

***AMICUS CURIAE BRIEF***

**Presented by the**

**NATIONAL CONGRESS OF AMERICAN INDIANS**

**in the case of the**

**MAYAGNA (SUMO) COMMUNITY**

**OF AWAS TINGNI**

Inter-American Court of Human Rights

Case No. 11.577

Robert A. Williams, Jr.  
E. Thomas Sullivan Professor of Law and American Indian Studies  
Tribal Law and Policy Program  
James E. Rogers College of Law  
The University of Arizona  
Tucson, Arizona, USA

Attorney for *Amicus* NCAI

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**Introduction**

The National Congress of American Indians (the “NCAI”), whose membership includes over 250 indigenous nations and tribes in the United States, hereby submits this brief as *amicus curiae* in the case of the Mayagna (Sumo) Indigenous Community of Awas Tingni (the “Community” or “Awas Tingni”). This case concerns an indigenous community’s claim to rights over lands and natural resources, and the state’s obligation to ensure protection of those rights through appropriate and effective means, particularly in the face of large-scale natural resource development initiatives that may adversely affect those rights. It also concerns the application of the right to prompt and effective judicial recourse where the state has allegedly infringed on an indigenous community’s rights to lands and natural resources.

The NCAI urges that the Inter-American Court of Human Rights accept its intervention as *amicus curiae* in this case and that the Court consider the points made herein. The NCAI submits that international responsibility in this case should be determined, not only by reference to the American Convention on Human Rights, but also by reference to other relevant international treaties, as well as by reference to international and domestic legal practice throughout the world that embodies customary international law on the subject. Such an assessment of international responsibility is appropriate, especially in light of article 29 of the American Convention, which states that “[n]o provision of this Convention shall be interpreted as ... restricting the enjoyment or

exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party.”

In this case, the Awas Tingni Community asserts, against the State of Nicaragua, rights to lands and natural resources based on the Community’s traditional patterns of use and occupancy. As this brief will demonstrate, such traditional land tenure and resource use by an indigenous community constitute forms of property that are protected by the American Convention, other international treaties, and customary international law. States are obligated to recognize and secure indigenous peoples’ property rights arising from their traditional land tenure. The domestic laws of several state parties to the American Convention, other members of the Organization of American States, and states in other regions of the world reflect and incorporate this obligation. International law also protects the cultural integrity of indigenous peoples and recognizes the links that bind indigenous peoples’ land, culture and physical well-being. The importance of land to the cultural and physical survival of indigenous peoples underlies a requirement that states consult and attempt to reach agreement with indigenous communities prior to permitting activities that will affect their traditional lands, and to specifically identify and secure the indigenous communities’ interests in those lands. Finally, states must provide adequate judicial procedures and effective remedies to secure for indigenous peoples their guaranteed legal rights.

### **The NCAI and its Interest in the Case**

The National Congress of American Indians is the oldest and largest organization of indigenous nations and tribes in the United States. It was founded in 1944 to secure Native American rights and benefits, to preserve rights under treaties and other agreements with the United States, to promote the common welfare of American Indians and Alaska Natives, and to enlighten the public toward a better understanding of Indian peoples and the issues affecting them. The NCAI has coordinated programs in education, youth and elder services, health care, environmental and

cultural protection, economic opportunity, and affordable housing for its member tribes and nations throughout the United States. Additionally, the NCAI has been a leader in addressing legislative issues affecting indigenous peoples in the United States and has advocated for the recognition and protection of indigenous peoples' rights at the international level.

The NCAI's interests in this matter concern the serious threats to the safe enjoyment of human rights that are presented in this case, including the threat to the cultural survival and physical well-being of an entire indigenous community. Furthermore, the NCAI is concerned with maintaining the coherence of the American Convention and its relation to other rules and principles of international law; especially the protection, without discrimination, of property rights to lands and natural resources belonging to indigenous peoples and communities. State actions, giving rise to this case, have gravely threatened and compromised the integrity of widely recognized and respected principles of human rights. The NCAI regards a state's violation of these principles as a serious matter, and as a radical departure from well-established understandings and norms of state responsibility for the protection of indigenous peoples' most basic human rights.

The Court's decision in this matter will send an important and resounding message to states within the Inter-American system about their responsibilities to protect and fully guarantee the human rights and survival of indigenous peoples. The NCAI offers this brief as a means of assisting the Court in its articulation of that message.

## Argument

### **I. Indigenous Peoples have Property Rights over Lands and Natural Resources on the Basis of Traditional Land Tenure, and those Rights are Protected by International Law**

Traditional land tenure and natural resource use patterns, such as those asserted by the Awas Tingni Community, are common to the indigenous peoples of the Atlantic Coast of Nicaragua and throughout the Americas and other regions of the world. This traditional land tenure and resource use creates forms of property within indigenous communities and within the domestic legal systems of numerous states. Such forms of property are protected by international law, including the American Convention on Human Rights.

#### **A. *Indigenous Peoples' Traditional Land Tenure as Property***

Among indigenous peoples generally, each group's particular system of land tenure embodies a property regime. Within the corresponding system of indigenous peoples' customary norms, traditional land tenure generally is understood as establishing collective property of the indigenous community and derivative rights among community members. An examination of indigenous peoples' own jurisprudence, including the jurisprudence of modern indigenous judicial institutions in the United States, reveals the character of the property rights derived from indigenous peoples' land tenure systems.

Today, there are more than 150 indigenous judicial systems functioning in the United States. These institutions are part of the self-governance structures of modern Indian nations or tribes, and they regularly apply and develop the concept of "tribal law" or "customary law" in their legal decisions. The United States legal system recognizes these decisions as authoritative and enforces them under principles of judicial comity and full faith and credit in the state and federal courts of the

United States.<sup>1</sup> The authoritative legal interpretations and understandings of indigenous peoples' property rights, which can be found in the growing corpus of published judicial opinions by these modern tribal courts, consistently emphasize the *sui generis* nature of the traditional land and resource use patterns that constitute forms of property in particular indigenous communities.

The tribal courts of the Navajo Nation in the southwestern United States, for example, have articulated this principle of the *sui generis* character of property rights in their indigenous community in quite clear and illuminating terms.<sup>2</sup> The Navajo courts, in their published judicial opinions, have consistently stressed that the property rights of the Navajo people derive from their own unique cultural traditions and Navajo land tenure. The Navajo Supreme Court explained the difference between Navajo land tenure and the land tenure system of the dominant United States society in the case of *Begay v. Keedah* as follows:

. . . Traditional Navajo land tenure is not the same as English common law tenure, as used in the United States. Navajos have always occupied land in family units, using the land for subsistence. Families and subsistence residential units (as they are sometimes called) hold land in a form of communal ownership.<sup>3</sup>

The Navajo courts have stressed that land includes both cultural and economic dimensions that are of crucial importance:

There are valuable and tangible assets which produce wealth. They provide food, income and the support of the Navajo People. The most valuable tangible asset of the Navajo Nation is its land, without which the Navajo Nation would [not] exist and

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<sup>1</sup> See David Getches, Charles Wilkinson, Robert Williams "Federal Indian Law: Cases and Materials" (4th ed.; St. Paul Minn.: West Group, 1998) [hereinafter "Federal Indian Law"], pp. 656-657.

<sup>2</sup> See *id.* at 393-398.

<sup>3</sup> 19 Indian L. Rep. 6021-23 (Navajo 1991).

without which the Navajo People would be caused to disperse . . . Land is basic to the survival of the Navajo People.

While it is said that land belongs to the clans, more accurately it may be said that the land belongs to those who live on it and depend upon it for their survival. When we speak of the Navajo Nation as a whole, its land and assets belong to those who use it and who depend upon it for survival -- the Navajo People.<sup>4</sup>

Thus, according to Navajo customary law, as with customs and usages of many other indigenous communities, the ownership of land is vested in the indigenous community or group as a whole.<sup>5</sup> Navajo customary law does recognize, however, an individual property interest:

Land use on the Navajo Reservation is unique and unlike private ownership of land off the reservation. While individual tribal members do not own land similar to off reservation, there exists a possessory use interest in land which we recognize as customary usage. An individual normally confines his use and occupancy of land to an area traditionally occupied by his ancestors. This is the customary use area concept.<sup>6</sup>

Aside from Navajo courts, other indigenous peoples' judicial systems have affirmed the ability of an indigenous community to define and protect its rights to its lands according to its own unique traditions and customs. In *Bugenig v. Hoopa Valley Tribe*,<sup>7</sup> the Northwest Regional Tribal Supreme Court for the Hoopa Valley Tribal Court of Appeals upheld the right of the Hoopa Valley

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<sup>4</sup> Tome v. Navajo Nation, 4 Navajo Rptr. 159, 161 (Window Rock D. Ct. 1983).

<sup>5</sup> See Yazzie v. Jumbo, 5 Navajo Rptr. 75, 77 (1986).

<sup>6</sup> Estate of Wauneka, Sr., 5 Navajo Rptr. 79, 81 (1986).

<sup>7</sup> 25 Indian Law Reporter 6139 (1998).

Tribe of California to define areas of sacred significance and to protect those areas by imposing regulations restricting the cutting of timber near those areas:

[A] timber harvest regulation neutrally applied, the purpose and effect of which is to preserve the sanctity of the Hoopa Tribe's most sacred spiritual location for the present and future of tribal members, would be a right retained by the Hoopa people to ensure that their reservation remains livable.<sup>8</sup>

As these examples from modern indigenous peoples' legal systems demonstrate, each indigenous community will define property rights according to its own unique traditions and customs. There is no "universal" or one-size-fits-all definition of "indigenous property rights." Because each indigenous community possesses its own unique social, political, and economic history, each has adapted and adopted methods of cultural survival and development suited to the unique environment and ecosystem inhabited by that community. Indigenous societies' property rights systems possess the same particularity and divergence that characterize the property rights systems of non-indigenous societies. Just as different systems of property rights exist between the domestic legal systems of Mexico (a civil law system) and the United States (a common law system), it is not unusual to see indigenous societies that might be neighbors with systems of property rights that are significantly different from each other.

Furthermore, indigenous communities may migrate over time and may have overlapping land use and occupancy areas. Such patterns are simply characteristic of indigenous peoples' land tenure and resource use and do not undermine the existence or determinacy of their property rights.<sup>9</sup> The International Labour Organization's Convention No. 169 concerning Indigenous and Tribal Peoples

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<sup>8</sup> *Id.* at 6144.

<sup>9</sup> *See, e.g.,* Mason v. Tritton, 34 New South Wales Law Reporter 572, at 581 (N.S.W. 1994) (Australia); Strong v. United States, 518 F.2d 556 (Ct. Cl.), *cert. denied*, 423 U.S. 1015 (1975) (United States); Confederated Tribes of Warm Springs Res. v. United States, 177 Ct. Cl. 184 (1966) (United States).

in Independent Countries of 1989, expressly recognizes this principle, and requires of its state parties as follows:

. . . [M]easures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.<sup>10</sup>

Aside from providing a means of sustenance for an indigenous community's members, the lands occupied and used by that community are crucial to its existence, continuity, and culture. The property rights of indigenous peoples cannot be fully understood without an appreciation of the profound linkages that exist between indigenous peoples and their lands. The U.N. Sub-Commission on the Promotion and Protection of Human Rights (formally the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities) currently is conducting a study on "Indigenous people and their relationship to land."<sup>11</sup> The latest report resulting from this study observes that, through their involvement over a period of several years at the United Nations,

indigenous peoples have emphasized the fundamental issue of their relationship to their homelands. They have done so in the context of the urgent need for understanding by non-indigenous societies of the spiritual social, cultural, economic and political significance to indigenous societies of their lands, territories and resources for their continued survival and vitality. Indigenous peoples have explained that, because of the profound relationship that indigenous peoples have to

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<sup>10</sup> International Labour Organization Convention (No. 169 of 1989) concerning Indigenous and Tribal Peoples in Independent Countries, art. 14(1) (entered into force Sept. 1991) [hereinafter "Convention No.169"].

<sup>11</sup> See U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Indigenous peoples and their relationship to land: Second progress report on the working paper prepared by Mrs. Erica-Irene A Daes, Special Rapporteur*, E/CN.4/Sub.2/1999/18 (3 June 1999) [hereinafter "*U.N. indigenous land rights study, second progress report*"].

their lands, territories and resources, there is a need for a different conceptual framework to understand this relationship and a need for recognition of the cultural differences that exist. Indigenous peoples have urged the world community to attach positive value to this distinct relationship.

. . . [A] number of elements ...are unique to indigenous peoples: (i) a profound relationship exists between indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the intergenerational aspect of such a relationship is also crucial to indigenous peoples' identity, survival and cultural viability.<sup>12</sup>

In short, the lands and resources of an indigenous community are prerequisites for its cultural survival, and are property rights entitled to protection under both the domestic legal systems of states and international law.

**B. *Recognition of Indigenous Peoples' Traditional Land Tenure as Property in International and Domestic Legal Practice: A Pattern of Practice Constituting Customary International Law***

Indigenous peoples have property rights to land and natural resources that are based on their own traditional, ancestral patterns of use and occupation. These are important substantive rights, closely connected to indigenous peoples' cultural survival and integrity, and they are increasingly recognized and protected by authoritative actors within the international sphere and by the legal practice of states and indigenous peoples at the domestic level. While the relevant international and domestic practice varies, just as state practice varies in its treatment of property rights in general, it includes a sufficiently uniform and widespread acceptance of core principles to constitute a norm of

customary international law. The relevant practice of states and international institutions is highlighted below, and is further detailed in Appendix A, attached hereto, and in the recent scholarly work by Professor Siegfried Wiessner, which is attached to this brief as Appendix B.<sup>13</sup> Professor Wiessner concurs that, as a matter of customary international law, states must recognize and protect indigenous peoples' rights to land and natural resources in connection with traditional or ancestral use and occupancy patterns.<sup>14</sup>

### **1. International Practice**

One of the most impressive achievements of the international system in the protection of human rights in the post World War II era has been the recognition of indigenous peoples as special subjects of concern.<sup>15</sup> As part of this development, states, and others acting through international institutions, increasingly and repeatedly have affirmed the central importance of traditional lands and resources to the cultural survival of indigenous peoples.

The requirement that states recognize and protect indigenous peoples' rights in their traditional lands is included in the Inter-American Charter of Social Guarantees, which was adopted by the General Assembly of the Organization of American States in 1948. Article 39 of the Charter requires that states take "necessary measures . . . to provide Indians with protection and assistance, protecting their lives and property, defending them from extermination, sheltering them from

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<sup>12</sup> *Id.* at paras. 10, 18.

<sup>13</sup> See Siegfried Wiessner, "The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis", *Harv. Human Rights J.* vol. 12 (1999), p. 57 (attached as Appendix B).

<sup>14</sup> See *id.* at 109. See also S. James Anaya, *Indigenous Peoples in International Law* (Oxford and New York: Oxford University Press, 1996), pp. 49-58, 107 for an earlier assessment of the emergence of customary law in regard to indigenous peoples and their land rights.

<sup>15</sup> See Anaya, *supra* note 14, at 47-58 (describing and documenting relevant international developments).

oppression and exploitation, protecting them from poverty and providing them with appropriate education.”<sup>16</sup> The article specifically addresses the land rights of indigenous peoples as follows:

Institutions or services shall be established for the protection of Indians and in particular to safeguard their lands, legalize their ownership thereof, and prevent the invasion of such lands by outsiders.<sup>17</sup>

The International Labour Organization Convention No. 107 of 1957 similarly recognized indigenous peoples’ rights of ownership to the lands they traditionally occupied.<sup>18</sup> Despite Convention No. 107’s widely-criticized, and now rejected, assimilationist bias in other respects, its recognition in 1958 of the right to collective land ownership by indigenous groups demonstrates the long-standing concern in international practice for protecting indigenous peoples’ property rights to their traditional lands.<sup>19</sup>

ILO Convention No. 169 of 1989, a revision of Convention No. 107, is international law’s most concrete manifestation of the growing recognition of indigenous peoples’ rights to property in lands. Convention No. 169’s land rights provisions are framed by article 13(1), which states:

In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned

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<sup>16</sup> Inter-American Charter of Social Guarantees, 1948, at article 39, in *Encyclopedia of the United Nations and International Relations* at 433 (Edmund Jan Osmanczyk ed.; London: Taylor and Francis, 2d ed. 1990).

<sup>17</sup> *Id.*

<sup>18</sup> International Labour Organization Convention (No. 107 of 1957) concerning the Protection and Integration of Indigenous Populations and other Tribal and Semi-tribal Populations in the Independent Countries [hereinafter “Convention No.107”], art. 11.

<sup>19</sup> See Anaya, *supra* note 14, at 44-45.

of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.<sup>20</sup>

The Convention, which has been ratified by a significant number of American states,<sup>21</sup> speaks specifically to the property rights of indigenous peoples as follows:

The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized.<sup>22</sup>

The growing acceptance in international practice of indigenous peoples' property rights in land and natural resources is further evidenced by article 18 of the Proposed American Declaration on the Rights of Indigenous Peoples, prepared by the Inter-American Commission on Human Rights in consultation with OAS member states and representatives of indigenous peoples.<sup>23</sup> Article 18 of the Proposed American Declaration states:

1. Indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property.

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<sup>20</sup> Convention No.169, *supra* note 10, art. 13(1). For a description and analysis of the development of Convention No.169 by the principal ILO officer involved, see Lee Swepston, "A New Step in the International Law of Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989," 15 *Okla. City U. L. Rev.* 677 (1990).

<sup>21</sup> These include Argentina, Bolivia, Colombia, Costa Rica, Guatemala, Honduras, Mexico, Paraguay, and Peru.

<sup>22</sup> Convention No. 169, *supra* note 10, art. 14(1).

<sup>23</sup> Commentary by OAS member states in relation to the Proposed American Declaration has reflected a range of views and some concern over terminology. But the commentary reflects a substantial core of consensus on basic principles of indigenous peoples' rights, including land rights. *See generally* "Report of the First Round of Consultations Concerning the Future Inter-American Legal Instrument on Indigenous Rights," in *Annual Report of the Inter-American Commission on Human Rights, 1992-93*, OEA/Ser.L/V/II.83, doc.14, corr.1, at 263 (1993); *Report of the Chair, Meeting of the Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Populations* (held in Washington, D.C., November 8-12, 1999) (preliminary version).

2. Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.<sup>24</sup>

Emphasizing that such property rights originate from traditional patterns of land tenure, the Proposed Declaration also stipulates: “Nothing . . . shall be construed as limiting the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights over them.”<sup>25</sup>

The Draft United Nations Declaration on the Rights of Indigenous Peoples, developed by the United Nations Working Group on Indigenous Populations and approved by U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, provides further evidence of the increasingly widespread international recognition of and respect for indigenous peoples’ property rights in lands and resources. The Draft U.N. Declaration was approved by the Sub-Commission after several years of discussions in which both states and indigenous peoples from throughout the world took part.<sup>26</sup> The Draft U.N. Declaration affirms:

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their

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<sup>24</sup> Proposed American Declaration on the Rights of Indigenous Peoples, art. XVIII, in *Annual Report of the Inter-American Commission on Human Rights, 1997*, OEA/Ser.L/V/III.95, doc.7, rev., 1997, 654-676 (proposal by the Inter-Am.C.H.R.) [hereinafter “Proposed American Declaration”].

<sup>25</sup> *Id.* at art. XVIII, paras. 2 and 3(iii).

<sup>26</sup> See Anaya, *supra* note 14, at 51-53 and notes.

laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.<sup>27</sup>

The above principles are not only articulated in numerous documents in abstract terms, they are also reflected in the practice of international human rights bodies as they examine the situations of particular indigenous groups. The U.N. Human Rights Committee, the U.N. Committee on the Elimination of Racial Discrimination, the relevant organs of the International Labour Organization, and the Inter-American Commission on Human Rights apply the prevailing understandings of indigenous peoples' land and resource rights when they monitor human rights situations where indigenous peoples are located and when they consider complaints brought by specific indigenous groups.<sup>28</sup>

Every major international body that has considered indigenous peoples' rights during the past decade has acknowledged the crucial importance of lands and resources to the cultural survival of indigenous peoples and communities. They have also recognized the critical need for governments to respect and protect the varied and particular forms of land tenure defined and regarded as property by indigenous peoples themselves. In addition to the international human rights institutions

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<sup>27</sup> Draft United Nations Declaration on the Rights of Indigenous Peoples, art. 26, adopted and proposed by the Subcommission on the Prevention of Discrimination and the Protection of Minorities by its Resolution 1994-45, August 26, 1994, E/CN.4/Sub.2/1994/45 [hereinafter "Draft UN Declaration"], para. 105.

<sup>28</sup> See *infra* notes 42-56 and text (discussing cases before the Human Rights Committee and the Inter-American Commission on Human Rights). See also *Report of the Committee of Experts on the Application of Conventions and Recommendations: General Report and Observations Concerning Particular Countries*, Report 3 (pt. 4A), International Labour Conference, 81<sup>st</sup> Sess. (1994), at 348-52 (regarding land rights of indigenous peoples in Bangladesh and Brazil); "Committee on Elimination of Racial Discrimination Urges Australia to Suspend Implementation of Amended Act on Aboriginal Land Rights," HR/CERD/99/29 (March 18, 1999). See generally Anaya, *supra* note 14, at 151-84 (surveying relevant activity by international institutions).

mentioned above, the World Bank and the European Union have pronounced and acted in favor of these rights.<sup>29</sup> Indigenous peoples and their rights over land and natural resources have been discussed at a multitude of international meetings and conferences sponsored by the U.N., the OAS, and other inter-governmental organizations over the last several years. In their numerous oral and written public statements at these meetings, states have concurred or acquiesced in the essential elements of the principles of indigenous peoples' land and resource rights that now find expression in several international documents.<sup>30</sup>

## **2. Domestic Legal Practice**

The international norms that recognize rights based on indigenous peoples' traditional landholdings and resource use are increasingly incorporated and reflected in the domestic legal practice of states throughout the American region and the world. Nicaraguan law itself gives formal legal recognition to indigenous peoples' communal property rights in lands and natural resources based on traditional patterns of use and occupation.<sup>31</sup> Throughout the hemisphere, OAS state members have amended their constitutions or have adopted new laws to recognize and protect land and natural resource rights for indigenous peoples. In several states, judicial organs have been the architects of domestic legal doctrine recognizing such rights. Similarly, state legal systems in other parts of the world have incorporated property rights based on indigenous peoples' traditional land tenure. Much of this regional and global state practice is detailed and analyzed in Appendix A and

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<sup>29</sup> See, e.g., World Bank Operational Directive 4.20, Indigenous Peoples (September 17, 1991), para. 13 (requiring respect for indigenous peoples' land rights in connection with Bank financed projects); Council of Ministers of the European Union, Resolution on Indigenous Peoples within the Framework of the Development Cooperation of the Community and Member States, 214th Council meeting, Brussels, 30 November 1998; European Parliament, Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples, Strasbourg, 9 Feb. 1994, Eur. Parl. Doc. PV 58(II) (1994).

<sup>30</sup> See Anaya, *supra* note 14, at 52-53, 56-57, 107 and notes (documenting such statements).

<sup>31</sup> See Appendix A, *infra* notes 114-117 and text (for examples of Nicaraguan law recognizing these rights).

in Professor Wiessner's article which is attached as Appendix B. As Professor Wiessner concludes, this domestic legal practice, together with the relevant practice at the international level, constitutes customary international law.<sup>32</sup> At the very least, a sufficient pattern of common practice regarding indigenous peoples' land and resource rights exists among OAS member states to constitute customary international law at the regional level.

### ***C. The Evidence of Indigenous Peoples' Traditional Land Tenure***

As affirmed by the U.N. Draft Declaration on the Rights of Indigenous Peoples, Indigenous peoples possess unique knowledge about the lands and resources that they have traditionally occupied or used, and to which they accordingly have rights under their own legal systems, as well as under domestic and international law. International and domestic legal institutions have come to recognize and respect that indigenous peoples' own knowledge can effectively establish the existence, scope, and characteristics of their traditional land tenure. An increasing number of state legal systems now recognize indigenous peoples' oral history and their own documentation and mapping of their lands as evidence in legal proceedings determining land rights. Additionally, expert testimony from anthropologists, geographers and other qualified scholars and academics with relevant knowledge of indigenous peoples' custom and culture is also recognized by domestic legal systems as relevant to establish indigenous peoples' property rights based on traditional systems of land tenure.

In *Delgamuukw v. British Columbia*,<sup>33</sup> the Canadian Supreme Court incorporated recognition of the customs of the Gitsxan and Wet'suwet'en band members into the common law of Canada. In reversing a lower court, which refused to accept oral testimony on the boundaries of the bands' ancestral homelands on the grounds that it was hearsay, the Court expressed grave concern that if

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<sup>32</sup> See Wiessner, *supra* note 13, at 109 (Appendix B).

<sup>33</sup> *Delgamuukw v. British Columbia* (1997) 3 S.C.R. 1010 (Can.).

oral history were not allowed to prove pre-contact claims, indigenous groups would find it impossible to provide evidence of their claims as their traditions are primarily oral.<sup>34</sup> The Court ordered a new trial, stating that the oral testimony, which consisted of traditional songs containing descriptions of the ancestral territory's metes and bounds, must be considered by the trial judge as evidence of the boundaries of the bands' historically occupied lands.<sup>35</sup>

In the United States, the State of Hawaii Supreme Court has recognized customary and traditional property rights of Hawaiian Native peoples by reference to their oral testimony at trial.<sup>36</sup> And it is well established in the legal system of the United States that the testimony of qualified anthropologists, geographers, and other academic experts carries considerable weight in establishing indigenous peoples' property rights.<sup>37</sup> Australia's High Court, as reflected in the landmark case of *Mabo v. Queensland*,<sup>38</sup> has similarly recognized the relevance of indigenous peoples' oral testimony and expert academic opinions in establishing the existence, scope and characteristics of indigenous peoples' traditional land tenure.

Thus, evidence of indigenous peoples' traditional and customary land tenure can be established by qualified expert and academic opinion, as well as by objective facts that can be discerned from the oral accounts and documentation produced by the indigenous communities concerned. Indigenous peoples' own knowledge will, in most instances, provide the most reliable

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<sup>34</sup> *Id.* at 1066-69.

<sup>35</sup> *Id.* at 1079, 1071-74.

<sup>36</sup> *See* *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982); *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992); *Public Access Shoreline Hawaii (PASH) v. Hawai'i County Planning Comm.*, 79 Haw. 425, 903 P.2d 1246, *cert. denied*, 517 U.S. 1163 (1996).

<sup>37</sup> *See* *Pueblo of Taos*, 15 Ind. Cl. Comm. 688, 694-95 (1965); *United States v. Washington*, 384 F. Supp. 312, *aff'd* 520 F.2d 676 (9<sup>th</sup> Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

<sup>38</sup> *Mabo v. Queensland [No.2]* (1992), 175 C.L.R. 1 (Austl.).

proof of the existence of their property rights entitled to protection under a state's legal system. Under general principles of law, a state cannot deny an indigenous groups' claimed property rights in land by excluding or ignoring evidence derived from the culture and traditions of the indigenous group or community itself.

**D. *Indigenous Peoples' Customary Land Tenure as Property Protected by Article 21 of the American Convention***

The foregoing establishes that indigenous peoples have property rights to land and natural resources based on traditional land tenure and resource use. These property rights are recognized in existing and developing international instruments and are upheld by provisions of domestic law in an increasing number of countries, including the domestic law of Nicaragua. The rights may be discerned through objective facts taken from the oral accounts and documentation produced by the indigenous communities concerned, and by other expert testimony and documentation.

Article 21 of the American Convention on Human Rights protects the right to property, and it implicitly affirms that indigenous peoples' traditional rights to lands and natural resources, along with other forms of property, are protected by the Convention. The fundamental principle of nondiscrimination, which is itself enshrined in the Convention and is part of general international law, leads to this interpretation of the reach of the right to property affirmed in article 21. To exclude indigenous land tenure from the protection of article 21 would be discriminatory against indigenous peoples with regard to their own modalities and forms of landholding and resource use.

Eradication of the legacies of historical discrimination affecting the enjoyment of property requires adherence to the principle of equality as exemplified by the Australian High Court in *Mabo v. Queensland [No.2]*.<sup>39</sup> In that case, the High Court, reversing over a century of Australian jurisprudence and official policy, recognized "native title": that is, a right of property based on

indigenous peoples' customary land tenure. Justice Brennan represented the view of the Court majority in characterizing as "unjust and discriminatory" the past failure of the Australian legal system to embrace and protect native title. Earlier, in *Mabo v. Queensland [No.1]*,<sup>40</sup> Justices Brennan, Toohey, and Gaudron, in a joint judgment, expressed the Court's majority view that a legislative measure targeting native title for legal extinguishment was racially discriminatory and hence invalid. Regarding the indigenous Miriam people of the Murray Islands, the justices viewed the discriminatory treatment of their claim to native title as "impairing their human rights while leaving unimpaired the human rights of those whose rights in and over the Murray Islands did not take their origins in the laws and customs of the Miriam people."<sup>41</sup>

As the Australia High Court in *Mabo I* declared, legislation providing that the state owned all land not under formal title and ignoring indigenous peoples' historic occupancy would be unlawful under Australia's Racial Discrimination Act of 1975, which implemented the United Nations Convention on the Elimination of All Forms of Racial Discrimination. The 1988 *Mabo I* decision thus rejected Queensland's defense that state law resolved the aboriginal challenge, opening the way for the court's 1992 landmark decision recognizing native title under Australian law.

Article 21 of the American Convention recognizes, in general, that: "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society." Examined in light of the fundamental principle of non-discrimination enshrined in article 1(1) of the Convention, article 21 necessarily includes protection for those forms of property that are based on indigenous peoples' traditional patterns of land tenure. Failure to afford such protection to the property rights of indigenous peoples would accord illegitimate discriminatory

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<sup>39</sup> *Id.* at 42.

<sup>40</sup> *Mabo v. Queensland [No.1]* (1988), 83 ALR 14 (Austl.).

<sup>41</sup> *Id.* at 20.

treatment to their customary land tenure, in violation of the principle of equality under the law affirmed by the Convention.

## **II. The Traditional Land Tenure Patterns of an Indigenous Community are Part of its Culture and as Such are Protected by the American Convention and by the International Covenant on Civil and Political Rights**

The international responsibility of Nicaragua in this case is also a function of its obligation to protect the integrity of indigenous cultures, of which land use patterns are an essential part. Indigenous peoples' agricultural and other land use patterns are typically linked with familial and social relations, religious practices, and the very existence of indigenous communities as discrete social and cultural phenomena.<sup>42</sup> Several rights articulated in the American Convention on Human Rights support the enjoyment of such critical aspects of indigenous peoples' cultures, including the right to property (article 21) discussed above in relation to lands and resources, the right to religious freedom (article 12), the right to family and protection thereof (article 17), and rights to freedom of movement and residence (article 22). The Inter-American Commission on Human Rights has observed that, "[f]or indigenous peoples, the free exercise of such rights is essential to the enjoyment and perpetuation of their culture."<sup>43</sup>

As urged in the introduction of this brief, Nicaragua's responsibility in the present case should be determined not only by reference to the American Convention, but also by reference to other international human rights treaties to which Nicaragua is a party. Nicaragua has a particular obligation to protect the culture of indigenous communities given its status as a party to the International Covenant on Civil and Political Rights.

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<sup>42</sup> See *U.N. indigenous land rights study, second progress report*, *supra* note 11, at paras. 10-18.

<sup>43</sup> Inter-Am.C.H.R., *Report on the Human Rights Situation in Ecuador*, OEA/Ser.L/V/II.96 (1997), at 103 [hereinafter "Report on Ecuador"].

Article 27 of the Covenant on Civil and Political Rights states:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.<sup>44</sup>

Relying especially on article 27, the Inter-American Commission on Human Rights has correctly affirmed that international law protects minority groups, including indigenous peoples, in the enjoyment of all aspects of their diverse cultures and group identities.<sup>45</sup> The Commission has held that, for indigenous peoples in particular, the right to the integrity of culture covers “the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands.”<sup>46</sup>

In its Proposed Declaration on the Rights of Indigenous Peoples, the Commission once again articulated the obligation of states to respect the cultural integrity of indigenous peoples, expressly linking property rights and customs to the survival of indigenous cultures. Article VII of the Proposed Declaration, entitled “Right to Cultural Integrity” states:

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<sup>44</sup> International Covenant on Civil and Political Rights, December 16, 1966, G.A. Res. 2200(XXI), 999 U.N.T.S. 171 (entered into force March 23, 1976), art. 27.

<sup>45</sup> See, e.g., Report on Ecuador, *supra* note 43, at 103-04; Inter-Amer. C.H.R., *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc. 10, rev. 3 (1983), OEA/Ser.L/V/II.62, doc. 26 (1984), at 76-78 (regarding the land rights of the Miskito and other indigenous communities of Nicaragua’s Atlantic Coast [hereinafter “Miskito Report”]); Case 7615 (Brazil), Inter-Am. C.H.R., OEA/Ser.L/V/II.66, doc. 10, rev. 1, at 24, 31 (1985) (concerning the Yanomami of Brazil).

<sup>46</sup> Miskito Report, *supra* note 45, at 81.

1. Indigenous peoples have the right to their cultural integrity, and their historical and archeological heritage, which are important both for their survival as well as for the identity of their members.
2. Indigenous peoples are entitled to restitution in respect of the property of which they have been dispossessed, and where that is not possible, compensation on a basis not less favorable than the standard of international law.
3. The states shall recognize and respect indigenous ways of life, customs, traditions, forms of social, economic and political organization, institutions, practices, beliefs and values, use of dress, and languages.<sup>47</sup>

The United Nations Human Rights Committee has confirmed the Commission's interpretation of the reach of the cultural integrity norm, in its General Comment on article 27 of the Covenant:

[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of these rights may require positive measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>48</sup>

The Committee has confirmed that indigenous peoples' traditional land use patterns are elements of culture that states must take affirmative measures to protect under article 27 of the Covenant on

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<sup>47</sup> Proposed American Declaration, *supra* note 24, art. VII.

<sup>48</sup> Human Rights Committee, General Comment No. 23 (50) (art. 27), HRI/GEN/1/Rev.1 at 38, adopted April 6, 1994 [hereinafter AHRC General Comment on art. 27"], para. 7.

Civil and Political Rights, regardless of whether or not states recognize indigenous peoples' ownership rights over lands and resources that are subject to traditional uses.<sup>49</sup>

The Human Rights Committee found violations of article 27 in circumstances similar to those confronting the Awas Tingni Community. In *B. Ominayak, Chief of the Lubicon Lake Band of Cree v. Canada*,<sup>50</sup> the Committee determined that Canada had violated article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and timber development within the ancestral territory of the Lubicon Lake Band. The Committee found that the natural resource development activity compounded historical inequities to "threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue."<sup>51</sup>

Also significant are the Committee's pronouncements in the *Länsmann* cases. These two cases involved threats to reindeer herding by indigenous Sami people, through state permitting of rock quarrying and forestry in traditional Sami territory. In both cases the Committee concluded that article 27 protected Sami traditional means of livelihood in their traditional area, despite the fact that ownership to the area was in dispute.<sup>52</sup> Additionally, in both cases the Committee confirmed its position, articulated in an earlier case involving Sami reindeer herding, that article 27 protections

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<sup>49</sup> See, e.g., *J.E. Länsmann v. Finland*, Communication No. 671/1995, CCPR/C/58/D/671/1995, paras. 2.1-2.4, 10.1-10.5 (*Länsmann II*) (Sami reindeer herding in certain land area is protected by article 27, despite disputed ownership of land). See also *B. Ominayak, Chief of the Lubicon Lake Band v. Canada*, Communication No. 167/1984, Hum. Rts. Comm., A/45/40, vol. II, annex IX.A, para 32.2 (economic and social activities linked with territory are part of culture protected by article 27); *Länsmann et al. v. Finland*, Communication No. 511/1992, Hum. Rts. Comm., CCPR/C/52/D/511/1992 (1994) (*Länsmann I*) (reindeer herding part of Sami culture protected by article 27); *Kitok v. Sweden*, Communication No. 197/1985, Hum. Rts. Comm., A/43/40, annex VII.G (1988) (article 27 extends to economic activity "where that activity is an essential element in the culture of an ethnic community").

<sup>50</sup> Communication No. 167/1984, Hum. Rts. Comm., A/45/40, vol. II, annex IX.A.

<sup>51</sup> *Id.* at para. 33.

<sup>52</sup> *Länsmann et al. v. Finland*, Communication No. 511/1992 (*Länsmann I*), *supra* note 49; *J.E. Länsmann v. Finland*, Communication No. 671/1995 (*Länsmann II*), *supra* note 49.

extend to economic activity “where that activity is an essential element in the culture of an ethnic community.”<sup>53</sup>

Article 27 has also been the basis of decisions by the Inter-American Commission on Human Rights in cases involving particular indigenous groups. In these decisions, the Commission has confirmed the importance and international legal obligation of protecting indigenous peoples’ cultural and related property rights. In its 1985 decision concerning the Yanomami Indians of Brazil,<sup>54</sup> the Commission, citing article 27, asserted that contemporary international law recognizes “the right of ethnic groups to special protection in the use of their own language, of the practice of their own religion, and in general, for all those characteristics necessary for the preservation of their cultural identity.” The Commission noted that the OAS and its member states have established the “preservation and strengthening” of the indigenous groups’ cultural heritage as a “priority,” and declared that Brazil’s failure to protect the Yanomami from incursions by miners and others into their ancestral lands threatened the Indians’ physical well being, as well as their culture and traditions. The Commission therefore recommended that the government secure the boundaries of a reserve for the Yanomami to protect their cultural heritage. Brazil responded by moving forward with the establishment of the Yanomami Reserve and by amending its constitution in 1988 to provide greater protections to Indians and their lands.

The Inter-American Commission also invoked article 27 in its consideration of the 1983 complaint filed by the indigenous peoples of Nicaragua’s Atlantic Coast against the government of Nicaragua for human rights abuses committed during the early years of Nicaragua’s civil war.<sup>55</sup>

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<sup>53</sup> Kitok v. Sweden, *supra* note 49.

<sup>54</sup> Res. No. 12/85, Case No. 7615 Inter-Am C.H.R. 24 (1985), in *Annual Report of the Inter-American Commission of Human Rights 1984-85*, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985).

<sup>55</sup> See Miskito Report, *supra* note 45.

Relying specifically on the cultural rights guarantees of article 27, the Commission recommended measures to secure the indigenous communities' land rights and to develop "an adequate institutional order" that would better accommodate the distinctive cultural attributes and traditional forms of organization of the indigenous groups.<sup>56</sup> The Commission's recommendations were instrumental in leading the government to the negotiating table with indigenous community leaders. The negotiation process culminated in the enactment of the constitutional provisions and law referred to above, which affirm indigenous peoples' land rights and establish regional governments for the indigenous communities-- including the Awas Tingni Community--on Nicaragua's Atlantic Coast.

Critical to the viable continuation of indigenous peoples' cultures is the link the Human Rights Committee and Inter-American Commission have recognized between the economic and social activities of indigenous peoples and their traditional territories. Both the Human Rights Committee and the Inter-American Commission have concluded that, under international law, the states' obligation to protect indigenous peoples' right to cultural integrity necessarily includes the obligation to protect traditional lands as those two sets of rights are inextricably linked.

**III. The State has an Obligation to Seek Agreement with an Indigenous Community Prior to Authorizing any Development Initiative that May Affect the Community's Interests in Lands and Resources, and an Obligation to Adopt Measures to Ensure Safeguards and Benefits for the Community in Relation to the Development Initiative.**

The American Convention, other international treaties to which Nicaragua is party, and other provisions of international law require consultation with an indigenous community before granting concessions to develop natural resources in areas traditionally used or occupied by the community. Under the relevant international standards, the objective of such consultation is to establish

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<sup>56</sup> *Id.* at 81-82, para. 15.

agreement with the affected indigenous community over the proposed development activity. Furthermore, international law requires that, for any approved development activity that affects an indigenous community, measures be adopted to safeguard the community's interests in the affected lands and to ensure economic and other benefits for the community.

**A. *The Obligation to Consult and Reach Agreement with Indigenous Peoples***

As demonstrated above, under the American Convention and other aspects of international law, indigenous peoples have rights to the protection of their traditionally occupied lands and natural resources. At a minimum, therefore, the human rights norms that protect indigenous peoples' interests in land and natural resources obligate states to consult with the indigenous groups concerned about any decision that may affect their interests and to adequately weigh those interests in the decision-making process. The right to property affirmed in article 21 of the American Convention would have little meaning for indigenous peoples if their property could be encumbered without due consultation, consideration, and, in appropriate circumstances, just compensation, by the state. Within the framework of article 27 of the International Covenant on Civil and Political Rights, the United Nations Human Rights Committee has recognized the imperative of ensuring indigenous peoples' effective participation in decisions that may affect their traditional land and resource use.<sup>57</sup>

The right of consultation relates, moreover, to the fundamental principle of self-determination, a principle of general international law affirmed in multiple international instruments, including the International Covenant on Civil and Political Rights. At its core, self-determination means that human beings, individually and collectively, have a right to be in control of their own destinies under conditions of equality. For indigenous peoples, the principle of self-determination

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<sup>57</sup> HRC General Comment on art. 27, *supra* note 48, at para. 7.

establishes a right to control their lands and natural resources and to be genuinely involved in all decision-making processes that affect them.<sup>58</sup>

As stated in the Covenant on Civil and Political Rights, “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.”<sup>59</sup> For indigenous peoples to freely pursue their economic, social and cultural development, they must be in a position to determine how best to utilize their own lands and resources.

In its concluding observations on Canada in April 1999, the U.N. Human Rights Committee reinforced the relationship between the right to self-determination and the duty to consult with indigenous peoples regarding the disposition of their traditional lands and resources. Concerning the situation of indigenous peoples in Canada, “the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence.”<sup>60</sup> Thus, the Committee admonished against governmental acts that would unilaterally infringe on indigenous peoples’ enjoyment of their rights to lands and natural resources, viewing such infringement as incompatible with the right of self-determination affirmed in article 1 of the Covenant.<sup>61</sup>

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<sup>58</sup> See Anaya, *supra* note 14, at 85-88.

<sup>59</sup> International Covenant on Civil and Political Rights, *supra* note 44, art. 1(1).

<sup>60</sup> *Concluding Observations of the Human Rights Committee: Canada*, CCPR/C/79/Add.105 (7 April 1999), at para. 8.

<sup>61</sup> *Id.* The Human Rights Committee also has recently called upon Mexico and Norway to faithfully implement the right of self-determination in relation to indigenous peoples and their traditional lands. See *Concluding observations of the Human Rights Committee: Mexico*, U.N. Doc. CCPR/C/79/Add.109 (1999), para. 19; *Concluding Observations of the Human Rights Committee: Norway*, U.N. Doc. CCPR/C/79/Add.112 (1999), paras. 10, 17.

The Draft United Nations Declaration on the Rights of Indigenous Peoples describes an “urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies.”<sup>62</sup> This statement recognizes that the promotion of fundamental rights includes a recognition and respect for indigenous peoples’ own perspective on their lands and resources. To that end, the Draft Declaration concludes that, “control by indigenous peoples over developments affecting them and their lands and territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.”<sup>63</sup> The Draft Declaration also recognizes the right of indigenous peoples to determine priorities and strategies for exercising their right to development and requires states to obtain the free and informed consent of indigenous peoples before adopting and implementing legislative and administrative measures that may affect them.<sup>64</sup>

For its part, the Proposed American Declaration on the Rights of Indigenous Peoples affirms the right of self-determination and consultation in stating that: “Indigenous peoples have the right to participate without discrimination, if they so decide, in all decision-making, at all levels with regard to matters that might affect their rights, lives and destiny.”<sup>65</sup> The Proposed Declaration also affirms the right of indigenous peoples “to be informed of measures which will affect their environment,

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<sup>62</sup> Draft U.N. Declaration, *supra* note 27, preamble para.6.

<sup>63</sup> *Id.* preamble para. 8.

<sup>64</sup> *Id.* arts. 20, 23 and 30.

<sup>65</sup> Proposed American Declaration, *supra* note 24, art. XV.2.

including information that ensures their effective participation in actions and policies that might affect it.”<sup>66</sup>

These statements of rights to consultation and self-determination are consistent with ILO Convention No. 169, which clarifies that indigenous peoples’ right to consultation extends even to decisions about natural resources that remain under state ownership:

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.<sup>67</sup>

Further, Convention No. 169 establishes that indigenous peoples “have the right to decide their own priorities for the process of development as it affects their lives . . . [and hence] they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.”<sup>68</sup> Consequently, the Convention stipulates that consultations “shall be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”<sup>69</sup>

The required consultations with indigenous peoples must be more than formalities or simply processes by which they are given information about development projects. Clear, complete, and accurate information is necessary, but that information alone is not sufficient for effective

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<sup>66</sup> *Id.* art. XIII.2.

<sup>67</sup> Convention No. 169, *supra* note 10, art. 15(2).

<sup>68</sup> *Id.* art. 7.

<sup>69</sup> Convention No. 169, *supra* note 10, art. 6(2).

participation in decision-making. Rather, in order to be truly effective, the consultations must also provide indigenous peoples a full and fair opportunity to be heard and to genuinely influence the decisions before them.<sup>70</sup>

The content of meaningful consultations with indigenous peoples was elaborated by the Colombian Constitutional Court in a case dealing with oil exploration within the traditional territory of the U'wa people.<sup>71</sup> The court suspended an oil exploration permit pending proper consultations, and held that, in order for indigenous peoples' cultural integrity to be secured, consultation must be active and effective, and therefore involves:

- (a) full disclosure regarding proposed projects;
- (b) full disclosure of the possible effects of the proposed projects;
- (c) the opportunity to freely and privately (without outside interference) discuss the proposed projects within the entire community or among its authorized representatives;
- (d) the opportunity to have their concerns heard and to take a position on the viability of the project.<sup>72</sup>

Accordingly, those conducting such consultations should make every effort to reach an agreement or accord with the indigenous community.

Similarly, the Supreme Court of Canada in its landmark *Delgamuukw* decision concerning aboriginal title held that, in the disposition of indigenous peoples' lands and resources, "[t]here is always a duty of consultation . . . this consultation must be in good faith, and with the intention of

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<sup>70</sup> See *id.* (for proposition that consultation shall be undertaken in good faith and in a form appropriated to the circumstances). See also International Labour Organization, *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169* (1996), at 8-7 (for the proposition that good faith consultation includes a full and fair opportunity to be heard and to genuinely influence the decisions at issue).

<sup>71</sup> See Const. Ct. Judgement No. SU-039 (1997) (Case of Comunidad U'wa)

<sup>72</sup> *Id.*

substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, [the duty] will be significantly deeper than mere consultation. Some cases . . . require the full consent of an aboriginal nation.”<sup>73</sup>

These domestic precedents confirm that states are obligated to fully inform and meaningfully consult with indigenous peoples before making decisions disposing of or affecting their traditional lands. States must maintain the objective of reaching agreement with the indigenous groups concerned and ensure that they have a meaningful say in the development process as it affects them and that their interests in land and resources are protected.

**B. *The Obligation to Take Steps to Prevent or Mitigate the Negative Impacts of Development Activities***

Consultations with indigenous groups over development activities should lead, *inter alia*, to specific measures to safeguard the interests and rights of the indigenous communities concerned in relation to the development activities. Such safeguards include measures to prevent or mitigate the impacts of development activities that might harm or interfere with indigenous peoples’ use and enjoyment of lands and natural resources. ILO Convention No. 169 provides that “Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.”<sup>74</sup> To that end, the Convention requires states to adopt special measures “as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.”<sup>75</sup>

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<sup>73</sup> Delgamuukw v. British Columbia (1997), 3 S.C.R. 1010 para. 168 (S.C.C.) (Can.), per Lamer CJC.

<sup>74</sup> Convention No. 169, *supra* note 10, art.2(1).

<sup>75</sup> *Id.* art. 4(1).

The obligation of states to uphold, on a nondiscriminatory basis, indigenous peoples' property, cultural, and other rights in relation to lands and natural resources includes the obligation to take the measures necessary to make those rights effective. In general, international law requires states to adopt the legislative and administrative measures necessary to ensure the full enjoyment of the human rights they are obligated to uphold.<sup>76</sup> This includes the obligation to adjust the state governing apparatus to bring it in conformity with applicable human rights norms.<sup>77</sup> A state, therefore, cannot escape international responsibility by merely referring to its domestic laws or administrative practices. Rather, it has the obligation to change its internal laws and practices to recognize indigenous peoples' rights in relation to lands and resources and, moreover, to take affirmative steps to protect them.

The U.N. Human Rights Committee, in its General Comment on Article 27 of the International Covenant on Civil and Political Rights, states that "positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture."<sup>78</sup> The Committee notes that "[p]ositive measures of protection are...required not only against acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party."<sup>79</sup> Under this framework, when a state grants a concession to a private party for natural resource extraction within the area in which an indigenous community claims lands and resources, it is obligated to take positive measures to safeguard indigenous peoples' cultural and subsistence practices from the

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<sup>76</sup> The obligation of effectiveness is made explicit in Articles 1 and 2 of the American Convention on Human Rights, in relation to rights affirmed in that Convention.

<sup>77</sup> See *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser.C) No. 4, para. 166 (1988).

<sup>78</sup> HRC General Comment on art. 27, *supra* note 48, para. 6.2.

<sup>79</sup> *Id.* para. 6.1.

potentially harmful effects of the private development activity. In the context of a logging concession, such positive measures might include, for example, measures in the design of the governing operational plan to prevent environmental impacts from road-building or timber harvesting that might harm indigenous peoples' subsistence hunting and agricultural practices or interfere with access to sacred sites. Such measures might also include compensation for temporary or long term degradation of soil or water quality.

The Human Rights Committee has affirmed that positive measures of protection should be “directed towards ensuring the survival and continued development of the cultural, religious and social identity” of the protected groups.<sup>80</sup> Therefore, merely examining the environmental or economic impacts of government-permitted activities does not fulfill the requirement to take positive steps to ensure the “survival” of cultures. Rather, governments must develop systems that incorporate protections for the integrity of indigenous peoples' lands and cultures in all aspects of their relationships to indigenous peoples.

Agenda 21, the detailed program of action adopted by the U.N. Conference on Environment and Development confirms the *sui generis* character of the requirement to protect indigenous peoples from the adverse effects of development activities, within the context of recognizing indigenous peoples' “historical relation with their lands.” Chapter 26 of Agenda 21 calls on states to adopt and give effect to the following measures, among others:

- (4) Adoption or strengthening of appropriate policies and/or legal instruments at the national level;
- (5) Recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that

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<sup>80</sup> See HRC General Comment on art. 27, *supra* note 48, para. 9.

the indigenous peoples concerned consider to be socially and culturally inappropriate;

- (6) Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development.<sup>81</sup>

The impact of government-sanctioned resource extraction activities in indigenous peoples' traditional territories that do not conform with this requirement not only reduces the ability of the affected cultural group to maintain its own economic and social integrity, it irredeemably changes the entire economic structure of the affected region. State-imposed economic exploitation of their lands and loss of resources deprives indigenous peoples of their traditional livelihoods, forcing them to participate in a new economic regime that they do not control. In this way the cultural fabric of the indigenous group slowly unravels, instead of "enriching the fabric of society as a whole" as anticipated by the U.N. Human Rights Committee.<sup>82</sup> The requirement of providing special safeguards is to protect indigenous peoples from such a fate.

### ***C. The Obligation to Ensure Benefits***

In addition to being required to develop safeguards to protect indigenous peoples from the adverse impacts of development activities, states are obligated under international law to ensure that indigenous peoples realize benefits from development projects and other activities that affect them and their lands. The initial report of the U.N. Sub-Commission land rights study mentioned above, notes that "[e]conomic development has been largely imposed from outside, with complete disregard for the right of indigenous peoples to participate in the control, implementation and benefits of

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<sup>81</sup> Agenda 21, U.N. Conference on Environment and Development, Rio de Janeiro, June 13, 1992, para. 26.3(a), U.N. Doc. A/CONF.151/26 (vol.3), Annex 2 (1992).

<sup>82</sup> See HRC General Comment on art. 27, *supra* note 48, para. 9.

development.”<sup>83</sup> Such a pattern of development activity can no longer be tolerated under rules and principles of international law.

The right of indigenous peoples to benefit from economic activities on their lands is an essential element of their right to property. In addition to providing recognition of their rights to control, ownership, use and enjoyment of lands, the Proposed American Declaration on the Rights of Indigenous Peoples also provides that indigenous peoples shall participate in the benefits of resource exploitation activities and receive compensation for any loss they may sustain as a result of such activities.<sup>84</sup> In the *Länsmann* cases cited above, the Human Rights Committee noted that “economic activities must, in order to comply with article 27 of the Covenant on Civil and Political Rights, be carried out in a way that the [Sami] continue to benefit” from their traditional means of livelihood.<sup>85</sup>

The United Nations Draft Declaration on the Rights of Indigenous Peoples provides that: “Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.”<sup>86</sup> The Draft Declaration also provides that indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.<sup>87</sup> ILO Convention No. 169 requires that “[t]he peoples concerned shall wherever possible participate in the benefits of [resource

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<sup>83</sup> *U.N. indigenous land rights study, second progress report, supra* note 11, para. 64.

<sup>84</sup> Proposed American Declaration, *supra* note 24, art. XVIII, paras. 1 and 5.

<sup>85</sup> *Länsmann I, supra* note 49, para. 9.8

<sup>86</sup> Draft U.N. Declaration, *supra* note 27, art. 21.

<sup>87</sup> *Id.*

exploitation], and shall receive fair compensation for any damages which they may sustain as a result of such activities.”<sup>88</sup>

To ensure that indigenous peoples’ rights to property and cultural integrity are protected, benefits from economic activities should focus on strengthening indigenous peoples’ ability to determine and develop priorities for their own development, protecting their land and resources for their uses, and ensuring the preservation of their cultural integrity. The second progress report of the U.N. Sub-Commission land rights study quotes from a Canadian government statement as support for the idea that indigenous peoples, as well as the world at large, benefit when indigenous peoples are “guaranteed participation in land, water, wildlife and environmental management...; financial compensation; resource revenue-sharing; specific measures to stimulate economic development; and a role in management of heritage resources.”<sup>89</sup>

**IV. The State has an Obligation to Adopt Adequate Measures to Specifically Identify and Secure Indigenous Peoples’ Communal Lands, through Land Demarcation or other Appropriate Procedures, and Such Measures Should be Developed and Implemented in Cooperation with the Indigenous Peoples Concerned.**

When state governments grant concessions for natural resource exploitation without due regard for the traditional land or resource rights of indigenous peoples, such behavior is typically associated with a general failure on the part of the state to identify and provide an effective form of legal recognition of the specific land areas over which indigenous peoples hold rights. This situation of state neglect is in violation of the state’s obligation to adopt and implement effective measures to secure indigenous peoples’ rights over lands and natural resources. For state parties to the American Convention on Human Rights, this obligation follows especially from articles 1 and 2 of the

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<sup>88</sup> Convention No. 169, *supra* note 10, art. 15(2).

<sup>89</sup> U.N. *indigenous land rights study, second progress report, supra* note 11, para. 95.

Convention, by which state parties must enact the measures necessary, including constitutional and legislative reform if necessary, to make effective the rights affirmed in the Convention.

The most recent report resulting from the U.N. study on indigenous peoples' lands remarks that:

In terms of frequency and scope of complaints, the greatest single problem today for indigenous peoples is the failure of States to demarcate indigenous lands. Demarcation of lands is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground. Purely abstract or legal recognition of indigenous lands, territories or resources can be practically meaningless unless the physical identity of the property is determined and marked.<sup>90</sup>

The U.N. report cites the situation of the Awas Tingni Community as a case in which the necessary land demarcation is lacking.<sup>91</sup>

The state's obligation to secure indigenous peoples' rights goes beyond the duty to take steps aimed specifically at protecting against potential harm from particular development activities and at ensuring benefits from those activities when they occur. It also entails the obligation to identify the geographic boundaries of indigenous peoples' lands and use areas, and to provide specific legal recognition of the corresponding rights. As the Inter-American Commission on Human Rights has stated, because of their vulnerable conditions vis-a-vis majority populations, indigenous groups may require certain additional protections beyond those granted to all citizens, in order to bring about true equality among the nationals of a state.<sup>92</sup> The "prevention of discrimination, on the one hand,

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<sup>90</sup> *Id.* at para. 47 (citations omitted).

<sup>91</sup> *Id.* at para. 49.

<sup>92</sup> *See* Miskito Report, *supra* note 45, at 76.

and the implementation of special measures to protect minorities, on the other, are merely two aspects of the same problem: that of fully ensuring equal rights of all persons.”<sup>93</sup> The Inter-American Commission has found that states owe “special legal protections” to indigenous people for the preservation of their cultural identities.<sup>94</sup> Where indigenous peoples’ rights over lands and natural resources are concerned, such special protections include land demarcation and other official mechanisms to provide legal certainty for the rights within the domestic legal system.<sup>95</sup>

Given the typical centrality of lands and natural resources to the cultural and physical survival of indigenous peoples, and to their enjoyment of human rights in general, the obligation of states to provide the necessary legal certainty for indigenous peoples’ land and resource rights is *sui generis*. Measures to demarcate and otherwise safeguard indigenous peoples’ land rights are not just a matter of obligation under the American Convention on Human Rights. They also are required by the International Convention on the Elimination of All Forms of Racial Discrimination, to which Nicaragua is also a party. The United Nations Committee on the Elimination of Racial Discrimination, in interpreting the requirements of the fundamental norm of non-discrimination embraced by the Convention, has admonished states to take specific steps to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.”<sup>96</sup>

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<sup>93</sup> Report on Ecuador, *supra* note 43, at 106 (quoting F. Caportorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*) (U.N. Center for Human Rights, 1991), para. 585.

<sup>94</sup> See Miskito Report, *supra* note 45, at 81.

<sup>95</sup> See *id.*

<sup>96</sup> CERD General Recommendation XXIII, on indigenous peoples, adopted August 18, 1997, CERD/C51/Misc.13/Rev.4 (1997).

ILO Convention No. 169 articulates the nature and scope of the *sui generis* obligation to secure indigenous peoples' rights in lands and natural resources as follows:

Governments shall take steps necessary to identify the lands which [indigenous] peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession...Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.<sup>97</sup>

Similarly, the Proposed American Declaration on the Rights of Indigenous Peoples affirms that indigenous peoples “have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands.”<sup>98</sup> Additionally, the Proposed Declaration enjoins states to “give maximum priority to the demarcation and recognition of properties and areas of indigenous use.”<sup>99</sup>

Failure on the part of states to provide such demarcation and recognition of indigenous peoples' properties and use areas results in difficult and threatening conditions for indigenous peoples. Without secure and defined land tenure, indigenous peoples invariably find their lands and habitats being encroached upon by outsiders, they are vulnerable to the practices of government officials who may regard their land as property of the state, and they are deprived of the ability to effectively and freely develop their lands and resources on their own terms. For the state to allow such conditions of vulnerability to persist is to assume responsibility for a violation of the obligation to effectively secure indigenous peoples' rights in lands and natural resources. In rectifying this situation, the state must develop and implement the required measures, and it must do so in cooperation with the indigenous peoples concerned. The requirement that indigenous peoples have a

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<sup>97</sup> Convention No. 169, *supra* note 10, art. 14(2-3).

<sup>98</sup> Proposed American Declaration, *supra* note 24, art. XVIII.4.

<sup>99</sup> *Id.* art. XVIII.8.

substantial say in the development of measures to protect their rights over lands and resources follows from the rights of consultation and self-determination discussed earlier.

**V. The State is Obligated to Provide and Implement Effective Judicial Protections for Indigenous Peoples' Rights.**

International law requires that states provide prompt and effective judicial remedies for the protection of indigenous peoples' fundamental human rights, including rights to property and cultural integrity. The American Convention on Human Rights provides in article 8 that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, . . . for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." Additionally, article 25 of the Convention provides for the "right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention."

Professor Erica-Irene Daes, special rapporteur to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, has observed in a recent study that expropriation of indigenous peoples' lands and resources for national development is a growing problem and that "significant problems arise because of discriminatory laws and legal doctrines that are applied regarding indigenous peoples, their lands, and resources."<sup>100</sup> In the same study, Professor Daes comments:

In [some] settings,... there is sometimes no effective legal system to provide a remedy, or indigenous peoples cannot afford to pay for necessary professional legal representation, or they cannot use the language required by the courts or legal agencies, or they cannot travel to the courts or legal agencies, or they simply do not

know that legal remedies may be available. As with other human rights, the poverty, geographical remoteness and cultural and linguistic differences of indigenous peoples create severe impediments to the protection of their land, territorial and resource rights.<sup>101</sup>

It is thus critical for judicial systems to provide effective judicial protection with particular attention to the situation of indigenous peoples, given the predisposition of many governments to ignore indigenous peoples' concerns and the typical lack of access of indigenous peoples to political power and judicial authority. Judicial scrutiny of government actions regarding indigenous peoples' land and resource rights is particularly crucial in countries where governments traditionally have not been responsive to requests for protection of rights by indigenous peoples. When the court system of a country fails to fulfill the requirements of article 25, there are no guarantees that the government will be held accountable, or that it will have the incentive to improve its policies toward indigenous people. Without a fair and impartial tribunal, governments may continue to act in violation of human rights with impunity.

In all countries, even those with strong and stable democratic institutions, the effectiveness of the judiciary is of critical importance to indigenous groups seeking to protect their rights. In Canada, the United States, and Colombia, litigation of indigenous peoples' rights has been vital in bringing the government to a position of respect for those rights, and thus facilitating negotiated resolutions of indigenous peoples' claims. Access to judicial determination of their rights, and effective relief against violations, has been critical to the advances made by the indigenous peoples of those countries.

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<sup>100</sup> *U.N. indigenous land rights study, second progress report, supra* note 11, para. 115.

<sup>101</sup> *Id.* para. 52.

Chief Justice Lamer of the Canadian Supreme Court recognized this role of judicial protection when he stated, in *Delgamuukw*, that constitutional protection of indigenous rights “provides a solid . . . base upon which subsequent negotiations can take place. . . . Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of [the] Court, that we will achieve . . . the reconciliation of the pre-existence of aboriginal societies” with existing state structures.<sup>102</sup>

Simply creating new legislation or formal judicial procedures is not sufficient to effectively protect indigenous peoples’ property and cultural rights. States must faithfully apply the required protections in order to truly fulfill their obligations to indigenous peoples. Article 25 of the American Convention on Human Rights requires that States “ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; . . . develop the possibilities of judicial remedy; . . . [and] ensure that the competent authorities shall enforce such remedies when granted.”

An essential element of the effectiveness of judicial remedies is timeliness. The right to judicial protection requires that the courts adjudicate and decide cases expeditiously. The Inter-American Court on Human Rights has stated that: “A remedy which proves illusory because of the general conditions prevailing in the country or even in the particular circumstances of a given case, cannot be considered effective...for example . . . in any situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.”<sup>103</sup> The need for prompt judicial action is enhanced when, in

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<sup>102</sup> *Delgamuukw v. British Columbia* (1997), 3 S.C.R. 1010 para. 168 (S.C.C.) (Can.), para.186.

<sup>103</sup> *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87 of Oct. 6, 1987, Inter-Am.C.H.R. (Ser. A) No. 9 (1987), at para. 24. [hereinafter “*Judicial Guarantees in States of Emergency*”].

cases like the present, the alleged violations continue unabated and are irreparable. Even if they are forthcoming, judicial remedies are ineffective if they come too late.

The Inter-American Commission on Human Rights has adopted the following criteria to determine whether there has been unjustified delay in the administration of justice:

1. The complexity of the case.
2. The conduct of the damaged party in terms of cooperating with the process as it evolves.
3. How the investigative stage of the process unfolds.
4. The action of the judicial authorities.<sup>104</sup>

When a delay in rendering judgments cannot be excused for any of the above reasons, the delay is unwarranted. The Inter-American Commission on Human Rights has found unjustified delay in several cases where domestic courts have failed to provide remedies within a reasonable time.<sup>105</sup>

In many countries, the remedy of *amparo* is the principle mechanism for providing swift and effective judicial protection for all fundamental rights, requiring immediate action by the court to provide prompt remedies for any violations that may be occurring. Failure to respond quickly to a petition of *amparo*, and to provide appropriate protections against further violations of rights, denies the petitioner an effective remedy and judicial protection of fundamental rights.<sup>106</sup>

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<sup>104</sup> Case 11.218 (Nicaragua), Inter-Am C.H.R., Report 52/97, OEA/Ser.L/V/II.98, doc. 7, rev., at 721, para. 122 (1998).

<sup>105</sup> See e.g., Case 10.580 (Ecuador), Inter-Am.C.H.R., OEA/Ser.L/VII.91, doc.7 at 76, paras. 5-6 (1996) (Commission found failure of domestic court to respond to petition for over a year as evidence of unresponsiveness and unwarranted delay.)

<sup>106</sup> The Inter-American Court of Human Rights has stated that “amparo...is a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention.” The court adds that the writ of *amparo* is “among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited...and that

The Inter-American Court of Human Rights has stated:

States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art.8(1)), . . . According to this principle, the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking.<sup>107</sup>

Accordingly, the Court has found that “[a]ny state which tolerates circumstances or conditions that prevent individuals from having recourse to the legal remedies designed to protect their rights is consequently in violation of Article 1(1) of the Convention.”<sup>108</sup>

A state’s obligation to provide effective judicial remedies is not fulfilled simply by the existence of courts or formal procedures, or even by the ability to resort to the courts. Rather, a state must take affirmative steps to ensure that the remedies provided by the state through its courts are “truly effective in establishing whether there has been a violation of human rights and in providing redress.”<sup>109</sup>

Therefore, the duty to provide judicial protection for indigenous peoples’ human rights includes a duty to provide a judicial determination on the merits of their claims, and to provide a reasoned decision. The Inter-American Court on Human Rights has concluded: “. . . when it is

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serve, moreover, to preserve legality in a democratic society.” *Judicial Guarantees in States of Emergency*, *supra* note 103, at paras. 32.

<sup>107</sup> *Id.* paras. 27-28.

<sup>108</sup> *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights)*, Advisory Opinion OC-11/90 of August 10, 1990, Inter-Am.Ct.H.R. (Ser.A) No. 11 (1990), at para. 34.

<sup>109</sup> *Judicial Guarantees in States of Emergency*, *supra* note 103, at para. 24.

shown that remedies are denied for trivial reasons or without an examination of the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others . . . resort to those remedies becomes a senseless formality.”<sup>110</sup>

Where recourse to judicial remedy is denied on arbitrary procedural grounds, without an examination of the merits, the Inter-American Court of Human Rights has chosen not to ignore ongoing violations of constitutionally protected rights. As the Court has stated, “due process of law...includes the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination.”<sup>111</sup> Thus, to be effective, judicial protection of rights afforded indigenous peoples must include procedural mechanisms to allow indigenous peoples adequate opportunity to be heard and requires that the courts consider the full merits of their claims.

The foregoing establishes that states have an international obligation to provide effective judicial remedies and are therefore internationally responsible for the shortcomings of their judicial systems. According to the Inter-American Court on Human Rights: “[P]rotection of the law consists, fundamentally, of the remedies the law provides for the protection of the rights guaranteed by the Convention. The obligation to respect and guarantee such rights, . . . implies . . . the duty of the States Parties to organize the governmental apparatus . . . so that they are capable of juridically ensuring the free and full enjoyment of human rights.”<sup>112</sup>

In addition to a simple and swift remedy, article 25 of the American Convention on Human Rights includes a requirement that states will “ensure that the competent authorities shall enforce

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<sup>110</sup> Velásquez Rodríguez Case, *supra* note 77, at para. 68 (1988).

<sup>111</sup> *Judicial Guarantees in States of Emergency*, *supra* note 103, at para. 28.

<sup>112</sup> *Exceptions to the Exhaustion of Domestic Remedies*, *supra* note 108, at para. 23.

such remedies when granted.” The failure to ensure enforcement of judicial remedies illustrates that a state lacks adequate judicial protections for indigenous communities whose property and cultural rights are threatened. As observed in the land rights study of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, “[t]he existence of a fair constitutional and legal system, including a fair judicial system, able to guarantee due process of law, is an important framework for the success and implementation of land settlement processes.”<sup>113</sup> Thus, enforcement of judicial remedies is an essential element of a state’s obligation to provide fair judicial processes as it will lead to greater respect and protection of indigenous peoples’ fundamental rights.

### **Conclusion**

The present *Amicus Curiae* Brief, presented by the National Congress of American Indians (NCAI), demonstrates that states are obligated to protect indigenous peoples’ property rights over their traditional land and natural resources, as well as indigenous peoples’ rights to cultural integrity, self-determination, and judicial protection through appropriate and effective means. This Brief offers the following conclusions:

1. The lands and resources of an indigenous community are prerequisites for its cultural survival, and are property rights entitled to protection by Article 21 of the American Convention and other legal rules and principles of law. Indigenous communities’ legal systems, the international legal system, and the domestic legal systems of countries around the world recognize indigenous peoples’ land and resource rights based upon traditional land tenure and customary use and occupation. Evidence of indigenous peoples’ traditional and customary land tenure can be established by the oral testimony and other evidence presented by indigenous peoples and by expert academic opinions. The principle of non-

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<sup>113</sup> *U.N. indigenous land rights study, second progress report, supra* note 11, para. 124.

discrimination requires protection of indigenous peoples' enjoyment of their rights to traditional land and resources.

2. The American Convention and other sources of international law, particularly the International Covenant on Civil and Political Rights, require states to protect the cultural integrity of indigenous peoples. Indigenous peoples' land use patterns are inextricably linked with familial and social relations, religious practices, and the existence of indigenous communities as discrete social and cultural phenomena. States are obligated to develop effective systems that incorporate protections for the integrity of indigenous peoples' cultures, including those aspects related to lands and resources. Failure to provide adequate protection of an indigenous community's rights to its lands and resources impairs the community's cultural integrity, in violation of international law.
3. The provisions of international law that protect indigenous peoples' interests in land and natural resources obligate states to consult with indigenous groups concerning any proposed development activity that may affect those interests. Especially in light of the right of self-determination affirmed in article 1 of the International Covenant on Civil and Political rights, such consultations should be with the objective of reaching agreement with the indigenous groups concerned. The relevant international law obligates states to adopt measures, devised on the basis of consultations with the indigenous peoples concerned, to safeguard indigenous peoples' interests in relation to development activities on their lands and to ensure that indigenous peoples benefit from the development activities. These provisions of international law also obligate states to provide safeguards through establishment and application of legislation providing protections for indigenous peoples' fundamental rights.
4. The American Convention and other sources of international law obligate states to adopt the measures necessary to secure for indigenous peoples the effective enjoyment of their rights

in relation to lands and natural resources. This obligation includes the requirement that states demarcate, or otherwise identify, specific indigenous communities' properties and use areas and that they incorporate specific protections for the corresponding rights within the domestic legal and administrative systems.

5. State parties to the American Convention are required to provide judicial procedures to respond to indigenous peoples' claims regarding violations of their fundamental human rights, including their rights to their traditional lands and resources. States are also obligated to ensure that available judicial remedies are not mere formalities but that they are faithfully and effectively implemented to guarantee protection for indigenous peoples' fundamental rights.

## APPENDIX A

### Indigenous Peoples' Land and Resource Rights in Domestic Legal Systems

#### *a. Nicaragua*

Nicaragua gives formal legal recognition in its Constitution and in its national laws to the land and resource rights of indigenous peoples on the basis of their traditional and customary patterns of land and resource use and occupancy. These rights are recognized by the Political Constitution of Nicaragua and the Statute of Autonomy for the Atlantic Coastal Regions of Nicaragua.

The Political Constitution of Nicaragua provides as follows:

The State recognizes the existence of the indigenous peoples, who enjoy the rights, duties, and guarantees enshrined in the Constitution, and in particular those intended to maintain . . . the communal form of their lands and their enjoyment and use.<sup>114</sup>

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The State recognizes the communal forms of land ownership of the Atlantic Coastal Communities. It also recognizes the use and enjoyment of the waters and forests on their communal lands.<sup>115</sup>

...

The State guarantees these communities the enjoyment of their natural resources, the effectiveness of their forms of communal property and the free election of their authorities and representatives.<sup>116</sup>

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<sup>114</sup> Political Constitution of Nicaragua, art. 5.

<sup>115</sup> *Id.* art. 89.

<sup>116</sup> *Id.* art. 180.

In addition, based on these Constitutional articles, the Statute of Autonomy for the Atlantic Coastal Regions of Nicaragua defines communal property as follows: “The communal property consists of the land, waters, and forests that have traditionally belonged to the Atlantic Coastal Communities.”<sup>117</sup>

Accordingly, the Political Constitution and the Statute of Autonomy provide for property rights originating in the customary system of land tenure that has historically or traditionally existed among the indigenous communities of the Atlantic Coast.

*b. Other State Parties to the American Convention*

Nicaragua’s formal legal recognition of indigenous peoples’ land and resource rights in its Constitution and national laws is in accord with the domestic legal practices of other state parties to the American Convention, and of other state members of the OAS.

*1. Brazil*

Brazil amended its constitution in 1988 to accord greater protections to Indians and their lands.<sup>118</sup> Article 231 of the amended constitution recognizes the social organization, customs, languages, beliefs, and traditions of the indigenous peoples and their ancestral rights to lands they have traditionally occupied. This article provides that the state must demarcate indigenous lands, protect them, and assure that indigenous peoples are able to benefit from the lands. The Brazilian constitution guarantees to indigenous peoples permanent possession and exclusive use of their traditional lands - including soils and waters.<sup>119</sup> It also provides a broad array of protections including the prohibition of removal of indigenous peoples from their lands, freedom from outside exploitation of their lands, and preservation of the environmental resources necessary for their well-

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<sup>117</sup> Statute of Autonomy of the Atlantic Coastal Autonomous Regions of Nicaragua, Law 28 of 1987, art. 36.

<sup>118</sup> Constitution of the Federal Republic of Brazil, Title VIII.

<sup>119</sup> *Id.* art. 231, sec. 2.

being and cultural survival.<sup>120</sup> The constitution recognizes the right of indigenous peoples to benefit from natural resource activities on their lands while also protecting those lands from alienation. It further provides that indigenous peoples be allowed to develop according to their own usages, customs, and beliefs.<sup>121</sup>

Federal mandates implementing the constitutional provisions provide further protections for indigenous land rights. For instance, Brazil's Directive 24 authorizes FUNAI (Fundacao Nacional do Indio) to implement procedures to assist indigenous peoples in retaining the value of their land's natural resources through environmental degradation prevention measures, appropriate ecological technology, and educational programs. In addition, Brazilian courts have held as unconstitutional any state action, by statute or contract, that implies a reduction or alienation of indigenous lands.<sup>122</sup>

## 2. *Mexico*

The federal laws of Mexico also recognize indigenous peoples' land and resource rights and provide numerous protections for indigenous peoples' use, benefit, and management of communal lands. The Political Constitution of the United Mexican States of 1917, as amended, states specifically in article 27, section VII, that the law will protect the integrity of indigenous peoples' lands. This article also provides protections for collective uses of lands, forests, and waters and requires respect for the wishes of indigenous peoples in determining approaches for achieving the greatest benefit from the productive resources on their lands. Article 27 prohibits the sale of communal lands by political authorities and prevents them from authorizing others to take advantage of communal lands and resources. The same article guarantees expedited and honest justice on

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<sup>120</sup> *Id.* secs. 2, 4, and 6.

<sup>121</sup> *Id.* secs. 2, 3, and 5.

<sup>122</sup> See L. Roberto Barroso, "The Saga of Indigenous Peoples in Brazil: Constitution, Law and Policies", 7 *St. Thomas L.Rev.* (Summer, 1995), pp. 645, 660.

agrarian issues in order to achieve legal security for indigenous tenure in communal lands, and for the restitution of lands, forests, and waters to communities.

Indigenous peoples' land rights are also protected in other Mexican federal laws. Both the Agrarian and the Forestry Laws of 1992 require protection by authorities of indigenous peoples' lands.<sup>123</sup> The Agrarian Law provides that communal land properties are imprescriptible, and free from seizure, and further provides for community determination of the use and organizational structure of community lands.<sup>124</sup> The Forestry Law requires that the consent of indigenous communities be obtained prior to authorization of forestry concessions to third parties. In recognizing indigenous peoples as legitimate owners of forest resources, the Forestry Law provides that indigenous communities' rights be guaranteed by the federal government and that they be allowed to participate in the production, transformation, and commercialization of forest resources, while promoting the strengthening of their social and economic organization.<sup>125</sup>

Mexico's 1988 General Law of Ecological Equilibrium and Protection of the Environment guarantees in article 15, section XIII, the right of communities, including indigenous peoples, to the protection, preservation, sustainable use and benefit of natural resources. Other provisions of the law protect natural areas that are of importance to the culture and identity of indigenous peoples (article 45). It also requires recognition of their opinions, consideration of their traditional biological knowledge, and promotion of their participation in the establishment, administration, and management of protected natural areas (articles 47, 58, 78, and 79). This law provides for protection of indigenous lands (article 59), gives indigenous peoples preference in the granting of concessions

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<sup>123</sup> Mexico's Agrarian Law of 1992, art. 106, and the Forestry Law of 1992, art. 19.

<sup>124</sup> Mexico's Agrarian Law of 1992, arts. 74, 99 and 100.

<sup>125</sup> Mexico's Forestry Law of 1992, art. 19 and Bis 4.

and permits for activities in protected areas (article 64), and provides for management by indigenous peoples through negotiated agreements with the government.

### 3. *Chile*

In 1993, Chile's legislative authority established a law protecting indigenous peoples' land rights<sup>126</sup>. This law includes provisions recognizing indigenous communities' rights in lands which they actually occupy or possess, and it offers many of the same guarantees and protections provided by the Brazilian and Mexican laws. The Chilean law in article 13 provides that the indigenous peoples' lands, as required by national interest, will enjoy the protection of this law and will not be transferred, obstructed, taxed, nor acquired by prescription, except between communities or indigenous members of the same ethnic group. Articles 18 and 19 of this law recognize the norms of collective rights to lands as established by the customs of each ethnic group and recognize the right of indigenous peoples to engage in collective activities on lands of cultural significance. The affected indigenous communities may request a voluntary transfer of real estate title to these culturally significant areas.

Articles 20 through 22 create a Fund for Indigenous Lands and Waters administered by a corporation established under this law. The corporation may grant subsidies for the acquisition of lands. Articles 26 and 27 discuss the establishment of Indigenous Development Areas, in which the Ministry of Planning and Cooperation, at the proposal of the corporation, may establish territorial spaces within the administrative structure of the state focused on benefiting the harmonious development of the indigenous peoples and their communities. Further articles of the law provide

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<sup>126</sup> See *Establece Normas sobre Protección, Fomento y Desarrollo de los Indígenas y Crea la Corporación Nacional de Desarrollo Indígena* (Ley No. 19.253).

for indigenous peoples' participation in establishment and planning regarding protected wilderness areas, as well as in the decision-making processes that affect their rights.<sup>127</sup>

#### 4. *Bolivia*

The Bolivian Constitution of 1967, as amended in 1994, in article 171 guarantees and protects the social, economic and cultural rights of indigenous peoples including rights related to their identity, values, languages, customs, institutions, and customary land and resource use. In addition to this constitutional provision, there are several other laws specifically protecting indigenous peoples' land rights. Supreme Resolution 205862 of February 17<sup>th</sup>, 1989, declares the national and social necessity of recognition, assignment, and tenure of indigenous territorial areas in order to guarantee their full economic and cultural development. Indigenous peoples' lands have been demarcated and recognized through various Supreme Decrees.<sup>128</sup>

Bolivian Law 1257, in article 14, ratifies ILO Convention No. 169 recognizing the right of indigenous peoples' ownership and possession of lands. Law 1715 of the National Service of Agrarian Reform reaffirms the constitutional provisions of article 171 and guarantees the rights of indigenous peoples to their "Tierras Comunitarias de Origen" (Original Communal Lands) and to the sustainable use of renewable natural resources. Law 1715 is also intended to protect the integrity of indigenous peoples' areas, giving preference to indigenous peoples' rights on their lands over those of others in cases of overlapping or conflicting rights.<sup>129</sup> In addition, the Bolivian Forestry Law

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<sup>127</sup> *Id.* arts. 27, 34, and 35.

<sup>128</sup> See Secretaria de Asuntos Etnicos de Genero y Generacionales - Programa Indigena, Organización Internacional del Trabajo, Oficina Regional para América Latina y el Caribe-Lima-Perú, Proyecto BOL/92/102, *Reforma de la Constitución Política de Bolivia en Relación con los Pueblos Indígenas-Propuesta de Articulado sobre Comunidades y Pueblos Indígenas para el Anteproyecto de Ley de Tierras*, Informe de Misión, Raúl Arango Ochoa, Santafé de Bogotá, Colombia, noviembre de 1994, at 5 (hereinafter "OIT, Proyecto BOL/92/102").

<sup>129</sup> Bolivian Law 1715, Paragraph IV, Third of the Temporary provisions, and Paragraph I, Second of the Final provisions.

recognizes the rights of indigenous peoples to the forests on their lands and prohibits the State from granting forestry concessions in areas where indigenous peoples are living. This law also gives priority to indigenous communities for grants of forestry concessions in their areas and regards the communities as the resource managers in development of management plans for forestry operations.<sup>130</sup>

## 5. *Colombia*

The 1991 Constitution of Colombia provides indigenous peoples with distinct constitutional status. Indigenous peoples form a special constituency for the election of central government representatives.<sup>131</sup> They have the right to self-government according to their customs and traditions within their lands, including the administration of justice.<sup>132</sup> Cultural, social, and economic integrity is protected generally by article 330 of the Constitution. The Constitutional Court has recognized territory as a necessary condition for cultural integrity, and indigenous peoples' land rights are determined in light of ensuring that integrity.<sup>133</sup> The constitution provides for recognition of indigenous peoples' lands, and guarantees their inalienable and imprescriptible nature.<sup>134</sup>

The Constitutional Court has held that the constitutional recognition of indigenous land imposes a legal obligation on the State to demarcate and protect the lands of particular indigenous communities. "The fundamental right of ethnic groups to collective property implicitly contains,

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<sup>130</sup> OIT, Proyecto BOL/92/102, *supra* note 128, at 16-17.

<sup>131</sup> *See* Political Constitution of Colombia, arts. 171, 176.

<sup>132</sup> *Id.* arts. 330, 246.

<sup>133</sup> *See* Constitutional Court of Colombia Judgment No. T-188 (1993) (Case of Crispín Laoza) "The right to collective property ... is essential for the cultures and spiritual values of aboriginal peoples ... the special relationship indigenous communities have with the land they occupy [stands out] not only because it is their principle means of subsistence, but because it is an integral element of the cosmology and religions of aboriginal peoples. .. Without this right, the rights to culture and autonomy are merely formal."

<sup>134</sup> *See* Political Constitution of Colombia, art. 63.

given the constitutional protection of the principle of ethnic and cultural diversity, a right to the creation of reserves under the control of the indigenous communities.”<sup>135</sup>

Under article 330, indigenous peoples are also guaranteed the right to be consulted regarding natural resource development or exploitation in their territories. For this right to be honored, the Constitutional Court has determined that the consultation must be broad and meaningful. It must include full disclosure of the proposed activities on the land and of the possible consequences of that activity. The communities must also have ample opportunity to discuss the plans among their members and to provide a meaningful response.<sup>136</sup> Under Article 33 the state is bound to take measures to protect against detrimental effects brought to their attention by the community during the consultation period. This article provides that the exploitation of natural resources in indigenous peoples’ territories will not be carried out so as to derogate from the cultural, social, and economic integrity of the indigenous communities.<sup>137</sup>

The need for effective judicial proceeding to protect indigenous peoples’ rights to culture and land have also been recognized in Colombia. Different legal procedures and remedies exist for the vindication of fundamental rights (*tutela*), and collectively shared interests (*acción popular*). Although a *tutela* action is generally only available for individual rights, indigenous communities have been permitted to bring *tutela* actions to protect their land and cultural rights as fundamental rights despite the collective nature of those rights.

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<sup>135</sup> Judgment T-188 (1993), *supra* note 133.

<sup>136</sup> See Constitutional Court of Colombia, Judgment SU-039 (1997) (Case of Comunidad U’wa).

<sup>137</sup> See Political Constitution of Colombia, art. 33.

## 6. *Ecuador*

The new Ecuadorian Constitution of June, 1998 contains several comprehensive provisions regarding indigenous peoples' rights. In Title III, article 84, of the constitution, Ecuador recognizes and guarantees to indigenous peoples collective rights to maintain and develop their cultural and economic traditions, conserve community lands as imprescriptible property (protected from seizure and exempt from taxation), and maintain possession of ancestral community lands. Under this article, indigenous peoples are guaranteed the right to participate in the use, administration, and conservation of renewable natural resources found on their lands, be consulted in programs of non-renewable resource exploration and exploitation, and be ensured of their participation in the benefits of these activities. Indigenous peoples may also receive indemnification for the socio-environmental damage caused by resource extraction activities.

Article 84 of the Constitution further commits the State to conserve and promote indigenous peoples' practices of biodiversity management, traditional forms of social organization, and collective intellectual property. Indigenous peoples are protected from displacement from their lands and are guaranteed the right to participate, with adequate financing from the state, in the formulation of priorities in plans and projects for the development and improvement of their economic and social conditions. The law also guarantees their right to participate in official legislative bodies.

Article 224 of the Ecuadoran Constitution provides for indigenous community territorial districts to be established by law. Within these territorial districts, the Constitution envisions a gradual development of autonomous governing bodies. The 1994 Codification of the Law of Agricultural Development also recognizes indigenous peoples' rights to collective and individual ownership over traditional lands. Under this law, the State commits to protect and legalize the

ancestral lands of indigenous peoples as well as to consider the cultural impact water concessions will have on indigenous groups.<sup>138</sup>

*c. State members of the OAS not parties to the Convention*

*1. Canada*

Canada provides another example of an OAS member state that recognizes indigenous peoples' rights in their traditional lands. The Canadian government has negotiated numerous bilateral agreements and settlements with aboriginal groups which include the recognition of indigenous land and resource rights in large areas of land. These rights have been well established in Canadian law for over thirty years, since the Supreme Court of Canada decided the landmark case of *Calder v. Attorney General of British Columbia*.<sup>139</sup>

From early colonial times the Canadian government made efforts to demarcate the boundaries of lands occupied by indigenous peoples. These lands fell into three categories: "General Lands", to which the colonial government had obtained title from the indigenous group, and which then became available for settlement; "Indian Territories", which were open to all native peoples for continuing occupation or resettlement; and "Reserves", which were permanently attached to a particular group of native people.<sup>140</sup> Where there is a dispute regarding whether the status of particular lands has changed from Indian Territories to General Lands, there is a presumption in favor of aboriginal title:

“ . . . where a group asserts aboriginal title to lands currently in their possession, it will be presumed in law that the lands still form part of the Indian Territories, in the

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<sup>138</sup> Codificación de la Ley de Desarrollo Agrario de Ecuador, art. 38, 43.

<sup>139</sup> S.C.R. 313 (1973). For an analysis of recent efforts by members of the Court to define the source of aboriginal title, see Kent McNeil, *The Meaning of Aboriginal Title*, in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Michael Ash ed., 1997).

<sup>140</sup> See Brian Slattery, "Understanding Aboriginal Rights", 66 *Can. B. Rev.* (1987) 727, at 743.

absence of proof to the contrary. It is for the party submitting that the lands have been converted to General Lands to establish the fact.”<sup>141</sup>

The presumption in favor of aboriginal title likewise operates where claimants can show historic occupation of lands.<sup>142</sup>

In the Canadian legal system, the common law doctrine of aboriginal title has developed as a *sui generis* right belonging to Canada’s indigenous peoples with several distinct attributes. First, the right preexists the colonizers and survives their coming.<sup>143</sup> Second, the State owes a fiduciary duty of protection to indigenous peoples regarding land sold or managed on their behalf and must compensate them for any mismanagement.<sup>144</sup> Third, rather than impose the legal conception of ownership drawn from the larger dominant society or from British common law, under which title inheres in the individual, Canadian common law recognizes that aboriginal title is collective and inheres in the group, with individual use determined internally by the group according to its traditional land use system.<sup>145</sup> The standard of proof necessary to establish aboriginal title is favorable to indigenous groups who need prove only historic occupation and the presence of an organized society.<sup>146</sup>

Furthermore, the fiduciary duty of the Crown creates a right to consultation in the event that the State proposes to infringe aboriginal title. In *Delgamuukw v. British Columbia*, Chief Justice

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<sup>141</sup> *Id.* at 761.

<sup>142</sup> *See id.*

<sup>143</sup> *See Guerin v. the Queen*, 2 S.C.R. 335, 336 (1984). *See also* Slattery, *supra* note 140, at 729.

<sup>144</sup> *See Guerin supra* note 143, at 336.

<sup>145</sup> *See Slattery, supra* note 140, at 745.

<sup>146</sup> *See McNeil, supra* note 139, for analysis of recent judicial definitions of the standard of proof necessary to establish aboriginal title.

Lamer held that “[t]here is always a duty of consultation ... in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue ... Some cases may even require the full consent of an aboriginal nation.”<sup>147</sup>

The protections afforded to indigenous peoples’ land and resource rights are buttressed in the Canadian legal system by the Constitution of 1982, which recognizes and affirms the “existing aboriginal and treaty rights of the aboriginal peoples of Canada.”<sup>148</sup> This legal guarantee encompasses aboriginal title as an enforceable substantive right and thereby limits legislative acts that would restrict or extinguish indigenous peoples’ aboriginal property rights. This guarantee is not subject to section 33 of the Canadian Charter of Rights and Freedoms, which allows a legislative override of other provisions,<sup>149</sup> nor is it subject to limitation by any other rights granted by the Charter.<sup>150</sup> Section 52 declares the Constitution the “Supreme Law of Canada,” thereby constitutionalizing aboriginal rights, including the doctrine of aboriginal title.<sup>151</sup>

These Canadian constitutional guarantees prevent provincial and federal legislatures from arbitrarily depriving indigenous peoples in Canada of their aboriginal rights.<sup>152</sup> In a landmark Canadian Supreme Court decision of the last decade, *Sparrow v. R.*,<sup>153</sup> the Court, interpreting section

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<sup>147</sup> *Delgamuukw v. British Columbia* (1997), 3 S.C.R. 1010 (S.C.C.)(Can.), per Lamer C.J. and Cory, McLachlin and Major JJ.

<sup>148</sup> Section 35, Schedule B of the Canada Act, 1982.

<sup>149</sup> See *Federal Indian Law*, *supra* note 1, at 981.

<sup>150</sup> See Thomas Isaac, “The Constitution Act, 1982 and the Constitutionalization of Aboriginal Self-Government in Canada: Cree-Nas-kapo (of Quebec) Act”, *Can. Nat. L. Rep.* 1 (1991).

<sup>151</sup> *Id.*

<sup>152</sup> See Slattery, *supra* note 140, at 740-741.

<sup>153</sup> *Sparrow v. R* (1990), 2 S.C.R. 1075 (S.C.C.)(Can.).

35(1) of the 1982 Constitution, adopted a strict scrutiny standard of review of legislative acts that might impact existing aboriginal rights.

Canadian officials have negotiated a number of agreements on aboriginal land claims with indigenous peoples beginning in 1975 with the settlement of several land claims in Quebec. Under the James Bay and Northern Quebec Agreements, indigenous groups' village lands were set aside as reserves, and the groups retained hunting and fishing rights. Cree and Inuit peoples were organized as corporations and given funding and title to extensive lands. The Canadian government has also reached land settlements with northern indigenous groups, such as the Inuvialuit of the Western Arctic and the Yukon Indians. These settlements confirmed indigenous peoples' effective ownership of large land areas and provided cash settlements. In the most recent settlement, the 1998 agreement between the government and the Nisga'a people of British Columbia, which was recently ratified by Canada's Parliament, the Nisga'a received confirmed title to over 1,900 square kilometers of land in the Nass River Valley of British Columbia and a U.S. \$190 million cash settlement, as compensation for the surrender of rights to certain other aboriginal lands. The agreement also provides for the establishment of a tribal government.<sup>154</sup>

The Canadian government has negotiated these settlements regardless of whether the indigenous groups have treaties, since aboriginal rights have an independent basis in Canadian common law. In reaching these settlements, in addition to offering land rights and financial compensation, the government has included recognition of hunting and trapping rights, resource management authority, revenue sharing, taxation powers, and the option of participation by Canada's indigenous peoples in local and federal government.<sup>155</sup>

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<sup>154</sup> See *Federal Indian Law*, *supra* note 1, at 987-988.

<sup>155</sup> See *Id.*

## 2. *United States of America*

Like Canada, the United States provides another example of an OAS member state with extensive jurisprudence and laws protecting indigenous peoples' land and resource rights in traditionally occupied lands. In the United States, Indian tribes' recognized land and resource rights in their lands amount to 52.5 million acres held in trust. These Indian trust lands are inalienable and not subject to taxation by the federal government. The interest that Indian tribes hold in their land and resources represents a unique form of property right in the United States legal system. Indigenous property is a form of "ownership in common;" it is not analogous to other collective forms of ownership known to anglo-american private property law because an individual member of an indigenous group has no alienable or inheritable interest in the communal holding, other than that which may exist within the land tenure system of the indigenous community concerned.<sup>156</sup> Rather, indigenous land and resource interests are held in common for the benefit of community members. Under United States laws, the governmental processes and legal systems of indigenous peoples have the authority to recognize individual property interests of individual members of the group, property interests controlled by clans and families under traditional customary tenure rules, and tribally-controlled property interests. Under United States statutes tribes are authorized to lease and develop tribal lands for mining,<sup>157</sup> for oil and gas,<sup>158</sup> for grazing,<sup>159</sup> and for farming.<sup>160</sup>

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<sup>156</sup> See *United States v. Jim*, 409 U.S. 80 (1972); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977).

<sup>157</sup> See 25 U.S.C. § 3962.

<sup>158</sup> See 25 U.S.C. § 398.

<sup>159</sup> See 25 U.S.C. § 397.

<sup>160</sup> See 25 U.S.C. §§ 402-402a.

In terms of judicial protection of indigenous peoples' land and resource rights in the U.S. legal system, the United States Supreme Court long ago stated that indigenous peoples' rights in land and resources are "as sacred as the fee-simple title of the whites."<sup>161</sup> In *Oneida Indian Nation v. County of Oneida*,<sup>162</sup> a 1974 decision, the United States Supreme Court stated:

It very early became accepted doctrine in this court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign - first the discovering European nation and later the original States and the United States - a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, would be terminated only by sovereign act.<sup>163</sup>

Through the practice of treaty-making, the United States recognized Indian land and resource rights in traditional lands. This practice is represented by the first treaty the United States entered into with an Indian tribe: "The United States does engage to guarantee to the aforesaid nation of Delawares and their heirs, all their territorial rights in the fullest and most ample manner."<sup>164</sup> Today, some 300-plus treaties recognize indigenous land and resource rights and form the legal basis for the extensive system of Indian-held lands in the United States. Constitutionally, these treaty lands cannot be taken from tribes without payment of just compensation by the United States.<sup>165</sup>

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<sup>161</sup> *Mitchell v. United States*, 34 U.S. (9 Pet.) 711, 743 (1835).

<sup>162</sup> 414 U.S. 661 (1974).

<sup>163</sup> *Id.* at 667.

<sup>164</sup> Treaty with the Delawares, Sept. 17, 1778, art. 6, 7 Stat. 13, 14.

<sup>165</sup> *See Sioux Tribe v. United States*, 316 U.S. 317, 326 (1942) (citing *Shoshone Tribe v. United States*, 299 U.S. 476 (1937)).

As to lands held traditionally by indigenous peoples without formal recognition by the United States (unrecognized aboriginal title),<sup>166</sup> indigenous peoples' legal interests in such lands may be extinguished without compensation under U.S. law. The United States legal system, nevertheless, has generally provided some compensation for the taking of even this type of Indian right to land and resources.<sup>167</sup> The Indian Claims Commission Act, created to settle aboriginal land claims against the federal government, required compensation for extinguishment of Indian title.<sup>168</sup> In the Alaska Native Claims Settlement Act,<sup>169</sup> Alaska Natives, in return for voluntarily relinquishing their claims to aboriginal title in Alaska, agreed to land selection rights to forty-four million acres along with money payments totaling \$962.5 million. Similar land settlement acts such as the Maine Indian Claims Settlement Act,<sup>170</sup> Florida Indian Land Claims Settlement Act,<sup>171</sup> and the Connecticut Indian Land Claims Settlement Act<sup>172</sup>, have continued the legislative practice of recognizing indigenous land and resource rights.

*d. States in Other Regions of the World*

As demonstrated by the foregoing examples, a pattern of domestic legal practices among member states of the Organization of American States recognizes, affirms and protects indigenous peoples' traditional land and resource tenure. This practice is not confined to states in the western

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<sup>166</sup> See *Tee-Hit-Ton v. United States*, 348 U.S. 272, 285 (1955).

<sup>167</sup> See Felix Cohen, "Original Indian Title", 32 *Minnesota Law Review* 28 (1947), p. 29-30.

<sup>168</sup> See 25 U.S.C. §§ 70 to 70v-3.

<sup>169</sup> 43 U.S.C.A. §§ 1601-1628.

<sup>170</sup> 25 U.S.C.A. § 1721, et seq.

<sup>171</sup> 25 U.S.C.A. § 1741 et seq.

<sup>172</sup> 25 U.S.C.A. § 1754 et seq.

hemisphere. In most other parts of the world, states have developed impressive legal regimes for the protection of indigenous peoples' land and resource rights.

### 1. *Australia*

Australia provides an example of a legal system that has come to uphold the land and resource rights of indigenous peoples on the basis of traditional land tenure. Like a number of other domestic legal systems that derive from British common law tradition, Australian legal doctrine now recognizes that its indigenous peoples possess “aboriginal rights” to lands. These rights exist by virtue of historical patterns of use or occupancy and may give rise to a level of legal entitlement in the nature of full ownership referred to as “native” or “aboriginal title.”<sup>173</sup> Apart from such native or aboriginal title in its fullest sense, aboriginal land and resource rights may exist in the form of free-standing rights to fish, hunt, gather, or otherwise use resources or have access to lands.<sup>174</sup> In the High Court of Australia's decision in the case of *Mabo [No. 2] v. Queensland*,<sup>175</sup> Justice Brennan explained the basis for aboriginal land and resource rights, particularly native title, as follows:

Native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. . . . [N]ative title . . . may be

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<sup>173</sup> See, e.g., *Mabo v. Queensland [No.2]* (1992), 175 C.L.R. 1, 69 (Aust.); *Delgamuukw v. British Columbia*, 153 D.L.R. (4<sup>th</sup>) 193 (S.C.C.) (Can. 1997); *R. v. Van Der Peet*, 137 D.L.R. (4<sup>th</sup>) 289, 109 C.C.C. (3d) 1 (S.C.C.) (Can.1996); *U.S. v. Shoshone Tribe of Indians*, 340 U.S. 111, 116-118 (1938); *Amodu Tijani v. Secretary, Southern Nigeria*, 2 A.C. 399, 3 N.L.R. 21 (P.C. 1921); *Adong bin Kuwau v. Kerajaan Johor* 1 M.L.J. 418 (H.D. (Malaysia 1997)). See generally Kent McNeil, *Common Law Aboriginal Title* (Oxford: Oxford University Press, 1984); Felix S. Cohen, *Original Indian Title*, *supra* note 167; Slattery, *supra* note 140.

<sup>174</sup> See, e.g., *R. v. Adams*, 110 C.C.C. (3d) 97, 32 W.C.B. (2d) 91 (S.C.C.) (Can. 1996) (Mohawks of St. Regis Reserve found to have right to fish in waters not within the reserve); *Antoine v. Washington*, 420 U.S. 194 (1975) (upholding off-reservation right to fish). See also *Amoudou Tijani v. Secretary, Southern Nigeria*, 2 A.C. 399 (P.C. 1921) (holding native rights of a tribe include usufructuary occupation or right).

<sup>175</sup> *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1 (Aust.).

protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence . . . whether possessed by a community, a group or an individual. . . . Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.<sup>176</sup>

The Australian High Court cited specifically to contemporary international legal practice in upholding the rights of indigenous peoples to protection of their land and resource rights under domestic law:

. . . Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the United Nations Optional Protocol to the International Covenant on Civil and Political Rights (see Communication 78/1980 in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol. 2, p. 23) brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily

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<sup>176</sup> *Id.* at 58, 61.

conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.<sup>177</sup>

Several developments preceded the Mabo case. The 1971 Supreme Court of the Northern Territory case, *Milirrpum v. Nabalco Pty. Ltd.*,<sup>178</sup> was one important marker in the Australian government's move towards recognition of indigenous peoples' land and resource rights. In that case a dispute arose over mining leases granted by the federal government in the Gove Peninsula of the Northern Territory when the government failed to consult with the Yirrkala aboriginal people who had traditionally occupied those lands. Although the court in *Milirrpum* rejected aboriginal title claims in that case, the government nonetheless decided to reevaluate its position and declared a moratorium on mineral exploration licenses in the Northern Territory aboriginal reserve. Several major reforms followed allowing for the demarcation and transfer of Northern Territory tribal lands to aboriginal ownership. In one case, special legislation allowed 1,250 square miles of land to be transferred to a particular tribe, the Gurendii Tribe.

In 1976, Australia enacted an Aboriginal Land Rights Act that recognized traditional claims to land in the Northern Territory based on spiritual ties, a ground that had been previously rejected in the *Milirrpum* case. The legislation established a way for aboriginal peoples to identify and acquire

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<sup>177</sup> *Id.* at 42.

<sup>178</sup> *Milirrpum v. Nabalco Pty. Ltd.*, 17 F.L.R. 141 (N.T.Sup.Ct. 1971).

land in fee simple through a system of land trusts. These land trusts are directed by local elders appointed by the Minister of Aboriginal Affairs from lists submitted by an Aboriginal Land Council. The Councils are representative bodies of Aboriginal people. They negotiate with mineral companies, governments, and others, provide legal and other services, and are supported by mineral royalties.

The 1976 Act also provided for an Aboriginal Land Commissioner to decide aboriginal land claims. The Commissioner holds extensive hearings on the claims and then makes recommendations to the Minister of Aboriginal Affairs who makes the final decision. The Act makes large areas of unalienated Crown land (about 26 percent of the Northern Territory) available to be claimed by aboriginal groups who can demonstrate their ownership according to aboriginal law. However this act did not address the needs of 80 percent of the aboriginal population - those who derived no benefits from the 1976 Act because their homelands were already privately owned. To address the needs of this group, the Land Acquisition Act was passed in 1981, allowing the Commonwealth to compel the sale of land to meet native claims.

The Australian High Court's 1992 decision in *Mabo* prompted further land rights legislation for Australia's indigenous peoples. Following a lengthy and acrimonious political debate, the federal government passed the Native Title Act in 1993. The Native Title Act is Commonwealth legislation, but many states and territories also passed legislation to govern native title claims pursuant to the provisions of this Act. The main purposes of the Act are:

- (i) to recognize and protect native title, (ii) to establish and set standards to deal with future issues involving native title, (iii) to establish a mechanism to determine native title claims, and (iv) to validate past acts that native title has now invalidated.

Native title is defined by the Act where:

(a) the rights and interests [in the land] are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognized by the common law of Australia.

Another important aspect of the Native Title Act is that it establishes an “arbitral body” - the National Native Title Tribunal - where claimants can pursue their land claims. Claimants can also pursue land claims at a state or territory arbitration tribunal established under the standards set by the Native Title Act. Additionally, the Native Title Act provides procedural safeguards so that Native title holders are guaranteed certain procedural rights such as notification and compensation if their native title is extinguished by the government.

Amendments to the Native Title Act in 1998 allowing unilateral government extinguishment of native land rights drew strenuous criticism from a broad spectrum of indigenous Australians, and from the United Nations Committee on the Elimination of Racial Discrimination. That criticism demonstrates the depth and strength of international recognition and support for aboriginal rights to communal lands. The United Nations Committee on the Elimination of Racial Discrimination adopted a decision in which it described the Australian Parliament’s Native Title Amendment Act as an “acute impairment of the rights of its native communities”.<sup>179</sup> The Committee further confirmed its support of indigenous peoples’ land and resource rights by calling upon the Australian Government to suspend the implementation of the Native Title Amendment Act, which in some cases simplifies extinguishment of native title, and to respond to the Committee’s concerns with the

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<sup>179</sup> *Australia Presents Report on Aboriginal Rights to United Nations Committee on Elimination of Racial Discrimination*, U.N. Doc. HR/CERD/99/21 (1999).

“utmost urgency”.<sup>180</sup> The Committee affirmed that indigenous peoples’ land rights are recognized in international law, and that the international community now understands that doctrines of dispossession are illegitimate and racist.<sup>181</sup> The Committee further expressed its concern that the Native Title Amendment Act violates Australia’s responsibilities as a signatory of the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>182</sup>

## 2. Malaysia

The increasing recognition of indigenous peoples’ land and resource rights in the domestic legal systems of states throughout the world is further evidenced by recent judicial decisions and legislation in Asian countries. In 1998, the Malaysia Court of Appeal, in *Adong bin Kuwau v. State of Johor*, upheld a trial judgment that awarded compensation for the loss of 53,273 acres of ancestral lands in the southern state of Johor to the Jakun tribe, an Orang Asli population in peninsular Malaysia.<sup>183</sup> The state government had taken the land and the Public Utilities Board of Singapore had constructed a dam to supply water to both Johor and Singapore.

The Malaysian Federal Constitution of 1957 gives the national government legislative jurisdiction over the “welfare of the aborigines,”<sup>184</sup> and provides for the “protection, well-being and

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<sup>180</sup> *Committee on Elimination of Racial Discrimination Urges Australia to Suspend Implementation of Amended Act on Aboriginal Land Rights*, U.N. Doc. HR/CERD/99/29 (1999) (hereinafter ACERD Urges Australia to Suspend”).

<sup>181</sup> *Committee on Elimination of Racial Discrimination Concludes Consideration of Situation in Australia*, U.N. Doc. HR/CERD/99/22 (1999).

<sup>182</sup> *CERD Urges Australia to Suspend*, *supra* note 180. See also, *Decision of August 16 reaffirming March decisions and expressing concern over lack of positive Australian action: Committee on Elimination of Racial Discrimination Examines situation in Australia, Adopts Decision*, U.N. Doc. HR/CERD/99/52 (1999).

<sup>183</sup> The trial judgment in *Adong bin Kuwau v. Johor* is reported at 1 Malayan Law Journal 418-436 (1997). The reasons for judgment of Gopal Sri Ram, J.C.A. for the three person panel in the Court of Appeal, were issued 24 February, 1998.

<sup>184</sup> Ninth Schedule, List 1, Section 16.

advancement of the aboriginal peoples of the Federation (including the reservation of land) . . .”<sup>185</sup>

Legislative measures to “protect” the Orang Asli date to 1939. The current legislation, the *Aboriginal Peoples Act*, dates from 1954, and was revised in 1967 and 1974. The Department of the Aboriginal Peoples’ Affairs has existed since 1954. Under the Malaysian legal system, certain lands are reserved for aboriginal peoples and they have recognized rights to hunt and gather over additional lands.

The trial judge in the *Adong bin Kuwau* case acknowledged that a renewed recognition of aboriginal rights had occurred in legal systems throughout the world in recent years:

Of late, aboriginal peoples’ land rights -- or generally what is internationally known as native peoples’ rights -- gained much recognition after the Second World War, with the establishment of the United Nations of which the UN Charter guarantees certain fundamental rights. Native rights have been greatly expounded on by the courts in Canada, New Zealand and Australia restating the colonial laws imposed on native rights over their lands. It is worth noting that these native peoples’ traditional land rights are now firmly entrenched in . . . Canada, New Zealand and Australia - where special statutes have been enacted or tribunals set up in order for natives to claim a right over their traditional lands.<sup>186</sup>

In his decision, the trial judge quoted “the landmark case of *Calder*” from Canada to support his judgment: “. . . when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. . .” Consequently, the trial judge

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<sup>185</sup> Section 8(5)(c).

<sup>186</sup> *Adong bin Kuwau*, *supra* note 183.

ruled that the Jakun Tribe had the “right to continue to live on their lands, as their forefathers had lived. . .”<sup>187</sup>

The trial judge also concluded that the Jakun had proprietary rights over their lands, but no alienable interest in the land itself. The proprietary rights were protected by Article 13 of the Federal Constitution, which required the payment of “adequate compensation” for any taking of property. This judgment was upheld by the Malaysia Court of Appeal.

### 3. *Philippines*

The Philippines provide another example of a state legal system that protects indigenous peoples’ traditionally-occupied lands. The Constitution of the Philippines recognizes “indigenous cultural communities” and rights to “ancestral lands” and “ancestral domain.” Article 12, Section 5 provides:

The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being.

The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.<sup>188</sup>

To implement the provisions on indigenous peoples’ “ancestral domain” rights, the Philippine congress passed the *Indigenous Peoples Right Act* in October, 1997.<sup>189</sup> The *IPRA* establishes a seven person *National Commission on Indigenous Peoples (NCIP)*, replacing two earlier bodies concerned with “cultural minorities.” By section 38, the *NCIP* is “the primary

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<sup>187</sup> *Id.*

<sup>188</sup> *See* Constitution of the Philippines, art.12, sec. 5.

<sup>189</sup> *See* Republic Act 8371.

government agency responsible for the formulation and implementation of policies, plans and programs to promote and protect the rights and well-being of the ICCs/IPs [Indigenous Cultural Communities/Indigenous Peoples] and the recognition of their ancestral domains as well as their rights thereto.”

Section 44(e) empowers the *NCIP* to “issue certificate of ancestral land/domain title.” This legislative power requires the Commission to establish a definition of ancestral land/domain title and to make a determination on extinguishment, as section 56 provides that existing property rights in third parties will be “recognized and respected”. Under its quasi-judicial powers, the *NCIP* can resolve disputes between indigenous and non-indigenous claimants, and between competing claims of indigenous people. It also can “take appropriate legal action” for the cancellation of titles that have been granted illegally, which is a common problem in many parts of the country.

This legislation allows the well-established land law system of the Cordillera tribes in central Luzon to gain recognition under Philippine law. The legislation also inaugurates the process of stabilizing indigenous people’s land rights in other parts of the country where settlers, business operations and government actions continue to usurp aboriginal ancestral lands.

*e. Conclusion*

As this brief sampling of the domestic legal practice of state parties to the American Convention and of states in other parts of the world demonstrates, a pattern of state practice exists that recognizes and affirms indigenous peoples’ traditional systems of land tenure as creating rights that are entitled to substantive protection as a matter of law. Consistent with developments at the international level, this pattern of domestic legal practice confirms that indigenous peoples’ rights in land and resources are essential to the cultural integrity and survival of indigenous peoples. As affirmed in article 21 of the American Convention, indigenous peoples’ property rights must be

regarded as basic human rights, and must be protected as they are essential to the cultural survival of indigenous peoples.