

**AFRO COMMUNITIES' STRUGGLE FOR LAND  
RIGHTS IN LATIN AMERICA:  
A NEW APPROACH TO PROTECT THEIR  
LANDS IN THE INTER-AMERICAN HUMAN  
RIGHTS SYSTEM**

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**Abstract:** *The Inter-American human rights system, which has been the region's driving force for extensive land rights protection of indigenous peoples, has failed to effectively protect Afro communities' collective land claims. While it has identified Afro-descendants as tribal peoples and vulnerable groups to afford them the same land rights as indigenous peoples, these two qualifications have numerous limitations. To overcome these weaknesses and strengthen Afro communities' land rights protection, this essay proposes a community-based approach.*

INTRODUCTION

Latin America is characterized by the world's most unequal distribution of land ownership. The land distribution inequality is particularly extreme in Colombia where two-thirds of the agricultural land is in the hands of only 0.4 percent of the farms.<sup>1</sup> Data from Brazil, Chile, Paraguay, and

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**1** OXFAM, UNEARTHED: LAND, POWER AND INEQUALITY IN LATIN AMERICA 23 (2016), [https://www-cdn.oxfam.org/s3fs-public/file\\_attachments/bp-land-power-inequality-latin-america-301116-en.pdf](https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp-land-power-inequality-latin-america-301116-en.pdf).

Venezuela show similar patterns.<sup>2</sup> This inequality exacerbates poverty and contributes to the displacement of rural communities that lack land security, as these communities cannot provide for themselves and are forced to migrate to impoverished urban centers for employment. In the 1950s and 60s, many Latin American states undertook agrarian reforms to grant ownership to those who physically work the land. However, the reforms did not substantively alter land distribution, and subsequent military dictatorships and armed conflicts reversed much of the progress made.<sup>3</sup> After the fall of the authoritarian regimes in the 1990s, Latin America witnessed the rise of indigenous rights movements, reviving the public debate on land distribution. Across the region, indigenous peoples demanded, inter alia, recognition of their existence and access to the lands where they traditionally inhabited. Afro communities, made up of descendants of enslaved Africans brought to the region during colonial times, joined the indigenous rights movements, raising similar land-related demands in many countries. In response, most Latin American states took steps towards titling lands of indigenous peoples and, to a lesser extent, Afro communities, partially remedying these communities' restricted access to property. At the international level, the Inter-American human rights system, including the Inter-American Commission on Human Rights (Inter-American Commission) and Inter-American Court of Human Rights (Inter-American Court), supported and accelerated the states' efforts by developing an extensive human rights framework on collective land rights and corresponding state obligations in favor of indigenous peoples. According to a 2015 survey, indigenous and Afro

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<sup>2</sup> *Id.*

<sup>3</sup> Solon L. Barraclough, *The Legacy of Latin American Land Reform*, NACLA MAGAZINE (Sept. 25, 2007), <https://nacla.org/article/legacy-latin-american-land-reform>; Thomas Griffiths, *Indigenous Peoples, Land Tenure and Land Policy in Latin America*, LAND REFORM: LAND SETTLEMENT AND COOPERATIVES, Jan. 2004, at 46.

communities now own or control 1.7 percent of the total territory in Costa Rica, Guatemala, and Honduras, and 20 percent of the total territory in Argentina, Bolivia, Brazil, Chile, Colombia, Guyana, Peru, Suriname, and Venezuela.<sup>4</sup>

Land rights remain one of the most contentious issues in Latin America. Many communities, particularly those of African descent, still lack access to and control over their lands. In Colombia, only 2 percent of the Caribbean coastal lands occupied by Afro communities are formally titled in the communities' names,<sup>5</sup> and the government refuses to grant collective land ownership to Afro communities residing on lands designated for mining and other extractive industries.<sup>6</sup> Afro-Brazilians have experienced similar delays in the land titling process after the government cut the budget of the competent authority, the National Institute for Agrarian Reform and Colonization, by over 90 percent between 2012 and 2018.<sup>7</sup>

In addition, several states have rolled back the legal land protection once granted to Afro communities to attract investors and large-scale development projects. Peru implemented a series of legislative changes to facilitate expropriation of collective land titles belonging to non-indigenous communities, including Afro and other peasant

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4 RIGHTS AND RESOURCES INITIATIVE, WHO OWNS THE LAND IN LATIN AMERICA?: FORMAL RECOGNITION OF COMMUNITY-BASED LAND RIGHTS IN LATIN AMERICA 3 (2005), [https://rightsandresources.org/wp-content/uploads/FactSheet\\_English\\_WhoOwnstheLandinLatinAmerica\\_web.pdf](https://rightsandresources.org/wp-content/uploads/FactSheet_English_WhoOwnstheLandinLatinAmerica_web.pdf).

5 *Id.* at 4.

6 Maria Monica Monsalve, *Las 401 solicitudes de títulos colectivos afros que están sin resolver [The 401 Afro Petitions for Collective Land Titling That Have Not Been Resolved]*, EL ESPECTADOR (June 29, 2021), <https://www.elespectador.com/ambiente/las-401-solicitudes-de-titulos-colectivos-afros-estan-sin-resolver/>.

7 Oswaldo Braga de Souza, *What Changes (or What's Left) for the Quilombos with President Bolsonaro's Reforms?*, INSTITUTO SOCIOAMBIENTAL (Feb. 1, 2019), <https://www.socioambiental.org/en/noticias-socioambientais/what-changes-or-whats-left-for-the-quilombos-with-president-bolsonaros-reforms>.

communities, to promote private and public investment.<sup>8</sup> Colombia recently withdrew a collective land title from an Afro community under a flimsy legal pretext. Local authorities and lawyers assume that the real motivation behind the withdrawal is to pressure the community into clearing the way for a tourism project on its land.<sup>9</sup>

Activists and lawyers have risked their lives in an effort to reverse or mitigate these developments and advance land rights protection for their communities. In 2020, 264 human rights defenders were reportedly killed in Latin America, over 100 of whom pursued causes related to land, indigenous peoples, and environmental protection.<sup>10</sup> Most of these killings occurred in a climate of impunity.

An adequate legal framework to protect Afro communities' land rights claims is important from a legal and practical perspective. Cases involving collective land rights protection of Afro communities are pending before the Inter-American Court and require a sustainable solution that is consistent with recognized international and national legal principles. For instance, the Afro-Honduran community of San Juan has filed a petition against Honduras for failing to issue a collective ownership title over the community's entire ancestral land, among other allegations.<sup>11</sup> Honduras has allegedly awarded part of the ancestral land to third parties,

<sup>8</sup> Luis A. Hallazi Mendez, *Situación de las tierras y territorios indígenas en Perú* [Situation of the Indigenous Lands and Territories in Peru], SERVINDI (Feb. 20, 2019), <https://www.servindi.org/19/02/2019/situacion-de-las-tierras-y-territorios-de-los-pueblos-indigenas-en-el-peru>.

<sup>9</sup> *Cartagena impugnerà fallo que anula título colectivo de La Boquilla* [Cartagena will appeal the decision annulling the collective land title of La Boquilla], EL TIEMPO (Sept. 9, 2020), <https://www.eltiempo.com/colombia/otras-ciudades/cartagena-impugnara-fallo-que-anula-titulo-colectivo-de-la-boquilla-536799>.

<sup>10</sup> FRONT LINE DEFENDERS, GLOBAL ANALYSIS 2020, at 20 (2021), [https://www.frontlinedefenders.org/sites/default/files/fl\\_d\\_global\\_analysis\\_2020.pdf](https://www.frontlinedefenders.org/sites/default/files/fl_d_global_analysis_2020.pdf).

<sup>11</sup> *Caso comunidad garifuna de San Juan y sus miembros vs. Honduras* [Case of the Garifuna Community of San Juan and its Members vs. Honduras], INTER-AMERICAN COURT OF HUMAN RIGHTS, [https://www.corteidh.or.cr/docs/tramite/garifuna\\_de\\_san\\_juan\\_y\\_sus\\_miembros.pdf](https://www.corteidh.or.cr/docs/tramite/garifuna_de_san_juan_y_sus_miembros.pdf) (last visited Aug. 26, 2021).

including hotel businesses, without previously consulting the community. If the allegations are true, the Court could use this case to set a precedent for stronger land rights protection for Afro communities across the region than under the limited concepts of tribal peoples and vulnerable groups. Practically, enhanced land rights protection would help ameliorate the immense land inequalities in Latin America by allowing more Afro communities to access land. Additionally, studies have shown that communities thrive economically after obtaining collective land titles.<sup>12</sup> Legally secured land ownership affords communities the stability to invest in their land and community life by removing fear of displacement. Thus, land rights protection also contributes to the economic integration of a historically marginalized population group.

The current international human rights framework is, however, limited in its ability to strengthen the land rights protection of Afro communities. Binding international human rights instruments do not explicitly address Afro-descendants' legal protections, let alone recognize them as a separate category of rightsholders. Human rights bodies and legal scholarship have debated whether Afro-descendants can be qualified as indigenous or tribal peoples, vulnerable groups, racial and ethnic minorities, or individual rightsholders.<sup>13</sup> Two dominant approaches have emerged. The Inter-American human rights system has qualified several Afro communities as "tribal peoples," affording them collective land rights if they are able to demonstrate certain cultural characteristics considered "tribal." The Inter-American and United Nations (UN) human rights bodies as well as human rights practitioners have qualified Afro communities as vulnerable groups to grant them enhanced

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<sup>12</sup> Ximena Peña et al., *Collective Property Leads to Household Investments: Lessons from Land Titling in Afro-Colombian Communities*, 73 *WORLD DEV.* 27, 27 (2017).

<sup>13</sup> E.g., Leonardo Reales, *Ethnic Minorities and Human Rights Violations: The Afro-Colombian Case*, 22 *REV. LATINOAMERICANA DE DERECHOS HUMANOS* 153, 157–58 (2011).

land rights protection.

This essay argues that the tribal peoples and vulnerable group approaches offer insufficient land rights protection for Afro communities. It proposes an alternative approach that requires Afro communities to fulfill three criteria in order to benefit from collective land rights in the Inter-American human rights system: (1) adherence to a community-based organizational structure; (2) self-identification as being of African descent; and (3) ancestral occupancy of the land they claim ownership over. These criteria are already being applied by several Latin American states, including Brazil, Colombia, Nicaragua, and Honduras, and are consistent with other domestic and international legal principles and supported by practical considerations.

This essay first outlines the current understandings of Afro-descendants' land rights protection, including the tribal peoples and vulnerable group approaches. Next, the essay presents the weaknesses of these approaches and proposes an alternative solution to Afro communities' land rights based on domestic and international law principles as well as practical considerations.

## I. CURRENT INTERNATIONAL HUMAN RIGHTS PROTECTION OF AFRO-DESCENDANTS' LAND CLAIMS

The dominant approaches to Afro communities' land rights protection in international human rights law are the qualification of Afro-descendants as tribal peoples and vulnerable groups.

### *A. The Tribal Peoples Approach*

The Inter-American human rights system primarily bases the land rights protection of Afro communities on the concept of tribal peoples as stipulated in the International Labor Organization Convention No. 169 (ILO Convention No. 169). This convention defines tribal peoples as population groups who (1) exhibit social, cultural, and economic characteristics

different from other population groups; (2) regulate their status wholly or partially by their own customs, traditions, or special rules; and (3) self-identify as tribal members.<sup>14</sup> Applying this concept to Afro-descendants is appealing because it contains elements of collectivity and self-regulation that resonate with Afro communities.<sup>15</sup> Moreover, unlike the definition of indigenous peoples, it does not require a community to live on a given territory prior to colonization or the establishment of state boundaries.<sup>16</sup> The former is crucial given that Afro-descendants arrived as enslaved people *during* the European colonization of Latin America and therefore have not lived on their lands since before the colonization. Rather, they were present on the territory of Latin American states at the same times as these states were established.

All Inter-American human rights cases dealing with Afro communities apply the terminology of tribal peoples.<sup>17</sup> For instance, in *Saramaka People v. Suriname*, the Inter-American Court addressed the land rights of the Afro-descendant Saramaka people and their battle against mining and logging companies, which had received concessions from the Surinamese state to carry out activities on the Saramaka's land without prior consultation.<sup>18</sup> When discussing the legal scheme applicable to the Saramaka, the Court held that the Saramaka is a tribal people "because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their

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<sup>14</sup> ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (I.L.O. No. 169), art. 1(a), June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO Convention No. 169].

<sup>15</sup> See *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 86 (Nov. 28, 2007).

<sup>16</sup> See ILO Convention No. 169, art. 1(b).

<sup>17</sup> See Inter-Am. Comm'n 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*, ¶ 34, OEA/Ser.L/V/II. Doc. 56/09 (Dec. 30, 2009).

<sup>18</sup> *Saramaka*, *supra* note 15.

own norms, customs, and/or traditions.”<sup>19</sup> In more recent jurisprudence, the Inter-American Court has abandoned the distinction between indigenous and tribal peoples altogether. In the 2015 case, *Garifuna Community of Triunfo de la Cruz and its Members v. Honduras*, the Court dealt with the question of whether the Honduran state’s urban development projects that extended into the ancestral land of the Afro community of Triunfo de la Cruz violated the community’s land rights under the American Convention on Human Rights.<sup>20</sup> To determine the nature and scope of these land rights, the Court discussed whether the community qualifies as an indigenous people, tribal people, or neither. It first analyzed the community’s history, relationship to the traditional land, economic activities, language, and internal organization.<sup>21</sup> The Court then simply stated that it would consider “the indigenous or tribal nature”<sup>22</sup> of the community, as both indigenous and tribal peoples enjoy the same land-related rights.

In *Saramaka* and *Garifuna Community of Triunfo de la Cruz*, the Court looked for cultural characteristics similar to those attributed to indigenous peoples to determine whether a specific community qualified as tribal. For example, it analyzed whether the community has a unique language, observes folkloric elements of culture, such as traditional dances and music, relies on the ancestral land for its cultural,

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<sup>19</sup> *Id.* ¶ 84.

<sup>20</sup> *Garifuna Community Triunfo de la Cruz and its Members v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 305 (Oct. 8, 2015); American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 [hereinafter ACHR].

<sup>21</sup> *Garifuna Community of Triunfo de la Cruz, id.*, ¶¶ 46–56.

<sup>22</sup> *Id.* ¶ 57. The Inter-American Court reached the same conclusion in *Punta Piedra Garifuna Community and its Members v. Honduras*. Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 304, ¶ 91 (Oct. 8, 2015). This case deals, inter alia, with the question of whether the Honduran State incurred an obligation to clear the Garifuna community’s traditional lands from interferences by third parties. The Court held that the community was indigenous or tribal in nature and therefore enjoyed collective land rights under Article 21 ACHR. *Id.* ¶¶ 83–90, 168.



spiritual, and material survival, and engages in traditional economic activities, including fishing, hunting, and agriculture.<sup>23</sup> In evaluating the folkloric elements criteria, the Court relied on testimonies of anthropologists, historians, and other experts on cultural features of these communities. This approach requires Afro-descendants to show cultural elements to gain the right to collective land ownership, natural resources, prior consultation, and a healthy environment.<sup>24</sup> Legal scholars have coined this understanding “the cultural approach” because it obliges communities seeking protection under the concept of tribal peoples to prove certain cultural characteristics.<sup>25</sup>

The Inter-American human rights system’s rationale for its tribal peoples approach is that Afro-descendant communities adhere to a traditional lifestyle akin to that of indigenous peoples and thus should be able to prove the same cultural features to benefit from the collective land rights protection.<sup>26</sup> Unlike the majority population, Afro communities rely on their ancestral land to survive as a community and maintain their ancestors’ way of life. The Inter-American human rights system also argues that granting legal protection of their lands supports the communities’ cultures, an integral part of a democratic and pluralist society.<sup>27</sup> Based on these considerations, the Inter-American human rights system has granted far-reaching land rights to Afro communities that qualify as tribal.

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23 *Punta Piedra Garifuna Community, id.*, ¶¶ 85–91; *Garifuna Community of Triunfo de la Cruz, supra* note 20, ¶¶ 49–57; *Saramaka, supra* note 15, ¶¶ 80–84.

24 Inter-Am. Comm’n on Human Rights, *supra* note 17, ¶¶ 3, 194. For example, the Inter-American Court granted the Saramaka people the rights to natural resources and prior consultation because of its tribal characteristics. *Saramaka, supra* note 15, ¶¶ 121, 129.

25 Ariel E. Dulitzky, *When Afro-descendants Became “Tribal Peoples”: The Inter-American Human Rights System and Rural Black Communities*, 15 UCLA J. INT’L L. & FOREIGN AFF. 29, 32 (2010).

26 *Saramaka, supra* note 15, ¶ 79.

27 *Kaliña and Lokono Peoples v. Suriname, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309 (Nov. 25, 2015).

### *B. The Vulnerable Groups Approach*

The reference to Afro-descendants as a vulnerable population group is based on the understanding that they have historically been discriminated against and have not enjoyed the same opportunities as the rest of the population. Their vulnerability is a result of “poverty, underdevelopment, social exclusion and economic inequalities that are closely linked to racism, racial discrimination, xenophobia and related intolerance.”<sup>28</sup> By identifying Afro communities as vulnerable groups, the international human rights bodies and scholars seek to push for enhanced State protection and expand the scope and content of state obligations. States should take measures to overcome the communities’ exclusion and discrimination and ensure their cultural survival.<sup>29</sup>

Several UN and Inter-American human rights bodies and practitioners have referred to Afro-descendants as a vulnerable group. While the legal protection derived from this concept is less specific than that derived from the categorization of Afro-descendants as tribal peoples, it provides the benefit of commanding states to remedy the vulnerability that prevents communities from claiming their rights.

The concept of vulnerable groups emerged from the practice of UN and regional human rights treaty bodies. It is not explicitly mentioned in binding international human rights instruments. The UN Committee on Economic, Social, and Cultural Rights, the UN Committee on the Elimination of Racial Discrimination, the Inter-American human rights system, and the European Court of Human Rights, among

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<sup>28</sup> Robert Rojas Davila, *Afro-Descendants as Subjects of Rights in International Human Rights Law*, SUR INT’L J. ON HUM. RTS., Dec. 2018, at 151, 159.

<sup>29</sup> *Saramaka*, *supra* note 15, ¶ 103; *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Inter-Am. Comm’n H.R., Report No. 40/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 ¶ 95 (2004); INT’L LABOUR ORG., INDIGENOUS AND TRIBAL PEOPLES’ RIGHTS IN PRACTICE: A GUIDE TO ILO CONVENTION NO. 169, at 35 (2009).

others, have employed the term “vulnerable” or “disadvantaged” to refer to a group of persons that are more susceptible to human rights abuses than others due to their social or economic conditions, exposure to structural discrimination, or inability to seek judicial protection.<sup>30</sup> Yet they have frequently used the terms “vulnerable” and “disadvantaged” interchangeably without providing a consistent or clear definition of either term.<sup>31</sup> And the human rights treaty bodies apply the concept of a vulnerable group on an ad hoc basis to a variety of population groups. These groups have included women, children, persons with disabilities, persons deprived of liberty by the state, asylum seekers, persons of low economic status, indigenous peoples, and Afro-descendants.<sup>32</sup> The lack of definition and broad application of the terms raise the question of who qualifies as vulnerable or disadvantaged and whether this is a permanent classification.

With regards to Afro-descendants, scholars and human rights treaty bodies have referred to the population’s vulnerability to advocate for enhanced legal protection.<sup>33</sup> For instance, the UN Working Group of Experts on People of African Descent has repeatedly stated that Afro-Latin Americans are a vulnerable group and States should take special measures to combat the poverty, discrimination, and inequalities they suffer.<sup>34</sup> Similarly, the Inter-American

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**30** Jo M. Pasqualucci, *The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System*, 31 HASTINGS INT’L & COMP. L. REV. 1, 17–22 (2008).

**31** Audrey R. Chapman & Benjamin Carbonetti, *Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights*, 33 HUM. RTS. Q. 682, 683 (2011).

**32** *Id.* at 683–84.

**33** Claudia Martin, *The Moiwana Village Case: A New Trend in Approaching the Rights of Ethnic Groups in the Inter-American System*, 19 LEIDEN J. INT’L L. 491, 498 (2006).

**34** Human Rights Council, Rep. of the Working Group of Experts on People of African Descent: Visit to Peru, ¶¶ 99–141, U.N. Doc. A/HRC/45/44/Add.2 (Aug. 21,

human rights system has ordered states to implement measures for Afro (and indigenous) communities that go beyond the content of ordinary state obligations for individuals.<sup>35</sup> Such special measures are temporary in nature and seek to achieve substantive equality vis-à-vis the rest of the population, leveling the playing field for all members of society.

The Inter-American human rights system has also employed the vulnerability terminology to shed light on specific circumstances that might prevent Afro communities from enjoying their fundamental rights. This use of the vulnerability concept becomes evident in *Punta Piedra Garifuna Community and its Members v. Honduras*, in which the Inter-American Court addressed Honduras' failure to prevent third parties from interfering with the Afro community's traditional land despite knowing of the interferences.<sup>36</sup> The Court ruled that Honduras did not provide the community an effective domestic recourse to address these interferences.<sup>37</sup> It held that the decisions of the Honduran courts "should be executed without obstacles or undue delays in order to achieve their objective in a quick, easy, and integral manner. This is particularly important in cases on indigenous matters *given the special situation of vulnerability* that these peoples could be in, *which by itself could impose obstacles* not only to access justice but also to achieve implementation of the adopted decisions."<sup>38</sup> Without

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2020); Human Rights Council, Rep. of the Working Group of Experts on People of African Descent: Visit to Ecuador, ¶¶ 69, 71, U.N. Doc. A/HRC/45/44/Add.1 (Aug. 21, 2020); Human Rights Council, Rep. of the Working Group of Experts on People of African Descent: Visit to Peru, ¶¶ 28, 42, U.N. Doc. A/HRC/42/59/Add.2 (Aug. 14, 2019).

<sup>35</sup> *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 63, 163 (June 17, 2005); Inter-Am. Comm'n on Human Rights, *supra* note 17, ¶¶ 48–54.

<sup>36</sup> *Punta Piedra Garifuna Community and its Members v. Honduras*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 304, ¶¶ 189, 372 (Oct. 8, 2015).

<sup>37</sup> *Id.* ¶ 251.

<sup>38</sup> *Id.* ¶ 249 (emphasis added).

defining the term “vulnerability,” the Inter-American Court concluded that the state should design its judicial avenues to provide easier access for indigenous and tribal peoples.<sup>39</sup> Thus, the Court used the vulnerability concept to inform the scope and content of specific State obligations, highlighting that Afro-descendants are particularly susceptible to human rights abuses.

## II. WEAKNESSES IN THE TRIBAL PEOPLES AND VULNERABLE GROUP APPROCHES TO AFRO COMMUNITIES' LAND RIGHTS PROTECTION

While the Inter-American human rights system's tribal peoples and vulnerable group approaches have helped some Afro communities gain collective land rights and contributed to enhanced legal protection of these communities, both approaches have several weaknesses. The tribal peoples approach overemphasizes folkloric cultural aspects and reinforces socio-economic inequalities and negative stereotypes. The vulnerable group approach fails to resolve ambiguities in the legal understanding of vulnerability. Both approaches neglect the land's economic dimension, raise challenges with third party rights, and risk paternalizing Afro communities.

### *A. Overemphasis of Folkloric Cultural Aspects to the Exclusion of Most Afro Communities*

The tribal peoples approach strongly emphasizes folkloric elements of culture, including a unique language, religious practices, and traditional economic activities. These elements are present in only a very small number of Afro communities, such as the Garifuna people in Central America or the community of San Basilio de Palenque in Colombia.<sup>40</sup> Slavery

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<sup>39</sup> *Id.*

<sup>40</sup> The community of San Basilio de Palenque is an Afro-descendant community

and the century-long assimilationist policies of Latin American States have caused the vast majority of Afro-descendants to lose touch with their ancestral languages or religions.<sup>41</sup> Most Afro communities speak the language of their territorial states, adhere to Christian beliefs, and do not exclusively engage in agriculture, fishing, or hunting. While these communities may still raise collective land claims, they do not possess the required cultural characteristics to qualify as tribal peoples. As a result, they lack any protection of their land claims under the tribal peoples framework of the Inter-American human rights system.<sup>42</sup>

The communities that still follow some unique rituals and customs are forced to essentialize their cultures if they seek qualification as tribal peoples and enjoyment collective land-related rights. This prevents them from developing or adjusting their way of life.<sup>43</sup> For instance, to enjoy continuous legal protection under the tribal peoples' framework, Afro communities are required to maintain traditional economic activities. If they carry out different economic activities, they risk losing the ability to claim collective land title.<sup>44</sup> In *Saramaka*, for example, the Inter-American Court ruled that the community's right to use and enjoy natural resources is only protected if the natural resources are "found on and within the [...] territory" and "essential for the survival of [the

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in Colombia's Caribbean coast that was established by escaped slaves about four centuries ago. Its inhabitants have preserved unique cultural characteristics rooted in African traditions, such as the Palenque language, music expressions, medical practices, and distinct social practices. In 2005, the UNESCO listed the community as intangible cultural heritage of humanity. *Cultural Space of Palenque de San Basilio*, UNESCO INTANGIBLE CULTURAL HERITAGE, <https://ich.unesco.org/en/RL/cultural-space-of-palenque-de-san-basilio-00102> (last visited Aug. 26, 2021).

<sup>41</sup> TANYA KATERI HERNANDEZ, *RACIAL SUBORDINATION IN LATIN AMERICA* 34–38 (2013).

<sup>42</sup> Dulitzky, *supra* note 25, at 45.

<sup>43</sup> *Id.* at 42–43, 46–48.

<sup>44</sup> *Id.* at 42.

community's] way of life.”<sup>45</sup> The Court concluded that the Saramaka people have traditionally used timber but not the gold resources on their land and consequently have a right to use and enjoy only timber.<sup>46</sup> This leads to the paradoxical situation that multinational companies may obtain a license to extract natural resources from ancestral community lands, but the Afro communities living on the land may not engage in such activities if they want to maintain their collective land rights.

*B. Reinforcement of Socio-Economic Inequalities and  
Negative Stereotypes About Afro Communities*

The tribal peoples approach fails to acknowledge that land claims of Afro-descendant communities are the result of social and economic inequalities that have persisted since colonial times.<sup>47</sup> Across Latin America, many Afro-descendants live in poverty and have only limited access to quality education, health care, and sanitary installations.<sup>48</sup> The tribal peoples approach further entrenches these undesirable socio-economic structures by encouraging the communities to focus on their cultural characteristics. Afro-descendants enjoy land ownership only to preserve their traditional cultural identity while the dominant, racially mixed population has unlimited access to land. As a result, the Inter-American human rights system prevents Afro communities from pursuing economic development, which perpetuates the image that they are poor and underdeveloped.<sup>49</sup> This approach reduces the communities to

<sup>45</sup> *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 123 (Nov. 28, 2007).

<sup>46</sup> *Id.* ¶ 155; Dulitzky, *supra* note 25, at 48.

<sup>47</sup> Dulitzky, *supra* note 25, at 63.

<sup>48</sup> WORLD BANK, AFRO-DESCENDANTS IN LATIN AMERICA: TOWARD A FRAMEWORK OF INCLUSION 65 (2018), <https://openknowledge.worldbank.org/handle/10986/30201>.

<sup>49</sup> *See, id.* at 100.

their cultural features.

### *C. Ambiguous Concept of Vulnerability in the Law*

The fact that U.N. and Inter-American human rights bodies have not adopted a working definition of the term “vulnerability,” renders the concept vague and leads to many ambiguities. While the Inter-American Court has referred to the vulnerability of Afro communities in its cases, it is unclear whether all Afro communities would be included in this concept. Would a community lose its enhanced legal protection if its living conditions improve such that it no longer qualifies as “vulnerable”? The precise scope and content of the enhanced legal protection a “vulnerable” community would enjoy is equally unclear. The concept of vulnerability by itself does not impose a specific framework of legal protection similar to the indigenous or tribal peoples schemes. This makes the land rights-related protection granted to Afro communities under the concept of vulnerability ambiguous. While this concept might be suitable to highlight the difficult socio-economic living conditions of many Afro communities, it is an insufficient basis for the legal protection of their land rights.

### *D. Neglect of the Land’s Economic Dimension*

Both the tribal peoples and vulnerable group approaches disregard the economic value of the Afro communities’ ancestral lands. In *Garífuna Community of Triunfo de la Cruz*, the Inter-American Court held that indigenous and tribal communities enjoy collective property rights under Article 21 of the American Convention on Human Rights (ACHR) to “continue living their traditional way of life” and respect and protect “their cultural identity, social structure, economic system, customs, beliefs, and distinctive



traditions.”<sup>50</sup> The Inter-American Court clarified that such conditions were necessary to ensure the communities’ physical and cultural survival.<sup>51</sup> This reasoning reveals that the Inter-American human rights system views land as a mere cultural commodity, ignoring the economic dimension of lands.<sup>52</sup> This reduction prevents Afro communities from freely deciding their own way of life and economic development.

The failure to recognize the economic value of communal lands further contradicts the Charter of the Organization of American States (OAS Charter), the cornerstone of the Inter-American human rights system.<sup>53</sup> While the OAS Charter does not explicitly mention human rights norms,<sup>54</sup> it states that land rights and control over natural resources are essential tools to overcome poverty and achieve a just society.<sup>55</sup> It also recognizes the importance of securing land rights to ensure economic survival.<sup>56</sup> States should, *inter alia*, modernize rural life and implement an equitable and efficient land tenure system.<sup>57</sup> These references demonstrate the importance of ownership, use, and control over land to ensure the economic existence of all people, including Afro communities.

### *E. Challenges with Third-Party Land Rights*

The Inter-American human rights system’s existing case law

<sup>50</sup>Garifuna Community Triunfo de la Cruz and its Members v. Honduras, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 305, ¶ 102 (Oct. 8, 2015).

<sup>51</sup> *Id.*

<sup>52</sup> *Cf.* Dulitzky, *supra* note 25, at 61, postscript.

<sup>53</sup> Charter of the Organization of American States, Apr. 30, 1948, O.A.S.T.S. No. 61, 119 U.N.T.S. 47 [hereinafter OAS Charter]. The OAS Charter created the Organization of American States (OAS), which has adopted numerous human rights treaties, and established the Inter-American Commission of Human Rights. OAS Charter, art. 106.

<sup>54</sup> The OAS Charter also does not impose obligations that member States have towards their individual citizens.

<sup>55</sup> OAS Charter, art. 34.

<sup>56</sup> OAS Charter, art. 30.

<sup>57</sup> OAS Charter, art. 34(d).

on indigenous and tribal peoples indicates challenges with the rights of third parties over community lands. The Afro communities' land rights (based on cultural features and vulnerability considerations) do not necessarily override the rights of third parties to the community land.<sup>58</sup> Instead, if non-community members have an interest in the communal lands, the Inter-American human rights system conducts a proportionality test according to which restrictions must be established by law, necessary, proportional, and have a legitimate goal in a democratic society.<sup>59</sup> This puts Afro communities in a disadvantageous position in land disputes with non-community members because the communities can only claim a cultural relationship with their land while third parties' claims are not subject to any limitation. If the communities' interest in their land becomes primarily economic because assimilationist policies have caused them to lose their unique cultural features, they risk losing legal protection of their traditional lands.

#### *F. Risk of Paternalizing Afro Communities*

With the current approaches to Afro communities' land rights claims, the Inter-American human rights system risks determining the communities' way of life on their behalf. In all cases involving Afro communities, the Inter-American Court places strong emphasis on the expert testimonies of anthropologists and other experts,<sup>60</sup> who are mostly not citizens of the territorial State in question. For instance, in *Saramaka*, the Inter-American Court heard seven expert witnesses testifying on the different aspects of the Saramaka people's culture; the six community member witnesses primarily testified on human rights abuses and their efforts

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<sup>58</sup> Inter-Am. Comm'n on Human Rights, *supra* note 17, ¶ 116; Dulitzky, *supra* note 25, at 52.

<sup>59</sup> Inter-Am. Comm'n on Human Rights, *supra* note 17, ¶ 117.

<sup>60</sup> See also Dulitzky, *supra* note 25, at 43.

to remedy these abuses.<sup>61</sup> While the experts undoubtedly have knowledge in their respective fields, they might not be familiar with the cultural nuances of specific communities. By relying heavily on their testimonies, the Court risks adopting a top-down determination that cultural characteristics are not present in a case where the experts misinterpret the Afro communities' way of life. Such result would challenge the legitimacy and influence of the Inter-American human rights system at the local level.

### III. THE WAY FORWARD: A COMMUNITY-BASED APPROACH TO LAND RIGHTS PROTECTION

To counter the weaknesses in the tribal peoples and vulnerable group approaches and strengthen the land rights protection of Afro communities in Latin America, this essay proposes a community-based approach based on three criteria. If a community fulfills these criteria, it is entitled to collective land rights under the Inter-American human rights system. This community-based approach is based on domestic and international legal principles and practical considerations.

#### *A. Three Criteria for Collective Land Rights Protection Under the Community-Based Approach*

First, to benefit from collective land rights protection under international human rights law, the Afro community should possess a certain **internal organization**. This can include a community council, assembly, board, or other self-governance entity that is competent to decide and act on the community's land issues. This criterion ensures that the group of people seeking collective land rights protection actually constitutes a community with a shared interest in accessing and using

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<sup>61</sup> *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 64–65 (Nov. 28, 2007).

their traditional lands.

Second, the community in question should **self-identify** as being of African descent. This criterion helps limit the collective land claims to those groups who have historically been marginalized and prohibited from owning property. It also mitigates the risk that the relevant human rights bodies assessing the community's land claims take a top-down approach, imposing their own views of who is and what it means to be of African descent.

Lastly, the Afro community should have **ancestral occupancy** of the land to which they claim to be entitled. Information indicating the existence of early settlements, such as church or other official records, testimonial accounts, maps, or the presence of historical sites, can serve as proof. This criterion ensures that the community has existed over a prolonged period without forcing it to adopt folkloric cultural features or limiting its economic, social, or cultural development. It also mitigates the risk that a community falsely self-identifies as Afro-descendant for the sake of improved land rights protection, as the community still needs to prove its prolonged existence in a specific location.

### *B. Legal and Practical Foundations of the Community-Based Approach*

From a domestic law perspective, the community-based approach – or at least some elements of it – is already being applied by several Latin American States. In Brazil, Afro communities are entitled to collective land rights under federal law if they self-identify as “*quilombolas*,” who are broadly defined as employing “practices of resistance for the maintenance and reproduction of their characteristic way of life,”<sup>62</sup> and present a technical report that draws the

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<sup>62</sup> Sue Branford & Mauricio Torres, *Brazilian Supreme Court Ruling Protects Quilombola Land Rights for Now*, MONGABAY (Feb. 13, 2018), <https://news.mongabay.com/2018/02/brazilian-supreme-court-ruling-protects-quilombola-land-rights-for-now/>.

boundaries of their land.<sup>63</sup> Brazil's definition of quilombolas allows Afro communities to obtain land rights protection while freely determining their preferred lifestyle. Some state laws, such as those of the state of Para, only rely on the criterion of self-identification for Afro-Brazilians' collective land rights.<sup>64</sup> In Colombia, Law No. 70 of 1993 states that only Afro communities with certain folkloric cultural features enjoy collective land rights,<sup>65</sup> but authorities have broadened the law's scope. They grant collective land ownership to Afro communities if the communities have a community council, self-identify as Afro-descendants, and can prove ancestral occupancy of their land.<sup>66</sup> Similarly, the Honduran and Nicaraguan laws focus on the communities' ancestral occupancy of their lands.<sup>67</sup> In Nicaragua, Afro communities are additionally required to form a community council prior to initiating the land titling process.<sup>68</sup>

The concept of the social function of property, which is reflected in the constitutions of many Latin American

**63** Article 2 of the Decreto No. 4.887, de 20 de Novembro de 2003, Diário Oficial da União [D.O.U.] de 21.11.2003 (Braz.).

**64** RAPOPORT DELEGATION ON AFRO-BRAZILIAN LAND RIGHTS, BETWEEN THE LAW AND THEIR LAND: AFRO-BRAZILIAN QUILOMBO COMMUNITIES' STRUGGLE FOR LAND RIGHTS 27 (2008), <https://law.utexas.edu/wp-content/uploads/sites/31/2016/02/brazil-eng.pdf>.

**65** Articles 2(5), 4 of the L. 70/93, agosto 31, 1993, D.O. (Colom.).

**66** JUAN CARLOS BETANCUR & SERGIO CORONADO DELGADO, OBSERVATORIO DE TERRITORIOS ÉTNICOS [OBSERVATORY OF ETHNIC TERRITORIES], DERECHOS TERRITORIALES DE LAS COMUNIDADES NEGRAS: UNA MIRADA DESDE LA DIFERENCIA [TERRITORIAL RIGHTS OF BLACK COMMUNITIES: A DIFFERENTIAL PERSPECTIVE] 14 (2012).

**67** Article 93 of Decreto No. 82-2004, 15 June 2004, Ley de Propiedad [Property Law], D.O., 29 June 2004 (Hond.); Articles 39-40 of Ley No. 445, 13 Dec. 2002, Ley de Régimen de Propiedad Comunal de los Pueblos Indígenas y Comunidades Étnicas de las Regiones Autónomas de la Costa Atlántica de Nicaragua y de los Ríos Bocay, Coco, Indio y Maíz [Ley de Propiedad Comunal] [Law of the Communal Property Regime of the Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and the Rivers Bocay, Coco, Indio, and Maíz], L.G., 23 Jan. 2003 (Nic.) [hereinafter Law of Communal Property].

**68** Article 40 of the Law of Communal Property.

States,<sup>69</sup> further supports collective land rights of Afro communities. This concept states that private property ownership should not be exercised in a way that causes harm to others but should benefit the collective.<sup>70</sup> Private property may also invoke an obligation to use productive land to cultivate food and other goods for society. For example, arable land should not be left unused or for speculation. Restricting collective property rights to the few Afro communities with specific cultural features contradicts the social function principle because it leaves most communities without access to land that they could use for the benefit of their members and the society at large.

From an international human rights perspective, the community-based approach comports with the principle of self-identification. This principle establishes that communities and their individual members can freely choose to identify as indigenous or tribal.<sup>71</sup> Third parties, including State actors, international human rights bodies, anthropologists, legal scholars, and other experts, may not determine the identity and way of life of communities or their members. Outside the context of indigenous and tribal peoples, the principle of self-identification is implied in the right to participate in one's cultural life enshrined in Article 15(1)(a) of the International Covenant on Economic, Social, and Cultural Rights.<sup>72</sup> According to the current interpretation of this provision, "[t]he decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognized, respected and protected on the basis of

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<sup>69</sup> Danilo Bonilla & Sheila Foster, *The Social Function of Property: A Comparative Law Perspective*, 80 *FORDHAM L. REV.* 1003, 1008 (2011).

<sup>70</sup> *Id.* at 1004–05.

<sup>71</sup> Inter-Am. Comm'n on Human Rights, *supra* note 17, ¶ 31.

<sup>72</sup> International Covenant on Economic, Social, and Cultural Rights, art. 15(1)(a), Dec. 16, 1966, 993 U.N.T.S. 3.

equality.”<sup>73</sup> Thus, the self-identification principle is consistent with the community-based approach because both approaches refrain from imposing a particular culture on communities. Instead, they emphasize the preferred lifestyle and views of the communities and their members, irrespective of whether the communities identify as indigenous, tribal, or neither.

The community-based approach resolves existing challenges in the Inter-American human rights system's jurisprudence on the rights of third parties to community land. Currently, the cultural relationship of indigenous and tribal peoples to their land does not necessarily trump third parties' claims over the same land. While third parties can base their claims on any given justification, indigenous and tribal peoples are limited to claiming a cultural relationship to their land. The community-based approach removes this limitation as Afro communities can claim an economic link to their ancestral lands, just like third parties. This places Afro communities on an equal footing with third parties in land rights disputes. Lastly, the community-based approach grants land rights protection to a greater number of Afro communities than the tribal peoples or vulnerable group approaches, as more communities are likely to fulfill the three above-mentioned criteria. It therefore contributes to a more equal land distribution in Latin America and helps overcome existing inequalities as more Afro communities gain access to land that allows for economic, social, and cultural flourishing.

## CONCLUSION

Land rights of Afro communities are one of the most disputed issues in Latin America. The Inter-American human rights

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<sup>73</sup> Comm. on Econ., Soc. & Cultural Rights, General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights), ¶ 7, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009).

system, the region's driving force for extensive land rights protection of indigenous peoples, has failed to effectively protect Afro communities' land claims. It has granted Afro-descendants collective land rights under the concepts of tribal peoples and vulnerable groups, but these concepts have numerous weaknesses. While the tribal peoples approach excludes most Afro communities based on an inability to demonstrate the cultural features of tribal peoples, and reinforces socio-economic inequalities, the vulnerable group approach is vague, neglecting to specify a set of rights for Afro communities. Further, both approaches fail to consider the economic value of Afro communities' lands, which paternalizes such communities and places them in a disadvantageous position in property disputes with third parties. To overcome these weaknesses, this essay proposes a community-based approach. Afro communities who (1) have some sort of internal organization, (2) self-identify as being of African descent, and (3) have ancestral occupancy over the land, should be entitled to collective land rights protection in the Inter-American human rights system. This approach is based on existing domestic and international legal principles and practical considerations.

While this change in the framing of Afro communities' land rights is necessary to strengthen land rights protection under international human rights law, it needs to be combined with efforts to enhance enforcement of international human rights norms at the domestic level. This can be achieved by, *inter alia*, improving the implementation of the Inter-American human rights system's decisions on the ground, providing effective remedies for violations of the communities' land rights, and holding those who threaten or even kill land rights defenders accountable before the law. The design of these measures is a topic that is ripe for future research.