The Right to Dignified Living Conditions and the Position of Vulnerability in the Jurisprudence of the Inter-American Court

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I. Introduction and Outline of the Problem

Over the years, but particularly in the last decade, the Inter-American Commission on Human Rights (hereinafter IACHR) and the Inter-American Court on Human Rights (hereinafter IACtHR) have tried out diverse argumentative strategies for grounding the exigible character of social rights. These strategies range from (a) directly applying the American Declaration of the Rights and Duties of Man; (b) drawing the content of the right to social benefits from the right to life to explain state obligations to create conditions of a dignified existence; (c) applying Article 26 of the Inter-American Convention on Human Rights (hereinafter IACHR) indirectly in reference to social, cultural, and economic rights;[1] (d) applying Article 26 of the IACHR directly (though this is done in very few cases) e) up to, most recently – though it was not a majority opinion – applying the content of the right to health in the San Salvador Protocol directly (a concurring vote of Eduardo Ferrer Mac Gregor in a case against Ecuador in 2013[2]). These argumentative strategies have created heated disputes in academia about the relevance of each.

In this article we are interested in exploring the debates about the construction of the right to conditions of a dignified existence (which we will eventually come to call, in the following, "the right to a dignified life"), to reestablish that which has been

[1] CADH**:** Derechos Económicos, Sociales y Culturales. Artículo 26. Desarrollo Progresivo. "Los Estados partes se comprometen a adoptar providencias, tanto a nivel interno como mediante la cooperación internacional, especialmente económica y técnica, para lograr progresivamente la plena efectividad de los derechos que se derivan de las normas económicas, sociales y sobre educación, ciencia y cultura, contenidas en la Carta de la Organización de los Estados Americanos, reformada por el Protocolo de Buenos Aires, en la medida de los recursos disponibles, por vía legislativa u otros medios apropiados."

[2] Corte IDH, Caso Suarez Peralta *vs.* Ecuador, Sentencia de 21 de mayo de 2013.

overshadowed: *the argument of vulnerability*. With that extension, for methodological reasons, we do not address on this occasion the discussions related to provisional rights, the right to health in general[3] and sexual and reproductive health in particular, nor those related to the right to education.

The argumentative strategy of jurisprudential development connected to the right to conditions of a dignified existence tends to be analyzed from two perspectives. On the one hand, some maintain that the right to the conditions of dignified existence arise from the content of the right to life and physical integrity,[4] even from emancipatory perspectives that draw from the ways in which grassroots movements build their own battle cries. This right is considered to be violated as well by state omission, or more precisely, by the failure to fulfill the State's affirmative obligations to create conditions which guarantee a dignified life, either for children, detained persons, internees, indigenous communities, or other groups or persons in a situation of vulnerability.[5] On

[3] V. un estudio pormenorizado del derecho a la salud en las producciones de la CIDH y Corte IDH, en: Parra Vera, Oscar, *La protección del derecho a la salud a través de casos contenciosos ante el Sistema Interamericano de Derechos Humanos*, en: Clérico/Ronconi/Aldao, *Tratado de Derecho a la Salud*, Buenos Aires, Abeledo Perrot, 2013.

[4] V. Cavallaro, James L. y Schaffer, Emily J., *Rejoinder: Justice Before Justiciability: Inter-American Litigation and Social Change* [Réplica: Justicia antes que Justiciabilidad: Litigio interamericano y cambio social], New York University, "Journal of International Law and Politics", New York, v. 39, 2006, p. 345; Cavallaro, James L. y Schaffer, Emily J., *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas* [*Menos es más: Repensando el litigio internacional de los derechos económicos y sociales en las Américas*], "Hastings Law Journal"**,** v. 56, 2004, p. 217.

[5] V. Corte IDH, Caso de los "Niños de la Calle" (Villagrán Morales y otros) *vs*. Guatemala, Sentencia de 19 de noviembre de 1999, párrs. 144 a 146; Caso Bulacio *vs.* Argentina, Sentencia de 18 de septiembre de 2003; Caso Myrna Mack Chang *vs.* Guatemala, Sentencia de 25 de noviembre de 2003; Caso "Instituto de Reeducación del Menor" *vs.* Paraguay, Sentencia de 2 de septiembre de 2004; Caso Huilca Tecse *vs*. Perú, Sentencia de 3 de marzo de 2005; Caso de los Hermanos Gómez Paquiyauri *vs.* Perú, Sentencia de 8 de julio de 2004, párr. 124; Caso Juan Humberto Sánchez *vs.* Honduras, Sentencia de 7 de junio de 2003, párr. 110; cfr. Caso 19 Comerciantes *vs.* Colombia, Serie C No. 109, Sentencia de 5 de julio de 2004, párr. 153. Referido a las condiciones de detención, v., Caso del Penal Miguel Castro Castro *vs.* Perú, Sentencia de 25 de noviembre de 2006, párrs. 285, 293 a 295, 300 y 301; Caso Montero Aranguren y otros (Retén de Catia) *vs.* Venezuela, Sentencia de 5 de julio de 2006, párrs. 102 y 103; Caso De la Cruz Flores *vs*. Perú, Sentencia de 18 de noviembre de 2004, párr. 132; Caso Tibi *vs.* Ecuador, Sentencia de 7 de septiembre de 2004, párr. 157; Caso Loayza Tamayo *vs.* Perú, Sentencia de 17 de septiembre de 1997; Caso de la Masacre de Pueblo Bello *vs*. Colombia, Sentencia

the other hand, it is maintained that the right to conditions of a dignified existence must be directly founded in Article 26 of the IACHR on social, cultural, and economic rights.[6]

We argue in this article that this dispute loses sight of something fundamental. The right to a dignified life and the consequent affirmative obligations of the State to create conditions of a dignified existence recognizes a constant in opaque debate we've mentioned:[7] the IACtHR has always tightly maintained this development – in an express or implied way—with the *concept of vulnerable groups or the concept of a situation of vulnerability*. This argument allows us to maintain that the foundation of the development

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de 31 de enero de 2006, párr. 120; 111-112; Caso de la "Masacre de Mapiripán" *vs*. Colombia, Sentencia de 15 de septiembre de 2005, párr. 232, 108, 110; Caso Huilce Tecse *vs.* Perú, Sentencia de 3 de marzo de 2005, párr. 66; Caso "Instituto de Reeducación del Menor" *vs.* Paraguay, cit., párr. 158; Caso de los Hermanos Gómez Paquiyauri *vs.* Perú, cit., párr. 129; Caso 19 Comerciantes *vs.* Colombia, cit., párr. 153; Caso Myrna Mack Chang *vs.* Guatemala", cit., párr. 153; Caso Juan Humberto Sánchez *vs.* Honduras, cit., párr. 110; Caso Bámaca Velásquez *vs.* Guatemala, Serie C No. 70, Fondo, Sentencia de 25 de noviembre de 2000, párr. 172; y Caso de los "Niños de la Calle" (Villagrán Morales y otros) *vs*. Guatemala, cit., párrs. 144 a 146.

[6] Melish, Tara J., *Rethinking the "Less as More". Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas* [*Repensando la tesis de "Menos es Más": el litigio internacional de los DESC en las Américas*], New York University Journal of International Law and Politics, v. 39, 2006, p. 171; Melish, Tara J., *El litigio supranacional de los Derechos Económicos, Sociales y Culturales: avances y retrocesos en el Sistema Interamericano*, en AA.VV., *Derechos Económicos, Sociales y Culturales*, México, Programa de Derechos Humanos del Ministerio de Relaciones Exteriores, 2005, pp. 215-217; Melish, Tara, *The Inter-American Court of Human Rights: Beyond Progressivity*, en Langford, Malcolm (ed.), *Social Rights Jurisprudente: Emerging Trends in Comparative and Internacional Law*, Cambridge University Press, 2008.

[7] Aunque no se lo desconoce, v. Melish, Tara J., *El litigio supranacional de los Derechos Económicos, Sociales y Culturales: avances y retrocesos en el Sistema Interamericano*, ob. cit., pp. 215-217. Por ejemplo, Melish sostiene que la Corte IDH: "(…) ha preferido encontrar que los derechos deben ser protegidos en virtud de la vulnerabilidad especial de grupos particulares, en vez de reconocer directamente la aplicación universal de los derechos socioeconómicos. Específicamente, ha tendido a hallar ciertos derechos socioeconómicos requeridos por las "elevadas" o "especiales obligaciones" del Estado para con ciertas poblaciones, a la luz de su derecho a la vida y a la integridad personal (…)". La utilización del argumento de vulnerabilidad no implica necesariamente desconocer el carácter universal de los DESC, incluso es de uso frecuente desde posturas que conciben a los derechos sociales como plenamente exigibles (v., en otros, Parra Vera, Oscar, *Protección Internacional de los Derechos Económicos, Sociales y Culturales*, San José de Costa Rica, IIDH, 2008). La situación de vulnerabilidad, entre otros, es un argumento a favor del carácter definitivo de una obligación estatal que surge de un derecho. En todo caso, el problema en esta disputa es que no se haya prestado la suficiente atención al argumento de la vulnerabilidad, esto permitiría discutir las ventajas y desventajas del uso de esta estrategia argumentativa.

of the right to conditions of a dignified existence (sometimes referred to elsewhere as "minimum subsistence"[8] or "minimum existence"[9]) is the argument of material equality.

To support our thesis we first reconstruct the argumentative strategy that derives the right to social benefits from the right to life; next we reconstruct the rational through social, cultural, and economic rights. The insufficiency of each of these strategies speaks to the benefit of focusing on material inequality. In its turn, it allows us to discuss the advantages and disadvantages of the use of the argument of vulnerable groups or of the situation of vulnerability in relation to the obligation to create conditions of a dignified existence. It's noteworthy that to date this argumentative relationship has not found sufficient space in inter-American literature.

II. The Right to Dignified Living Conditions

Since the case of *The "Street Children" (Villagrán Morales and others) vs. Guatemala*, the first decision to interpret Article 19 (on the rights of children and special protective measures) of the American Convention on Human Rights (ACHR), the Inter-American Court of Human Rights (IACtHR) began to develop the content of the right to a "dignified life" as the *right through which the material conditions necessary to allow*

[8] V. Arango, Rodolfo, *El concepto de derechos sociales fundamentales*, Bogotá, Legis, 2005, p. 173 (R. Arango, *Der Begriff der sozialen Grundrechte*, Baden-Baden, Nomos, 2001); Rodolfo Arango y Julieta Lemaitre "Jurisprudencia Constitucional sobre el derecho al mínimo vital", en: *Estudios Ocasionales* CIJUS Universidad de los Andes, Bogotá 2002; García Jaramillo, Leonardo; "La paz como proyecto constitucional", en: *Araucaria. Revista Iberoamericana de Filosofía, Política y Humanidades*, 2013, p. 151.

[9] Alexy, Robert, Theorie der Grundrechte, Suhrkamp, Frankfurt a. Main, pp. 465 y ss.; R. Arango, *Der Begriff der sozialen Grundrechte*, Baden-Baden, Nomos, 2001; y sobre las sentencias recientes del Tribunal Constitucional Federal alemán, BVerfGE, 125, 175 (222) del 9 de febrero del 2010, Inga T. Winkler; Claudia Mahler, "Interpreting the Right to a Dignified Minimum Existence: A New Era in German Socio-Economic Rights Jurisprudence?", in: *Human Rights Law Review*, 13:2 (2013), 388-401, entre otros.

the development of a life with dignity are created.[10] We understand these conditions as those which allow the progressive improvement of each individual life path. In the case of children, in various contentious advisory opinions, the court relates the right to the "best interests of the child." Later the court extended the rule to cover the rights of the imprisoned and people kept in healthcare facilities, and, more recently, extended the interpretation of the right to indigenous communities seeking recovery of ancestral lands.

The argument employed is simple. If the right to life implies existence, then it is not violated solely by actions that involve taking the life of another person; the content of this right is also violated when the conditions that make a dignified existence possible are absent, when people live in a social and familial context in which these conditions are not present. As such, the state does not only violate the right to life when its agents go out and kill children who live in the streets, but also when nothing has been done (or what has been done has been done in an insufficient or inappropriate way) to create the conditions by which those children can develop the courses of their lives in the context of their families and communities. The development of this argument has a key impact on certain rights and creates not solely obligations not to intervene, but also affirmative obligations to act. We see this development in the jurisprudence of the IACtHR in four moments:

a) **The case of the "Street Children" (Villagrán Morales *et al.*) *vs*. Guatemala: *the right to life of children is not violated solely by action, but also by state omission.***

The case deals with the torture and extrajudicial killing, by state agents, of adults and minors of 18 years of age (these last are children according to Article 1 of the Convention

[10] Inter-American Court of Human Rights, Case of the "Street Children" (Villagrán Morales and others) *vs*. Guatemala, cit., par. 144.

on the Rights of the Child) who lived or spent most of the day in the streets of the capital of Guatemala. Guatemala was found responsible for the violation of, among other rights, the right to life.

These children found themselves living on the street in a situation of extreme poverty. They were without even minimal access to dignified living conditions (understood as conditions that permit the development of a dignified life path). In this case, the IACtHR developed the right to life as an affirmative right[11] generating state obligations. The Court holds this in the final sentence of the famous paragraph 144:

> "The right to life is a fundamental human life, the enjoyment of which is a prerequisite to the enjoyment of all other human rights. If not respected, all other rights lack meaning. Due to the fundamental character of the right to life, restrictive perspectives on the right are not permitted. In essence, the fundamental right to life includes not only the right of every human being not to be arbitrarily deprived of life, *but also the right to access, without impediment, conditions which ensure a dignified existence.* A state has the obligation to guarantee the creation of the conditions necessary to avoid violations of this basic right, and in particular, it must prevent its agents from infringing upon it. [12]

After the aforementioned paragraph 144, an argument appears in the following passage which, as we understand it, takes into account the special vulnerability of the children in the case:

> "The Court cannot fail to note the special gravity of the instant case, because it deals with young victims, three of them children, and because of the fact that the state conduct violates the express intent not only of Article 4 of the American Convention, but also of numerous international instruments which have been

[11] Pascualucci, Jo, "The Right to a Dignified Life (Vida Digna)", 31 *Hastings International and Comparative Law Review*, 2008, 1-32, which states that, "the Court's jurisprudence on the right to life thereby integrates the concepts of economic and social rights with civil and political rights within the context of the right to dignified life".

[12] Additional Note 5. Accordingly, the judgment of the Inter-American Court of Human Rights in the case of Servellón García and Others *vs.* Honduras, Series C No. 152, Opinion of September 21, 2006, deals with the execution of "socially marginalized children and youth affected by poverty" (par. 116); it stresses that the State did not allow "access to services and essential goods, in such a way that this failure *permanently deprived the minors of the potential to free themselves, to develop themselves, and to become adults capable of determining their own future* (par. 117), emphasize added.

> widely accepted by the international community, instruments which obligate the State to adopt special measures for the protection and aid of the children under its jurisdiction."[13]

The vulnerability of the children in this case was the result of a *confluence of circumstances*. One concept of the right to special protective measures that emerges from conventions on international human rights (hereinafter CIHRs) that deal with children's rights and from Article 9 of the ACHR is that the right belongs to children. The other concept is related to the context of the specific case: it looks at the "position of risk" in which children who dwell in the streets live. They are found to be in a situation of total socio-economic deprivation, and moreover, as a result of the systemic practice of aggression perpetrated by the security forces, they are under permanent threat. [14] This group of multiple vulnerabilities speaks, on the one hand, to the gravity of the restriction of children's right to life. On the other hand, it connects with a background argument concerning material equality. These children were found not to enjoy true equality of access to conditions that permit the exercise of rights, or in the language of the Inter-American Court, they did not have access to the conditions necessary for a dignified existence. In this way, the Court is able to explain the dual obligation (and with it the dual state transgression) to guarantee the right to dignified living conditions, the right of children to develop their identity and wholeness.[15]

What do these protective measures (Article 19 of the ACHR) consist of? Or what, in the words of the Court, comprises "the right to an adequate standard of living"? [16] How

[13] IACtHR, in the Case of "Street Children" (Villagrán Morales and Others) *vs*. Guatemala, par. 146.
[14] IACtHR, in the Case of "Street Children" (Villagrán Morales and Others) *vs*. Guatemala, par. 189.
[15] IACtHR, in the Case of "Street Children" (Villagrán Morales and Others) vs. Guatemala, par. 191.
[16] Accordingly, "The need to protect the weakest individuals – such as street children – requires, in short, an interpretation of the right to life such that it contains the minimal conditions for a life with dignity. From there there is an inevitable link, which we affirm in the circumstances of the present case, between articles 4 (the right to life) and 19 (rights of the child) of the American Convention, ()." In this way, "We believe

do we evaluate whether or not the State has violated (by omission or by insufficient action) its affirmative obligation to create dignified living conditions? The response begins to draw upon, in its framework (not as such in the concrete content and scope of affirmative duty to ensure these conditions), the reconstruction of the line of jurisprudence that began in Villagrán Morales v. Guatemala.

b) The case of "The Institute for the Reeducation of Minors" *vs.* Paraguay: dignified living conditions and the issue of restraint of detained persons and special protections for detained children[17]

This case deals with the deprivation of the liberty of children, a few of whom had passed away in the course of their confinement. In accordance with the judgment, the state obligation to provide detained persons with "the minimal conditions necessary for the preservation of dignity during their stay in detention centers" [18] is exponentially derived anew from the dual *situation of vulnerability.* On the one hand, the situation emerges in the case of detained persons because they are confined by state authority in a state of imprisonment. The situation "prevents them from meeting their own basic human

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that *the project of life is inseparable from the right of existence, and requires dignified living conditions for its development, conditions of security and the wholeness of the human person* (…)" As such, "A person who in his/her childhood lives, as is the case in so many countries in Latin American, in the humiliation of misery, without the even the minimal conditions from which to build the project of his or her life, experiences a malady equivalent to a spiritual death; the physical death which follows in some circumstances is the culmination of the complete destruction of the human being. These afflictions make victims not only of those who suffer them directly, in body and spirit; they are also painfully cast upon the loved ones of the direct victims, and in particular on their mothers, who also commonly endure a state of abandonment. To the suffering of the violent loss of their children is added the indifference with which the they are treated by the rest of the world," ibid, from the concurrent of judges A.A. Cançado Trindade and A. Abreu Burelli, pars.7, 8 and 9 respectively.

[17] "It is worth noting as well that, as this Tribunal has already said, an illegally detained person [with explicit reference to] (…), par. 134) is found to be in an heightened situation of vulnerability, from which arises a certain risk that other rights will be made vulnerable, such as the right to physical integrity and the right to be treated with dignity," IACtHR, Case of the "Street Children," (Villagrán Morales and Others) *Vs*. Guatemala, cit., par. 166, emphasis added.

[18] IACtHR, in the case of "The Institute for the Reeducation of Minors" *vs.* Paraguay, cit., pars. 151, 152 and 153; 159.

needs which are essential for the development of a dignified life."[19] On the other hand, in the case of detained children, there exists moreover an obligation of special protection (Article 19 of the ACHR), which requires that the state, "should assume the special position of guarantor with great care and responsibility, and should take special measures directed at the outset at the highest interests of the child."[20] This requires, among other things, that "the State concerns itself particularly with the life circumstances that may come along with the deprivation of liberty."[21] In both cases, this situation of vulnerability is exacerbated by another which can be specifically identified: the specific conditions in which these children are found to be detained.

To evaluate whether the state, in this specific case, fulfilled its treaty obligations to provide "initiatives to guarantee to all those confined in the Institution, adults and children, a dignified life with the goal of strengthening his or her life path, in spite of his or her incarceration,"[22] the Court takes into account living situation, access to food, education, and health.[23] The IACtHR concludes that the state has not effectively taken "necessary and sufficient positive measures" to guarantee dignified living conditions.

[19] IACtHR, in the case of "The Institute for the Reeducation of Minors *vs.* Paraguay, cit., par. 152.
[20] IACtHR, in the case of "The Institute for the Reeducation of Minors" *vs.* Paraguay, cit., pars. 160, citing Hermanos Gómez Paquiyauri *vs.* Peru, cit., pars. 124, 163, 164 and 171; in the Case of Bulacio *vs.* Argentina, cit., pars. 126 and 134; and "Street Children" (Villagrán Morales and Others) *vs*. Guatemala, cit., pars. 146 and 191; and Advisory Opinion No. 17, Series A No. 17, "The Legal Condition and Human Rights of the Child," August 28, 2002, pars. 56 and 60.
[21] IACtHR, in the case of "The Institute for the Reeducation of Minors" *vs.* Paraguay, cit., pars.160, and 159, italics added.
[22] IACtHR, in the case of "The Institute for the Reeducation of Minors *vs.* Paraguay, cit., par. 164 and following.
[23] "With respect to children who have been deprived of liberty and are therefore in state custody, a state has the obligation to, *inter alia*, provide those children with assistance in health and education, and in so doing to assure that the detention to which the children are subject does not destroy their life paths." IACtHR, in the case of "The Institute for the Reeducation of Minors vs. Paraguay, cit., par. 161, citing Advisory Opinion No. 17, "The Legal Condition and Human Rights of the Child," pars. 80, 81, 84 and 86-88; "Street Children" (Villagrán Morales and Others) vs. Guatemala, cit., pars. 196; and Rule 13.5 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), adopted by the General Assembly in Resolution 40/33 November 28, 1985.

They cited the fact that detainees lived overcrowded conditions as a result of overpopulation, that they were poorly fed, that they did not have access to medical care, dental care, or timely and appropriate psychological attention,[24] nor did the state guarantee their right to education.[25]

In summary, the argumentative strategy of the Court's reasoning behind the right to dignified living conditions emerges from this case with great clarity. They do not make the argument in the abstract, but rather in relation to the right of persons who are found in to be in a disadvantaged position. Firstly, it arises out of their situation as both subject to the control of the state and their imprisonment, and secondly, it derives from their vulnerability as children; finally, it is a product of the specific conditions of overcrowding and the lack of access to basic services in which they spend their confinement.

Here we glimpse an interesting nuance with respect to the Case of the "Street Children" (Villagrán Morales and others) vs. Guatemala. In order to determine the content of the right to dignified living conditions and the scope of the corresponding state obligations, the IACtHR *makes use of the social rights* that emerge from the Convention

[24] IACtHR, in the Case of "the Institute for the Reeducation of Minors" *vs.* Paraguay, cit., pars. 166, 172, 173, 174, 176.

[25] "In light of the reply to the complaint, in which the State conceded its responsibility with respect to 'the conditions of detention incompatible with personal dignity,' as well as that which was discussed earlier in this chapter, it can be concluded that the state's efforts did not effectively fulfill its obligation to guarantee *in the context of this special relationship of subjugation to the state – adult/child deprived of liberty -- that it did not take the affirmative special measures required for children.* Moreover, it was the State that permitted its agents to threaten, harm, violate, or restrict rights, rights that must not be the target of any type of limitation or violation. Through the constant display of cruel, inhumane, and degrading treatment of all of the detainees at the Institute, these vile living conditions affected their right to life, their development, and their life paths, and as such constitute violations of articles 4.1, 5.1, 5.2, and 5.6 of the American Convention, as well as article 1.1 of the same, with respect to the children, as read in light of article 19 of the Convention," IACtHR, in the case of "The Institute for the Reeducation of Minors *vs.* Paraguay, cit., par. 176, emphasize added.

on the Rights of the Child and the Sal Salvador Protocol.[26] While the Court does not directly evaluate the violation of social rights, the construction of the scope of the right to dignified living conditions under the mantle of the right to life crucially does not derive from the so-called civil and political rights, but from social rights. This argumentative trend is developed further when we look at the right to dignified living conditions of indigenous communities, as is discussed below.

c) The right to dignified living conditions in indigenous communities: the importance of economic, social, and cultural rights in determining the nature of those conditions

Up to this point, the jurisprudence of the IACtHR treated the right to dignified living conditions as an expansion of the right to life in light of situations of vulnerability: as a result of age (children); extreme poverty; the risk inherent in conditions of certain living environments ("street children"); because of being subject to state power (detained persons); for age (detained children), and overcrowding as a result of overpopulation (detained adults and children). Now, the new standard associated with this right comes not from cases related to children, but from those cases involving indigenous peoples.

The cases of the Indigenous Community Yakye Axa *vs.* Paraguay,[27] Indigenous Community Sawhoyamaxa *vs*. Paraguay,[28] and Indigenous Community Xákmok Kásek *vs*. Paraguay[29] broaden the right to a dignified life in indigenous communities. The Court evaluates the violation of the right to collective property as it concerns ancestral lands,

[26] The representatives of the victims alleged a failure to comply with the state obligation to guarantee minimal levels of social rights and they based their claim in the right to progress development of the Economic, Social, and Cultural Rights (article 26 of the IACHR). The State conceded the point, accepting therefore the representatives' argument. The IACtHR nevertheless resolved the case following the line of argument that had begun with the Villagrán Morales case.
[27] IACtHR, Case of the Indigenous Community Yakye Axa *vs*. Paraguay, Judgment of June 17, 2005.
[28] IACtHR, Case of the Indigenous Community Sawhoyamaxa *vs.* Paraguay, Judgment of March 29, 2006.
[29] IACtHR, Case of the Indigenous Community Xákmok Kásek *vs.* Paraguay, Judgment of August 24, 2010.

and in determining the content of the right to dignified living conditions, it openly and explicitly uses the content of social rights: the San Salvador Protocol, and the Observations of the Committee on Social, Cultural, and Economic Rights on the International Covenant on Economics, Social, and Cultural Rights (hereinafter ICESCR).

The Court also applies Article 26 of the ACHR, an important nuance which separates the case from the Case of the "Institute for the Reeducations of Minors" vs. Paraguay, even though it should be recognized that Article 26 is not used as a factor to directly evaluate the actions of the State, but as an argument to develop the content of the right. Nevertheless, its relevance with respect to previous cases is that it can be deduced from the Court's argumentation that the determination of what constitutes dignified living conditions, in these cases, must be decentralized and must take into account the way of life of the communities, listening to the voices of affected populations.[30] That is to say, if until now the situations of vulnerability – present in the previous cases – were the result of an inequality of weapons to combat those situations because of an unjust distribution of economic and social goods,[31] these cases alert us to the situations of vulnerability as a result of a systemic and historic lack of acknowledgement of indigenous communities.[32]

[30] IACtHR, Case of the Indigenous Community Yakye Axa *vs*. Paraguay, cit., par. 131.

[31] The socio-economic injustice is embedded in the economic-political structure of society with respect to the distribution of goods (examples of this type of injustice are visible in labor exploitation, economic marginalization, and the deprivation of material goods indispensible to the process of lifting oneself up to a dignified life, among others). Fraser, Nancy, *Justice Interrupted*, Bogotá, Century of Men Editors/University of the Andes, 1997.

[32] This last comes out of cultural or symbolic injustice, embedded in the socially dominant, wealthy members of society, "patrones," from which comes the pretense of "uniformity." As an example, we see the form of use, possession, and disposition of the land that necessarily occurs when the specific voices of diverse persons who have different interpretations are not effectively heard in the process of decision (examples of this type of injustice, among others, are the cultural domination, the lack of acknowledgement and the lack of respect paid to the diverse voices coming from indigenous communities). Fraser, Nancy, *Justice Interrupted*, Bogotá, Century of Men Editors/University of the Andes, 1997 and Fraser, Nancy: "Social Justice in the Era of Political Identity", in: Fraser/Honneth, *¿Redistribution or Recognition?: A Political-Philosophical Debate*, Morata, Madrid, 2006.

The three cases against Paraguay are characterized as being cases that deal with the plunder of the lands of indigenous communities to grant them to tenants or businesses for their exploitation. Although these cases are against a particular State, this situation is replicated in various iterations all over the region.[33] The case of Yakye Axa (2005) deals with an indigenous community that accused the state of Paraguay of the violation of rights resulting from the failure to reinstate their ancestral lands, from which they had been displaced. The community lived along the route to what had been their lands in a state of "extreme misery,"[34] without adequate access to food, healthcare, or education. As a result of this situation 16 people died. The case therefore arrived at the IACtHR because of state omission which made impossible the effective realization of the right to community ownership of their ancestral lands, which much also be seen as their form of self-sufficiency and self-sustainance. In addition, they claimed a lack of appropriate and sufficient affirmative measures to guarantee the dignified living conditions of the community.

The IACtHR ordered the State of Paraguay to delimit the traditional territory of these communities and to reinstate their territory along those limits, without cost, as part of the process of restitution, as well as to provide services which would guarantee access to food, health, and education. The judgment contained many argumentative particularities that go beyond the scope of this piece. It interests us nevertheless to linger

[33] A current classification of the cases decided by the IACtHR concerning indigenous communities and other peoples is made according to various forms of structural inequality, v. Góngora Mera, Manuel, (2013), The Judicialization of the Ethno-racial Inequalities in Latin America: Conceptualization and typology of an Inter-American Dialogue, en www.desigualdades.net; v., as well as Pascualucci, Jo, "The Right to a Dignified Life (Vida Digna)", op. cit.; Pascualucci, J. A "Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples," *Wisconsin International Law Journal*, 2009.

[34] IACtHR, Case of the Indigenous Community Yakye Axa *vs*. Paraguay, cit., par. 164, italics added.

over the standard used to evaluation the failure to fulfill the state obligation to create conditions of a dignified existence.[35]

The insufficiency of the measures taken by the State was evaluated as a violation of the right to a dignified life (Article 4 of the IACHR); nevertheless the measures were also explicitly scrutinized in relation to the general duty to guarantee contained in Article 1.1 and, indirectly, with the right to progressive development in Article 26 of the same Convention, as well as Article 10 (Right to Health), 11 (Right to a Health Environment), 12 (Right to Food), 13 (Right to Education), and 14 (Right to the Benefits of Culture) of the Supplemental Protocol of the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, and the pertinent rulings under Convention No. 169 of the ILO. In determining the violations, the IACtHR also took into account the content of the basic obligations that come from the social rights to food, health, and education which are developed in the General Observations of the United Nations Committee on Social, Cultural, and Economic Rights.[36]

The argumentative strategy of the IACtHR examined here leaves us three take-aways: two encouraging in the line of enforcement of social rights and the other which must be examined in terms nuance (in the best of cases) or setbacks (in the worst of case). On the one hand, the relation of the right to life – and the consequent obligation to "create the minimal life conditions compatible with the dignity of the human person"[37] and to not produce conditions that impede the realization of that dignity or make it more difficult –

[35] IACtHR, Case of the Indigenous Community Yakye Axa *vs*. Paraguay, cit., par. 161, citing the Case "Institute for the Reeducation of Minors" *vs.* Paraguay, cit., par. 156; Case of the Gómez Brothers Paquiyauri *vs.* Peru, cit., par. 128; Case of Myrna Mack Chang *vs*. Guatemala", cit., par. 152, and Case of the "Street Children" (Villagrán Morales and others) *vs*. Guatemala, cit., par. 144.

[36] IACtHR, Case of the Indigenous Community Yakye Axa *vs*. Paraguay, par. 166, citing the United Nations Committee on Social, Cultural, and Economic Rights, General Observation 14 on *The Right to Health* (2000).

[37] Case of "The Institute for Reeducation of Minors" *vs.* Paraguay, cit., par. 159.

with the duty to progressive development of those social, cultural, and economic rights of Article 26 of the ACHR now emerges in an explicit way. This interdependence is not a formal citation. The content of these state obligations "to take affirmative measures, specific and directed at the satisfaction of the right to a dignified life, especially when dealing with persons in a situation of vulnerability or risk, to whom attention is critical"[38] is measured in explicit form through the social rights that come from the ICESCR and the San Salvador Protocol. In turn, it emerges from the examined decisions that when the content of the violated right is found to be in close relation with the right to life, a key to subsistence, it is treated as an breach of a state's basic obligations. With which, we interpret, is won – indirectly – a reading of Article 26 of the IACHR that establishes that not everything is examined simply as to whether it is begun and continues in a progressive way, but that there are some affirmative measures that must not wait.

On the other hand, in the specific Case of the Indigenous Community Yakye Axa *vs*. Paraguay, the responsibility of the state arises when they are aware of the situation of risk in which the community lives (theory of risk) and as a result have a duty to use affirmative measures to prevent the risk from becoming actual harm. Because of this, some conclude that the Court will not recognize responsibility under international law in all cases of grave violations of the state obligation to create conditions of a dignified existence,[39] but rather only in those in which the State was aware of the situation and the

[38] IACtHR, Case of the Indigenous Community Yakye Axa *vs*. Paraguay, par. 166, italics added.

[39] The obligation of prevention requires that the State acts with respect to risks derived from the situations of poverty and extreme poverty. A. Dultizkly posits that the IACtHR has not extended the obligation to guarantee the right to life to all situations of poverty and extreme poverty. Ariel E. Dulitzky, *Poverty and Human Rights in the Inter-American System Algunas aproximaciones preliminares*, in Revista IIDH, No. 48, San José, IIDH, 2008; cfr. Report of the Inter-American Institute of Human Rights on Human Rights and Poverty, 2010; v. cases of the IACtHR , Indigenous Community Sawhoyamaxa vs. Paraguay, cit., par. 155; Case of Xakmok Kasek, cit. par. 188.

risk in which the victims were found.[40] In these contexts, the "relativization" of the fulfilled state responsibility by the IACtHR is reprehensible, and places on the State the obligation to be aware.

Ultimately, the argumentative reasoning of this judgment strengthens the argument that the lack of material equality comes from a baseline *situation of multiple vulnerabilities*. To evaluate (and make a conclusion about) the insufficiency of the affirmative measures taken, the Court established that the State should have taken "into account the special situation of vulnerability from which the complainants came, concerning their different way of life (systems of understanding the world different from those of western culture, that include maintaining a close relationship with the earth) and their life paths, in their individual and collective dimensions (…)"[41]. With this the IACtHR builds the obligations to create dignified living conditions in a *situation of vulnerability*. This takes place when three circumstances are all present. On the one hand, the indigenous community is not treated as an equal, but was displaced from their lands, which provided them a means of self-sufficiency, without the state having taken appropriate measures of restitution. This situation of vulnerability arises out of a concrete circumstance imputable to state omission. The second condition, on the other hand, concerns a more abstract consideration. The situation of vulnerability comes as a result of

[40] Reiterated again in the Case of Indigenous Peoples of Sarayaku *vs*. Ecuador, Judgment of June 27, 2012, pars. 245 and 248, in which the IACtHR enters a judgment against Ecuador for actions carried out by an oil company with the aquiesence and protection of the State; the business cleared paths and planted around 1400 kg. of the explosive pentolite en block 23, which included the Sarayaku territory. "Consequently, it has been a clear and proven risk, that correspondingly the State must diffuse (…)," par. 248.

[41] IACtHR, Case of the Indigenous Community Yakye Axa *vs*. Paraguay, cit., par. 163. *See also* Melish, Tara, "The Supranational Lititgation of Social, Cultural and Economic Rights: Advances and Setbacks in the Inter-American System," which conceeds that the jurisprudence of "life path" seems indespensible "en those specific objective contexts in which the totality of the conditions necessary to achieve a dignified existance are absent and to parse out specific violations is impossible," Nevertheless, it does not to be the the methodology for treating the increasing volume of claims for failure to fulfill economic, social, and cultural rights in the region, various of which are already being sent to the Inter-American System.

acknowledging that the communities are groups which have historically been excluded, marginalized, subordinated, and where the harmful consequences of these practices persist in the present day, "in light of the international *corpus juris* which exists concerning the special protection required by members of indigenous communities."[42] Finally, the third condition is more specific because it concerns members of the community of a young age (children), or advanced age (the elderly), and connects the case directly with the situation of vulnerability that come with age (such as in the cases of the "Street Children" (Villagrán Morales and Others) vs. Guatemala and in "The Institute for the Reeducation of Minors" vs. Paraguay). The insufficiency of the state methods is even more grave because of the additional obligation to adopt special methods for the protection of children.[43] The situation of vulnerability is underlying, because in order to determine that the state methods have been neither sufficient nor adequate, the IACtHR evaluated them with respect to their suitability for reversing the "situation of vulnerability, given the particular gravity of the present case."[44]

The negative point that remains comes out of Yakye Axa, because the majority vote of the IACtHR does not condemn the state for violating the right to life of persons

[42] IACtHR, Case of the Indigenous Communit Yakye Axa *vs*. Paraguay, cit., par. 163.

[43] "La Corte no puede dejar de señalar la especial gravedad que reviste la situación de los niños y los ancianos de la Comunidad Yakye Axa. ... *En el presente caso, el Estado tiene la obligación, inter alia, de proveer a los niños de la Comunidad de las condiciones básicas orientadas a asegurar que la situación de vulnerabilidad en que se encuentra su Comunidad por la falta de territorio, no limitará su desarrollo o destruirá sus proyectos de vida*", Corte IDH, Caso de la Comunidad Indígena Yakye Axa *Vs*. Paraguay, cit., párr. 172, cursiva agregada, con referencias a: Caso "Instituto de Reeducación del Menor" *vs.* Paraguay, cit., párr. 160 (aunque en este párrafo no aparece lo que Yakye Axa aparece en cursiva en el párr. 172); Opinión Consultiva No. 17 "Condición Jurídica y Derechos Humanos del Niño", cit., párrs. 80-81, 84, y 86-88, y Caso de los "Niños de la Calle" (Villagrán Morales y otros) *vs*. Guatemala, cit., párr. 196. Interpretamos que Yakye Axa avanza un paso respecto de los derechos de los niños, ya que en "Villagrán Morales" la Corte IDH enumera medidas de protección, pero no especifica cuáles serían las medidas positivas apropiadas, tampoco aparece un párrafo similar que en esta nota de Yakye Axa se marca en cursiva. A pesar de este avance, la Corte IDH no condenó al Estado por violación al artículo 19 (derechos del niño a medidas especiales de protección); en rigor tampoco lo había solicitado la Comisión IDH. Similar situación se dio con el caso Comunidad Indígena Sawhoyamaxa *vs*. Paraguay.

[44] Corte IDH, Caso de la Comunidad Indígena Yakye Axa *Vs*. Paraguay, cit., par. 169.

who actually died as a result of the insufficiency of state actions (nor to did they condemn the state for violating the rights of the child, even though some of the victims were children under the terms of Article 19), even though it held that there had been a violation of the right to life of the survivors. This last point motivated the dissent of Judge Cançado Trindade, for whom the State was responsible as well for the actual dead among the members of the community; in the dissent, it was enough to prove that the state had created and perpetuated the "situation of sub-human conditions" that ended in the death of various members of the community. By contrast, for the majority, in the cases of the actual dead, additional proof was required. For Cançado Trindade, the alleged absence of additional proof could never be understood as proof that the state's international obligations were not triggered by the death of some of the members of the Yakye Axa community, given the sub-human conditions in which they lived.[45] Judge Cançado's dissent does not fall on deaf ears. It left the way prepared for when, in a similar case in the year 2006, the IACtHR condemned the state of Paraguay for the death of nineteen members of an indigenous community, among them eighteen children, because the state had not fulfilled its state obligations to implement appropriate and sufficient affirmative measures to create the conditions of a dignified existence for this community which was found to be in a situation of extreme vulnerability.[46]

In the case of the Indigenous Community Xákmok Kásek *vs*. Paraguay the argumentation becomes more sophisticated by way of the setting of standards of international responsibility (the duty of prevention and theory of risks) with regard to the guarantee of the right to life and the imputation of responsibility in cases of actual death,

[45] Corte IDH, Caso de la Comunidad Indígena Yakye Axa Vs. Paraguay, cit., voto en disidencia del juez Cancado Trindade.
[46] Corte IDH, Caso Comunidad Indígena Sawhoyamaxa *Vs*. Paraguay, cit.

while at the same time strengthening the use of social rights to evaluate whether the affirmative measures taken by the state were sufficient to fulfill the duty to create conditions of a dignified existence. The case began with a determination of state responsibility for the failure to guarantee the right to ownership of ancestral lands for the Xákmok Kásek community. The court concluded in the case that this community had not been able to recover their lands, despite the fact that a domestic claim for relief had been pending for more than 20 years without receiving a satisfactory response. Moreover, the Court established that the lack of access to their lands affected their means of self-sufficiency, their way of life. They declared, "that the State *has not afforded the basic benefits necessary to protect the right to a dignified life in these conditions of special risk, actual and immediate for a determinate group of people*, which constitutes a violation of Article 4.1 of the Convention, in relation to Article 1.1 of the same, to the detriment of all the members of the Xákmok Kásek Community,"[47] who were found to be "in a situation of extreme vulnerability."

The situation of extreme vulnerability [48] impacted, in various senses, the examination of the (lack of) suitability of state actions criticized as insufficiently [49]

[47] Corte IDH, Caso Comunidad Indígena Xákmok Kásek *Vs*. Paraguay, cit., par. 217, destacado agregado.

[48] En reiteradas oportunidades la Corte habla del carácter extremo de la situación de vulnerabilidad, lo que podría llevar a pensar que concibe la vulnerabilidad en forma gradual. El carácter gradual de la gravedad de la vulnerabilidad presente en la argumentación del TEDH sobre grupos vulnerables fue utilizado por Peroni, Lourdes y Timmer, Alexandra [*Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law*, Int J Constitutional Law (2013) 11 (4): 1056-1085], para preguntarse si ese Tribunal argumentaba desde una narrativa de derechos humanos que tomaba la vulnerabilidad como una característica común a todas las personas o como algo específico de determinados grupos. Una pregunta similar podría ser realizada respecto a la estrategia argumentativa ensayada por la Corte IDH sobre derecho a condiciones de existencia digna y situación de vulnerabilidad. ¿Se trata de una narrativa en la que se parte del hecho irrefutable fenomenológicamente de que las personas son, desde el comienzo de su existencia y en el trayecto de sus vidas, vulnerables a algo o alguien y por ello, en todo caso, las vulnerabilidades son una cuestión de grados, de intensidades? O, ¿la gradualidad de las vulnerabilidades se piensa como en una escala aparte construida para aplicar a personas o grupos específicos? El tratamiento de estas preguntas excedes los objetivos de este trabajo. Por de pronto requeriría un análisis del discurso de la línea

fulfilling the state obligation to create conditions of a dignified existence (Article 4 of the IACHR). The state action criticized for being insufficient is complex and is configured as such: on the one hand, we examine the administrative procedures for recovering the lands. With respect to the right to a dignified life, the IACtHR continued by identifying the variables by which they measured whether the State fulfilled its obligation to create conditions of a dignified existence and its obligation to respect the right to communal ownership of ancestral lands. Critically, these variables are expressly read as social, cultural, and economic rights: *the right to access to water,* [50] *to food,*[51] *to health, and to education.* [52] In all relevant aspects, the state measures were neither sufficient nor appropriate. This test does not take place in the abstract, but rather it takes into account the state action together with its effect on reversing the situation of extreme vulnerability of the community and its members.

With respect to the procedures for the recovery of lands, in Xakmók Kásek, as in the cases of the indigenous communities of Yakye Axa and Sawhoyamaxa, the IACtHR held that the internal administrative proceedings were *ineffective* since they did *not offer the genuine possibility* that the members of the communities would recover their

jurisprudencial estudiada, entrevistas a los jueces y juezas de la Corte como así también a los asistentes letrados, análisis comparado de otras líneas jurisprudenciales de la Corte IDH en la que usó el argumento de vulnerabilidad, como así también una periodización del argumento de vulnerabilidad en relación con la historia del sistema interamericano.

[49] V. Clérico/Aldao, ob. cit.

[50] Respecto del derecho al acceso a agua, las gestiones realizadas por el Estado a partir del Decreto no alcanzaron para proveer a los miembros de la comunidad de agua en cantidad suficiente y calidad adecuada, lo cual los expuso a riesgos y enfermedades.

[51] En relación con el derecho a la alimentación, a pesar de lo demostrado por el Estado, no se superaron las necesidades nutricionales que existían con anterioridad al Decreto. Corte IDH, Caso Comunidad Indígena Xákmok Kásek *vs.* Paraguay, cit., párr. 208.

[52] En relación con el derecho a la educación, si bien algunas condiciones en cuanto a la prestación de la educación por parte del Estado habían mejorado, las acciones eran insuficientes porque no existían instalaciones adecuadas para la educación de los niños: las clases se desarrollaban bajo un techo sin paredes y al aire libre e, igualmente, no se aseguraba por parte del Estado ningún tipo de programa para evitar la deserción escolar.

traditional lands if they were found to be under private ownership.[53] This caused the absence of possibilities for self-sufficiency and self-sustenance of community members, in accordance with their ancestral traditions. As such, the community depended almost totally on state actions, which, it is worth reiterating, forced them to live not just in a way that was out of step with their cultural norms, but in a condition of extreme destitution.

In summary, the IACthR examines the insufficiency of state actions either in general nor in abstract, but by taking into account the specific situation. In turn, the argument of extreme vulnerability impacts in various senses this test. In one sense, it worked in favor of a very intense application of the test of insufficiency which is a result of a restriction of rights that was, from the start, extreme and persistently not dealt with,[54] and required "urgent" state action.[55] At the same time, it meant that the State is charged with proving the appropriateness/adequacy of state actions,[56] a charge which in this case it did not successfully fulfill. In another sense, it served to weaken from the start the possible reasons alleged by the State. It was held that the extreme restriction of rights was a product of the specific situation of vulnerability which was increased by the duration of the restriction,[57] by the urgency of the state action and because the affected group belonged to a vulnerable group (the argument of equality). For this is is clear how little

[53] S. los "problemas estructurales" que presenta el procedimiento administrativo, que impiden "encontrar una solución definitiva del problema", Corte IDH, Caso Comunidad Indígena Xákmok Kásek *vs*. Paraguay, cit., párr. 145. *Cfr*. Caso de la Comunidad Indígena Yakye Axa *vs*. Paraguay, cit., par.98, y Caso Comunidad Indígena Sawhoyamaxa *vs*. Paraguay, cit., párr. 108.

[54] Corte IDH, Caso Comunidad Indígena Xákmok Kásek *Vs*. Paraguay, cit., párr. 181.

[55] Cfr. Corte IDH, Caso Comunidad Indígena Sawhoyamaxa *vs*. Paraguay, cit., párr. 173. Sobre el criterio que relaciona el "caso extremo" con la situación de "urgencia" para determinar las obligaciones estatales de hacer en materia de derechos sociales, v. Arango, R., *El concepto de derechos sociales fundamentales*, op. cit.

[56] Corte IDH, Caso Comunidad Indígena Sawhoyamaxa *vs*. Paraguay, cit., párr. 163.

[57] V. Corte IDH, Caso Comunidad Indígena Sawhoyamaxa *Vs*. Paraguay, cit., párr. 164.

weight that be given to the reasons that the state tried to offer to excuse the sufficient and appropriate fulfillment of its obligations.[58]

The case of Xákmok Kásek is the last in a jurisprudential line that began with Villagrán Morales and Others. That case strengthens our thesis that the argument of equality underlies the construction of the state obligation to create the conditions of a dignified existence. One the one hand, it can be deduced that in the cases of Villagrán Morales, Yakye Axa and Sawhoyamaxa, the situation of vulnerability arises out of the situation of extreme poverty and the failure to acknowledge indigenous communities; and all of it as a result of the absence of affirmative appropriate measures, in step with social, cultural, and economic rights, to reverse the situation. In the case of indigenous communities it is made even worse because it is the very State which did not put in place effective procedural methods to return their lands and reclaimed territories. To do so would have allowed the reversion to "the proven conditions of extreme vulnerability" respecting the interpretations of the communities and their members about what self-sufficiency and self-subsistence means (a combination of vulnerability as a result of the lack of restitution and of recognition). On the other hand, the jurisprudence reaffirms that there are situation of vulnerability that are identified by the Inter-American Institute of Human Rights, such as those of indigenous communities and their members, those of children (Villagrán Morales, "Institute for the Reeducation of Minors," Yakye Axa, Sawhoyamaxa, Xákmok Kásek), [59] those of persons of advanced age (Yakye Axa, Sawhoyamaxa, Xákmok Kásek),[60] conditions of proven vulnerability that are found to be

[58] Corte IDH, Caso Comunidad Indígena Sawhoyamaxa *vs*. Paraguay, cit., párr. 155 y Caso Comunidad Indígena Xákmok Kásek *vs*. Paraguay, cit., párr. 188, destacado agregado; Clérico/Aldao, ob.cit.
[59] Corte IDH, Caso Comunidad Indígena Xákmok Kásek *Vs*. Paraguay, cit., párrs. 256-264.
[60] Corte IDH, Caso Comunidad Indígena Xákmok Kásek *Vs*. Paraguay, cit., párrs. 256-264.

made worse in specific cases. Finally, we hold that Xákmok Kásek crowns the line of jurisprudence considered here because 1) The IACtHR newly recognizes explicitly in this case that these insufficient state actions that to not create conditions of a dignified existence to resolve the situation of vulnerability 2) are evidence of "a discrimination in fact" against members of the Xákmok Kásek Community, "marginalized in the enjoyment of rights,"[61] and 3) "(…) the State has not adopted the positive measures necessary to reverse the exclusion."[62] This is the argument of baseline equality in all its splendor.[63]

III. The right to conditions of a dignified existence as the right to the progressive development of Social, Cultural, and Economic Rights

Discussions of Article 26 of the American Convention on Human Rights are fairly well known and exceed the scope of this article. Nevertheless, a simple going over of these issues permits the conjecture of some hypotheses about why the failure to fulfill the state obligation to create the conditions of a dignified existence are evaluated as a violation of the right to life instead of being considered a direct violation of Article 26 of the American Convention on Human Rights. Article 26 occupies Chapter III in the first

[61] Corte IDH, Caso Comunidad Indígena Xákmok Kásek *vs*. Paraguay, cit., en el párr. 274. V. Fiss, Owen, ob. cit.
[62] Corte IDH, Caso Comunidad Indígena Xákmok Kásek *Vs*. Paraguay, cit., párr. 274.
[63] Corte IDH, Caso Comunidad Indígena Xákmok Kásek *Vs*. Paraguay, cit., párr. 274 y justificación explícita en párr. 273. Se ponen en evidencia las asimetrías de posiciones en perjuicio de las comunidades, esto las afecta como comunidad y a sus integrantes para contar con igualdad de armas para participar en las interacciones como pares: "En el presente caso está establecido que *la situación de extrema y especial vulnerabilidad de los miembros de la Comunidad* se debe, inter alia, a la falta de recursos adecuados y efectivos que en los hechos proteja los derechos de los indígenas y no sólo de manera formal; ***la débil presencia de instituciones estatales obligadas a prestar servicios y bienes a los miembros de la Comunidad, en especial, alimentación, agua, salud y educación***; y ***a la prevalencia de una visión de la propiedad que otorga mayor protección a los propietarios privados por sobre los reclamos territoriales indígenas, desconociéndose, con ello, su identidad cultural y amenazando su subsistencia física***. Asimismo, quedó demostrado el hecho de que la declaratoria de reserva natural privada sobre parte del territorio reclamado por la Comunidad no tomó en cuenta su reclamo territorial ni tampoco fue consultada sobre dicha declaratoria." Destacados agregados.

part of the American Convention. The Chapter contains only one article, Article 26; by contrast, Chapter III, dedicated to "Civil and Political Rights," contains 22 articles (from the 3rd to the 25th).

Many topics have been the object of heated debates, as a result of their terse wording and particular location in this regulatory map including a) the justiciability and enforceability of social, economic, and cultural rights in general or in specific; b) the determination of the content of the right (in other words, which specific rights come as a result of the reference to Article 26 in the OAS Charter, which rights come from the application of the San Salvador Protocol on Social, Cultural, and Economic Rights, concerning the meaning of the clause on the progressive nature of the right and its relation to the scope of the right); c) the consequent state obligations (to respect, to guarantee, and to promote and/or the immediate fulfillment, the progressive development); d) its normative structure: as a rule and/or as a principle; and e) the manner of evaluating a violation of the right (which includes a test of the basic content of the right, a test for the prohibition of regression, a test for the prohibition of deficiency or omission, a test of equality with more or less heighted scrutiny, and a test of structural inequality), to name the most analyzed.

It is fairly well known as well that the IACtHR applied Article 26 of the ACHR directly and automatically in only two cases. These two cases do not refer to the right of conditions for a dignified existence, but to labor and welfare rights.[64] The history of the

[64] En el caso "Cinco Pensionistas" *vs.* Perú, sobre reducción del monto de los haberes de pensión, la Corte IDH prefirió identificar este retroceso en el contenido del derecho como una violación al derecho de propiedad antes que como una violación al desarrollo progresivo de los derechos sociales. Para ello sostuvo que el desarrollo progresivo se debe medir en general, en relación con la creciente cobertura de los DESC para el conjunto de la población, y no "en función de las circunstancias de un muy limitado grupo de pensionistas no necesariamente representativos de la situación general prevaleciente." Esta jurisprudencia fue objeto de varias críticas. La Corte IDH parece haber escuchado parte de ellas en el caso Acevedo

automatic application of Article 26 could change, for example, if the majority assumed content of the concurring votes of Judge Macaulay in the Case of Furlan and Relatives vs. Argentina[65] and of Judge Eduardo Ferrer Mac Gregor in the Case of Suárez Peralta *vs.* Ecuador, [66] respectively. In both cases the judges declared themselves in favor of evaluating violations of the right to health directly and automatically through Article 26 of the ACHR.

This review of the discussion of Article 26 of the ACHR is in contrast to the development of the affirmative right contained in the obligation to create conditions for a dignified existence in light of the right to life, analyzed in Section II of this article. Overall we observe that, for now, the application of Article 26 was more fruitful when it was used as an argument for gaining the content of the benefit of a right than when direct application was attempted.

Nonetheless there is something that can be viewed as a conclusion to our previous section. Article 26 of the American Convention on Human Rights has basic content (interpreted as a floor not as a ceiling) consisting[67] of the right to conditions of a

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Buendía y Otros ("Cesantes y Jubilados de la contraloría) *vs.* Perú [Corte IDH, Caso Acevedo Buendía y Otros ("Cesantes y Jubilados de la contraloría) *vs.* Perú, Sentencia de 1 de julio de 2009], sobre reducción de haberes previsionales. La Corte tuvo aquí oportunidad de aclarar que el artículo 26 de la CADH era justiciable en casos concretos, más allá de su utilidad para monitorear el progreso en la cobertura de los DESC en general así como que de él emanan las obligaciones de respeto y garantía como ocurre con los otros derechos. Más precisamente se detuvo en el contenido de las obligaciones de progresividad y de regresividad al aplicar expresamente criterios elaborados por el Comité de DESC de Naciones Unidas e incluso se refirió a un Informe de la Comisión IDH en el que se especifica que para determinar si una medida regresiva implica una violación a la CADH se deberá "determinar si se encuentra justificada por razones de suficiente peso", Corte IDH, Caso Acevedo Buendía y Otros ("Cesantes y Jubilados de la contraloría) *vs.* Perú, cit. párr. 103. V. Burgorgue-Larsen, Laurence; Ubeda de Torres, Amaya, *The Inter-American Court of Human Rights. Case-Law and Commentary*, OUP, Oxford, 2011; Melish, Tara, *The Inter-American Court of Human Rights: Beyond Progressivity*, ob. cit.

[65] Corte IDH, Caso Furlan y familiares *vs.* Argentina, Sentencia de 31 de agosto de 2012, párr. 15 del voto concurrente de la Jueza Macaulay; v. Parra Vera, Oscar (2013), ob. cit.

[66] Corte IDH, Caso Suarez Peralta *vs.* Ecuador, Serie C No. 261, Sentencia de 21 de mayo de 2013, voto del Juez Ferrer Mac Gregor, párr. 33 y ss.

[67] Para ponerlo en términos claros, con esto no se quiere sostener que los derechos sociales sólo garantizarían un contenido básico. Como cualquier otro derecho eleva la pretensión de ser desarrollado en

dignified existence that create definitive obligations with respect to some persons who are found to be in a state of extreme vulnerability. The content of this right accrued while the direct enforceability of Article 26 was discussed in the background.

IV. Intermediate Considerations

Instead of going into the traditional discussion with respect to what is the appropriate legal ruling (something that since the idea of "integrated interpretation" turns out to be perhaps not that important),[68] we reconstruct this right through the connection that the IACtHR establishes between the concept of the right and situations of vulnerability.

Thus, the generic structure of the argument for conditions of a "dignified existence" for practical purposes would be: 1) the State has the duty to affirmatively act by means of sufficient and appropriate actions after resolving an extreme and special situation of vulnerability 2) when confronted with persons or indigenous communities affected by a concrete situation of vulnerability and where at the same time 3) the State knew of (or should have known of) that situation and failed to act (or acted insufficiently) to repair the situation, and 4) all of that is to guarantee access to conditions of a dignified existence (the content of which is measured in light of the basic contents of the rights to food, water, health, and education). What's left is to analyze the normative elements that

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la mayor y mejor medida posible. Entonces cuando hablamos de que el Estado en el supuesto identificado tiene una "obligación definitiva" sostenemos que en ese supuesto el derecho se comporta como "regla" y no como "principio"; en ambos casos los derechos son exigibles.

[68] Agradecemos este comentario a Federico De Fazio.

establish the situation of vulnerability, which contributes to our thesis on the baseline argument of equality.

V. How is the argument of vulnerability used by the IACtHR to justify the state obligation to create conditions of a dignified existence? How to make the case of vulnerability without falling into various traps?

The jurisprudence of the IACtHR concerning vulnerable groups or situations of vulnerability that covers children, women, detained persons, displaced persons, migrants, indigenous communities, or persons of African descent,[69] among others, exceeds the scope of this article. *We lingered here only as it was an argument to justify state obligations to guarantee access to conditions of a dignified existence.*[70] We are concerned with discussing the advantages and disadvantages of the use of vulnerability as an argumentative strategy, especially to not lose sight of the possibilities and weaknesses of its utilization in connection with the argument of equality.[71]

[69] V., entre otros, García Ramírez, La afectaciones a los derechos humanos de las personas vulnerables y las minorías. El papel de la Corte Interamericana de Derechos Humanos, en: Henao, J. C. (ed.), Diálogos constitucionales de Colombia con el mundo, Univ. del Externado, Bogotá, 2013, p. 495-502; Dulitzky, Ariel, "When Afro-Descendants Became Tribal Peoples," 15 *UCLA Journal of International Law and Foreign Affairs*, 29 (Spring 2010);. Pascualucci, J., ob. cit.

[70] Pascualucci, Jo, "The Right to a Dignified Life (Vida Digna)", ob. cit., identifica con claridad esta relación; aunque no se detiene en los problemas que puede implicar el uso del argumento de vulnerabilidad; sin embargo, realiza una clasificación interesante de los potenciales peticionarios que divide en tres: aquellos que viven bajo exclusivo control estatal, los que pertenecen a grupos vulnerables y los que no pertenecen a ningún grupos reconocido tradicionalmente como vulnerable.

[71] V. en relación con la jurisprudencia del TEDH el trabajo recientemente publicado (diciembre 2013), Peroni, Lourdes y Timmer, Alexandra, *ob. cit.*: En este trabajo las autoras sostienen que el uso realizado por el TEDH le ha permitido desarrollar diversos aspectos de la igualdad material o sustantiva. Sin embargo, agregan que si el TEDH quiere mantener ese potencial es necesario que evite los problemas generalmente relacionados con el uso del concepto. Alexandra Timmer, A Quiet Revolution: "Vulnerability in the European Court of Human Rights", in: Martha Fineman & Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, 2013; Bogdandy, Armin, "La protección de los vulnerables: un ejemplo de gobernanza posnacional", en: von Bogdandy/Fix-Fierro/ Morales Antoniazzi/ Ferrer Mac-Gregor (eds.), *Construcción y Papel de los Derechos Sociales Fundamentales*, México, 2011, pp. 313-337.

The concept of vulnerability has been labeled ambiguous.[72] At the very least it is two-faced, and in some cases it is a double-edged sword.[73]

a) As an analytical tool it contains both a descriptive and a prescriptive use.

In this sense it is used, on the one hand, in descriptive form to identify a situation of vulnerability; that is to say, to determine how institutions and structures[74] create, maintain, and reinforce vulnerabilities. On the other hand, it is used in a prescriptive form. It is the foundation of an argument that, along with others, explains that something must be done to reverse that state or situation of vulnerability. Situations of vulnerability occur as a result of the cumulative effects of our actions and the actions of others, of interactions, and of institutional practices and arrangements[75] in the national environment

[72] Aunque siga siendo de uso frecuente por los tribunales, como surge de las sentencias de la Corte IDH, de la Corte Constitucional Colombiana y del TEDH, entre otros, se advierte que aún permanece subteorizado y que esas ambigüedades pueden implicar potencialidades. V., entre otras, Fineman, Martha Albertson, "The Vulnerable Subject: Anchoring Equality in the Human Condition." *Yale Journal of Law & Feminism*, Vol. 20, No. 1, 2008.

[73] Peroni y Timmer, ob. cit.

[74] Las disputas sobre el concepto y concepciones de "estructura" son de larga data. A los efectos de este trabajo nos ayuda tener como imagen de trasfondo la propuesta de Iris M. Young quien sostiene: "... la injusticia estructural existe cuando los procesos sociales sitúan a grandes grupos de personas bajo la amenaza sistemática del abuso o de la privación de los medios necesarios para desarrollar y ejercitar sus capacidades, al mismo tiempo que estos procesos capacitan a otros para abusar o tener un amplio espectro de oportunidades para desarrollar y ejercitar capacidades a su alcance. ... ". Young, Iris, *Responsabilidad por la justicia* Madrid, Morata, 2011, 69.

[75] Fineman, Martha, ob. cit., propone que: "Vulnerability is and should be understood to be universal and constant, inherent in the human condition. ... As such, vulnerability analysis concentrates on the institutions and structures our society has and will establish to manage our common vulnerabilities. This approach has the potential to move us beyond the stifling confines of current discrimination-based models toward a more substantive vision of equality." Asimismo, el argumento de la vulnerabilidad ha sido recuperado recientemente desde posiciones de la sociología del cuerpo. Por ejemplo, Bryan Turner sostiene que la sociología puede contribuir a desarrollar un concepto de derechos humanos sobre el principio de que los seres humanos comparten una ontología común que está basada en una vulnerabilidad compartida. De cara a la fragilidad de la vida humana (en la juventud, ancianidad, enfermedad, entre otras), sostiene que lo que las personas necesitan son derechos; y, por sobre todo derechos económicos y sociales, tales como el derecho a vivir en un contexto familiar, a la atención sanitaria, a vivir en un medio ambiente sano, v. Turner, B. S., 2006. *Vulnerability and Human Rights*, University Park, PA: Pennsylvania State University Press, pp. 9, and 10. En ese sentido las respuestas del Estado deberían ser sensibles a esta característica de la "condición humana". Turner sostiene que la sociología, como disciplina, estaría especialmente preparada para explorar las fallas de las instituciones existentes para la protección de la vulnerabilidad humana.

as in the global environment. These situations produce inequality.[76] This inequality is not natural; rather it emerges as a product of a given social structure. This has led to discussion of the relational[77] and contextual character of the concept and, in its turn, has driven the discussion of forms of collective responsibility (not just state responsibility) to offer transformative responses (and not simply reformists) to these vulnerabilities.

The reconstructed jurisprudential line of the IACtHR evidences a systematic use, at once descriptive and prescriptive, of the argument concerning situations of vulnerability, and as such its characterization as contextual and relational as well. Having said that, the question is, how willing is the IACtHR to thoroughly explore the contextual[78] and relational elements of situations of extreme vulnerability in this line of jurisprudence. The exploration of the relational character of these processes, in the context of a world more and more interdependent,[79] would have led to "showing" the active intervention of other global actors,[80] creators of policies on poverty that threaten conditions of a dignified existence in the region. To put it in clear terms, this is not an attempt to excuse the required state responsibility, but rather to broaden the vantage point

[76] Roberto Saba, "(Des)igualdad estructural", en: Gargarella/Alegre, *El derecho a la igualdad*: aportes para un constitucionalismo igualitario. Buenos Aires, 2007; Fiss, Owen, ob. cit.

[77] Young, Iris, *Responsabilidad por la justicia* Madrid, Morata, 2011, 69; cfr. Fiss, Owen, *ob. cit.* y Young, Iris, "Tras las fronteras", en Fiss, Owen, ob. cit.

[78] Esta crítica puede verse respecto de la jurisprudencia de la Corte IDH sobre afrodescendientes en Dulitzky, Ariel, 2010, ob. cit.

[79] Fraser, Nancy, Escalas de justicia, Herder, Barcelona, 2008 [Fraser, N., *Scales of Justice. Reimagining Political Space in a Globalizing World*. Cambridge, Malden: Polity, 2008]: la pregunta acerca del tratamiento de las injusticias transnacionales como asuntos meramente nacionales lleva a Fraser a ampliar los tipos de injusticia, si antes proponía concebirlas como injusticia por falta de redistribución y reconocimiento, recientemente la ha ampliado a la injusticia por falta de representación fallida. "Esto es lo que ocurre cuando, por ejemplo, las reivindicaciones de la población pobre del mundo se relega a ámbitos políticos internos de Estados débiles o fallidos y se le impide oponerse a las fuentes externas (*offshore*) de su desposeimiento.", "al tiempo que (se) aísla a los malhechores transnacionales respecto de toda crítica y control" (257). "Si el espacio político se enmarca injustamente, el resultado es la denegación de participación política a aquellos que están fuera del universo de los que "cuentan" (258). Con matices es asimismo el argumento de Young, Iris, "Tras las fronteras", en Fiss, Owen, ob. cit.

[80] Feeney, Patricia, "Business and Human Rights: the struggle for accountability in the UN and the future direction of the advocacy agenda", *International Journal of Human Rights*, Nro. 11; Nino, Ezequiel, "Inversiones extranjeras en países en desarrollo: alguien debería intervenir a nivel global?", entre otros.

from which to examine the processes that create structural inequities. The majority opinion of the IACtHR in this line of studied jurisprudence did not become an express echo of these considerations.[81] Nevertheless, they emerged from the reasoned votes of Judges Cançado Trindade and Abreu Burelli in the case of Villagrán Morales ("Street Children"); and in the votes of ad hoc Judges Fogel[82] and Fogel Pedroso,[83] respectively, in the cases against Paraguay on the right to a dignified existence for indigenous communities.

b) In relation to the effects of the actions of the State to resolve the situation of vulnerability

The argument of vulnerability, on the one hand, sends an alert about persons or groups of persons that require that another entity (the State) do something to help them exit their state of vulnerability, because they are found to be in a position of exclusion, of

[81] Si bien la Corte IDH puede condenar a los Estados, no a las empresas transnacionales, por violación a la obligación de proteger los derechos humanos de la población frente a actos de terceros, indirectamente el accionar de estos actores "privados" se puede poner en evidencia en el relato de los hechos, en las argumentaciones; además, las medidas reparatorias a cargo del Estado puede tener efectos en las acciones de las empresas, etc., v. entre otros, Fernando Gallardo Vieira Prioste y Thiago de Azevedo Pinheiro Hoshino, *Empresas Transnacionales en el Banco de los Acusados: Violaciones a los Derechos Humanos y las Posibilidades de Responsabilización*, Terra de Direitos, Curitiba: 2010, con estudio del caso, Corte IDH, Caso de la Comunidad Mayagna (Sumo) Awas Tingni. Sentencia de 31 de agosto de 2001; Salmón, Elizabeth, "Mecanismos de reparación en el ámbito del Sistema Interamericano por violaciones de derechos humanos cometidos por empresas multinacionales: La responsabilidad estatal y la construcción de medidas reparatorias", en: *Revista de Estudios Jurídicos* nº 12/2012 (Segunda Época), rej.ujaen.es; con trabajo de Informes de la CIDH y casos de la Corte IDH, entre otros, Caso Pueblo Indígena Kichwa de Sarayaku *vs*. Ecuador, cit.; Brandao Timo, Petalla, "Development at the Cost of Violations: The Impact of Mega-Projects on Human Rights in Brazil", *SUR International Journal of Human Rights*, Nro. 18, 2013, pp.137-157 con estudio del caso de la Represa de Belo Monte, entre otros.

[82] Corte IDH, Caso de la Comunidad Indígena Yakye Axa *vs*. Paraguay, cit., párr. 35, 36: "En los avances del Derecho Internacional de los Derechos Humanos se requiere que la comunidad internacional asuma que la pobreza, y particularmente la pobreza extrema, es una forma de negación de todos los derechos humanos, civiles, políticos, económicos y culturales, y actúe en consecuencia, de modo a facilitar la identificación de perpetradores sobre los cuales recae la responsabilidad internacional. El sistema de crecimiento económico ligada a una forma de globalización que empobrece a crecientes sectores constituye una forma "masiva, flagrante y sistemática violación de derechos humanos" , en un mundo crecientemente interdependiente. En esta interpretación del derecho a la vida que acompañe la evolución de los tiempos y las condiciones de vida actuales se debe prestar atención a causas productoras de pobreza extrema y a los perpetradores que están detrás de ellas. En esta perspectiva no cesan las responsabilidades internacionales del Estado de Paraguay y de los otros Estados Signatarios de la Convención Americana, pero las mismas son compartidas con la Comunidad Internacional que requiere de nuevos instrumentos."

[83] Corte IDH, Caso Comunidad Indígena Xákmok Kásek Vs. Paraguay, cit., par. 26.

marginalization, of subordination, and so do not have at their disposal the same tools (socio-economic tools, genuine participation in political processes, which enable persons to fight for the spaces from which it is possible to have an "effective voice," to be able to express individual voices as much as for expression of the voice members of a collective, etc.) to prosecute and repair that situation. Nevertheless, on the other hand, the argument can implicate the stigmatization or stereotyping of groups or persons that those state measures target (the dilemma of difference).[84] Does the Court successfully avoid falling into some of the traps inherent in the argument of vulnerability: sensationalization and/or stigmatization? The IACtHR plays constantly with three elements, which in some cases it applied with more intensity than in others. These three elements are: a) whether or not the affected persons belong to a vulnerable group defined by a specific international human rights treats (children, indigenous communities); b) the situation of concrete vulnerability (living in the street, being detained in conditions of overcrowding or overpopulation, living in a situation of displacement along a highway in extreme poverty); and c) the knowledge of this situation of vulnerability on the part of the State; and we add and insist[85] with the critique on this point by the IACtHR: the State cannot refuse to recognize a vulnerable group, nor may it ignore specific, public situations of vulnerability. For the State to concede this ignorance is very generous, to say the least;

[84] En rigor, las dificultades podrían encuadrarse dentro de los que Minow llama „el dilema de la diferencia": „The stigma of difference may be recreated both by ignoring or by focusing on it. Decisions about education, employment, benefits, and other opportunities in society should not turn on an individual´s ethnicity, disability, race, gender, religion, or membership in any other group about which some have deprecating or hostile attitudes. Yet refusing to acknowledge these differences may make them continue to matter in a world constructed with some groups, but not other, in mind. The problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently." en Minow, Martha, *Making all the difference*, Ithaca, Cornell, 1990, pgs. 19, 20.

[85] Agradecemos nuevamente por la insistencia a Nancy Cardinaux.

but above all it is a *boomerang* which will itself invalidate all the previous argumentative development, as we have already indicated.

Does this reconstruction of the jurisprudence of the IACtHR effectively avoid some of the tricks of the vulnerability argument? It iss extremely well known that the use of the concept of a vulnerable group and of situations of vulnerability can involve essentialization, stigmatization, and denial of the agency of affected persons, among others.[86] It is likely that the Court has taken implied note of these tricks. Hence, we have this emphasis on the "situation" of vulnerability, which led to an analysis of the specific situation, the context, which eventually leads to certain flexibility.

Essentialization consists in making the experience of one of the participants of a group representative of the experiences of the whole group to the detriment of how other group members (children or mothers, boys or girls, senior citizens, or persons with special needs, etc.) experience, interpret, and respond to vulnerabilities.[87] This risk can be frequent in human rights discourse. The Inter-American Institute of Human Rights identifies "categories," and under its guise the experience of some members of a group are normalized and others are silenced. This tendency may be present in the argumentation of the IACtHR when it identifies street children, those detained in situations of overcrowding or overpopulation, and indigenous communities as persons in a "situation of vulnerability." Nevertheless, the warning appears in element b) of its conceptualization: the situation of specific vulnerability. This would permit the Court to

[86] Peroni y Timmer, ob. cit., en relación con el TEDH.

[87] La literatura sobre la esencialización es extensa; a los efectos de este trabajo alcanza con la caracterización provisoria acercada en el texto. Por lo demás, v., entre muchas otras, el siguiente trabajo en el que se caracterizan y analizan críticamente cuatro formas de esencialismo, Phillips, Anne, "What's wrong with essentialism?", *Distinktion: Scandinavian journal of social theory*, 2010, 11 (1). pp. 47-60, available at: http://eprints.lse.ac.uk/30900/; además, sobre el riesgo de la esencialización en la jurisprudencia de la Corte IDH sobre afrodescendientes, v. Dulitzky 2010, ob. cit.; Costa/Leite, ob. cit.; Peroni/Timmer, ob.cit.

be sensitive to the diverse experiences of vulnerability in which children who inhabit the streets live or those of members of displaced indigenous communities who wind up living in a situation of extreme poverty along the side of a highway. For example, the IACtHR has been especially sensitive to the situation of vulnerability that is experienced among communities of persons of advanced age and children. Nevertheless, with respect to women in indigenous communities, women are referred to as individuals who are pregnant or lactating, which could very likely be interpreted as a generalization of the experience of vulnerability of some of the women of the group to the detriment of the voices and life experiences of other members of the community.[88]

In the case of the "Street Children" " (Villagrán Morales and Others) vs. Guatemala, the children's situation of living in the street was relevant for the IACtHR to define the situation of vulnerability apart from the state of confirmed social exclusion. Nevertheless, it is possible to wonder whether labeling the victims, "street children" and therefore children "at risk" or in a state of social exclusion could silence the voices of other children who experience the lack of access to conditions of a dignified existence but who live not in the streets but in family environments or similar contexts.

In cases involving indigenous communities, the situation of living in extreme poverty along a highway was determinative in identifying vulnerability. Nevertheless, it is worth asking, in the same vein, if the insistence on doing this in this circumstance

[88] V. Gargallo Celentani, Francesca, *Feminismos desde Abya Yala. Ideas y proposiciones de las mujeres de 607 pueblos en nuestra América*, Editorial Corte y Confección, México, 2014, pág. 139; agradecemos a Paola Bergallo el habernos pasado la referencia sobre este libro.

doesn't detract from – no less – the involuntary displacement from their lands and territories.[89]

Again, this pitfall can be avoided by paying attention to the relational, contextual, and particular nature of the experiences of the situations of vulnerability.[90] This brings us to a discussion of cumulative vulnerabilities, "spirals,"[91] layers,[92] intersectionalities.[93] All, with their nuances, indicate the mobile and flexible character of the vulnerabilities which serve to aggravate the situation or, even which bring about the construction of new identities within what others consider to be a single group. We believe that openness to the diversities of vulnerability should be present, at a minimum in: a) the identification of the problem or question of the case b) the moment of evaluating the (in)effectiveness or the (in)sufficiency of state action; and d) the moment of determining the remedies.

c) The dimensions of inequality

[89] Si bien la Corte IDH en el caso "Sawhoyamaxa" condena al Estado a devolver las tierras a las comunidades, nos preguntamos hasta qué punto sostiene la perspectiva de igualdad como reconocimiento, en tanto en los casos Yakye Axa y Sawhoyamaxa la Corte IDH concede que, "en los casos en que la devolución no fuese posible por encontrarse en mano de terceros, el Estado deberá entregarles tierras alternativas, electas de modo consensuado con la comunidad indígena en cuestión, conforme a sus propias formas de consulta y decisión, valores, usos y costumbres", Caso de la Comunidad Indígena Sawhoyamaxa, 2006, cit., párr. 212; cfr. Dulitzky 2010, ob. cit., se pregunta con razón por qué no otorgarle prioridad a los reclamos indígenas sobre sus tierras frente a la de los grandes hacendados o compañías agrícolas que las poseen y que solo reclaman un interés económico sobre la tierra; cfr. Corte IDH, Comunidad .Xákmok Kasek vs. Paraguay, cit., párr. 310: no basta "que las tierras reclamadas estén en manos privadas y sean racionalmente explotadas para rechazar cualquier pedido de reivindicación", si bien parece querer fortalecer la prioridad de las comunidades sobre sus tierras, tampoco es contundente.

[90] Algunos autores han explorado la relación que la Corte IDH establece entre identidad cultural y territorio, si bien reconocen los avances que ha implicado esta jurisprudencia, advierten que "an adequate legal protection of ancestral lands must be defended by joining the argument of ethno-cultural recognition with judicial responses to major socio-economic inequalities of black communities, through policies of redistribution", Dulitzky, Ariel, 2010, ob. cit., Costa, Sérgio; Gonçalves, Guilherme Leite; "Human Rights as Collective Entitlement? Afro-Descendants in Latin America and the Caribbean", *Zeitschrift für Menschenrechte*. Oct. 2011, Vol. 5, pp. 52-71.

[91] Quintero Mosquera, Diana Patricia, *La salud como derecho. Estudio comparado sobre grupos vulnerables*. Siglo del Hombre Editores, Bogotá, 2011, p. 84.

[92] Luna, Florencia, „Elucidating the Concept of Vulnerability: Layers Not Labels", en: *International Journal of Feminist Approaches to Bioethics* 121 (2009); Peroni/Timmer, *ob. cit.*

[93] Sobre la *simultaneidad y el cruce de diversas formas de violencia ligadas a diversas formas de opresión social*, v. Crenshaw, Kimberlé (1999): "Intersectionality, Identity Politics, and Violence Against Women of Color", en: *Stanford Law Review*, Núm. 43, pp. 1241-1299; entre otras.

Regarding inequality it is important to see if it is thought about from a *perspective of inequality* that is one-dimensional, two-dimensional, or multi-dimensional.[94]

The use of the concept of a "situation of vulnerability" can avoid essentialization and simply underscore that some people are found to be in a situation of asymmetry in terms of their access to conditions of a dignified existence. It shows, in its turn, that that inequality comes from pre-existing institutional arrangements, in which by definition the affected persons didn't have a genuine possibility to participate in an effective way and that, moreover, in the present, they cannot dismantle by their own methods, with their own means. This is the central argument of the IACtHR for justifying the affirmative duty of the State to secure methods of compensation that, in the case of children, explicitly arises out of Article 19 of the Inter-American Convention.

Up to this point there are no tricks. The problem occurs when this situations is seen solely as a problem of poor distribution of rights conceived of as things. If it were this way, compensation could mean whatever method entails an improvement. However, this raises the issue that the compensation could result in the denial of agency of those who are affected.[95] The problem is viewing the vulnerability solely as a product of mal-distribution. It overshadows as well the lack of recognition or certain possibilities for participation. The first can entail viewing affected persons as passive subjects of the methods of compensation, and not as persons with agency.

In the case of children, the IACtHR tries to avoid this pitfall when it considers the state obligations by which children can have life paths; in the case of indigenous communities, it does so when it emphasizes the special relationship that the communities

[94] V., entre otras, Fraser, Nancy, *Scales of Justice*, ob. cit.
[95] Cuestión que tiene un matiz adicional cuando se trata de niños pequeños, agentes incompetentes básicos por definición.

establish with their ancestral lands and territories, an issue which cannot be resolved simply by the giving of other lands nor by interpreting as definitive state actions the removal of communities the poverty without the return of their ancestral lands. Finally, this pitfall can be avoided if the vulnerabilities are interpreted, disarmed, and analyzed as multidimensional inequities resulting from poor distribution and the lack of recognition and participation, among other things.

If situations of vulnerability – discussed in each one of the cases in previous sections – are analyzed carefully, some speak of a disparate treatment of children because of poor/nonexistent distribution of economic and social goods to those who are "gutsy" enough to inhabit the streets or to children detained in a situation of overcrowding. Additionally, others fall into a disparate treatment because of a lack of recognition of the interpretations that the indigenous communities attribute to their relationship to the land (lack of recognition) which in its turn implies the obstruction of their self-sustenance and subsistence (distribution) and because of a lack of administrative mechanisms and judicial methods for reclaiming their lands and territories (poor distribution of the institutional arrangements of organization and procedure such as a lack of real possibilities for participation).[96]

The basis of disparate treatment in relationship to access to conditions of a dignified existence in this way turns out to be multidimensional.[97] It very much indicates that these institutional arrangements reveal such a poor distribution that in some cases

[96] V. Fraser, Nancy, *Scales of Justice. Reimagining Political Space in a Globalizing World*. ob. cit.
[97] Fraser, Nancy, *Scales of Justice. Reimagining Political Space in a Globalizing World*. ob. cit.

both recognition and the channels of participation are absent,[98] all of which places these people in a disparate situation in terms of being able to act as peers in society.[99]

VI. Final considerations

The intent of this article was not to delve into the dispute over which is the best strategy to argue in favor of the state obligation to guarantee conditions of a dignified existence. That is to say, the dispute between those who advocate for its justification by means of the right to life and those who maintain that it is justified by means of social rights. Neither was it our goal to explore the why behind the actual strategy chosen by the IACtHR. Our intention was to move beyond the dichotomous nature[100] in which this dispute over strategies tends to be presented, in order to bring to light the argument of vulnerability which had remained overshadowed in this dispute.

The consideration of the special gravity of the situation in which affected persons are found is the element which justifies the State obligation to undertake affirmative, appropriate, sufficient, and conducive measures[101] to repair this situation of vulnerability.

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[98] V. Corte IDH, Comunidad Indígena Xákmok Kásek *Vs.* Paraguay, cit., párr. 216 al tomar una afirmación del Comité de Derechos Económicos, Sociales y Culturales (Observación General No. 21, diciembre 21 de 2009, E/C.12/GC/21, párr. 38): "[L]a pobreza limita gravemente, en la práctica, la capacidad de una persona o un grupo de personas de ejercer el derecho de participar en todos los ámbitos de la vida cultural y de tener acceso y contribuir a ellos en pie de igualdad y, lo que es más grave, afecta seriamente su esperanza en el porvenir y su capacidad para el disfrute efectivo de su propia cultura".

[99] V. Fraser, Nancy, *Scales of Justice. Reimagining Political Space in a Globalizing World*. op. cit.

[100] En realidad nos parece más potente pensarla como "caja de herramientas": cada una de ellas tiene debilidades y fortalezas, con lo que su uso no debería ser excluyente sino en relación con el contexto del caso que se busca discutir y defender. Por ejemplo, la propuesta de Cavallaro y Schaffer recupera las consignas de los movimientos; por el otro lado, la propuesta de Melish —si bien no descuida el contexto—-, desarrolla con agudeza y profundidad teórica una dogmática de los derechos sociales para el contexto interamericano que, a su vez, es de utilidad para orientar el desarrollo en el ámbito local.

[101] V. recientemente, Corte IDH, "Caso de las comunidades afrodescendientes desplazadas de la cuenca del Río Cacarica (operación Génesis) vs. Colombia", sentencia 20 de noviembre de 2013, párr. 330: "el Estado es responsable por la violación a los derechos de niños y niñas, por no haber desarrollado las acciones positivas suficientes a su favor en un contexto de mayor vulnerabilidad, en particular mientras estuvieron alejados de sus territorios ancestrales, período en que se vieron afectados por la falta de acceso a educación y a salud, el hacinamiento y la falta de alimentación adecuada."

The underlying argument is the argument of material inequality. In these situations, there exists an inequality that creates grave violations of rights, especially the right to a dignified existence, by reason of which the State must intervene. This is the line of argument enlisted among those who propose the model or paradigm of social rule of law.[102] It is for this reason that the question of the right to a dignified life vs. the right to progressive development of Social, Cultural, and Economic Rights, does not prevent the IACtHR from ruling on basic questions of social justice,[103] even though it may only do so in a tangential way. These situations are produced as a result of a lack of redistribution (a lack or insufficiency of state actions to allow marginalized and/or detained children to develops their life plans) and moreover, as a result of a lack of recognition (of the voices of indigenous communities which from their places, their cultures, and their worldviews, emphasize a relationship with the land and their territories, and seek to ensure their self-sufficiency).

In this line of reasoning, various issues seem to remain pending on the agenda of the IACtHR. We focus on one:[104] the argumentative development that combines the right to a dignified existence with the content of social rights and the vulnerability which occurred in relationship to children in a situation of vulnerability, street children, detained adults and children, displaced indigenous communities in a situation of extreme poverty, elder members of these communities, children, and women who are "pregnant and post-

[102] Sobre el Estado Social de Derecho y las constituciones latinoamericanas para asegurar "una protección especial del Estado a personas o grupos en situación de "debilidad manifiesta" y sobre la democracia social como un modelo más adecuado (en comparación con el de la democracia liberal) "para responder a las circunstancias especiales de las sociedades no bien ordenadas del continente latinoamericano", v. Arango, R., *Fundamentos del ius constitutionale commune en América Latina: derechos fundamentales, democracia y justicia constitucional*. México.

[103] Conferencia del ex-juez de la Corte IDH, Sergio García Ramírez, *La "navegación americana": la jurisdicción interamericana de los derechos humanos*, Max Planck Institut, Heidelberg, 20-21/11/13.

[104] Otros fueron advertidos a lo largo del trabajo.

partum.” The trouble is that this development falls short. Although there exists in the jurisprudence of the IACtHR rulings on women, migrants, displaced persons, and incapacitated persons, in these cases the Court did not develop this argumentation with comparable conviction.

One the other hand, we identified the problems that can occur in working with the argument of vulnerability. In that regard, we sustain the IACtHR has shown a certain flexibility with respect to its use. It has taken age (children, persons of advanced age), membership in an indigenous community, and situations of special subjugation to state authority (detention) as a starting point, but combined them with an analysis of a specific living situation (children who live in the streets, displaced indigenous communities who live along a highway in a situation of extreme poverty) or situation of detention (children and adults detained in a situation of overcrowding). These situations of vulnerability are used as a baseline argument to justify the state obligation to create conditions of a dignified existence, crucially equality of distribution, recognition, and participation, in order to not fall into the traps that the use of the argument of vulnerability can entail. Only this way does it make sense to continue discussing the complexities of the use of the argument of vulnerability.