DEVELOPING ADVOCACY STRATEGIES FOR THE IMPLEMENTATION OF JUDGMENTS CONCERNING ESC-RIGHTS: THE EXAMPLE OF LAND RIGHTS CASES IN THE INTERAMERICAN SYSTEM

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I. Introduction

Over the last decades, the debate concerning economic, social and cultural rights was almost entirely focused on the justiciability of those rights. By now, several strategies have been created to counter the popular belief that ESC-rights are not justiciable, leading to an interesting body of case law, at both domestic and international levels.

This paper will deal more specifically with jurisprudence concerning land rights cases. There are numerous decisions by the Inter-American Court of Human Rights (hereinafter “Inter-American Court”) in favor of indigenous communities reclaiming their ancestral lands. Whether we look at the 2001 *Awas Tingni* case, which for the first time recognized the existence of "communal property" in favor of an indigenous community, or at the *Saramaka* case, in which a non-indigenous community was successful in claiming a right usually reserved for indigenous communities – things have considerably moved forwards over the last years with regards to justiciability.

However, it now becomes clear that it is the implementation of the Court’s orders that causes problems. It seems that a lot of effort and pressure from various sides is required for a judgment to be implemented, if only partially in some cases. In this study, we have therefore looked into developing advocacy strategies for the implementation of judgments concerning indigenous communities’ land rights. To this end, four cases from the Inter-American Court were analyzed with regard to enforcement to this date: *Mayagna Awas Tingni v Nicaragua*¹, *Saramaka v Suriname*², *Yakye Axa v Paraguay*³ and *Sawhoyamaxa v Paraguay*⁴. They were chosen for their resemblances, both factually and geographically. They all concern communities that were expelled from their ancestral lands in Latin America and the orders of the judgments are essentially the same. In terms of methodology, we examined the actions taken by the communities as well as by other actors over the years, in order to force the implementation of the Court’s orders. Amongst the four cases, only one has been fully implemented - after eight years of lobbying and pressuring the State to comply with the judgment. For the three other cases, full implementation is still pending.

Based on the results of our research on enforcement, we have attempted to identify global strategies that can be used by other communities in similar situations. Before explaining these strategies, we will first briefly look at the monitoring procedure by the Inter-American Court as we have come to the conclusion that this follow-up power was a key factor in the (partial) implementation of the four judgments. We will then illustrate four groups of strategies designed to help put pressure on the government and attract the attention of civil society: (1) strategic action by the community, (2) follow-up activities initiated by an NGO, (3) the development of a strategic calendar of external pressures and (4) pressures linked to economic interests.

¹ Case of *The Mayagna Sumo Awas Tingni Community (Nicaragua)* (2001), Inter-Am Ct HR(Ser C) no 79 [Awas Tingni].
² Case of *Saramaka People (Suriname)* (2007), Preliminary Objections, Merits, Reparations, and Costs, Inter-Am Ct HR(Ser C) no 172 [Saramaka].
³ Case of *the Indigenous Community Yakye Axa v Paraguay* (2005), Inter-Am Ct HR (Ser C) [Yakye Axa].
⁴ Case of *the Sawhoyamaxa Indigenous Community v Paraguay* (2006), Inter-Am Ct HR (Ser C) [Sawhoyamaxa].
II. The Court’s monitoring procedure

In *Baena Ricardo v Panama*\(^5\), the Inter-American Court interpreted its own power of monitoring, taking it upon itself to closely follow the implementation of orders and, to this end, request the parties to submit reports about what has been done.

Over the years, the Inter-American Court has developed a number of strategies in order to make its judgments more easily enforceable. These strategies can be illustrated through the evolution of the content and the form of judgments.

Nowadays, the Court’s orders frequently, if not always, set out a time frame (in years, sometimes months) for the implementation of each order. Furthermore, the vocabulary used in similar orders became more and more specific. As a consequence, the Inter-American Court went on to formulate orders more clearly and precisely so as to leave the least possible latitude for interpretation. The uniformity of judgments also helped the monitoring by making it easier to compare between judgments. To that effect, the same orders are repeated in different judgments with similar scenarios.

In the last order of a judgment, the Inter-American Court sets a deadline for the implementation of the entire judgment, normally of three years. It also includes a deadline for the State to provide the first report on enforcement, normally one year after the judgment. The monitoring procedure will usually start before the end of the deadline. This will allow the Court to evaluate the progression of the situation and whether the State will be able to comply in time. Both parties will be invited to attend a monitoring hearing. Following the hearing, the State has to provide the Inter-American Court with a report laying out the advancements that were made to implement the judgment. The State will generally claim that progress was made, which will often be contradicted by the other party in its response to the State’s report\(^6\). The Inter-American Court can then compare and assess the information provided by the parties. It will only affirm that an order is implemented if there is sufficient proof. In the meantime, the State remains accountable to the Inter-American Court who will consider the case open until all orders are fully complied with.

In our opinion, the Inter-American Court is one of the main protagonists in the implementation process because of its self-asserted power. It should be noted that the African Commission also interprets its statutes in a way that allows it to monitor the implementation of its decisions. Although the Commission can only formulate recommendations, it may nevertheless exercise pressure on the government, which may be crucial for the enforcement process.

In the cases analyzed for the purposes of this paper, the Court had issued judgments with an average of ten orders. All of them contained at least one order concerning the damages the State had to pay to the community. In most cases, a specific amount was specified. Our research

\(^5\) *Case of Baena-Ricardo et al v Panama* (2001), Inter-Am Ct HR (Ser C).

\(^6\) For example, see *Case of the Indigenous Community Yakye Axa v Paraguay*, Court order “Monitoring Compliance with Judgment” (8 February 2008) Inter-Am Ct HR, para 22-26, 27-30, 39-43.
clearly showed that orders for payment were invariably the first ones to be implemented, sometimes simply because the amounts involved were so low and made it easy for the government to comply (as in the Awas Tingni case). Generally, but not always, the order to publish the judgment in writing and in a radio broadcast would also be complied with relatively soon. By far the hardest to enforce are the orders concerning legislative change and restitution. In most cases, even after numerous years, restitution had not been made.

Also, in disguise of a conclusion for this section, we would like to propose a method inspired by other United Nations monitoring mechanisms\(^7\). The Court could improve its procedure by asking the State to produce a realistic timetable for the implementation of all the orders of the judgment at the occasion of the first report. The Court could also ask the other parties to comment the timetable provided by the State and modify it, if necessary. Having a schedule for the implementation may help the Court and the victims to put pressure on the State more easily.

III. Strategies derived from the land right cases

3.1. Strategy 1: Community action

The Yakye Axa and Sawhoyamaxa cases

The Yakye Axa and the Sawhoyamaxa communities went before the Inter-American Commission of Human Rights with the help of Tierraviva, a local NGO that represented them. The Commission subsequently brought their case before the Court. Both communities received favorable judgments, with the Court ordering the restitution of their lands. However, even after several years, next to no progress was made toward the implementation of the judgments and the situation of both communities was worsening by the day. They finally decided to unite their efforts and to ask Amnesty International to help them set up an international campaign designed to put pressure on the government.

The fact that the two communities undertook joint actions may have been an important factor in the enforcement process. The two communities being in the exact same situation gave their plight more weight and prevented the State from arguing that their situation was an exception. This was even truer when another indigenous community received a favorable judgment from the Court\(^8\) in relation to an almost identical claim for the restitution of ancestral lands. As a consequence, there are now three similar judgments dealing with indigenous land rights against the Paraguayan State. Being more numerous makes it easier to put pressure on the government and to prevent it from saying that a situation is an exception since more than one group is affected. The communities may eventually even argue that the problem is systemic and possibly discriminatory. Being more numerous also means that more people are involved so it is easier to ensure that a constant pressure is made.

\(^7\) Monitoring of children’s right violations in armed conflict, UNICEF, Joanne Doucet conference, UQAM, 5\(^{th}\) April 2013.

\(^8\) *Case of Xakmok Kasek Indigenous Community v Paraguay* (2010), Inter-Am Ct HR (Ser C).
Over the years, the Yakye Axa and Sawhoyamaxa communities have taken other types of actions in order to put pressure on the government, for example the blocking of important roads.\(^9\) Also, after years of disappointment and political games, the communities chose to turn to the president of the Supreme Court of Paraguay for help. In a letter, they explained how the government was violating their rights and called upon the Court to help them with their legitimate claim. Later that same year, the president of the Supreme Court of Paraguay wrote a letter to the government asking them to report to the Court about the implementation of the Inter-American Court’s judgments.\(^10\) The president justified his demands by saying that Paraguayan legislation gave him the power to take the matter in his hands. From that example, we are reminded that domestic remedies need to be part of an effective enforcement strategy. They can be used as another mechanism to follow up on the progress or the inaction of the State.

3.2. Strategy 2: The role of non-governmental organizations

Numerous non-governmental organizations were involved in the cases that were examined for the purposes of our analysis. As previously mentioned, a Paraguayan NGO, Tierraviva, helped two communities by giving them legal support. The Center for Justice and International Law (hereinafter “CEJIL”) also offered legal assistance to the Yakye Axa Community, not to mention the substantial input provided by Amnesty International, who mounted an international campaign in order to raise awareness about the situation of the communities and to put pressure on the Paraguayan government.

The international campaign mounted by Amnesty International had several components. Amnesty International first organized workshops with the indigenous communities, who helped to plan the campaign and articulate their claims. Another aspect was to run an intensive letter campaign by asking people to send letters to influential members of the Paraguayan government, requesting them to work towards the enforcement of the judgments. They also drafted a report, in collaboration with another NGO called Photovoice, documenting the horrendous conditions the communities were forced to live under. Photovoice specializes in “participatory photographic projects”. The report therefore included various photographs depicting the current situation of both communities. This type of visual aspect can have an important impact as it makes the situation more “real” in the mind of the reader.

Another strategy employed by Amnesty International was to send letters to the Paraguayan government asking them to comment on the implementation of the Court’s judgments. Over the years, Amnesty International has published a variety of documents in order to maintain an international interest in these cases, including several reports addressed to different UN Committees.

In the Saramaka case, the NGO “Forest Peoples Programme” gave legal support to the community. In the case of the Awas Tingni, the “University of Arizona Indigenous Peoples Law and Policy Program” (hereinafter “IPLP”) lent support to the community, not only before the

\(^9\) Amnesty international, press release, AMR 45/007/2012 Issue Date: 7 December 2012.
\(^10\) Ibid.
Inter-American Court, but also during the follow-up of the implementation of orders. The IPLP was also behind the approaches involving international mechanisms\textsuperscript{11}, which we will analyze in the next section.

The example of the Awas Tingni case shows that it is not always necessary to look to the largest and most well-known NGOs for support. The necessary expertise may well be provided by smaller, more specialized NGOs or specialized Law Clinics like the IPLP of the University of Arizona who, through its Legal Clinic, provides the opportunity for students to work with qualified teachers in the field of indigenous rights within concrete cases\textsuperscript{12}. We believe that Law Clinics specializing in International Human Rights Law can therefore be a valuable resource in order to receive support for filing different kinds of international procedures.

What becomes clear from the study of these four cases is that the support of an external organization, accustomed to the challenges involved and the tactics required, is beneficial, especially if the organization is willing and able to closely monitor the implementation of the Court's orders.

Based on these examples, the communication strategies may be summed up as follows:
- The larger the group who wishes to be heard, the more likely the message is going to be heard. Bringing together different groups and communities who are experiencing the same or similar difficulties can be a first step.
- The collaboration with non-governmental organizations may generate additional – and more creative – means and resources for communication. A key objective for an international campaign is to sustain efforts over a long period of time. Having several groups involved and take action at different moments may reinvigorate a movement that is on the slowdown.

The following section presents the various options for a communication plan. It is inspired by Amnesty International’s action in the above-mentioned cases:

**Press release**
- Helps to keep the population informed and create a constant pressure.
- Whenever the government pronounces itself on the implementation or promises to take action, this can be reported in a press release, thereby increasing the pressure to act.
- The short and concise format makes it easier to inform people rapidly. It also makes it easier for journalists and content distributors to restate the information. The more professional it appears, the more chances the press release has of being restated by other journalists. Also, a significant title is more likely to attract interest.
- Making frequent press releases regarding a specific case, allows people to follow the developments. It also helps build a case for advocacy action and allows anyone to easily find up-to-date information on the situation.

\textsuperscript{11} IPLP has frequently been involved in procedures before the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the UN Special Rapporteur on the Rights of Indigenous Peoples and the UN Special Rapporteur on Contemporary Forms of Racial Discrimination, Xenophobia and Related Intolerance.

\textsuperscript{12} More details on the IPLP web page at http://www.law.arizona.edu/depts/iplp/about.cfm.
In the type of scenario we have examined, a community may use press releases in order to prove the efforts made in the search for a solution.

**Reports**
- Different types of reports can be used in order to inform the population in general of to bring the issue before international committees (see next section).
- Reports can be more academic in nature (containing technical language or information, like statistics), others can be more easily accessible, for example by using graphic elements. The latter type of report will likely reach more people.
- Adding images allows the public to get a more concrete, realistic idea of the situation. It brings people closer.

**Videos**
- The moving image connected to the voice can have a greater impact because it allows the viewer to have a more realistic understanding of the situation in which the victims live.
- It allows the affected community to be heard directly; instead of having their message reported through somebody else, the community’s members can communicate directly. They are in connection with the viewers.
- Also, videos are easily spread through interactive media, thereby increasing the chance that a greater number of people will become aware of the issue.

**Mass mailing**
- An international campaign can use mass mailing in order to put pressure on influential political actors.
- In order for that method to work, a pre-formulated message and a mailing address have to be provided.

**Alternative methods**
- Nowadays, new means of communication are developing at a rapid rate and some advocacy groups are starting to use them. Although we have not noticed this in our cases, we feel that it is important to mention these means as they may be exploited in future cases.
  - Facebook
  - Twitter
  - Avaaz.org

All these communication methods are used to reach people, to keep them informed. One or several of them combined can be used to mount an information campaign. Also, different types of media have different distribution possibilities. In order to choose the appropriate methods, several factors have to be taken into account, like the available resources, the time required, the political context, etc.
3.3 Strategy 3: A strategic calendar of international mechanisms

In all four cases analyzed, the affected communities have made use, to varying degrees, of international mechanisms in order to create a constant pressure on the government to implement the Court's orders.

3.3.1. Awas Tingni case example

The Awas Tingni judgment by the Inter-American Court was rendered in 2001. The government rapidly implemented the orders concerning the payment of damages and the publication of the judgment, but the more important orders concerning the delimitation, demarcation and obtaining of the property title have only been implemented in 2009\(^{13}\). Over the course of these 8 years and in the face of the inaction and unwillingness of the Nicaraguan government to comply with the Court's orders, the community, with the help of IPLP, turned to international human rights mechanisms. Even if it is difficult to assess the causal link between the use of these mechanisms and the resolution of the case, the facts show that constant international pressure was put on the government of Nicaragua leading up to the full enforcement of the judgment.

Let us briefly recall that, at regular intervals, States have to submit a report on the implementation of the rights protected by a specific convention to the respective United Nations treaty-based body. For example, the Committee on the Elimination of Racial Discrimination (CERD) monitors the implementation of the rights enshrined in the *International Convention on the Elimination of all Forms of Racial Discrimination*\(^{14}\). What is interesting – and may be exploited in the development of an implementation strategy - is that the various treaty-based bodies all have different examination schedules, meaning that reports relating to the same country are not examined at the same time.

For example, in *Awas Tingni*, four international forums were solicited. While the Awas Tingni community was waiting for the judgment to be enforced, the state of Nicaragua had to submit a report to the Committee on the Elimination of Discrimination (CERD) in 2005, which was later postponed to 2006\(^{15}\). In 2006, Nicaragua requested an extension, which was granted until 2007\(^{16}\). Noting that the Nicaraguan report was long overdue, the Committee sent a letter\(^{17}\) to the government asking several questions concerning the Mayagna Awas Tingni case.\(^{18}\) The State of

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\(^{13}\) Case of *The Mayagna Sumo Awas Tingni Community* (Nicaragua) (2009), Order of the Inter-American Court of Human Rights - Monitoring Compliance with Judgment, Inter-Am Ct HR (Ser C) at par 14.


\(^{16}\) Committee on the Elimination of Racial Discrimination - 68th Session(20 February to 10 March 2006) - Consideration of State reports, online:<http://www2.ohchr.org/english/bodies/cerd/cerds68.htm>.

\(^{17}\) Letter available online:<http://www2.ohchr.org/english/bodies/cerd/docs/LO_Nicaragua_70.pdf>.

\(^{18}\) Committee on the Elimination of Racial Discrimination - 70th Session(19 February to 9 March 2007) - Consideration of State reports, online:<http://www2.ohchr.org/english/bodies/cerd/cerds70.htm>.
Nicaragua finally submitted a report in June 2007 for the 2008 review\(^\text{19}\). Even though the Government had not submitted any report to CERD between 2005 and 2008, the State was the subject to pressure from the Committee year after year. At the same time, the IPLP did not fail to inform the committee about the status quo of the Awas Tingni case on a regular basis (in 2006, 2007 and 2008). We may also assume that the State did not produce a report to the Committee before 2008 because no answers could be provided in relation to the Awas Tingni case.

During the same period, the Community also requested the UN Human Rights Committee to exert pressure on the government in the review of its periodic report, which was made by the CCPR during the State’s review in December 2008. Additionally, in 2005, the Community also presented its case to the UN Special Rapporteur on the Rights of Indigenous Peoples and the Special Rapporteur on Contemporary Forms of Racial Discrimination, Xenophobia and Related Intolerance. These rapporteurs have also contributed to pressuring Nicaragua to implement the Court’s orders\(^\text{20}\). The following is a summary of the pressures resulting from international action in the *Awas Tingni* case:

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>Intervention by the Special Rapporteur on the Rights of Indigenous People</td>
</tr>
<tr>
<td>2005</td>
<td>Intervention by the Special Rapporteur on Racism, Racial Discrimination, Xenophobia and Related Intolerance</td>
</tr>
<tr>
<td>2008</td>
<td>State's examination by the Committee on the Elimination of Racial Discrimination (CERD)</td>
</tr>
<tr>
<td>2008</td>
<td>State's examination by the Human Rights Committee (CCPR)</td>
</tr>
</tbody>
</table>

As for the other three cases that were examined, reports were mainly sent to the Committee on the Elimination of Racial Discrimination and the UN Human Rights Committee. It should also be noted that the UN Special Rapporteur on the Rights of Indigenous Peoples visited Paraguay at a crucial moment, when the implementation process was completely stalled, and subsequently mentioned the situation of Yakye Axa and Sawhoyamaxa in her report. Also, the UN Special Rapporteur on the Rights of Indigenous Peoples visited Suriname in 2011 and made recommendations to the State about the implementation of the *Saramaka* case.

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\(^{19}\) Committee on the Elimination of Racial Discrimination - 72th Session (18 February to 7 March 2008) - Consideration of State reports, online: <http://www2.ohchr.org/english/bodies/ced/cerds72.htm>.

3.3.2 Case study of *Yakye Axa* and *Sawhoyamaxa*:

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>The Rapporteur on the Rights of Indigenous Peoples, Paolo Carozza, carried out a visit to Paraguay.</td>
</tr>
<tr>
<td>2009</td>
<td>A representative of both communities attended the World Social Forum in Belem (Brazil)</td>
</tr>
<tr>
<td></td>
<td>UN Permanent Forum on Indigenous Issues (UNPFII) visited Paraguay and issued a report following that visit.</td>
</tr>
<tr>
<td></td>
<td>Report from the UN Permanent Forum on Indigenous Issues and the UN Committee on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>2010</td>
<td>Dinah Shelton, the Inter-American Commission’s Rapporteur on the Rights of Indigenous Peoples, visited Paraguay. She identified serious problems in relation to indigenous rights.</td>
</tr>
<tr>
<td>2011</td>
<td>Amnesty International submitted a report to the UN Universal Periodic Review of Paraguay</td>
</tr>
<tr>
<td></td>
<td>Amnesty International submitted a briefing to the UN Committee on the Elimination of Racial Discrimination</td>
</tr>
<tr>
<td></td>
<td>Dinah Shelton, Rapporteur for Indigenous Peoples, carried out a working visit to Paraguay.</td>
</tr>
<tr>
<td>2012</td>
<td>The Community wrote a letter to the President of the Supreme Court of Paraguay to ask that he gets involved to stop the State from violating their rights.</td>
</tr>
<tr>
<td></td>
<td>The International Trade Union Confederation (ITUC) wrote a letter to the President of Paraguay in support of the address made by the president of the Supreme Court</td>
</tr>
<tr>
<td></td>
<td>The Paraguayan Supreme Court asked the government to report about the measures taken by the State to implement the IAHRC orders</td>
</tr>
<tr>
<td>2013</td>
<td>Amnesty International submitted a briefing to the UN Committee on Human Rights</td>
</tr>
</tbody>
</table>

3.3.3. Strategy explanation

A strategy that may be drawn from these examples is the elaboration of a “strategic calendar” for international pressure. Although we are not aware that such a calendar was developed for any of the analyzed cases, this strategy is inspired by the kind of constant international pressure that was created, especially in the *Awas Tigni* case.

The use of different treaty-based bodies and special rapporteurs can help to put pressure on the State if it is done in a continuous manner. While complaints can be submitted to treaty-based bodies at any time, the process of examination of a State’s periodic report at fixed intervals allows for information provided by civil society to be taken into consideration in an effort to put pressure on the State. Unfortunately, the procedure and the applicable deadlines can vary greatly from one international mechanism to another. Indeed, some parallel reports must be submitted up to one year in advance. We suggest to carefully verify the procedure and
the timeframe for each mechanism when drawing up a strategic calendar. In matters affecting indigenous communities, the treaty-based bodies that may be most relevant are:

- Committee on the Elimination of Racial Discrimination (CERD)
- Human Rights Committee (CCPR)

Depending on the case at hand, other treaty-based bodies may be relevant:

- Committee on the Rights of the Child (CRC)
- Committee of Discrimination against Women (CMW)
- Committee on Economic, Social and Cultural Rights (CESCR)

The exact situation of the case will determine which treaty-based bodies can and should be brought into play, depending on which conventions were ratified by the concerned state. In addition to the reporting procedures, it is possible for some committees like the CERD, to adopt decisions and recommendations in urgent procedures in order to respond to problems requiring immediate attention, depending on the case at hand.

In addition, complaints can be sent to UN Special Rapporteurs. When writing to a Special Rapporteur, it is important to provide sufficiently detailed information about the case, so that the complaint will be listed as important, urgent and convincing. Once again, depending on the case, the following Special Rapporteurs could be called upon:

- UN Special Rapporteur on the Rights of Indigenous People
- UN Special Rapporteur on Racism, Racial Discrimination, Xenophobia and Related Intolerance
- UN Special Rapporteur on Minority Issues

Special Rapporteurs may conduct missions or investigations when a complaint is made. They may also publish reports on specific situations when the issue appears to be important. In urgent cases, they may directly express their concerns to the State in a letter, ask questions and demand information on the state of affairs. Obviously, the State may choose to simply ignore the requests and recommendations by treaty-based bodies or Special Rapporteurs for a certain period of time. However, we believe that the longer the procedure and the pressure stand, the more difficult it will be for the government to ignore the situation.

Finally, reports can be submitted via another state for the purpose of the UN Universal Periodic Review (UPR) before the UN Council of Human Rights, which involves a review of the entire human rights situation in a country. The UPR can certainly be used as an international strategy but this mechanism is different because the examination is undertaken by other states. Consequently, the pressure is different from other types of procedures. We suggest that peer pressure can be successful, especially if at least one of the reviewing states has economic interests or a good relationship with the State that is reviewed.
3.3.4. Example of a strategic calendar for a case concerning indigenous affairs

For the purposes of this paper, we would like to show how a community, in a hypothetical case against a randomly chosen country, could develop a strategic calendar of international mechanisms.

This calendar is based on the information about upcoming sessions of the Committee on the Elimination of Racial Discrimination, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights as well as the calendar of reviews for the 2nd cycle of the Universal Periodic Review, all of which can be found online. In addition, the cause could also be brought to the attention of Special Rapporteurs. This could be done in order to fill the gaps between examinations by the treaty-based bodies.

A strategic calendar could therefore look like this:

- 2014: Committee on Economic, Social and Cultural Rights
- 2015: Human Rights Committee
- 2016: Special Rapporteur on the Rights of Indigenous People
- 2017: Committee on the Elimination of Racial Discrimination
- 2018: Universal Periodic Review
- 2019: Special Rapporteur on Racism, Racial Discrimination, Xenophobia and Related Intolerance or Special Rapporteur on Minority Issues

3.4. Strategy 4: A possible link between economic interests and the implementation of land rights judgments

The analysis of the Awas Tingni case has revealed a combination of circumstances that could lead to an interesting strategy using economic interests and financial institutions in order to put stronger pressure on the State.

3.4.1. The role of the World Bank in the Awas Tingni case

In the Awas Tingni case, in 2001, the Inter-American Court obliged the State to adopt a domestic law providing for all necessary mechanisms for the delimitation, demarcation and titling of territory. Within the same period of time, a World Bank project (Land Administration Project PRODEP) was under way in Nicaragua. However, in the light of land rights disputes, the right to property did not seem sufficiently secure for investors, which is why the World Bank started to put pressure on the Nicaraguan government, asking it to adopt a demarcation law and to create legal certainty for property rights in Nicaragua. As a consequence, in 2003, the Nicaraguan parliament adopted Act No°445 with a view to creating a complete mechanism to delimitate,

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21 Awas Tingni, supra, note 1, par. 173(4).
demarcate and obtain a property title. The State thus complied at once with the orders by the Inter-American Court and with the requirements set out by the World Bank for the disbursement of the project funds. In this precise case, the World Bank’s intervention was therefore a key factor in the advancement of land restitution. The government’s motivation to act seems to have been to please the World Bank in order to unblock the funds.

3.4.2. Strategy explanation and potential risks

In this case, the World Bank's role was circumstantial\(^\text{23}\), in the sense that the World Bank was preoccupied with securing the right to property in Nicaragua for the benefit of investors. However, this precedent may give rise to an interesting strategy.

In fact, indigenous communities who are trying to reclaim a territory and to obtain a formal title may consider putting pressure on financial institutions, international or national, which provide loans for development projects within the country. It goes without saying that investors do not want to see their investments disappear or become too risky. If the right to property is not secure in the country, financial institutions may be tempted to block their investments or put pressure on the State to solve the problem by securing the right to property within the country.

In the *Awas Tingni* case, the pressure on the World Bank local authorities was made directly by the community. It was certainly one of the most important actions leading to the implementation of the judgment.

However, some caution may be indicated. In other cases, the State may well secure the right to property by adopting a law catering to private interests only and not to the community itself. Even though this may be contrary to international law (notably an existing judgment), the State could be more interested in producing irreversible facts.

IV. Conclusions related to consultation mechanisms

In the *Awas Tingni* case, two joint commissions were created for the implementation of different parts of the judgment, each one with an equal number of representatives from the government and the community. Joint Commission I was created to address the planning of the distinct phases of the delimitation, demarcation and titling process and Joint Commission II was created to address the investment of US$50,000 in works or services of collective interest for the indigenous community\(^\text{24}\). Joint Commission II proved to be a success. Government officials and the Community were able to find a common ground for the use of the funds\(^\text{25}\). However, Joint Commission I did not produce concrete results. Meetings were held by the State outside the formal negotiating channels in a context of pressure on the community leaders and without their

\(^{23}\) *Ibid.*


legal representatives\textsuperscript{26}. Also, there was, at the time, disagreement amongst state officials about whether or not the Court's orders should be implemented, which shows that multiple factors may affect the enforcement process.

Another conclusion, which suggests itself in this context, is that if the community does not clearly identify its representatives, there is a chance that the State will try to circumvent the formal negotiation process by talking to different persons, offering them different deals. In fact, the government could attempt to convince certain community members to accept conditions inferior to those ordered by the Court or by trying to create conflicts within the community in order to impede any progress in the negotiations and consultations.

Therefore, we recommend that representatives for the government and the community be clearly identified and to do so, if possible, in writing. Ideally, the names of those persons should be identified directly in the Court's orders (or in a follow-up on compliance with the Judgment). The importance of the spokes-person has to be understood by everyone in the community in order to have the desired effect. Another possible safeguard could be that the Court expressly obliges the state to respect official negotiation channels.

V. Political context

The two cases form Paraguay offer a good example of the importance of the political context in the elaboration of an enforcement strategy. In the aftermath of the two judgments from the Inter-American Court, the government did not appear eager to implement them. However, in 2008, Fernando Lugo was sworn in as president and broke the one-party rule by winning the elections. This political victory gave a lot of hope to the indigenous communities. In November 2008, Lugo signed a bill declaring the 15,963 hectares of land claimed by the Yakye Axa “of social interest” and ordering that it be expropriated from the current owner and restored to the community. Unfortunately, the Senate rejected the bill of expropriation in October 2009. The President also issued a presidential decree creating an “Inter-Institutional Commission for the Compliance with International Judgments” [Comisión Inter-Institucional para el Cumplimiento de las Sentencias Internacionales] (CICSI) in February 2009\textsuperscript{27}.

The presidential election thus significantly changed the situation; for the first time, the President was receptive to the pressures made by the communities. However, there was still strong opposition against indigenous rights within the political sphere. In 2011, an initial agreement was reached for the Sawhoyamaxa Community but when the president was impeached and forced to leave office, it put an end to the ongoing negotiations\textsuperscript{28}. The community was forced to find new approaches that led to write to the Supreme Court of Paraguay and to ask the president of the Court to monitor the implementation. The Yakye Axa

\textsuperscript{26} Ibid at p 620
\textsuperscript{28} Amnesty international, press release, AMR 45/007/2012 Issue Date: 7 December 2012.
Community was luckier; an agreement was reached between all parties. However, the Community is still waiting for the construction of a road to have access to the land.

What becomes clear from this example is that in order to choose the right combination of strategies, it is important to understand the political context surrounding the specific situation in the state that is responsible for implementing the Court’s orders. The strategy has to be planned with regards to political will and openness of the authorities to different types of pressures; it has to be adapted to the singular context of each situation. Direct pressure on the state from the community may work when there is political will, or when the government shows openness for negotiation. When there is no political will, pressure has to be made in an indirect fashion, meaning that it may be preferable to act through influential persons and organizations like the Inter-American Rapporteurs or the United Nations mechanisms.

VI. Conclusion

In conclusion, our research has shown that certain types of pressure can make a substantial contribution to promoting the implementation of a judgment. In the cases we have analyzed, the communities used these pressures in addition to the powerful monitoring exercised by the Inter-American Court.

We believe that it is the accumulation of different types of pressure that will produce the best results for indigenous communities in similar situations, because it constantly reminds authorities of their obligations and, at the same time, serves to include civil society in the process. Since most indigenous cases require several years for the orders to be fully implemented, a continuous effort of drawing attention to the case is essential. The key is not to fall into oblivion.

As we have shown throughout this paper, developing advocacy strategies may help the parties to initiate the process of implementation, or even to accelerate it. In the cases analyzed, it appears that governments have acted in what seems to be bad faith in order to delay the implementation of the Court's decisions. In light of what we learned, no government has implemented judgments rapidly nor without pressure. It appears all the more important for the victims to look into all the options for pressuring the government and to prepare an action plan based on what is best suitable in their situation. If the government is willing to cooperate and shows good will, the victims’ plan for action can be adjusted accordingly and thus allow the government to act. However, in the case of undue delays or perceived poor political will, the realization of the action plan can be brought underway quickly and efficiently.