23, and 25 of the American Convention on Human Rights. The IACHR also asked the State of Panama to adopt the measures necessary to guarantee the free circulation as well as the life and physical integrity of the members of the Ngöbe community, in order to prevent acts of violence or intimidation measures.

- Massive invasions of indigenous territories

Communities of the Kuna of Madungandí and Emberá of Bayano Peoples, Panama. On April 5, 2011, the IACHR granted precautionary measures for the Kuna of Madungandí and Emberá of Bayano peoples, in Panama. The request alleged that in early 2011 there were massive intrusions into the territories of the Kuna of Madungandí and Emberá of Bayano indigenous reserve, in which settlers violently seized and destroyed virgin forests that were used by the indigenous communities to ensure their food supply. The petitioners noted that this has been a recurring situation and that the State is not adopting measures to stop such invasions. In order to ensure that the subject of the petition in this case does not become moot, the Commission requested that the State of Panama adopt any necessary measures to protect the ancestral territory of the communities of the Kuna of Madungandí and Emberá of Bayano peoples from intrusions by third parties and from the destruction of their forests and crops, until such time as the IACHR has adopted a final decision in the merits of the case.

- Indigenous peoples in voluntary isolation

The Tagaeri and Taromenami Indigenous Peoples, Ecuador. On May 10, 2006, the IACHR granted precautionary measures in favor of the Tagaeri and Taromenami indigenous peoples who inhabit the Ecuadorian Amazon jungle in the area bordering Peru and who are currently voluntarily isolated. The available information stated that members of the Taromenami tribe were murdered on April 26, 2006 in the Cononaco (River Chiripuno) area during reprisals linked to illegal logging and encroachments onto indigenous lands. In view of this, the IACHR requested that the Ecuadorian State adopt the measures necessary to protect the territory inhabited by the beneficiaries from third parties.

- Similarly, the Inter-American Court can order provisional measures in situations in which there is grave and serious risk of irreparable harm, as an extraordinary remedy. The Court has issued such measures in the context of indigenous peoples in connection with risks to the life and physical integrity of indigenous persons;¹⁵ to preserve the status quo while the merits of a case are pending examination;¹⁶ to protect indigenous communities from forcible displacements,¹⁷ among others.

IV. Concluding Remarks

- In sum, since the 1990s, different countries in the region have seen a process of recognition of indigenous peoples' rights at the domestic, constitutional level, which is coupled by the development of the recognition and protection of the rights of indigenous peoples at the international level, particularly with respect to their rights over their ancestral territories and natural resources in the inter-American sphere. In parallel, starting in the 1990s, and increasingly in recent years, there has been a significant increase of investments by companies from diverse industries as a consequence of, among other things, attempt by States to attract such investments through de-regulation of certain activities and the lax or non-existence of strict oversight and supervision.
- This has posed important challenges to States, related to the obligation to adapt their domestic legal framework to international standards. It has also created important gaps between constitutional or legislative advances, the effective application of certain norms, the institutional frameworks, and the daily lives of indigenous peoples in the continent. Therefore, the challenge lies on the implementation and effective protection of the rights of indigenous peoples.
- This can be seen, for instance, in that the IACHR is currently dealing with over two hundred individual petitions and cases at different stages of the procedure, as well as numerous requests for precautionary measures, from all of the OAS member States where indigenous peoples are present. The petitions and cases address a wealth of individual and collective rights protected by international human rights law. Nonetheless, a substantial proportion of these petitions deals with the protection of territories and natural resources; free, prior and informed consultations; and the States' duties in that regard.¹⁸
- However, there are also structural causes at the root of many of the violations of the rights of indigenous peoples, such as a deep culture of discrimination, rooted in centuries of history that

¹⁵ See, e.g., I/A Court of H.R., Matter of Integrantes del Equipo de Estudios Comunitarios y Acción Psicosocial (ECAP). Masacre Plan de Sánchez (Guatemala). Provisional Measures. Order of the Court of November 11, 2007; I/A Court of H.R., Matter of Rosendo Cantú et al. (Mexico). Provisional Measures. Order of the Court of February 2, 2010.

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See, e.g., I/A court of H.R., Matter of the Indigenous People of Sarayaku (Ecuador). Provisional Measures. Order of the Court of June 17, 2005.

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See, e.g., I/A Court of H.R., Matter of Indigenous People of Kankhuamo (Colombia). Provisional Measures. Order of the Court of April 3, 2009.

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It is also important to note that there are five cases related to indigenous peoples awaiting resolution before the Inter-American Court, including Norín Catriman and others (traditional authorities, leaders, and activists from the Mapuche indigenous peoples) against Chile (12.576, accumulated 12.611 and 12.612); Indigenous Peoples Kuna of Madungandí and Emberá from Bayano and their members against Panama (12.354); Garifuna Triunfo de la Cruz Community against Honduras (12.548); Garifuna Punta Piedra Community against Honduras (12.761); Kaliña and Kokono Indigenous Peoples against Suriname (12.639).

permeate the State institutions and can be expressed in many different, sometimes subtle, ways. The IACHR has also recently started receiving alarming information of the multidimensional and intersectional nature of the discrimination that indigenous women and girls suffer. Indigenous women and girls tend to suffer discrimination on the basis of multiple factors, including their sex, race, ethnicity, and situation of poverty. This discrimination is connected with the persistence of violence against indigenous women, not only physical, psychological and sexual, but also spiritual. This violence is also linked to threats to the full protection of their right to property over lands, territories, and natural resources, including armed conflicts, development projects, and the presence of extractive industries.

- The historic exclusion to which indigenous peoples have been subject, along with many assimilation policies and the denial of their rights over their ancestral lands, can be expressed in the fact that indigenous peoples in the Americas are, generally, in a less favorable situation than the general population. This is reflected in, among other factors, the high rates of poverty and extreme poverty among indigenous peoples; the high rate of malnutrition among indigenous children; the lack of access to culturally adequate health and educational services, among others.