PUBLIC INTEREST LITIGATION IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THE PROTECTION OF INDIGENOUS PEOPLES AND THE GAP BETWEEN LEGAL VICTORIES AND SOCIAL CHANGE

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The Inter-American Court of Human Rights has had a fundamental role in the protection of human rights in Latin America. Its judicial decisions have had a significant impact in national legislation, public policies and national courts. In the case of indigenous peoples, its main contributions have been related to the right to prior consultation and the protection of their territory. The purpose of this essay is to analyze the Sarayaku Case and its impact on public interest litigation. If one of the goals of strategic litigation is to foster social change, this cannot be restricted to the legal findings but must also include the active participation of victims, assuring their right of access to justice.

La Cour interaméricaine des droits de l'homme a joué un rôle fondamental dans la protection des droits de l'homme en Amérique latine. Ses jugements ont eu un impact significatif sur la législation nationale, les politiques publiques et les juridictions nationales. Dans le cas des peuples autochtones, elle s'est axée sur le droit à la consultation préalable et la protection de leur territoire. Le but de cet essai est d'analyser le cas Sarayaku et son impact sur les litiges d'intérêt public. Si l'un des objectifs du litige stratégique est de promouvoir le changement social, il ne peut se confiner qu'à des conclusions juridiques, mais doit aussi inclure la participation active des victimes, assurer leur droit d'accès à la justice.

La Corte Interamericana de Derechos Humanos ha tenido un papel fundamental en la protección de los derechos humanos en América Latina. Sus sentencias han tenido un impacto significativo en la legislación y políticas públicas de los Estados Parte de la Convención Americana de Derechos Humanos, así como en las decisiones de sus tribunales nacionales. En lo que corresponde a los pueblos indígenas, la jurisprudencia de la Corte Interamericana se ha centrado en el derecho a la consulta previa y en las medidas para la protección de sus tierras. El propósito de este ensayo es analizar el Caso Sarayaku v. Ecuador y el impacto positivo que esta sentencia puede tener en el desarrollo de litigios de interés público, tanto en el ámbito interamericano como local. Si uno de los propósitos de estos litigios es promover el cambio social, el desarrollo de estos casos no puede limitarse al análisis jurídico sino que debe también fortalecer la participación activa de las víctimas con el fin de asegurar su derecho de acceso a la justicia.

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The purpose of this essay is to analyze the *Sarayaku* case and its impact on public interest litigation. If one of the goals of strategic litigation is to foster social change, this cannot be restricted to the legal findings but must also include the active participation of victims, assuring their right of access to justice.

In Latin America, the protection and enforcement of human rights, especially of disenfranchised groups, has found a leveling field in the courts. For the past years, the construction of a legal and institutional framework in accordance with minimal democratic standards[1] has been fostered by judicial decisions,[2] which include the national implementation of International Human Rights Law. Despite the fact that the remedies sought in litigation benefit accredited parties to a specific lawsuit,[3] the overarching effects of its legal rules have promoted legal and institutional changes.

Public interest litigation (hereinafter "PIL") has contributed in the advancement of civil rights and has become a trigger mechanism for legal reforms[4], at a national[5] and international level.[6] In this sense, litigation has proven to be

> a key strategy for protecting the rights and enlarging the power of subordinated groups, particularly when other channels of influence are unavailable. Groups hobbled by discrimination or collective action problems may turn to courts as allies in the struggle for social justice.[7]

This dynamic framework, that is shaping a new human-rights standard in Latin America, cannot be understood by merely determining that the attitudinal approach of the judges, especially in international courts, has been the sole factor for change. One must assess and credit the role and participation of victims (in some situations, putting at risk their own personal integrity), as well as their legal representation,[8] as an important element to this outcome.

Despite limited financial means and resources, strategic human rights litigation has progressively changed the status quo,[9] contributing to create a more

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1 *Inter-American Democratic Charter*, 11 September 2001, 40 ILM 1289, online: Organization of American States <http://www.oas.org>.

2 See Inter-American Institute of Human Rights, *Building Democracy from the Point of View of Human Rights: Twenty-fifth Anniversary of the Inter-American Institute of Human Rights*, 1st ed (Costa Rica: Instituto Interamericano de Derechos Humanos, 2005).

3 See Judith Schonsteiner, "Dissuasive Measures and the "Society as a Whole": A Working Theory of Reparations in the Inter-American Court of Human Rights" (2007) 23 Am U Int'l L Rev 127 [*Schonsteiner*].

4 See Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) at 92.

5 See Ryan Goodman & Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (New York: Oxford University Press, 2013) at 53.

6 See Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (New Jersey: Princeton University Press, 2014) at 335.

7 Scott L Cummings & Deborah L Rhode, "Public Interest Litigation: Insights from Theory and Practice" (2009) 36 Fordham Urb LJ 603 at 606 [*Cummings*].

8 See Thomas M Antkowiak, "An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice" (2011) 47 Stan J Int'l L 351.

9 See Jeremy Perelman, "Transnational Human Rights Advocacy, Clinical Collaborations, and the Political Economies of Accountability: Mapping the Middle" (2013) 16 Yale Human Rts & Dev LJ 89.

open and democratic society. These litigations have fostered the creation of administrative and judicial accountability mechanisms for international crimes perpetrated in the past; they have set an enforceable standard for the protection of vulnerable groups; and established a framework so that extractive projects are carried respecting the rights of indigenous peoples,[10] among others. In all of these cases, the narrative and stories that supported the legal obligations claimed by petitioners, has been seminal for social change.[11]

Taking the above into consideration, the Inter-American Human Rights System[12] is perhaps the best example of a regional subsidiary mechanism that has contributed for tangible social changes in the Americas. Within the system, the rulings adopted by its judicial body, the Inter-American Court of Human Rights (hereinafter "IACtHR"), have been incorporated in national legislations and adopted by Supreme Courts and Constitutional Tribunals in Latin America.[13] In practice, their judicial decisions have become the minimal interpretative standards for the protection and enforcement of fundamental rights and liberties established in the *American Convention on Human Rights*,[14] its foundational treaty.[15]

The judgments of the Court address violations that usually go beyond the specific victims accredited to a specific case, contributing to the protection of human rights that must be implemented by States. These rulings contribute to the fostering of PIL within the Inter-American Human Rights System because:

> (1) there is a public interest in the outcome of the litigation; (2) the plaintiff has no personal, proprietary or pecuniary interest in the outcome, or if such an interest exists, it does not justify the litigation economically; and (3) the

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10 See Benjamin van Rooij, "Bringing Justice to the Poor, Bottom-up Legal Development Cooperation" (2012) 4 Hague Journal on the Rule of Law 286.

11 See Rogelio Pérez-Perdomo, "Lawyers, Rule of Law and Social Justice: A Latin American Perspective" (2008) 5 U St Thomas LJ 730.

12 See Alexandra R Harrington, "Internalizing Human Rights in Latin America: The Role of the Inter-American Court of Human Rights System" (2012) 26 Temp Int'l & Comp LJ 1.

13 Most of these reforms have restricted the scope of antiterrorist legislation and military jurisdiction; it has contributed to the creation of Truth and Reconciliation Commissions and established rules for the protection of the rights of ethnic and racial minorities. For the legal reforms regarding the prosecution of gross human rights violations, see Brian D Tittemore, "Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes Under International Law" (2006) 12 Sw JL & Trade Am 429. For a general overview of transitional justice in Latin America, see Due Process of Law Foundation, *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America*, 1st ed (Washington, Due Process of Law Foundation, 2007). In Spanish, see Kai Ambos, Gisela Elsner & Ezequiel Malarino, eds, *Justicia de Transición con Informes de América Latina, Alemania, Italia y España* (Montevideo: Fundación Konrad Adenauer, 2009).

14 *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123, 9 ILM 99 (entered into force 7 July 1978) [*American Convention on Human Rights*].

15 With the acknowledgment of unenumerated rights and the wide array of reparations ordered by the IACtHR, its practice could (wrongly) tend to resemble more of a supra-national Supreme Court, with the capacity to determine which laws are incompatible with the Convention. Although the Court does not have the power to strike down a piece of legislation or to determine the unconstitutionality of a specific law, the binding nature of their rulings grant the power to limit State action on acts that could be presumed to be contrary to the object and purpose of the *American Convention on Human Rights*.

> litigation raises issues of importance beyond the immediate interests of the parties.[16]

In this essay, the analysis will focus on the impact of the Case of the Kichwa Indigenous People of Sarayaku.[17] This relatively recent case, decided in June 2012, addresses the rights of indigenous peoples under a new perspective.[18] Therefore, the purpose is to analyze the importance of the narrative in PIL in international human rights tribunals, focusing on the rules of access and victim participation in the hearings, consolidating the right of access to justice and the rule of law as a whole.

The *Sarayaku* case is important for PIL and the protection of indigenous peoples because of the following elements: (i) the role that the narrative of the petitioners had in deciding the case; (ii) the participation of the community in this process before the IACtHR; and (iii) the acknowledgement of the unenumerated right to cultural identity of indigenous people, based on the right of equality and non-discrimination.

By analyzing this case, the stories, testimonies and affidavits of the plaintiffs, one can have a better understanding of this process of change as well as reflect on the limitations of judicial decisions.[19] As important as the role of the judiciary is, no effective social change will be possible without political will, which include but is not limited to the allocation of resources by the Government and the participation of society as a whole.[20] Only the combination of these three elements, along with a continuous oversight and accountability mechanism, can assure a sustainable transformation of society.

For this purpose, the first part of the essay will briefly describe the functioning of the Inter-American Human Rights System and the impact that the decisions of the IACtHR have in Latin America Human Rights Law. The second part will contextualize the judicial framework established by this Court regarding the protection of indigenous population that builds up to the *Sarayaku* case. The third part will analyze this case under a PIL approach, prior to concluding with some remarks regarding PIL and the enforcement of Human Rights in Latin America. Cases

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16 Christian Schall, "Public Interest Litigation Concerning Environmental Matters Before Human Rights Courts" 20 J ENVTL L 417 at 419 (footnotes omitted).

17 *Case of the Kichwa Indigenous People of Sarayaku (Ecuador)* (2012), Merits and Reparations, Inter-Am Ct HR (Ser C) No 245 [*Sarayaku*].

18 The interesting aspect of these cases is that Latin America has benefited economically due to a surge on the price of minerals, gas and oil, which has been the main revenue that finances social expending and public policies. In this context, many of the decisions regarding the rights of indigenous peoples have economical consequences to the State. This "clash" between economic policy and the protection of human rights has seen an increase in socio-environmental conflicts. Institutional fragility in the majority of Latin American States has impeded an integral solution.

19 See David C Baluarte, "Strategizing for Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative for Victims' Representatives" (2012) 27 Am U Int'l L Rev 263.

20 See Bruce Ackerman, *We The People, Volume 3: The Civil Rights Revolution*, 1st ed (Cambridge: Harvard University Press, 2014).

regarding indigenous peoples that have been brought before the IACtHR,[21] a common factual denominator have been the use or concession, by the State, of their land and territory on behalf of extractive industries.[22]

The judicial enforcement of human rights has favoured the advancement of the recognition of the rights of indigenous peoples. The *Sarayaku* case can be catalogued as a "success story" for the remedies and measures ordered by the IACtHR to protect collective groups and to reassure that any activity within the territory of an indigenous population must be previously subject to consultation.[23] However, as important and consistent that these decisions might be within the judiciary, one must also address the political will to enforce such remedies, in order to make social change effective.

I. The Inter-American Human Rights System and the Role of the Inter-American Court of Human Rights[24]

Since the adoption of the *United Nations Charter*,[25] international organizations have developed a series of treaties and organs that acknowledge and protect fundamental rights and freedoms. The adoption of the *Universal Declaration of Human Rights*[26] set the contemporary framework for International Human Rights Law, leaving States the duty to implement and fulfill its mandate.[27] As important as the ratification and entry into force of core international conventions on human rights, might have been, its initial impact was minimal in Latin America.

At a national level, it must be taken into account that Latin American legal tradition comprehends a monist approach to international law. This means that international law is part of its national legal order. In the case of human rights treaties, they are part of what is called *bloc de constitutionalité* and are considered to be an integral part of the constitution, standing at the top of the legal hierarchy.[28] In addition, these treaties do not need legislative implementation and can be tried directly before national courts.

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21 Cesar Rodriguez-Garavito, "Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields" (2011) 18 Ind J Global Leg Stud 263.

22 See Jernej Letnar Cernic, "State Obligations Concerning Indigenous Peoples' Rights to Their Ancestral Lands: Lex Imperfecta?" (2013) 28 Am U Int'l L Rev 1129.

23 See Upasana Khatri, "Indigenous Peoples' Right to Free, Prior, and Informed Consent in the Context of State-Sponsored Development: The New Standard Set by Sarayaku v Ecuador and Its Potential to Delegitimize the Belo Monte Dam" (2013) 29 Am U Int'l L Rev 165.

24 Herencia Carrasco, *The Inter-American Court of Human Rights and the State Response to the Prosecution of Crimes Against Humanity in the Americas: A Critical Assessment* (2010), online: Social Science Research Network <http://ssrn.com>.

25 *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7.

26 *Universal Declaration of Human Rights*, GA Res 217A, UNGAOR, 3d Sess, 1st plen mtg, UN Doc A/810 (1948) at 71.

27 See Oona Hathaway & Scott J Shapiro, "Outcasting: Enforcement in Domestic and International Law" (2011) 121 Yale LJ 252.

28 See Allan R Brewer-Carías, *Constitutional Protection of Human Rights in the Americas: A comparative study of the Amparo Proceeding*, 1st ed (New York: Cambridge University Press, 2008).

In this context, as democratically elected governments began to regain power in the late 80's, the consolidation of the rule of law was intertwined with the enforcement of human rights.[29] However, the incorporation of fundamental rights and liberties in political constitutions[30] as well as the ratification of core international human rights treaties fostered a nominal rather than substantive protection of human rights, leaving the enforcement mainly to the judiciary.

Nonetheless, the weakness and lack of the judicial independence in the majority of Latin American States, especially during military regimes or authoritarian governments, prompted the need to create a regional, subsidiary and last resort mechanism to act when a State was unable or unwilling to administer justice.

It was in this context that the Organization of American States (hereinafter "OAS") adopted in 1969 the *American Convention on Human Rights*.[31] The functioning of an Inter-American Human Rights System has worked around a jurisprudence set to have a dynamic approach and interpretation to the object and purpose of the foundational treaty.[32]

The *American Convention on Human Rights*, which entered into force in 1978,[33] restates the core civil and political rights that are found in other international instruments, mainly the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*.[34] In order to assure compliance in the fulfillment of its object and purpose, a binary oversight mechanism was created, composed of the Inter-American Commission[35] and the IACtHR, which has its siege in San Jose, Costa Rica.[36]

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29 See Juan E Méndez & Catherine Cone, "Human Rights Make a Difference: Lessons from Latin America" in Dinah Shelton, ed, *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013) at 955.

30 See Roberto Gargarella, *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution* (Oxford: Oxford University Press, 2013) at 132.

31 *American Convention on Human Rights*, *supra* note 14.

32 Hector Faundez Ledesma, *El Sistema Interamericano de Protección de los Derechos Humanos: Aspectos Institucionales y Procedimentales*, 3rd ed (Costa Rica: Instituto Interamericano de Derechos Humanos, 2009).

33 As of April 2014, twenty-three States have ratified the *American Convention* and accepted the jurisdiction of the IACtHR: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay.

34 *International Covenant on Civil and Political Rights*, GA Res 2200A (XXII), UNGAOR, Supp No 16, UN Doc A/6316 (1976).

35 The Inter-American Commission of Human Rights operates like a regional Ombudsman, with oversight mechanisms on the compliance of the object and purpose of the treaty by State parties and as a semi prosecutorial agency. Individual complaints on violation of the *American Convention* are filed before the Commission. In case the case cannot be settled by the State party and the alleged victim, the Commission can file the case or take it to the IACtHR, where it becomes a party against the State.
For the purpose of this article, the analysis will focus on the role of the IACtHR in the *Sarayaku* case, noting that the Inter-American Commission has played a leading role in the promotion and protection of human rights in the Americas, including the rights of indigenous peoples.

36 The *American Convention* is divided into two main parts. The first part of the treaty acknowledges the human rights of citizens and persons located in the territory of State Parties, including the right to life,

The IACtHR is an international human rights tribunal that can decide on contentious cases[37] or render advisory opinions.[38] The Court has its framework set by the *American Convention on Human Rights* and with competence to exclusively determine the international responsibility of a State. This means that the scrutiny of the Court is limited to the rights and freedoms recognized in the *American Convention* and the unenumerated rights acknowledged by the IACtHR, lacking the competence to determine individual responsibility.

The jurisdiction of the IACtHR is complementary to the one exercised by the State and its judicial decisions are binding and final.[39] The Court has the capacity to order a broad range of reparations,[40] according to the terms established by Article 63 of the *American Convention*.[41] As of today, there has been no substantive amendment to the treaty,[42] only a progressive interpretation of its scope of application, including the recognition of unenumerated rights.

The IACtHR began its operations in 1979 and over the years, it has developed a systemic application of the *American Convention*, including institutions of international criminal law, international humanitarian law and other international human rights treaties to determine the obligation of States Parties, vis-à-vis its foundational treaty. This practice has been acknowledged by the Court as jurisprudential "cross-fertilization"[43] and allows a judicial body, in this case the IACtHR, to analyze human rights violations under the scope of other branches related to International Human Rights Law.

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the right to judicial protection and the right to due process, among others. The second part of the Convention establishes the procedure under which the organs of the Inter-American Human Rights System interact and maybe seized.

37 See *American Convention on Human Rights*, *supra* note 14 at art 62 and 63.

38 *Ibid* art 64.

39 *Ibid* art 67 states the following:
"The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment".

40 See Thomas M Antkowiak, "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond" (2008) 46 Colum J Transnat'l L 351.

41 *American Convention on Human Rights*, *supra* note 14, at art 63 states the following:
"1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.
2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission".

42 As stated before, some of the decisions have created a legal controversy causing some of the States to leave the jurisdiction of the Court (Peru during the final years of the Fujimori government) or to propose amendments to the *American Convention*, although in the latter case, there has not been a formal proposal. The only country that has effectively denounced the *American Convention* is Trinidad and Tobago in 1998, due to their political decision to reinstate the death penalty.

43 *Almonacid Arellano Case (Chile)* (2006), Preliminary Objections, Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 154, Concurring Opinion of Judge Cançado Trindade, at paras 26 and 27.

In this regard, the IACtHR has in some cases determined the obligation to respect and fulfill the object and purpose of treaties that have not been ratified by States[44] or ordered a State to implement legislation regarding crimes against humanity according to the guidelines set by specific international treaties.[45] As-of-today, the Court has addressed almost every civil and political right acknowledged in the *American Convention*, and is progressively analyzing the fulfillment of economic, social and cultural rights[46] as a means to ensure fundamental rights such as life and personal integrity.

The broad scope of interpretation by the IACtHR is granted by Article 1.1 of the *American Convention*, which determines the following:[47]

> Article 1. Obligation to Respect Rights
>
> 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

The first case that was brought before the IACtHR was the *Velasquez Rodríguez* case,[48] setting the path to what the mandate of the Court would be, focusing on the investigation and punishment of those responsible of international crimes. In this case, the IACtHR stated that

> the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.[49]

Another element that must be taken into account is that the claimants that seek relief before the Inter-American Human Rights System are usually people with limited financial resources who belong to social/racial or ethnic minorities or groups, where the State has systematically failed to provide basic conditions for the exercise of their rights.

As previously stated, the IACtHR is a Court of last resort and can only assume jurisdiction over a subject matter when a State is unable or unwilling to act.

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44 *Ibid*.

45 *Goiburu et al Case (Paraguay)* (2006), Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 153.

46 These rights are bound to have a progressive nature, under the scope of article 26 of the *American Convention* but the IACtHR has been analyzing its nature *vis-à-vis* civil and political rights. Among other, see *Five Pensioners Case (Peru)* (2003), Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 98.

47 *American Convention on Human Rights*, *supra* note 14 at art 1.1.

48 See *Velásquez Rodríguez Case (Honduras)* (1987), Preliminary Objections, Inter-Am Ct HR (Ser C) No 1.

49 *Velásquez Rodríguez Case (Honduras)* (1988), Merits, Inter-Am Ct HR (Ser C) No 4, at para 166 [*Velásquez*].

This means that a person must exhaust local remedies before seizing the Inter-American Human Rights system or the claimant must prove that local remedies are not available and/or inefficient.

This trigger mechanism is established in Article 46[50] of the *American Convention* and has been confirmed by the IACtHR since the *Velasquez Rodriguez* case by stating the following:

> the rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding, this is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction.[51]

As determined by the IACtHR in the *Las Palmeras* case:

> [t]his system is a two-tiered system: a local or national tier consisting of each State's obligation to guarantee the rights and freedoms recognized in the Convention and punish violations committed. If a specific case is not resolved at the local or national level, the Convention provides an international tier where the principal bodies are the Commission and this Court. But as the Preamble to the Convention states, the international protection is "reinforcing or complementing the protection provided by the domestic law of the American states."[52]

A matter can only be brought to the IACtHR by the Inter-American Commission or by another State party. Claimants cannot seize the Court directly and they must file their claims before the Inter-American Commission.[53] At this stage of the proceeding, the Commission works as a filter to determine if there are grounds to open an investigation or if it should be dismissed.[54]

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[50] *American Convention on Human Rights*, *supra* note 14 at art 46, states the following:
"1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:
a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
c. that the subject of the petition or communication is not pending in another international proceeding for settlement; and
d. that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.
2. The provisions of paragraphs 1a and 1b of this article shall not be applicable when:
a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies".

[51] *Velásquez, supra* note 49 at para 61.

[52] *Las Palmeras Case (Colombia)* (2001), Merits, Inter-Am Ct HR (Ser C) No 90 at para 33.

[53] See *American Convention on Human Rights*, *supra* note 14 at art 44.

[54] See *American Convention on Human Rights*, *supra* note 14 at art 48.

In case there are merits to open an investigation, the Commission calls upon the State to submit its written plea.[55] During this stage, the main purpose is to find a friendly settlement of dispute between the State and the claimants.[56] In case no settlement is achieved, the Commission must present a report with recommendations to the State if it considers that there has been a violation to the Convention.[57] In case the State does not fulfill them, then the Commission can take the case towards the IACtHR,[58] where it acquires semi-prosecutorial functions, opposing the State.

The Inter-American Human Rights System has been framed to respect the "judicial sovereignty of a State", where violations to the *American Convention* that have not been addressed by State parties can be brought before the Inter-American System. Over the years, the rules of procedure of the Inter-American Commission and the IACtHR have been modified to allow a more dynamic process, especially regarding the participation of victims. The last major change in the IACtHR *Rules of Procedure*[59] took place in November 2009, where the victims obtained an autonomous judicial standing, as soon as a case is officially filed before the Court.[60]

The relationship between the Inter-American Human Rights System and national legal orders has triggered a significant number of reforms, not only in the protection of human rights but also to the consolidation of democratic institutions. This "dialogue"[61] is not always pacific but the most important part is that private individuals, particularly victims and their legal counsels, have been able to contribute to this change. In some cases, national courts have used the rulings of the IACtHR as a stepping-stone to more overarching and thorough decisions. However, as the remedies ordered by Courts increase in complexity, the practical impact of the remedies orders tends to diminish.

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55 *Ibid*.

56 See *American Convention on Human Rights*, *supra* note 14 at art 49.

57 See *American Convention on Human Rights*, *supra* note 14 at art 50.

58 See *American Convention on Human Rights*, *supra* note 14 at art 51.

59 OAS, Inter-American Court of Human Rights, LXXXV Sess, *Rules of Procedure of the Inter-American Court of Human Rights*, (2009) [*Rules of Procedure*].

60 The last amendment of the IACtHR Rules of Procedure was adopted in November 2009, where its article 25 states that victims have an autonomous participation before the Court since the beginning of the judiciary proceedings.

Article 25. Participation of the Alleged Victims or their Representatives

1. Once notice of the brief submitting a case before the Court has been served, in accordance with Article 39 of the Rules of Procedure, the alleged victims or their representatives may submit their brief containing pleadings, motions, and evidence autonomously and shall continue to act autonomously throughout the proceedings.

61 See Ezequiel Malarino, "Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights" (2012) 12 International Criminal Law Review 665.

II. The Rights of Indigenous Peoples Established by the Inter-American Court of Human Rights

Within the Inter-American System of Human Rights, social justice is usually associated with economic, social and cultural rights, thus, limiting the scope of judicial application. The traditional justification is that social justice depends on the allocation of resources and it resides within the executive of each country the design and implementation of the aforementioned programs. However the dichotomy between civil and political rights and economic, social and cultural rights has progressively been deluded[62] as significant advances are being made in this field, mainly in the enforcement of the right to health and education.

The IACtHR has developed a comprehensive policy regarding the protection of human rights of special vulnerable groups but it is concerning the rights of indigenous peoples where there have been significant rulings that are having an economic and social impact. In this specific matter, the Court has adopted judicial decisions regarding the collective and intellectual property of indigenous peoples[63] that are having an effect on forestry, mining and oil projects.

The first challenge of the judges was to determine the legal framework, since the *American Convention on Human Rights* does not establish specific obligations to the protection of indigenous population. In this sense, the solution adopted was that under Article 29, section 2, the *Convention* granted the possibility of expanding "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".[64]

Therefore, by means of systematic interpretation, the Court has determined that the *169 Convention on the Rights of Indigenous and Tribal Peoples*[65] was fully applicable under the scope of the *American Convention*.[66] In addition, the link to this right was established within Article 21 of the *Convention*,[67] referring to the right to property, which later the Court determined that covered communal property.[68]

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62 See *Five Pensioners (Peru)* (2003), Inter-Am Ct HR (Ser C) No 98.

63 See *Yakye Axa Indigenous Community (Paraguay)* (2005), Inter-Am Ct HR (Ser C) No 125 [*Yakye*].

64 See *American Convention on Human Rights*, *supra* note 14 at art 29.

65 *Convention No 169, Convention concerning Indigenous and Tribal Peoples in Independent Countries*, June 27, 1989, Art 1 (3), 28 ILM 1382 (1989) [*Convention No 169*].

66 See *Case of the Saramaka People (Suriname)* (2007), Inter-Am Ct HR (Ser C) No 172, para 92 [*Saramaka*].

67 See *American Convention on Human Rights*, *supra* note 14 at art 21.
Article 21. Right to Property
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.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

68 See *Moiwana Community (Suriname)* (2005), Inter-Am Ct HR (Ser C) No 124 [*Moiwana*].

The second challenge was to determine the scope of application of the *169 Convention in the Inter-American System*. In the *Yakye Axa* case, the IACtHR analyzed the State responsibility regarding the occupation of ancestral indigenous territory by private companies. The Court determined that Paraguay had violated the right to property[69] of the indigenous community vis-à-vis the obligations established in the *169 Convention*.[70] Therefore, the *American Convention* can be employed as a bridge towards other international treaties that would have more specific measures of protection.

In this case, the Court concluded that communal rights can be limited when they are (i) established by law; (ii) necessary; (iii) proportional, and (iv) their purpose is to attain a legitimate goal in a democratic society.[71] Due to the fact that there was no agreement between the members of the community and the State regarding use of the land, it failed to ensure effective use and enjoyment by the members of the Yakye Axa community of their land.[72] The Court ordered the restitution of the communal land and the payment of due compensation.

In the case of the *Saramaka People*,[73] the IACtHR established the framework so that indigenous peoples can exercise the right to consult, prior to the concession of economic activities on indigenous territories.[74] In addition, the Court ruled that the State of Suriname "has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions".[75]

The decisions of the IACtHR regarding indigenous population show a trend towards the protection of cultures and traditions while trying to find a balance between economical activities and the protection of the environment.

The right to prior consultation as an unenumerated right of the *American Convention* has had an impact on all Latin American countries, regardless of their approach to social rights, free trade agreements or the institutional framework for the protection of human rights and indigenous peoples.[76] This includes the creation of specialized government agencies in charge of implementing the right to prior consultation,[77] the adoption of specific legislation implementing this right[78] as well as

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69 See *American Convention on Human Rights*, *supra* note 14 at art 21.

70 See also SAWHOYAMAXA Indigenous Community *(Paraguay)* (2006), Inter-Am Ct HR (Ser C) No 146.

71 See *Yakye, supra* note 63 at paras 142-145.

72 *Ibid*.

73 See *Saramaka, supra* note 66 at paras 132.

74 Convention 169, *supra* note 65 at art 6.

75 *Saramaka*, *supra* note 66 at para 134.

76 Inter-American Commission on Human Rights, Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources: Norms and jurisprudence of the Inter-American Human Rights System, OEA/SerL/V/II Doc 56/09 (Washington: IACHR, 2009).

77 As an example, in Colombia the Ministry of Interior is in charge of designing and implementing the previous consultation in the country while in Peru, the Viceministry of Interculturality is the entity in charge of protecting the rights of indigenous peoples.

the establishment of a judicial framework by Constitutional Courts or Supreme Courts of Justice regarding this topic.[79]

As a complement to these advances, an issue that is relatively new for the Inter-American Human Rights System is the protection of indigenous peoples in voluntary isolation or initial contact. In this type of situation, the issue is not the consultation process in itself but the adoption of measures adopted by the State to protect their territory (usually natural reserves), their health and security, mainly from drug trafficking and illegal mining activities in the Amazon forest.[80] As of today, the IACtHR has not addressed this topic but it is plausible to state that this will be brought before the Court in the near future.

III. The Importance of the *Sarayaku* Case for the Advancement of Public Interest Litigation on Behalf of Indigenous Peoples

In the *Sarayaku* case,[81] the facts of the case refer to the concession of the territory of the Sarayaku People by the Ecuadorian State for the exploration and exploitation of oil by a private company, without previously consulting with them or seeking to obtain their consent.[82] The territory of the Sarayaku is located in the Amazon region,[83] rich in natural and oil resources. This population subsists on collective-based farming, hunting and fishing;[84] hence, the intangibility of their territory is important for their subsistence.

Ecuadorian authorities have recognized the Sarayaku People as an original indigenous population, enabling them to govern themselves according to their customs and practices.[85] Moreover, in 1992, the State granted them a parcel of land in order to protect the biodiversity, to improve the lives of indigenous peoples and to protect their culture.[86] However, the State reserved the right to exploit, without interference and under certain environmental conditions, subsoil natural resources.[87]

Ecuador is a country rich in natural resources, especially oil. In 1996, a partnership contract was subscribed with a company to explore and exploit oil

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78 See Vladimir Ameller, Diego Chávez, *et al*, *El Derecho a la Consulta Previa de los Pueblos Indígenas en América Latina* (La Paz: Fundación Konrad Adenauer - Programa Regional de Participación Política Indígena, 2012).

79 See Due Process of Law Foundation, *Digesto de jurisprudencia latinoamericana sobre los derechos de los pueblos indígenas a la participación, la consulta previa y la propiedad comunitaria*, 1st ed (Washington: DPLF, 2013).

80 Inter-American Commission on Human Rights, *Indigenous peoples in Voluntary Isolation and Initial Contact in the Americas: Recommendations for the full respect of their Human Rights*, OEA/SerL/V/II Doc 47/13 (Washington: IACHR, 2013).

81 *Sarayaku, supra* note 17.

82 *Ibid*, para 2.

83 *Ibid*, para 52.

84 *Ibid*, para 54.

85 *Ibid*, para 55.

86 *Ibid*, paras 61-62.

87 *Ibid*, para 62.

resources in an area covering the territory of the Sarayaku People.[88] In the Environmental Impact Assessment submitted by the company in 1997 to Ecuadorian officials, it highlighted that the indigenous people had denied company contractors entry into their territory.[89] Attempts to negotiate with community leaders failed[90] and the activity within such territory was suspended until November 2002,[91] when the company began seismic activities in the Sarayaku territory. This included the loading of 1433 kg of pentolite explosives[92] in the surface and subsoil. The exploratory activity caused the destruction of communal property and a spiritual site,[93] among other damages.

The Sarayaku People unsuccessfully tried to halt the activity in their territory through a Constitutional protection clause,[94] enabling them to file a petition before the Inter-American Human Rights System in December 2003.[95] On July 2004, the IACtHR granted provisional measures[96] to protect the life and integrity of the Sarayaku People,[97] ordering the suspension of the extractive activity in their territory.

This measure, accepted by the State, halted the activities of the oil company in the area, assuring that a greater damage would not be caused in the territory. As a consequence, it led to the termination of the contract agreement in November 2010.[98] It must be noted that in this case, the Ecuadorian State accepted its international responsibility but the IACtHR continue to hear the case because of its importance for the protection of human rights.[99]

Under a PIL approach, this is the first element of relevance to this case. The provisional measure ordered by the Court prevented a greater damage to the petitioners. In a historical perspective of the IACtHR case law, this is important because the majority of the cases heard by the Court address situations where non-pecuniary measures of restitution are not possible, because the victims have been assassinated or disappeared by State agents or the damages are of such nature that a judicial decision cannot order a restitution to a pre-damage situation.

This is important for PIL because its nature is not only reactive towards a situation of systematic inequality or human right violation, but can actually prevent a greater damage and reverse the original cause that brought the case to the Court in the first place. In this case, the order to remove the explosives and to reforest the area,[100] sought to reestablish the situation prior to the oil exploration activities in the Sarayaku land.

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88 *Ibid*, para 64.
89 *Ibid*, para 69.
90 *Ibid*, paras 73-80.
91 *Ibid*, paras 84-85.
92 *Ibid*, para 101.
93 *Ibid*, para 104.
94 *Ibid*, paras 87-91.
95 *Ibid*, para 1.
96 *Ibid*, para 5.
97 *Ibid*, paras 47-48.
98 *Ibid*, para 123.
99 *Rules of Procedure, supra* note 59 at art 64.
100 *Sarayaku, supra* note 17 at paras 289-294 and para 341, order 2.

The second element of importance was regarding the participation of victims. As stated in Section 1, the IACtHR has adopted changes to its *Rules of Procedure* in order to grant petitioners a greater autonomy and participation in the proceedings. In addition, a Legal Assistance Fund [101] of the Inter-American Human Rights System was adopted by the OAS, with the purpose of assuring the participation of victims before the oral hearing, which in this case, was used to assure the participation of members of the Sarayaku People.[102]

It must be taken into account that the provisional measures ordered by the IACtHR were to protect the entire Sarayaku People, and not only specific members of their community that were accredited as potential victims. This slight shift in the language and scope of this measures meant that the goal was to protect a collective group as a whole, meaning that this case could need evidence beyond the ones that were presented in the written pleadings or oral hearing before the IACtHR.[103]

It must be restated that Ecuadorian authorities had accepted its international responsibility and due to the importance of the case for the protection of the rights of indigenous peoples and the protection of the environment, there was an opportunity to obtain "additional information about the situation of the presumed victims and the places where some of the alleged events took place".[104]

Despite the fact that the goal of social change is to actually change the status quo, PIL still takes place within a tribunal, where parties are obliged to abide by the rules of procedure and professional code of conduct established in law. This might be logical for legal professionals but for victims of human right violations who seek a relief in international courts that could not be obtained within their local systems, some of these rules might be limitative for them to express their views and stories. The recommendation is that these rules of procedure must exist but they must have a leniency to foster access to justice and meaningful participation of victims.

Therefore, a step towards the right direction was in the official public hearing before the IACtHR, which took place on 6 July 2011,[105] where one of the elders of the Sarayaku, Mr. Sabino Gualinga, rendered his testimony. Mr. Sabino, speaking in his own language with the assistance of a translator, described the effects that the exploration of oil had on the land, the flora and fauna as well as with their cultural traditions. Mr. Sabino declares that the oil company destroyed one of their sacred trees affecting part of their cultural traditions. In addition, he declares that because of the economic activity, the Sarayaku were unable to perform their traditional festivities, which is of vital importance to pass their history, chants and dances to the younger members of the community.

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101 *Rules of Procedure for the Operation of the Legal Assistance Fund of the Inter-American Human Rights System*, 11 November 2009, CP/RES 963 (1728/09) (2009).

102 *Sarayaku*, *supra* note 17, para 332.

103 The oral hearing took place in San Jose, Costa Rica (July 2011), online: IACtHR <http://www.corteidh.or> (Video was last consulted on April 22, 2014).

104 *Sarayaku*, *supra* note 17 at para 20.

105 Inter-American Court of Human Rights, "Caso del Pueblo Indígena Kichwa de Sarayaku vs Ecuador-Audiencia Pública del (6 July 2011), online: Corteidh <http://www.corteidh.or>.

As important as the testimony of Mr. Gualinga and the representatives of the victims to address the merits of the case, the State of Ecuador and the leaders of the community[106] invited the IACtHR to travel and visit the territory of the Sarayaku People so that they could directly assess the damages. This visit took place on 21 April 2012[107] and it was the first time that the Court had organized an in situ visit[108] for an on-going contentious matter. During the visit, representatives of the Court, the Inter-American Commission, victim representatives and State agents

> heard numerous statements from members of the Sarayaku, including young people, women, men, the elderly and children from the community, who shared their experiences, views and expectations about their way of life, their worldview and their experience in relation to the facts of the case.[109]

This is probably one of the main breakthroughs of this case for the advancement of PIL because, for the first time, members of the IACtHR visited the area to assess the damages caused to the territory of the Sarayaku, but also had the possibility of gathering new evidence based on the testimonials of all the members of the community.[110] This represents a major advance in access to justice and as of today, analysis of the ruling has not put this into the proper perspective, especially of what this could mean for future cases brought before the IACtHR.

In the official video of the visit, one can see that the entire community participates in this hearing, addressing Court officials in their own native language (with subsequent translation), wearing their traditional clothes and participating according to their customs and traditions.

In one of the testimonies, Mr. Franco Viteri, one of the members of the Sarayaku states that they have their own concept of development,[111] which embraces the protection of the environment, the animals and the rocks located in the territory. Despite the threats suffered in the past, they will not give up. In another segment, the President of the Sarayaku community describes what has been a nine-year litigation before national courts[112] and that they were hoping that the IACtHR would finally provide justice to their people.

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106 *Sarayaku*, *supra* note 17 at paras 18-21.

107 See Inter-American Court of Human Rights, "Video-documento ilustrativo sobre la diligencia in situ de una delegación de la Corte al territorio del Pueblo Sarayaku", (24 September 2012), online: Vimeo <http://vimeo.com>.

108 For the past years, the IACtHR has conducted oral hearings outside San Jose, with the purpose of "bringing the Court closer to the people. As important as this is, this is more of an outreach activity, where cases against the State that is hosting the hearing are not heard.

109 *Sarayaku*, *supra* note 17 at para 21.

110 To see a presentation from the then President of the IACtHR regarding his personal experience regarding the visit to the Sarayaku territory, see Comisión Andina de Juristas, "La Corte Interamericana de Derechos Humanos y la Consulta Previa" Comisión Andina de Juristas- Curso Prevención y Manejo de Conflictos Sociales en el Perú (August 2012), online: Youtube <http://www.youtube.com>.

111 *Ibid*.

112 *Ibid*.

In my view, this is one of the major breakthroughs of this case, because it established a multicultural and multilingual approach to PIL within the IACtHR. In dealing with cases referring to the advancement of rights by disenfranchised groups, narratives matter[113] and are seminal to the breakdown of taboos, prejudice and misconceptions. When it comes to human rights violations, the "day in Court" matters the most because it is a form of compensation and relief for these stories to be heard. As it can be seen in the video of the *Sarayaku* case, officials of the Court, State agents and members of the Inter-American Commission participated according to the practices and traditions of the community. As important as the rhetoric for the advancement of human rights, the legal framework for their protection must also be assured.[114]

Latin America is a multicultural and multiethnic continent, with Constitutional provisions celebrating and fostering this socio-cultural reality. National legislation acknowledges indigenous peoples to administer justice according to their customs, as long as this administration of justice respects minimal fundamental human rights standards.[115] Sometimes this autonomy has been questioned due to the harshness of some of the measures adopted by the community (particularly those that involve physical punishment). However, the solution cannot be limited to the imposition of limits by the State, as valid as they might be, but must also include dialogue and mutual understanding.

In no way this article abides for cultural relativism as a means to legitimize sanctions that might even amount to cruel or degrading treatment. However, there is a need to strengthen efforts to create bonds and channels of communication between the formal legal system and the indigenous communities. The *Sarayaku* case hearing in the community showed that this effors can promote positive change. If the IACtHR adopts this as a common practice, perhaps national legal system can also implement this practice.

One must consider that the rules in an international tribunal might be more flexible and subject to a broader interpretation to protect human rights[116] rather than national court proceedings. This type of measure not only gives Courts a more comprehensive view of the issue being addressed but it is also a means to assure access to justice of petitioners, assuring that their dignity will be respected while narrating their testimonies.

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113 Ravi Malhotra & Morgan Rowe, *Exploring Disability Identity and Disability Rights through Narratives: Finding a Voice of Their Own*, 1st ed (New York: Routledge, 2014).

114 See Thomas M Antkowiak, "Rights, Resources and Rhetoric: Indigenous People and the Inter-American Court" (2013) 35 U Pa J Int'l L 113.

115 To see a presentation from the then President of the IACtHR regarding indigenous peoples, multiculturalism and the Inter-American Human Rights System, see Comisión Andina de Juristas, "Pluralismo Jurídico, Jurisdicción Indígena y Derechos Humanos" (30 July 2013) Comisión Andina de Juristas-Curso Pluralismo Jurídico, Jurisdicción Indígena y Derechos Humanos en la Región Andina, online: Youtube <http://www.youtube.com>.

116 *Sarayaku*, *supra* note 17 at para 19.

The aforementioned in situ visit could have remained only as a "crowd pleaser" and purely rhetoric but as stated before, the collective nature of the provisional measures ordered by the IACtHR since July 2004 and the reluctance to conclude the case once the State had accepted its international responsibility, were signs that there could be a new development on the rights of indigenous peoples.

For the greatest part of the *Sarayaku* case, the IACtHR analyzes the obligations of States towards indigenous peoples,[117] especially the right to prior consultation and the requirements for its implementation under full compliance of the *American Convention on Human Rights* and the *169 ILO Convention*.[118]

However, in the conclusion of this section, the Court puts an emphasis on the collective rights involved,[119] concluding that

> indigenous or tribal communities and peoples, united by their particular ways of life and identity, exercise some rights recognized by the Convention on a collective basis, the Court points out that the legal considerations expressed or indicated in this Judgment should be understood from that collective perspective.[120]

This means that, for the first time, the Court acknowledged that the interests of collective groups can be protected in its entirety, going beyond the accreditation of alleged victims within a specific case. Needless to say that in a situation where these groups are protected, they can only be awarded remedies to compensate collective damages (like the deactivation of explosives or the reforestation of their territory) and not pecuniary individual compensation, which is limited to accredited individual victims.

Within the framework of the *Sarayaku* case, the right to communal property was breached by Ecuador. For this reason, the IACtHR determined that the absence of prior consultation by the State had a direct impact on the indigenous territory due to its failure

> to adopt all necessary measures to guarantee the participation of the Sarayaku People, through their own institutions and mechanisms and in accordance with their values, practices, customs and forms of organization, in the decisions made regarding matters and policies that had or could have an impact on their territory, their life and their cultural and social identity, affecting their rights to communal property and to cultural identity.[121]

For that reason, the Court concluded that within the rights of indigenous peoples, the right of cultural identity is an enforceable unenumerated right covered by

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117 *Ibid*, paras 145-230.

118 See María Clara Galvís Patiño & Angela María Ramírez Rincón. *Digesto de Jurisprudencia Latinoamericana sobre los Derechos de los Pueblos Indígenas a la Participación, la Consulta Previa y la Propiedad Comunitaria,* 1st ed (Washington: Due Process of Law Foundation, 2013).

119 See Carol Y Verbeek, "Free, Prior, Informed Consent: The Key to Self-Determination: An Analysis of the Kiwcha People of Sarayaku v Ecuador" (2012-2013) 37 Am Indian L Rev 263.

120 *Sarayaku*, *supra* note 17 at para 231 (citations ommited).

121 *Ibid*, para 232 (citations ommited).

the *American Convention on Human Rights*. The nexus of this right to cultural identity derives from the right to collective property as well as the right to equality and non-discrimination. Regarding this issue, the Court determined that

> [u]nder the principle of non-discrimination established in Article 1(1) of the Convention, recognition of the right to cultural identity is an ingredient and a crosscutting means of interpretation to understand, respect and guarantee the enjoyment and exercise of the human rights of indigenous peoples and communities protected by the Convention and, pursuant to Article 29(b) thereof, also by domestic law.[122]

Under a PIL approach, the in situ visit contributed for two major legal victories for the advancement of human rights. First of all, the Court acknowledged that collective groups can be subject to the protection of the *American Convention*. This is of fundamental importance for the protection of indigenous people, especially when confronting extractive companies in their territory.[123] In recent years, economic progress in Latin America has been spearheaded by extractive industries, causing a surge in socio-environmental conflicts.[124] In this sense, the protection of collective rights of indigenous peoples[125] is a significant progress for a more dynamic protection of their international human rights.

Secondly, the acknowledgement of the right to a cultural identity, as part of the principle of non-discrimination, is important because it consolidates an integral protection of indigenous people that goes beyond the scope of the right to property and the effects that economic activities might have on them. The right to cultural identity, for this purpose, is the right to exercise their customs and beliefs, regardless of the economic implications.

In this context, to analyze the impact of the *Sarayaku* case as a tool for social change, one must take into account that

> (1) litigation is a political tool that, when used strategically, can stimulate meaningful change and complement other political efforts; (2) whether litigation "works" or not must be judged in relation to available alternatives;

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122 *Ibid*, para 213.

123 In April 2014, the *Grupo de Trabajo sobre Minería y Derechos Humanos en América Latina*, an NGO conglomerate, regarding the negative impact of Canadian mining policy in Latin America. This report was submitted to the Inter-American Commission of Human Rights, building-up on an oral presentation given to this organization in October 2013. The language of the report is direct and unfiltered. It states complacency to human rights abuses by Canadian mining companies (p 9), including forced displacement of the population (p 12). In some parts, it states that Canadian authorities have pushed for a more flexible mining regulatory framework to foster investment (p 26), in detriment of human rights and environmental standards.See: Grupo de Trabajo sobre Minería y Derechos Humanos en América Latina, El impacto de la minería canadiense en América Latina y la responsabilidad de Canadá: Resumen Ejecutivo del Informe presentado a la Comisión Interamericana de Derechos Humanos, 1st ed, online: <https://ia902509.us.archive.org>.

124 Among others, see Deborah Delgado-Pugley, "Contesting the Limits of Consultation in the Amazon Region: On Indigenous Peoples´ Demands for Free, Prior and Informed Consent in Bolivia and Peru" (2013) 43: hors séries RD Ottawa, 151.

125 See Tara Ward, "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law" (2011) 10 Nw U J Int'l Hum Rts 54.

> and (3) in order to evaluate the social change potential of litigation in a given circumstance, it is necessary to examine the conditions—political, economic, cultural, and organizational—within which a lawsuit operates.[126]

Despite the fact that this is only one ruling from an international human rights tribunal, the effects of this decision affect the practice of Latin American States, at a national and international sphere. In the future, any case brought before the IACtHR will use the *Sarayaku* case as a precedent to request the protection of collective rights of indigenous peoples and to pursue more with in situ visits.[127]

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In a continent where rule of law persists to be seen as a luxury rather than the common standard, the *American Convention on Human Rights* and the Inter-American Human Rights System has become a "safe haven", exercising their capacity without restraint when dealing with systematic violations of human rights.

As an international tribunal, the IACtHR does not have a police apparatus to ensure the fulfillment of its judicial decisions, trusting in the bonne foi of States to willingly fulfill their international obligations. In these cases, the remedial orders[128] usually envisage not only the material and moral compensation of victims, but also the opportunity to adopt institutional changes.[129] In this sense, the decisions of the IACtHR have progressively strengthened its non-pecuniary dispositions.

Under the dispositions set on Article 63 of the *American Convention*, the IACHR has determined

> that any violation of an international obligation that has caused damage entails the obligation to repair it adequately, and that this provision embodies a norm of customary law that is one of the basic principles of contemporary international law on State responsibility.[130]

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126 *Cummings*, *supra* note 7 at 609.

127 As of April 2014, the IACtHR has carried another *in situ* visit, in January 2014, in a case against Peru, regarding the military operation to rescue hostages of the Japanese Embassy in Lima in April 1997, kidnapped by an illegal armed group.

128 See Claudio Nash Rojas, *Las reparaciones ante la Corte Interamericana de Derechos Humanos*, 2nd ed (Santiago: Centro de Derechos Humanos de la Facultad de Derecho de la Universidad de Chile, 2009).

129 See Salvador Herencia Carrasco "Las Reparaciones en la Jurisprudencia de la Corte Interamericana de Derechos Humanos" in Kai Ambos, Ezequiel Malarino & Gisela Elsner, eds, *El Sistema Interamericano de Protección de los Derechos Humanos y el Derecho penal Internacional* (Montevideo: Fundación Konrad Adenauer y Georg-August-Universität-Göttinggen, 2011) at 381-402.

130 *Cepeda Vargas Case (Colombia)* (2010), Preliminary Objections, Merits and Reparations, Inter-Am Ct HR (Ser C) No 213 at para 211.

Therefore, the orders of the IACtHR not only encompass individual reparations but also those to the society as a whole.[131] The guarantees of non-repetition[132] are the best example of this practice because it includes a wide array of orders that go from legal reforms, to the ratification of international treaties and institutional reforms.

In this point, the position of the Court is understandable in the social and political context of States. If these cases were brought before the Inter-American Human Rights System, it is because States have showed an incapability to adapt legal reforms on behalf of marginalized communities. One judicial decision can trigger change but it cannot be the sole mechanism. If there is no response by society or strong political will to assure the sustainability of these decisions, then the remedial orders on non-repetition guarantees will never be fully executed.

The decision on the *Sarayaku case* was rendered in July 2012 so it is still soon to assess its impact in the legal framework for the protection of the rights of indigenous peoples in Latin America. However, under the main elements of PIL identified in the introduction of this essay, we can conclude that this case is a significant victory and success story for indigenous peoples, based on the following criteria:

The importance of narrative and broad participation before Court proceedings. Stories matter and courts addressing violation of human rights must grant a wide array of options for victims and petitioners to speak, according to their language and traditions. This does not mean that the Rules of Procedure and Codes of Conduct must not be enforced, but the judges must be flexible to assure that victims are heard. In cases where accredited victims by the Court belong to disenfranchised groups, the facts of the case tend to deal with systemic discrimination. That is why the remedies ordered by the Court, particularly the guarantees of non-repetition, attempt to address structural causes affecting groups discriminated against, based on ethnicity, race, religion, gender, sexual orientation or any other analogous ground.

With the *Sarayaku case*, the hearing with the community helped to acquire more evidence and to adopt measures to protect the collectivity as a whole. With this decision, collective groups can seek protection from collective damages, under the scope of the *American Convention on Human Rights*.

The acknowledgments of the right to cultural identity of indigenous peoples. The right to a cultural identity had been addressed before as an element of the right to property established in the *American Convention*. With the *Sarayaku* case and the evaluation of the evidence presented before the IACtHR, the ruling determined that this right to cultural identity should go beyond the protection of communal property rights and be part of the right/principle of non-discrimination. This acknowledgment means that indigenous peoples could demand the fulfillment or the enforcement

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131 See *Schonsteiner*, *supra* note 3.

132 See Ben Saul, "Compensation for Unlawful Death in International Law: A Focus on the Inter-American Court of Human Rights" (2004) 19 Am U Int'l L Rev 523.

before national institutions and/or the IACtHR any legal or administrative measure adopted by the State that could affect their cultural identity. By going beyond the right to property, this ruling could be used for the protection of their language or to increase their participation in commissions regarding indigenous affairs, among others.

This legal victory recognizes the multicultural nature of Latin America, protecting it under a human rights perspective of equality before the law. In practice, this could mean that indigenous people are subject to a greater autonomy in the administration of their resources and the celebration of their customs, practices and religions, as long as their practices do not affect fundamental human rights.

One must be conscientious that the *Sarayaku* case, along with the previous judicial decisions from the IACtHR, are the first stepping stone towards social change. In Latin America, despite important judicial decisions granting rights and protection to indigenous peoples, the reality is that they continue to be discriminated and despite the creation of specialized institutions within governments or the adoption of specific legislation, they continue to be discriminated against. Legal and institutional frameworks are a small and positive signal of change. However, the real commitment to these legal victories remains to be seen, mainly when the protection of indigenous peoples are taking into account vis-à-vis economic interests, especially those arising from extractive industries[133] in their communities.

The challenge for PIL in Latin America regarding indigenous peoples is far from done. International and national practices have focused on the right to prior consultation, yet, there are other issues that must be enforced and PIL could have a vital role. The *169 ILO Convention* and the *UN Declaration on the Rights of Indigenous Peoples*[134] recognize a wide array of rights that have not been implemented by Latin American States. Access to education and health services in their own language, the protection of indigenous women, the fostering of political participation or the adoption of a special legal framework the protection of indigenous people in voluntary isolation or initial contact are just a few examples of the challenges ahead.

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[133] See Penelope Simons & Andrey Macklin, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage*, 1st ed (New York: Routledge, 2014) at 272-315.

[134] *Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res 61/295, UN Doc A/RES/47/1 (2007).