

**THE RIGHT OF INDIGENOUS PEOPLES TO POLITICAL  
PARTICIPATION AND THE CASE OF  
YATAMA V. NICARAGUA**

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*“[T]he right of self-determination may be satisfied where a people enjoys an effective voice, through its own representatives, in the governing of a democratic State, and suffers no disadvantage or discrimination.”<sup>1</sup>*

**I. INTRODUCTION**

Violence and protests erupted on the streets of Puerto Cabezas after Nicaragua denied a major indigenous political party, YATAMA, participation in the November 2000 municipal elections.<sup>2</sup> Due to the exclusion of the YATAMA party, between 85% and 95% of voters in the region abstained from voting in the elections; in some areas less than ten votes were cast.<sup>3</sup> Failing to reach any redress in Nicaraguan domestic courts, the YATAMA party sought relief from the Inter-American Court of Human Rights.

The ruling of the Inter-American Court of Human Rights in the case of *YATAMA v. Nicaragua* is a landmark legal precedent for guaranteeing indigenous peoples the right to political participation. The case marks the first time an international tribunal has found that a state violated political rights and equal

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1. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, Working Group on Indigenous Populations, *Working Paper: Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*, ¶ 19, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (June 10, 1996) (prepared by Erica-Irene A. Daes) (citing ECOSOC, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Discrimination Against Indigenous Peoples: Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, ¶¶ 21-23, U.N. Doc. E/CN.4/Sub.2/1993/26/Add.1 (July 19, 1993) (prepared by Erica-Irene A. Daes)) [hereinafter Working Group on Indigenous Populations]; see also S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 156 (2d ed. 2004) (“Constitutive self-determination . . . requires that [political] institutions and arrangements in no case be imposed upon indigenous peoples but rather be the outcome of procedures that defer to their preferences among justifiable options.”).

2. See CARTER CTR., *SECOND REPORT: THE CARTER CENTER MISSION TO EVALUATE ELECTORAL CONDITIONS IN NICARAGUA* 7 (2000), available at <http://www.cartercenter.org/documents/288.pdf> [hereinafter CARTER REPORT].

3. See *id.*

protection rights by denying the political participation of an indigenous group.<sup>4</sup> The decision in *YATAMA v. Nicaragua* authoritatively interprets the general human right to political participation to include for indigenous peoples the more specific rights to (1) special remedial measures and procedural safeguards to ensure effective participation and (2) participate in national political systems according to indigenous traditional systems. The decision adds to the developing norms in international law and domestic legal systems that also support these rights. By recognizing the rights of indigenous peoples to *effectively* participate in the national politics of the dominant society, in accordance with their traditional forms of organization and practices, *YATAMA v. Nicaragua* advances the rights to self-determination and equality for indigenous peoples.

Part II of this Note details the background and controversy leading up to proceedings within the Inter-American system in *YATAMA v. Nicaragua* and describes the Inter-American Court's decision in the case. Part III provides an overview of the general human rights to nondiscrimination and political participation, and identifies a number of international instruments and interpretive statements by other human rights bodies that build upon these rights and echo the Court's call to see the rights fulfilled for indigenous peoples in particular. This pattern of international practice, which is now reinforced by the *YATAMA* decision, shows movement toward a widespread international consensus and a norm of customary international law affirming special rights of political participation for indigenous people. Part IV outlines the contours of this norm of indigenous political participation as revealed in the relevant international practice and reinforced by the decision of the Inter-American Court in *YATAMA v. Nicaragua*. Part V highlights the legislative and constitutional provisions of some states in Latin America that provide mechanisms targeted specifically to encourage indigenous political participation at the national level and that contribute to the emerging customary international law on this subject, especially in the Latin American region.

## II. *YATAMA V. NICARAGUA*

In *YATAMA v. Nicaragua*, the Inter-American Court of Human Rights held that the right to political participation protected by the American Convention on Human Rights obligates states to adopt special measures to facilitate indigenous participation in the political process.<sup>5</sup> Accordingly, the Court also found that indigenous peoples have the right to participate in national political structures in accordance with their own customary political organization and

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4. See *Landmark Case Pending over Indigenous Rights*, WORLD INDIGENOUS NEWS, Aug. 5, 2003, <http://www.cs.org/publications/win/win-article.cfm?id=145>.

5. *YATAMA v. Nicaragua* Case, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 225 (June 23, 2005).

practices.<sup>6</sup> This decision of the Inter-American Court is in line with its now usual method of engaging in an “evolutionary interpretation” of international instruments, under the view that international human rights documents “are living instruments whose interpretation must consider the changes over time and present-day conditions.”<sup>7</sup>

## **A. Background**

### **1. The Atlantic Coast of Nicaragua**

The Atlantic Coast of Nicaragua is home to the majority of the country’s indigenous population and is mainly composed of Mestizo (mixed European and indigenous ancestry), Miskito, Creole, Mayagna (Sumo), and Rama groups.<sup>8</sup> It is the least densely populated region of Nicaragua, with approximately 35% of the population living in urban areas, 40% living in rural areas, and the rest of the population living in scattered areas.<sup>9</sup> Nearly 30% of people in the Atlantic Coast region belong to an indigenous group,<sup>10</sup> and in the northern area of the region, approximately 45% of the population is Miskito Indian.<sup>11</sup> The Atlantic Coast region has a special regime of autonomy granted under Nicaraguan laws.<sup>12</sup> The Autonomy Statute for the Autonomous Regions of the Atlantic Coast of Nicaragua of 1987 divided the Atlantic Coast of Nicaragua into the Northern Atlantic Autonomous Region (“Northern Territory”) and the Southern Atlantic Autonomous Region (“Southern Territory”).<sup>13</sup> This law recognizes that “indigenous peoples are found in a situation of impoverishment, segregation,

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6. *Id.*

7. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 114 (Oct. 1, 1999); *see also* Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua Case, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 146 (Aug. 31, 2001); Juan Humberto Sanchez v. Honduras Case, Inter-Am. Ct. H.R. (ser. C) No. 102, ¶ 56 (Nov. 25, 2003) (stating that it is the Court’s function to provide a “dynamic interpretation” of international human rights treaties).

8. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶¶ 124.4–.5; *see also* U.N. Comm. on the Elimination of Racial Discrimination [CERD], *Concluding Observations: Nicaragua*, ¶¶ 499-541, U.N. Doc. A/50/18 (Sept. 22, 1995) [hereinafter *Nicaragua Conclusions*].

9. *Nicaragua Conclusions*, *supra* note 8.

10. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶ 124.4.

11. *Id.* ¶ 124.6.

12. *Nicaragua Conclusions*, *supra* note 8.

13. Ley No. 28, 2 September 1987, Estatuto de Autonomía de las Regiones Autónomas de la Costa Atlántica de Nicaragua [Autonomy Statute for the Autonomous Regions in the Atlantic Coast of Nicaragua] art. 6, La Gaceta [L.G.], 30 October 1987 (Nicar.).

marginalization, assimilation, oppression, exploitation and extermination, which requires a profound change in the political, economic and cultural orders for them to achieve their demands and aspirations.”<sup>14</sup> Furthermore, the Constitution of Nicaragua recognizes that the indigenous communities of the Atlantic Coast of Nicaragua have the right to “preserve and develop their cultural identity within the national unity; have their own forms of social organization and administer their local affairs in accordance with their traditions.”<sup>15</sup> However, despite these acknowledgments, the acts of the Nicaraguan government in the case of *YATAMA v. Nicaragua* had the effect of denying the indigenous peoples of the Atlantic Coast the right to preserve their own forms of social organization and administer their local affairs according to their own traditions.

## 2. The YATAMA Political Organization

*Yapti Tasba Masraka Nanih Asla Takanka* (“Organization of the Children of Mother Earth,” hereinafter “YATAMA”) is the successor of an association originating in the 1970s as the principal organization of the indigenous peoples of the Atlantic Coast of Nicaragua.<sup>16</sup> The YATAMA party, whose membership is primarily Miskito Indian, promotes indigenous self-government and seeks to protect indigenous ancestral territories.<sup>17</sup> According to the legal representative of YATAMA, “[t]he indigenous communities consider the YATAMA organization to be their protector and they go to its representatives before any other authority.”<sup>18</sup>

The organizational and electoral structure of YATAMA is linked to the traditions and customs of the indigenous communities of the Atlantic Coast and is part of their cultural identity.<sup>19</sup> YATAMA inherited its organization through oral tradition from Miskito ancestors,<sup>20</sup> and its traditional organization is based on the concept of “communitarian democracy.”<sup>21</sup> According to this traditional structure,

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14. *Id.* pmbl. (author’s translation).

15. Constitución Política de la República de Nicaragua [Cn.] [Constitution] tit. IV, ch. VI, art. 89, *La Gaceta* [L.G] 9 January 1987 (Nicar.) (author’s translation).

16. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶ 110 (testimony of Centuriano Knight Andrews, the legal representative of YATAMA in the Northern Territory). The name of the original organization was ALPROMISU. *Id.* Later, when it formed an alliance with the Sandinista government, it became MISURASATA. *Id.*

17. *Id.* ¶ 110 (expert testimony of María Luisa Acosta Castellón, the lawyer for certain indigenous communities in the Atlantic Coast).

18. *Id.* ¶ 110 (author’s translation) (testimony of Centuriano Knight Andrews).

19. *Id.* ¶ 111 (testimony of Brooklyn Rivera Bryan, the principal director of the YATAMA organization).

20. *Id.* ¶ 110 (expert testimony of María Luisa Acosta Castellón, the lawyer for certain indigenous communities in the Atlantic Coast).

21. *Id.* ¶ 124.13.

indigenous groups are first organized into communal assemblies, which are integrated by all of the indigenous and ethnic communities living in the community or neighborhood (*Tawan Aslika*), and which are headed by a community council (*Wihta Daknika*).<sup>22</sup> The territorial assemblies, which represent the second level of political organization, are made up of the representatives of the communal assemblies from the area.<sup>23</sup> At the third level, the regional assembly is composed of representatives of the territorial assemblies and is headed by the regional council.<sup>24</sup> Political candidates must pass through communal, territorial, and regional levels to be an elected representative of YATAMA.<sup>25</sup> Each communal assembly nominates its political candidates and proposes them to the territorial assembly.<sup>26</sup> The territorial assembly elects the YATAMA candidates, and the regional assembly certifies these elections.<sup>27</sup> The candidates elected in the territorial assembly receive the full backing of the communities to carry out their electoral campaigns.<sup>28</sup>

## **B. The Events Leading up to *YATAMA v. Nicaragua***

### **1. The Nicaraguan Electoral Law of January 2000**

The de facto political system in Nicaragua is marked by a bipartisan system, which establishes the *Partido Liberal Constitucionalista* (PLC) and the *Frente Sandinista de Liberación Nacional* (FSLN)—the principal political parties of the State.<sup>29</sup> This pact between the PLC and FSLN effectively prohibits any other political groups from participating on the same level, with the same possibility of success, as these two major political parties.<sup>30</sup> Legislative and constitutional reforms in January 2000 altered the membership of Nicaragua's Supreme Court and Supreme Electoral Council to reflect only members of these two political parties.<sup>31</sup> A commonly held view is that the Supreme Electoral

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22. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶ 124.13.

23. *Id.* ¶ 124.14.

24. *See id.* ¶ 124.15.

25. *Id.* ¶ 111 (testimony of Brooklyn Rivera Bryan).

26. *Id.*

27. *Id.* ¶¶ 124.14–15.

28. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶ 111 (testimony of María Dolores Álvarez Arzate).

29. *See* DAVID R. DYE & SHELLEY A. MCCONNELL, CARTER CTR., OBSERVING THE 2001 NICARAGUAN ELECTIONS: FINAL REPORT 9 (2002), available at <http://www.cartercenter.org/documents/1027.pdf>.

30. *See* Jimmy Carter, *Foreword* to DYE & MCCONNELL, *supra* note 29, at 2.

31. *See* DYE & MCCONNELL, *supra* note 29, at 9.

Council established the new Electoral Law in order to maintain this bipartisan system and thus preserve the power of the PLC and the FSLN parties.<sup>32</sup>

YATAMA was able to participate in country-wide elections as a “popular subscription association” under the Nicaraguan electoral laws of 1990 and 1996.<sup>33</sup> These laws allowed any organization to participate in elections without belonging to a specific political party, requiring only that the political groups receive support from at least 5% of voters in their respective electoral districts.<sup>34</sup> The new Electoral Law of January 2000, enacted nine months before the municipal elections, eliminated the popular subscription associations.<sup>35</sup> The new law required all political organizations, including YATAMA, to change their traditional methods of organization and fulfill a series of strict requirements to participate as a political party.<sup>36</sup> This requirement is based on standards that conflict with the customary practices of indigenous peoples: “In the indigenous communal system, decisions are made by consensus. The party system is different because it generates a fight between ‘competitors.’”<sup>37</sup> To participate in the November 2000 elections, YATAMA was forced to restructure its customary organization into a political party structure that was antithetical to its traditional organization, which was based on “communitarian democracy.”

The new Electoral Law also required the political party to collect signatures from 3% of all registered voters in the Autonomous Region<sup>38</sup> and to register candidates in at least 80% of the municipalities of that region.<sup>39</sup> This meant that YATAMA had to participate in territories where there were no indigenous communities at all.<sup>40</sup> The director of YATAMA explained that:

In the Autonomous Region there are municipalities where the indigenous population dominates, where they have their own leadership and [government] structure, but there are other municipalities with *mestizos* with whom [YATAMA had no] connection or interest, but the law required [YATAMA to enter

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32. *See id.*

33. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶ 124.18 (author’s translation).

34. *See id.*

35. *Id.* ¶ 124.20. *See generally* Ley No. 331, 24 January 2000, Ley Electoral de Nicaragua [Electoral Law of Nicaragua] (Nicar.).

36. Ley No. 331 tit. V, ch. II, art. 65.

37. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶ 111 (author’s translation) (testimony of Jorge Teytom Fedrick, who is in charge of YATAMA’s international relations).

38. Ley No. 331 tit. V, ch. II, art. 65; *id.* tit. VI, ch. I, art. 77.

39. *Id.* tit. VI, ch. II, art. 82.

40. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶ 111 (testimony of Brooklyn Rivera Bryan).

into those areas], or the group would have been disqualified from participating in elections.<sup>41</sup>

Since YATAMA was largely a regional political party, it was one of the few parties negatively affected by this requirement.

## 2. The Exclusion of YATAMA Candidates from the November 2000 Elections

Article 77 of the Electoral Law required political parties to submit their proof of legal status, list of candidates, and signatures of registered voters six months prior to the municipal elections.<sup>42</sup> This gave YATAMA fourteen weeks to meet the new requirements established by the Electoral Law to become a “regional [indigenous] political party.”<sup>43</sup> YATAMA met the requirements and was granted legal status as a political party in May 2000, allowing it to present candidates for the November 2000 municipal elections.<sup>44</sup>

YATAMA presented its lists of candidates in the Northern Territory within the legal time limit established by the Electoral Law.<sup>45</sup> In the Southern Territory, YATAMA formed an alliance with the *Partido de los Pueblos Costeños* (PPC).<sup>46</sup> However, the Supreme Electoral Council denied the PPC the legal status necessary to participate in the elections, alleging that some of the 3% of signatures it collected in accordance with article 77 were not accompanied by valid identification numbers.<sup>47</sup> YATAMA sent the Electoral Council an urgent communication requesting authorization to participate in the Southern Territory, using only its name and list of candidates.<sup>48</sup> The Electoral Council did not respond to this request or additional requests sent by YATAMA on July 31, August 8, and August 9, 2000.<sup>49</sup>

On August 15, 2000, the Electoral Council issued a resolution that excluded YATAMA from elections in both the Northern and Southern Territories.<sup>50</sup> The Electoral Council based its resolution on the failure of the PPC to obtain the number of signatures required of political parties to participate in

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41. *Id.* ¶ 222 (author’s translation) (alteration in original omitted).

42. Ley No. 331 tit. VI, ch. I, art. 77.

43. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶¶ 124.21, 124.23 (author’s translation).

44. *Id.* ¶ 124.28.

45. *Id.* ¶ 124.31.

46. *Id.* ¶ 124.33.

47. *Id.* ¶ 124.46.

48. *Id.* ¶¶ 124.47–48.

49. *YATAMA v. Nicaragua*, Case 12.388, Inter-Am. C.H.R., Report No. 125/01, OEA/Ser.L/V/II.114, doc. 5 rev. ¶ 5 (2001).

50. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶ 124.51.

elections under Nicaragua's Electoral Law and on the failure of the total candidates presented by YATAMA to cover the percentage of municipalities and candidacies required by the Electoral Law.<sup>51</sup> However, YATAMA did not meet the required registration in 80% of municipalities and candidacies because the candidates presented as part of the PPC/YATAMA alliance were not eligible to participate in the elections since PPC's legal status had been cancelled.<sup>52</sup> YATAMA was thus denied the opportunity to present candidates for election in both the Northern Territory and the Southern Territory.

### 3. The Failure of Nicaragua's Domestic Courts to Redress the Violations and Its Effects on the November 2000 Elections

On August 18, 2000, YATAMA filed a motion for review before the Electoral Council against the August 15 resolution, but it did not obtain a response within the period provided within Nicaraguan laws.<sup>53</sup> On August 30, 2000, YATAMA brought an *amparo* (emergency constitutional) action against the Electoral Council before the Court of Appeals, North Atlantic District, Civil and Labor Chamber, for its August 15 resolution.<sup>54</sup> On October 11, the appellate court processed the appeal and suspended the effects of the Electoral Council's resolution.<sup>55</sup> On October 25, 2000, the Supreme Court reversed the appellate court decision and declared that the *amparo* action was improper.<sup>56</sup> The Supreme Court based its decision on Article 173 of the Nicaraguan Constitution, which provides that "[n]o appeal shall be taken, regular or special, of the rulings of the Supreme Council on electoral matters."<sup>57</sup> Nicaraguan law did not provide any method for defending the violated rights of the YATAMA party and its candidates.

Between 85% and 95% of eligible voters in the Atlantic Coast region boycotted the November 2000 elections because there were no indigenous candidates.<sup>58</sup> Indigenous peoples protested the exclusion of YATAMA in the elections in the streets of Puerto Cabezas, the capital city of the Northern Territory.<sup>59</sup> Five other political parties asked the Electoral Council to declare null and void the elections in the Northern Territory and to hold new elections with the

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51. *See id.*

52. *Id.* ¶ 124.51(a).

53. *Id.* ¶ 124.54.

54. *Id.* ¶ 124.55.

55. *Id.* ¶ 124.57.

56. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶ 124.61.

57. *Id.* (author's translation).

58. *See* CARTER REPORT, *supra* note 2, at 7.

59. *See id.*; *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶ 124.67.



YATAMA party candidates.<sup>60</sup> Despite these protests, the indigenous peoples of the Atlantic Coast had no political representatives for the next four years.<sup>61</sup>

### **C. Procedure in the Inter-American System**

#### **1. Brief Introduction to the Inter-American Human Rights System**

Two bodies within the Inter-American human rights system work to promote and monitor human rights. The function of one of these bodies, the Inter-American Commission on Human Rights, is to attend to petitions filed by people or groups alleging violations of human rights in the Organization of American States (OAS) member countries.<sup>62</sup> By virtue of having ratified the Charter of the Organization of American States, every American state has accepted the competence of the Inter-American Commission to consider violations of human rights in its jurisdiction.<sup>63</sup> The rights protected are specified in the American Convention on Human Rights (“American Convention”)<sup>64</sup> and the American Declaration of the Rights and Duties of Man.<sup>65</sup> The Commission can make recommendations to states, publish its conclusions regarding specific cases of human rights violations, and in certain cases, initiate legal action against a state on behalf of the victim before the Inter-American Court of Human Rights.<sup>66</sup> The second human rights body in the Inter-American human rights system, the Inter-American Court of Human Rights, adjudicates the violations of human rights that have been investigated by the Commission, as long as the alleged violating state is a party to the American Convention and has accepted the Court’s jurisdiction.<sup>67</sup> The Court can issue binding decisions on these countries.<sup>68</sup> The Inter-American Court takes up a case over which it has jurisdiction only after it is processed by

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60. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶ 124.71.

61. *Id.* ¶ 111 (testimony of Brooklyn Rivera Bryan).

62. Organization of American States [OAS], American Convention on Human Rights art. 41(f), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention]; see generally Rules of Procedure of the Inter-American Commission on Human Rights arts. 1, 23, Oct. 16-27, 2006, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4, rev. 9 (2003), available at <http://www.cidh.oas.org/Basicos/basic16.htm>.

63. See American Convention, *supra* note 62, art. 41.

64. See *id.* arts. 3-25.

65. American Declaration of the Rights and Duties of Man arts. I-XXVIII, O.A.S. Res. 30, adopted by the Ninth International Conference of American States (Mar. 30–May 2, 1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4, rev. 9 (2003), available at <http://www.cidh.org/Basicos/basic2.htm> [hereinafter American Declaration].

66. American Convention, *supra* note 62, arts. 41, 44.

67. *Id.* art. 62.

68. *Id.* arts. 67-68.

the Commission and only if the Commission or the state concerned decides to submit the case to the Court.<sup>69</sup>

## 2. Conclusions and Recommendations of the Commission

On April 26, 2001, YATAMA, the *Centro Nicaragüense de Derechos Humanos*, and the Center for Justice and International Law filed a petition with the Inter-American Commission on Human Rights against the State of Nicaragua, *inter alia*, alleging that it violated articles 23 (political rights), 24 (equality), 1(1) (obligation to respect rights), and 2 (obligation to adopt internal laws) of the American Convention.<sup>70</sup> The petitioners' central argument was that "Nicaragua did not adopt any special measure of protection to ensure the political participation of indigenous groups since the Electoral Law does not contain any provisions that give special treatment to indigenous peoples, due to their situation as such, and their situation of marginalization."<sup>71</sup>

The Commission investigated the case and found in favor of YATAMA.<sup>72</sup> Adopting the arguments presented by the petitioners, the Commission concluded that Nicaragua had violated the rights of the indigenous candidates by excluding YATAMA from participating in the 2000 elections on a technicality.<sup>73</sup> The Commission also concluded that Nicaragua violated the rights of the YATAMA candidates to participate and be elected since the Nicaraguan Electoral Law failed to adopt special measures to promote and facilitate the political participation of indigenous groups in accordance with their customary laws, values, and traditions.<sup>74</sup> The Commission found that "within international law in general and Inter-American law specifically, special protection is required so that indigenous peoples can exercise their rights fully and equally with the rest of the population."<sup>75</sup> It also found that "it may be necessary to establish special measures of protection for indigenous peoples, with the aim of guaranteeing their

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69. *Id.* art. 61.

70. YATAMA v. Nicaragua, Case 12.388, Inter-Am. C.H.R., Report No. 125/01, OEA/Ser./L/V/II.114, doc. 5 rev. ¶ 1 (2001).

71. See Brief for Indigenous Peoples' Law and Policy Program of the University of Arizona as Amicus Curiae Supporting Petitioners at 1, YATAMA v. Nicaragua Case, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127 (June 23, 2005) (author's translation), available at [http://www.law.arizona.edu/depts/iplp/advocacy\\_clinical/documents/AMICUS%20YATAMA\\_IPLP.pdf](http://www.law.arizona.edu/depts/iplp/advocacy_clinical/documents/AMICUS%20YATAMA_IPLP.pdf) [hereinafter YATAMA Amicus Curiae].

72. YATAMA v. Nicaragua Case, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 2 (June 23, 2005).

73. See *id.*

74. *Id.*

75. *Id.* ¶ 178(c) (author's translation).

physical and cultural survival, along with guaranteeing their effective participation in decision-making that affects them.”<sup>76</sup>

After finding that Nicaragua infringed on YATAMA’s rights to political participation and equal protection, the Commission issued a series of recommendations to the Nicaraguan government requesting that it repair the harm done to YATAMA by reforming its international legislation to guarantee the equal and effective political participation of indigenous communities and to allocate funds to meet the needs of the indigenous peoples of the Atlantic Coast.<sup>77</sup> Nicaragua refused to comply with the recommendations and did not take any other affirmative measures to ensure the political rights of its indigenous communities.<sup>78</sup> On June 17, 2003, the Inter-American Commission filed a suit against the Nicaraguan government on behalf of YATAMA, alleging that Nicaragua had violated the YATAMA candidates’ rights guaranteed under the American Convention on Human Rights.<sup>79</sup>

#### **D. The Decision of the Inter-American Court of Human Rights**

##### **1. Nicaragua’s Arguments Before the Inter-American Court**

During the proceedings before the Court, Nicaragua argued that it had not violated the rights to nondiscrimination (article 23) and political participation (article 24) because its electoral laws applied equally to all citizens and were therefore inherently nondiscriminatory.<sup>80</sup> This view reflects the traditional and increasingly retrograde classical-liberal view that laws should apply in the same way to all citizens within a nation-state. Nicaragua failed to acknowledge and expressly rejected that indigenous groups were entitled to any special protections not guaranteed to all citizens in general. Further, Nicaragua asserted that any measures that promote the indigenous self-government would imply separating and recognizing different types of Nicaraguan citizens and would therefore be “totally unacceptable.”<sup>81</sup> Specifically, Nicaragua argued that:

- The YATAMA candidates were not allowed to participate in the November 2000 elections because they failed to follow the requirements established in the Electoral Law;<sup>82</sup>

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76. *Id.* (author’s translation).

77. *Id.* ¶ 7.

78. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶ 10.

79. *Id.* ¶ 13.

80. *Id.* ¶¶ 180(e), (j).

81. *See id.* ¶¶ 180(f), (k).

82. *Id.* ¶ 180(b).

- The candidates elected in the indigenous communities must follow the requirements outlined in the Electoral Law, just like the candidates in all other regions of Nicaragua;<sup>83</sup>
- María Luisa Acosta Castellón's statement that YATAMA's goal to promote indigenous self-government implies the favoring of an independent group within an independent state was "totally unacceptable";<sup>84</sup>
- The Electoral Law already includes special protection for indigenous peoples since it allows them to nominate their candidates in accordance with their values, uses, and customs. However, once nominated, the official candidates of the indigenous communities have to follow the requirements of the electoral laws just like the rest of the candidates in other regions. Establishing special requirements for certain regions would imply the recognition of different categories of Nicaraguan citizens, whereas the Electoral Law is a law of general applicability, which is applied equally to all Nicaraguans.<sup>85</sup>

## 2. The Court's Decision

In its decision of June 2005, the Inter-American Court held that the Nicaraguan Electoral Law of 2000 unduly restricted the exercise of the right to be elected and that the law was applied discriminatorily.<sup>86</sup> The Court agreed with Nicaragua that states may establish minimum standards to regulate political participation, but the standards must be reasonable and in accordance with the principles of a representative democracy.<sup>87</sup> The Court found that election procedures should "promote and foster diverse forms of political participation" to strengthen democracy.<sup>88</sup> To promote this diverse democratic participation, the Court held that Nicaragua must adopt norms to facilitate participation of unrepresented sectors of society, "like members of indigenous and ethnic communities."<sup>89</sup>

The Court concluded that Nicaragua had violated the political rights of the YATAMA candidates. It found that the requirement that only political parties

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83. *Id.* ¶ 180(e).

84. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶¶ 110, 180(f).

85. *Id.* ¶ 180(k).

86. *Id.* ¶ 229.

87. *Id.* ¶ 207.

88. *Id.* (author's translation) (quoting Organization of American States, Carta Democrática Interamericana [Inter-American Democratic Charter] art. 6, *adopted* Sept. 11, 2001).

89. *Id.* (author's translation).

may participate in the elections “imposed an organizational structure on the YATAMA party that was foreign to their uses, customs, and traditions,” and interfered with their right to political participation.<sup>90</sup> The 2000 Electoral Law also violated the right to political participation by requiring parties to register candidates in 80% of municipalities since it disproportionately limited the rights of the YATAMA party to participate in the elections and did not consider that, in the Southern Territory, indigenous and ethnic communities constitute a minority of the population.<sup>91</sup> Therefore, the Inter-American Court found that Nicaragua failed to adopt the “means necessary to guarantee the right [of YATAMA] to be elected candidates.”<sup>92</sup> As a result, the members of the indigenous and ethnic communities who make up the YATAMA party suffered “legal discrimination that impeded their participation under equal conditions in the municipal elections.”<sup>93</sup>

The Court also found that Nicaragua violated the general obligation of a state to guarantee the right to vote enshrined in article 1.1 of the American Convention,<sup>94</sup> noting that there is a “narrow relationship between the right to be elected and the right to vote to elect representatives.”<sup>95</sup> Excluding the YATAMA candidates from participating in the November 2000 municipal elections placed the indigenous communities in an unequal voting situation.<sup>96</sup> Nicaragua’s regional bodies in charge of influencing development lacked representation for the indigenous communities’ needs.<sup>97</sup>

Finally, the Court found that the universal rights of equality and political participation give rise to an obligation on the part of the state to adopt affirmative and differentiated measures to guarantee the participation of indigenous groups under conditions of equality and to take into consideration their customary forms of organization. Thus, the Court held that Nicaragua is obligated to “*adopt all the necessary measures to guarantee that members of indigenous and ethnic communities of the Atlantic Coast of Nicaragua can participate, under conditions of equality, in the development policies that influence, or could influence, their rights and the development of their communities.*”<sup>98</sup> The Court determined that this should be done in such a way that indigenous peoples can integrate themselves into state institutions and participate directly and proportionately to their population, in the management of public affairs.<sup>99</sup> In addition, the Court found that the special measures should be adopted through the indigenous

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90. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶ 218 (author’s translation).

91. *Id.* ¶ 223.

92. *Id.* ¶ 224 (author’s translation).

93. *Id.* (author’s translation).

94. *Id.* ¶ 226.

95. *Id.* (author’s translation).

96. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶ 227.

97. *Id.*

98. *Id.* ¶ 225 (emphasis added) (author’s translation).

99. *Id.*

community's own institutions and "in accordance with their values, uses, customs, and forms of organization."<sup>100</sup>

### 3. Remedies and Implementation of the Court's Decision

To repair the harm caused by the violations, the Inter-American Court ordered Nicaragua to undertake a series of remedial measures—most significantly, enacting legislation designed to promote the political participation of indigenous groups. The Court ordered Nicaragua to pay US\$80,000 in damages to the YATAMA party.<sup>101</sup> In addition, the Court ordered Nicaragua to publish the *YATAMA v. Nicaragua* decision in the national newspapers, radio programs, and on the State's web site within one year from the issuance of the decision<sup>102</sup> and to enact laws establishing simple, fast, and effective mechanisms to challenge decisions of the Electoral Council.<sup>103</sup> Most importantly, the Inter-American Court held that Nicaragua shall adopt, within a reasonable timeframe, necessary measures so that the members of indigenous and ethnic communities "can effectively participate in electoral processes, taking into consideration their traditions, uses and customs."<sup>104</sup> The Inter-American Court held that these measures must permit and facilitate the adequate representation of indigenous communities, allowing them to intervene in decision-making processes regarding national issues affecting society in general and indigenous communities in particular.<sup>105</sup> Therefore, the Court added that the reformed Electoral Law should include no provisions that constitute obstacles to the participation of indigenous communities.<sup>106</sup>

After the Court's decision, the task was to ensure that Nicaragua implemented the Court's holding in good faith. In a report on compliance published by the Inter-American Court on November 29, 2006, the Court stated that Nicaragua had complied with certain aspects of the *YATAMA v. Nicaragua* decision, including publishing the decision in the local newspaper and on the State's web site, and that it had partially complied with the requirement to announce the Court's decision on local radio stations.<sup>107</sup> However, the Court concluded that Nicaragua had not complied with reforming its Electoral Law in accordance with the Court's decision.<sup>108</sup> Furthermore, in its communication to the

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100. *Id.* (emphasis added) (author's translation).

101. *Id.* ¶ 248.

102. *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶¶ 252-53.

103. *Id.* ¶¶ 254-55.

104. *Id.* ¶ 259 (emphasis added) (author's translation).

105. *Id.*

106. *Id.*

107. Order of the Inter-American Court of Human Rights, *YATAMA vs. Nicaragua Case*, Monitoring Compliance with Judgment, at 7-8, ¶¶ 9-10 (Nov. 29, 2006).

108. *Id.* at 10, ¶ 3.

Court regarding Nicaragua's compliance with the Court's decision, the Inter-American Commission recommended that Nicaragua include the country's indigenous groups in the process of drafting the law.<sup>109</sup>

### **III. THE RIGHTS TO NONDISCRIMINATION AND POLITICAL PARTICIPATION AND THEIR APPLICATION TO INDIGENOUS PEOPLES IN GENERAL**

In *YATAMA v. Nicaragua*, the Inter-American Court found that Nicaragua violated two rights of the American Convention on Human Rights—the right to political participation (article 23) and the right to equality before the law (article 24)—by prohibiting the YATAMA organization from participating in the 2000 municipal elections.<sup>110</sup> This and the subsequent sections of this Note discuss the developing international practice surrounding and contributing to the right of indigenous peoples to political participation.

Provisions of already adopted or developing international written instruments, such as treaties, declarations, and reports by international bodies, can be seen as reflecting or giving rise to customary international law. While not all of these instruments are by their own force legally binding, “[t]aken together with relevant domestic legal practice, international practice gives rise to obligations of customary international law that apply more generally throughout the Inter-American system.”<sup>111</sup> They represent movement towards a consensus internationally regarding the content of indigenous rights and “simultaneously give rise to expectations that the rights will be upheld, regardless of any formal act of assent to the articulated norms.”<sup>112</sup> However, while the provisions discussed in this section guarantee political participation under conditions of equality and affirm the right of political participation for indigenous peoples in particular, they do not elaborate on the more specific content of the right of indigenous peoples to political participation. As will be discussed in the following section, the *YATAMA v. Nicaragua* decision and other provisions of relevant international instruments elaborate upon the content of the right of indigenous peoples to political participation under conditions of equality and interpret it to include the rights to (1) special remedial measures and procedural safeguards to ensure that indigenous groups can participate on equal footing in political elections and (2) participation in accordance with their traditional forms of organization.

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109. *Id.* at 6, ¶ 6(d).

110. *See YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶ 190; *see also supra* Part II.D.2.

111. S. James Anaya & Robert A. Williams, *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 54 (2001).

112. *Id.*

### **A. The Right to Equality**

Numerous major international human rights instruments recognize the fundamental human right to equality. These instruments include the Universal Declaration of Human Rights,<sup>113</sup> the International Covenant on Civil and Political Rights,<sup>114</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>115</sup> The right to equality is also broadly guaranteed under the domestic laws of countries within the Inter-American system.<sup>116</sup>

Indigenous peoples “practically as a matter of definition” have suffered and continue to suffer serious discrimination.<sup>117</sup> The U.N. Committee on the Elimination of Racial Discrimination notes that “in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms.”<sup>118</sup> Not surprisingly, international instruments specifically proscribe discrimination against indigenous

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113. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, arts. 1, 2, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

114. United Nations International Covenant on Civil and Political Rights art. 2.1, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

115. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force Jan. 4, 1969) [hereinafter Convention on Racial Discrimination]; *see also* Declaration on the Elimination of All Forms of Intolerance and of the Elimination of Racial Discrimination Based on Religion or Belief, at 117, U.N. Doc. A/36/55 (Nov. 25, 1981) [hereinafter Declaration on Racial Discrimination]; American Convention, *supra* note 62, arts. 1, 24; American Declaration, *supra* note 65, arts. II; ANAYA, *supra* note 1, at 129-31.

116. *See, e.g.*, Constitución Política del Estado de Bolivia [Const.], *as amended*, tit. preliminar, art. 1(II), pt. I, tit. I, art. 6, 6 de Julio de 2005; Constitución Política de Colombia de 1991 [Const.], *as amended*, tit. II, ch. I, art. 13, 27 de Julio de 1991; Constitución Política de La Republica de Costa Rica de 1949 [Const.], *as amended*, tit. IV, ch. I, art. 33, tit. V, ch. I, art. 54, 15 de Julio de 2003; Constitución Política de la República de Ecuador de 1998 [Const.] tit. III, ch. 1, art. 23(3); Constitución Política de los Estados Unidos Mexicanos [Const.] tit. I, ch. I, arts. 8(B), 12, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.); Constitución Política de la República de Nicaragua [Cn.] [Constitution] tit. IV, ch. I, art. 27, tit. IV, ch. II, art. 48, La Gaceta [L.G] 9 January 1987; Constitución Política de la República de Panamá de 1972 [Const.], *as amended*, tit. III, ch. 1, art. 19, 1994; Constitución de la República de Paraguay de 1992 [Const.] tit. II, ch. III, art. 47; Constitución Política del Perú 1993 [Const.], *as amended*, tit. I, ch. I, art. 2(2), 4 de Octubre de 2005; Constitución Política de La República Oriental del Uruguay de 1967 [Const.], *as amended*, § II, ch. I, art. 8, 31 de Octubre de 2004; Constitución Política de la República Bolivariana de Venezuela [Const.] tit. III, ch. I, art. 21, Gaceta Oficial, 30 de Diciembre de 1999.

117. ANAYA, *supra* note 1, at 130.

118. U.N. Comm. on the Elimination of Racial Discrimination [CERD], *General Recommendation No. 23: Indigenous Peoples*, ¶ 3, U.N. Doc. A/52/18, Annex V (Aug. 18, 1997) [hereinafter CERD, *General Recommendation 23*].



peoples.<sup>119</sup> The International Labour Organisation Convention No. 169 on Indigenous and Tribal Peoples (“ILO Convention No. 169”),<sup>120</sup> the U.N. Declaration on the Rights of Indigenous Peoples (“U.N. Declaration”),<sup>121</sup> and the Proposed American Declaration on the Rights of Indigenous Peoples of the OAS (“Proposed American Declaration”)<sup>122</sup> all affirm the right to equality for indigenous peoples.

International instruments and institutions have recognized that the international community owes a special duty of care to indigenous peoples to remedy the historical discrimination that they have suffered.<sup>123</sup> The Inter-American Commission on Human Rights recognizes that “for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the States.”<sup>124</sup> Arising out of the recognition of indigenous peoples’ right to a special duty of care, international law and practice affirm the need to develop special remedial measures so that indigenous peoples may exercise their rights under conditions of equality in relation to the majority society. The Inter-American Commission on

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119. ANAYA, *supra* note 1, at 130.

120. See International Labour Organisation [ILO], Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries art. 3(1), June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1990) [hereinafter ILO Convention No. 169] (“Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.”).

121. United Nations Declaration on the Rights of Indigenous Peoples, H.R.C. Res. 2006/2, Annex, art. 2, U.N. Doc. E/CN.4/2006/79 (June 29, 2006) [hereinafter U.N. Declaration] (“Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination.”).

122. This is a draft document on the rights of indigenous peoples prepared by the Inter-American Commission on Human Rights, now under review by a working group of OAS member states. Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.95, doc. 7 rev., art. VI(1) (Mar. 14, 1997) [hereinafter Proposed American Declaration] (“Indigenous peoples have the right to special guarantees against discrimination that may have to be instituted to fully enjoy internationally and nationally-recognized human rights.”).

123. See ANAYA, *supra* note 1, at 186.

124. Inter-Am. Comm’n on Human Rights, Resolution on Special Protection for Indigenous Populations: Action to Combat Racism and Racial Discrimination, Dec. 28, 1972, OEA/Ser.L/V/II.29, § 2, pt. 5 (1973), *cited in* Yanomami v. Brazil, Case 7615, Inter-Am. C.H.R., Report No. 12/85, ¶ 8 (1984-85); see also Mary Robinson, U.N. High Comm’r for Human Rights & Sec’y-Gen. to the World Conference Against Racism, Speech at the European Conference Against Racism: All Different, All Equal: From Principle to Practice (Oct. 11-13, 2000), *available at* <http://www.unhchr.ch/hurricane/hurricane.nsf/0/F62A33FDA2C1829BC12569760027A078?opendocument> (stating that “there is a special duty of care . . . to protect the rights of . . . vulnerable groups,” including indigenous peoples).

Human Rights,<sup>125</sup> the U.N. Human Rights Council,<sup>126</sup> the International Labour Organisation,<sup>127</sup> the U.N. Human Rights Committee,<sup>128</sup> which oversees compliance with the International Covenant on Civil and Political Rights, and the U.N. Committee on the Elimination of Racial Discrimination (CERD), which oversees compliance with the Convention on the Elimination of All Forms of Racial Discrimination,<sup>129</sup> have all recognized this right. The U.N. Human Rights Committee's general comment on nondiscrimination provides that:

[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination

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125. See, e.g., *Mary & Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, ¶ 125 (2002); *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 at 727, ¶ 95 (2004) (“In this regard, a review of pertinent treaties, legislation and jurisprudence reveals the development over more than 80 years of particular human rights norms and principles applicable to the circumstances and treatment of indigenous peoples. Central to these norms and principles has been the recognition of the need for special measures by states to compensate for the exploitation and discrimination to which these societies have been subjected at the hands of the non-indigenous.”); Inter-Am. Comm’n on Human Rights, *Report on the Situation of Human Rights in Ecuador*, ch. IX, OAS/Ser.L/V/II.96, doc. 10 rev. 1 (Apr. 24, 1997) (“Within international law generally, and inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival—a right protected in a range of international instruments and conventions.”).

126. U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 121, art. 21(2) (obligating states to “take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions”); see also *id.* art. 38 (obligating states “in consultation and cooperation with indigenous peoples, [to] take the appropriate measures, including legislative measures, to achieve the ends of this Declaration”).

127. ILO Convention No. 169, *supra* note 120, arts. 2, 4. For example, article 2.2(a) states that governments shall have the responsibility of developing mechanisms to protect the rights of indigenous peoples, including measures for “ensuring that members of these peoples benefit *on an equal footing* from the rights and opportunities . . . granted to other members of the population.” *Id.* art. 2.2(a) (emphasis added).

128. U.N. Human Rights Comm., *General Comment No. 23: The Rights of Minorities* (Art. 27), ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994) [hereinafter HRC, *General Comment 23*].

129. See, e.g., CERD, *General Recommendation 23*, *supra* note 118, ¶ 1 (“In the practice of the Committee on the Elimination of Racial Discrimination, in particular in the examination of reports of States parties under article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, the situation of indigenous peoples has always been a matter of close attention and concern.”).

prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned *certain preferential treatment* in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.<sup>130</sup>

The Inter-American human rights system has also recognized on several occasions the need to develop special measures of protection to make up for the historical discrimination that indigenous peoples have suffered. The Inter-American Commission affirmed that:

[E]nsuring the full and effective enjoyment of human rights by indigenous peoples requires consideration of their particular historical, cultural, social and economic situation and experience. . . . In most instances, this has included identification of the need for special measures by states to compensate for the exploitation and discrimination to which these societies have been subjected at the hands of the non-indigenous.<sup>131</sup>

Consequently, the Proposed American Declaration recognizes that indigenous peoples have the right to “special guarantees against discrimination that may have to be instituted to fully enjoy internationally and nationally-recognized human rights.”<sup>132</sup> This guarantee of special measures can be exercised through article 2 of the American Convention, which holds that where the country’s laws do not already ensure the exercise of these rights, the state parties shall “adopt, in accordance with their constitutional processes and the provisions of this

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130. U.N. Human Rights Comm., *General Comment No. 18: Non-discrimination*, ¶ 10 (Nov. 10, 1989) (emphasis added), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 26, U.N. Doc. HRI/GEN/1/Rev.1 (1994); *see also* U.N. Human Rights Comm., *General Comment 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)*, ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996) [hereinafter HRC, *General Comment 25*] (“[The International Covenant on Civil and Political Rights] requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.”).

131. *Mary & Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, ¶ 125 (2002).

132. Proposed American Declaration, *supra* note 122, art. VI.

Convention, *such legislative or other measures as may be necessary to give effect to those rights or freedoms.*"<sup>133</sup>

Therefore, in addition to the general prohibition against discrimination guaranteed in most international human rights instruments, developments internationally also advocate adopting special measures to remedy past discrimination and to put indigenous peoples on equal footing compared with other citizens for future equal treatment in the enjoyment of their human rights.

### **B. The Right to Political Participation**

The right of all citizens to political participation is broadly recognized in international law as a fundamental human right and is enshrined in several international instruments.<sup>134</sup> Countries that have ratified the American Convention also broadly guarantee the right to political participation for all citizens.<sup>135</sup> According to the U.N. Human Rights Committee, the right to political participation articulated in article 25 of the International Covenant on Civil and Political Rights, lies "at the core of democratic government based on the consent of the people."<sup>136</sup> International instruments specifically recognize the right of indigenous peoples to political participation. For example, the ILO Convention

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133. American Convention, *supra* note 62, art. 2 (emphasis added).

134. *See, e.g.*, Universal Declaration of Human Rights, *supra* note 113, art. 21; United Nations International Covenant on Civil and Political Rights, *supra* note 114, art. 25; HRC, *General Comment 25*, *supra* note 130; Protocol to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Mar. 20, 1952, 213 U.N.T.S. 262 (entered into force May 18, 1954), *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm>; African Charter on Human and Peoples' Rights art. 13(1)-(2), *adopted* June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) [hereinafter African Charter], *available at* [http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html).

135. *See, e.g.*, Constitución Política del Estado de Bolivia [Const.], *as amended*, pt. 2, tit. IX, ch. I, art. 219, 6 de Julio de 2005; Constitución Política de Colombia de 1991 [Const.], *as amended*, tit. II, ch. I, art. 40, 27 de Julio de 1991; Constitución Política de La Republica de Costa Rica de 1949 [Const.], *as amended*, tit. VIII, ch. II, arts. 93, 95, 15 de Julio de 2003; Constitución Política de la República de Ecuador de 1998 [Const.] tit. III, ch. 3, art. 26; Constitución Política de la República de El Salvador de 1983 [Const.], *as amended*, ch. III, art. 72, 6 de Julio de 2000; Constitución Política de la República de Nicaragua [Cn.] [Constitution] tit. IV, ch. II, arts. 50-51, La Gaceta [L.G] 9 January 1987; Constitución Política de la República de Panamá de 1972 [Const.], *as amended*, tit. IV, ch. 2, arts. 129, 130, 1994; Constitución de la República de Paraguay de 1992 [Const.] tit. II, ch. X, art. 117; Constitución Política de La República Oriental del Uruguay de 1967 [Const.], *as amended*, § III, ch. II, art. 77, 31 de Octubre de 2004; Constitución Política de la República Bolivariana de Venezuela [Const.] tit. III, ch. VII, art. 114, Gaceta Oficial, 30 de Diciembre de 1999.

136. HRC, *General Comment 25*, *supra* note 130, ¶ 1.

No. 169, to which most countries in Latin America are a party,<sup>137</sup> requires implementing the means by which indigenous peoples “can freely participate . . . at all levels of decision-making” affecting them.<sup>138</sup> Similarly, the U.N. Declaration on the Rights of Indigenous Peoples affirms that “[i]ndigenous peoples have the right . . . to participate fully, if they so choose, in the political . . . life of the State.”<sup>139</sup> The Inter-American Commission has also emphasized the right of indigenous peoples to political participation, stating in its Proposed American Declaration on the Rights of Indigenous Peoples that “[i]ndigenous peoples have the right to participate . . . in all decision-making, at all levels, with regard to matters that might affect their rights, lives and destiny.”<sup>140</sup> States within the Inter-American system also affirm as a matter of domestic law the right of indigenous peoples in particular to participate in the national politics of the state. Specifically, Ecuador,<sup>141</sup> Mexico,<sup>142</sup> Guatemala,<sup>143</sup> Nicaragua,<sup>144</sup> and Paraguay<sup>145</sup> articulate this right in their constitutions and legislation.

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137. This includes Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru, Venezuela. See International Labour Organisation [ILO], Status of Ratification of Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, *available at* <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>.

138. ILO Convention No. 169, *supra* note 120, art. 6.1(b).

139. U. N. Declaration on the Rights of Indigenous Peoples, *supra* note 121, art. 5.

140. Proposed American Declaration, *supra* note 122, art. XV(2).

141. Constitución Política de la República de Ecuador de 1998 [Const.] tit. III, ch. 5, § 1, art. 84(14) (“The State recognizes and guarantees indigenous peoples . . . the following collective rights: . . . [the right to] participate through representatives, in official bodies.” (author’s translation)).

142. Constitución Política de los Estados Unidos Mexicanos [Const.] tit. I, ch. I, art. 2(A)(III), (VII), Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.) (“[The Constitution guarantees] the right of peoples and communities . . . to elect in accordance with their norms, procedures and traditional practices, their authorities or representatives for the exercise of their own forms of internal government . . . . [T]he constitutions and laws . . . will recognize and regulate these rights in the municipalities, with the purpose of strengthening the participation and political representation in conformity with their traditional and internal norms.” (author’s translation)).

143. Agreement on Identity and Rights of Indigenous Peoples, Mar. 31, 1995, pt. IV.D (Guat.) (“[I]ndigenous peoples have been excluded from the decision-making process in the country’s political life,” which is why “it is necessary to institutionalize the representation of indigenous peoples at the local, regional, and national level,” and “in the decision-making process in the various areas of national life.”), *translated in* <http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/guat12.pdf>.

144. Ley No. 28, 2 September 1987, Estatuto de Autonomía de las Regiones Autónomas de la Costa Atlántica de Nicaragua [Autonomy Statute for the Autonomous Regions of the Atlantic Coast of Nicaragua] art. 10, La Gaceta [L.G.], 30 October 1987 (Nicar.) (“The Communities of the Atlantic Coast form part of the unified and undivided State of Nicaragua and their inhabitants have all the rights, duties that correspond as Nicaraguans in accordance to the Political Constitution.” (author’s translation)); *id.* art.

Central to the right of political participation is the notion that all citizens have the right to political participation without discrimination. The U.N. International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination<sup>146</sup> and affirms that states must “guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of . . . [p]olitical rights.”<sup>147</sup> In particular, this includes “the right to participate in election—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have *equal access* to public service.”<sup>148</sup> The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,<sup>149</sup> the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities,<sup>150</sup> and the Human Rights Committee General Comment on article 25 of the International Covenant on Civil and Political Rights<sup>151</sup> also specifically affirm the right to political participation under conditions of equality.

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11(7) (“The inhabitants of the Communities of the Atlantic Coast have the right to . . . elect . . . their own authorities from the Autonomous Regions.” (author’s translation)).

145. Constitución de la República de Paraguay de 1992 [Const.] tit. II, ch. V, art. 65 (“[The State] guarantees the right of indigenous peoples to participate in the . . . political life of the state, in accordance with their customary uses.” (author’s translation)).

146. Convention on Racial Discrimination, *supra* note 115, art. 1.1 (defining racial discrimination as “any distinction, exclusion restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights . . . in the political . . . field of public life” (emphasis added)).

147. *Id.* art. 5(c) (emphasis added).

148. *Id.* Some states in Latin America, such as Bolivia, Panama, and Paraguay, have adopted this provision in their domestic legislation.

149. Declaration on Racial Discrimination, *supra* note 115, art. 4.1 (“All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.”).

150. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. Res. 47/135, Annex, art. 2(2)-(3), U.N. Doc. A/Res/47/135/Annex (Feb. 3, 1993) (“Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.”).

151. HRC, *General Comment 25*, *supra* note 130, ¶ 3 (“No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”). Article 25 of the International Covenant on Civil and Political Rights provides for “the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service.” *Id.* ¶ 1.

The human rights instruments of the Inter-American system also acknowledge the right to equality in the exercise of political rights in particular. The American Convention incorporates the right to political participation under conditions of equality when it states in article 23 that “[e]very citizen shall enjoy the [right] . . . to take part in the conduct of public affairs, directly or through freely chosen representatives[,] . . . to vote and to be elected in genuine periodic elections[,] . . . [and] to have access, *under general conditions of equality*, to the public service of his country.”<sup>152</sup> Additionally, the American Convention states broadly in article 1 that the state parties to the Convention must ensure that all persons can fully exercise all the rights enshrined in the Convention, including political participation rights, without discrimination.<sup>153</sup>

Furthermore, it is important to note that the right to political participation is linked with the right to self-determination.<sup>154</sup> The right of self-determination is the right of peoples to choose for themselves the form of political organization that will govern the territory in which they live, under the notion that “government

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152. American Convention, *supra* note 62, art. 23 (emphasis added); *see also* Andrés Aylwin Azócar et al. v. Chile, Case 11.863, Inter-Am. C.H.R., Report No. 137/99, ¶ 155 (1999).

153. American Convention, *supra* note 62, art. 1.

154. Self-determination of peoples is considered a fundamental principle of international law and is recognized in several international and regional human rights instruments, including the Charter of the United Nations and the International Covenant on Economic, Social, and Cultural Rights, as well as in other international treaties at the regional level. U.N. Charter art. 1, para. 2 (“The Purposes of the United Nations are . . . [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”); International Covenant on Economic, Social and Cultural Rights art. 1.1, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (“All 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.”); African Charter, *supra* note 134, art. 20(1) (“All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.”); African Charter, *supra* note 134, art. 20(3) (“All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.”); Council of the League of Arab States, Arab Charter on Human Rights art. 1(a), Sept. 15, 1994, *reprinted in* 18 HUM. RTS. L.J. 151 (1997), *available at* <http://www1.umn.edu/humanrts/instree/arabcharter.html> (“All peoples have the right of self-determination . . . and, accordingly, have the right to freely determine the form of their political structure and to freely pursue their economic, social and cultural development.”); *see also* CERD, *General Recommendation No. 21: Right to Self-determination*, ¶ 1, U.N. Doc. A/51/18 (Aug. 23, 1996) [hereinafter CERD, *General Recommendation 21*], *reprinted in* *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 212, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004).

is to function according to the will of the people governed.”<sup>155</sup> The U.N. Committee on the Elimination of Racial Discrimination notes that together with the right to self-determination, “there exists a link with the right of every citizen to take part in the conduct of public affairs at any level.”<sup>156</sup> Similarly, the U.N. Declaration on the Rights of Indigenous Peoples specifically refers to the right of self-determination in relation to the political status of an indigenous group, stating that “[i]ndigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status.”<sup>157</sup> However, it should be stressed that effective exercise of the right of self-determination does not depend upon achieving independent statehood. As Professor S. James Anaya states:

[S]elf-determination does not imply an independent state for every people, nor are peoples without states left with only the individual rights of the groups’ members. Rather, peoples as such, including indigenous peoples with their own organic social and political fabrics, are to be full and equal participants in the construction and functioning of governing institutions under which they live at all levels.<sup>158</sup>

Thus, access to government decision-making bodies through political participation is fundamental to the advancement of the right of self-determination of any group and is separate from the achievement of independent statehood. As will be discussed in the following section, the right to effective self-determination for indigenous peoples—with respect to their right to political participation—includes both the right to maintain culturally distinctive political practices, and the right to participate effectively in the larger political order of the dominant society.

#### IV. THE CONTENT OF THE RIGHT OF INDIGENOUS PEOPLES TO POLITICAL PARTICIPATION UNDER *YATAMA V. NICARAGUA* AND EMERGING CUSTOMARY INTERNATIONAL LAW

The international practice discussed in this section helps build and reveal the content of the international treaty-based and emerging customary international law surrounding the right to political participation for indigenous peoples. The Inter-American Court’s decision in *YATAMA v. Nicaragua* contributes to the relevant international law by authoritatively interpreting the rights to equality and

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155. ANAYA, *supra* note 1, at 150.

156. CERD, *General Recommendation 21*, *supra* note 154, ¶ 4.

157. U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 121, art. 3.

158. S. James Anaya, Speech at 52d International Congress of Americanists, Sevilla: Why There Should Not Have to Be a Declaration on the Rights of Indigenous Peoples 4-5 (Summer 2006) (transcript available with author).



political participation as giving rise (when applied to indigenous peoples) to the more specific rights to (1) effective participation and special measures of protection and (2) participation in accordance with indigenous customs and traditional forms of organization. In addition, by recognizing the rights of indigenous peoples to effectively participate in the political processes of the state, the *YATAMA* decision and the other international developments reviewed in this section help indigenous peoples “achieve meaningful self-determination through political institutions . . . that reflect their specific cultural patterns and that permit them to be genuinely associated with all decisions affecting them on an ongoing basis.”<sup>159</sup> As stated by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, “[t]he right of self-determination may be satisfied where a people enjoys an *effective* voice, *through its own representatives*, in the governing of a democratic State, and *suffers no disadvantage or discrimination*.”<sup>160</sup>

#### **A. The Right to Effective Political Participation and Special Measures of Protection**

The decision in *YATAMA v. Nicaragua* affirmed a norm of special measures of protection to ensure indigenous peoples’ effective political participation—a norm that is increasingly reflected elsewhere in international practice. Regardless of the intent of states to allow indigenous groups access to the national politics of the country, in countries where ethnic minorities and indigenous peoples make up a minority of the population, their votes are often “diluted” in national elections and they are simply outvoted by majority populations.<sup>161</sup> As noted by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, the under-representation of minorities in the political life of the dominant society “[i]s simply a manifestation of a structural difficulty or flaw in many political systems, including majoritarian democracies: because of their lower numbers, minorities are simply and almost systematically outvoted in terms of their participation and representation in public life.”<sup>162</sup> This problem is augmented if minorities are not concentrated in specific territorial regions.<sup>163</sup> These structural flaws have the effect of silencing minority voices within a state. The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities affirms that “traditionally, minorities can almost

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159. ANAYA, *supra* note 1, at 156.

160. Working Group on Indigenous Populations, *supra* note 1, ¶ 19 (emphasis added).

161. ECOSOC, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, Working Group on Minorities, *Working Paper: Towards Effective Political Participation and Representation of Minorities*, U.N. Doc. E/CN.4/Sub.2/AC5/1998/WP4 (May 1, 1998) (prepared by Dr. Fernand de Varennes).

162. *Id.*

163. *Id.*

never elect the number of representatives that reflects more or less faithfully their actual percentage of the population. Their voices in the world of political representation, even in completely democratic systems, tend to be either weak or barely audible, their presence almost invisible.”<sup>164</sup> Therefore, even though domestic election laws are not facially discriminatory, the majority-wins feature of representative democracies has the effect of excluding minority populations from national and local decision-making.<sup>165</sup>

Creating special mechanisms and affirmative action policies to encourage indigenous political participation is a way to guarantee the political participation of indigenous and other minority groups under conditions of equality since it increases their likelihood of accessing political structures. In 1996, the Human Rights Committee affirmed that “States must take effective measures to ensure that all persons entitled to vote are able to exercise that right.”<sup>166</sup> Two years earlier, it observed that the enjoyment of human rights “may require positive legal measures of protection and measures to ensure the *effective participation of members of minority communities in decisions which affect them*.”<sup>167</sup> The Lund Recommendations,<sup>168</sup> the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation of Europe (CSCE),<sup>169</sup> and the Helsinki Document of the Conference

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164. *Id.*

165. See Mary Ellen Turpel, *Indigenous Peoples’ Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 CORNELL INT’L L.J. 579, 593 (1992) (“Without some political participation in national policy formulation, public decision-making, and public-opinion formation, the autonomy or self-government of indigenous peoples in affiliation with larger settler states will be structured without the input and consent of the indigenous peoples. Furthermore, their small numbers will mean exclusion from meaningful decision-making.”); Hurst Hannum, *The Rights of Persons Belonging to Minorities*, in HUMAN RIGHTS: CONCEPTS AND STANDARDS 277-94 passim (Janusz Symonides ed., 2000) (stating that a purely formal democracy in which members of minorities are consistently denied any share in power might well violate the emerging international norms of minority rights).

166. HRC, *General Comment 25*, *supra* note 130, ¶ 11.

167. HRC, *General Comment 23*, *supra* note 128, ¶ 7 (emphasis added).

168. FOUND. OF INTER-ETHNIC RELATIONS, THE LUND RECOMMENDATIONS ON THE EFFECTIVE PARTICIPATION OF NATIONAL MINORITIES IN PUBLIC LIFE & EXPLANATORY NOTE 5-6 (1999), available at [http://www.osce.org/documents/hcnm/1999/09/2698\\_en.pdf](http://www.osce.org/documents/hcnm/1999/09/2698_en.pdf) (affirming in the first principle that “in order to promote . . . [the effective participation of national minorities in public life], governments often need to establish specific arrangements for national minorities” and in the sixth principle that “States should ensure that opportunities exist for minorities to have an effective voice at the level of the central government, including through special arrangements as necessary”).

169. Conference on the Human Dimension of the Conference on Security and Cooperation in Europe [CSCE], Copenhagen, Den., June 5-29, 1990, *Document of the Copenhagen Meeting* at 20, ¶ 35 (June 29, 1990), available at [http://www.osce.org/documents/odih/1990/06/13992\\_en.pdf](http://www.osce.org/documents/odih/1990/06/13992_en.pdf) (“The participating States will respect the right of

on the Human Dimension of the CSCE<sup>170</sup> also generally affirm the obligation of states to adopt special measures to ensure effective participation of minorities.

The lack of political participation of indigenous peoples is particularly serious given their long history of colonization, marginalization, and discrimination within the societies in which they live.<sup>171</sup> Developing international norms therefore speak directly to the obligation of states to establish special remedial measures and enact procedural safeguards to encourage the political participation of indigenous groups in particular. The U.N. Declaration on the Rights of Indigenous Peoples guarantees the right to “*participate fully*, if they so choose, in the political . . . life of the State.”<sup>172</sup> The U.N. Committee on the Elimination of Racial Discrimination’s General Recommendation XXIII on the Rights of Indigenous Peoples calls upon states to “*ensure* that members of indigenous peoples have equal rights in respect of *effective* participation in public life.”<sup>173</sup> In addition, ILO Convention No. 169 affirms that “[*s*]pecial measures shall be adopted as appropriate for safeguarding the . . . institutions [and] cultures . . . of the peoples concerned,”<sup>174</sup> and that governments shall “establish means by which [indigenous peoples] can freely participate . . . at all levels of decision-making in elective institutions.”<sup>175</sup> These measures are inherently remedial in nature since they attempt to make up for past discrimination of indigenous groups through affirmative-action-type measures.

While these international instruments do not speak directly as to the kinds of mechanisms required to ensure that indigenous and other minority groups participate under the same conditions of equality as other citizens, these special mechanisms have taken the form of autonomous regions, guaranteed presentation,

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persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities.”).

170. CSCE, Third Heads of State Summit, Helsinki, Fin., July 9-10, 1992, *Helsinki Document 1992: The Challenges of Change* at 47, ¶ 24 (1992), available at [http://www.osce.org/documents/mcs/1992/07/4046\\_en.pdf](http://www.osce.org/documents/mcs/1992/07/4046_en.pdf) (“[State parties] [w]ill intensify in this context their efforts to ensure the free exercise by persons belonging to national minorities, individually or in community with others, of their human rights and fundamental freedoms, including the right to *participate fully*, in accordance with the democratic decision-making procedures of each State, in the political, economic, social and cultural life of their countries including through democratic participation in decision-making and consultative bodies at the national, regional and local level.” (emphasis added)).

171. See ANAYA, *supra* note 1, at 130.

172. U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 121, art. 5 (emphasis added).

173. CERD, *General Recommendation 23*, *supra* note 118, ¶ 4(d) (emphasis added); see also CERD, *Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination: Australia*, ¶ 9, U.N. Doc. CERD/C/304/Add.101 (Apr. 19, 2000).

174. ILO Convention No. 169, *supra* note 120, art. 4.1 (emphasis added).

175. *Id.* art. 6.1(b).

redistricting, veto powers, and proportional voting systems.<sup>176</sup> As will be discussed in the following section, the special mechanisms included in the constitutions and laws of Latin American countries shed light on the possible ways to comply with the obligations noted above to ensure the effective participation of indigenous peoples in national political structures.

### **B. The Right to Participate in Accordance with Traditional Forms of Organization**

A second, related right guaranteed under developing norms in international law and *YATAMA v. Nicaragua* is the right of indigenous peoples to access national political systems through their traditional forms of organization.<sup>177</sup> This right guarantees equality in the manner in which the group organizes itself to access national, dominant political structures, as well as equality in the effects of the indigenous groups' levels of political participation. The broad requirement that all political parties organize themselves in the exact same way, or that they elect representatives in one single manner, has been viewed in international practice, including the *YATAMA v. Nicaragua* decision, as arbitrarily discriminatory to those groups that adopt different organizational methods.<sup>178</sup> Such is the case with indigenous groups; requiring that they adopt foreign forms of organization in order to participate in national politics can have the effect of limiting their participation, whether or not this limitation on the part of the state is intentional.<sup>179</sup> As noted by Professor Laurence Tribe, "minorities can also be injured when the government is 'only' indifferent to their suffering or 'merely' blind to how prior official discrimination contributed to it and how current official acts will perpetuate it."<sup>180</sup> One way this arbitrary discrimination can occur is by requiring indigenous groups to abandon their traditional participatory and organizational structures in order to participate in the national politics of the dominant society.<sup>181</sup> As noted by Professor Mary Ellen Turpel:

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176. See Catherine Irons Magallanes, *Dedicated Parliamentary Seats for Indigenous Peoples: Political Representation as an Element of Indigenous Self-Determination*, 10 MURDOCH U. ELECTRONIC J.L. 4, ¶ 9 (Dec. 2003), available at <http://www.murdoch.edu.au/elaw/issues/v10n4/iorns104.html>; *YATAMA Amicus Curiae*, *supra* note 71, at 28-39.

177. See *supra* Part II.D.2; *YATAMA v. Nicaragua Case*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 225 (June 23, 2005).

178. See *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶¶ 218-19; see, e.g., HRC, *General Comment 25*, *supra* note 130, ¶ 17 ("The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy.").

179. See *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶¶ 218, 223.

180. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1519 (2d ed. 1988).

181. See *YATAMA Case*, 2005 Inter-Am. Ct. H.R. No. 127, ¶ 218.

Although it is important for indigenous people to be able to participate in public affairs with the same status as “citizens,” this type of participation is clearly insufficient . . . . [This insufficiency could be due to] the historic lack of participation by indigenous peoples in alien political systems, the failure of the party-system to respond to indigenous concerns, and the Anglo-European political premise of one-person, one-vote, a view that is antithetical to the governing traditions of clan and family-based societies.<sup>182</sup>

Furthermore, the right to political participation under conditions of equality for indigenous peoples means that governments cannot discriminate in the way the group organizes itself in order to participate in national political structures. This interpretation of the right also touches upon the rights of cultural integrity and self-determination, under which indigenous peoples have the right to maintain their own institutions and practices, while having a voice in state institutions.<sup>183</sup> As noted by Professor S. James Anaya, “for a culturally differentiated group, ongoing self-determination requires a democratic political order in which the group is able to continue its distinct character and “to have this character reflected in the institutions of government under which it lives.”<sup>184</sup> Thus, guaranteeing the right of indigenous peoples to maintain their traditional institutions while participating in the larger political order allows “indigenous peoples to achieve meaningful self-determination through political institutions and consultative arrangements that reflect their specific cultural patterns and that permit them to be genuinely associated with all decisions affecting them on an ongoing basis.”<sup>185</sup> By allowing indigenous groups to participate in accordance with their traditional forms of organization, developing norms in international law, to which the *YATAMA v. Nicaragua* decision contributes, require states to not discriminate in the way an indigenous group organizes itself to access national political structures.

Provisions of already adopted or developing international instruments, which can be seen as reflecting or giving rise to customary international law, guarantee the right of indigenous peoples to participate in state politics in accordance with their traditional political practices. Most prominently, the U.N. Declaration on the Rights of Indigenous Peoples states broadly that indigenous

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182. Turpel, *supra* note 165, at 595.

183. See U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 121, pmbl., arts. 3-5.

184. ANAYA, *supra* note 1, at 106 (citing Ian Brownlie, *The Rights of Peoples in Modern International Law*, in *THE RIGHTS OF PEOPLES* 1, 5 (James Crawford ed., 1988)).

185. *Id.* at 156.

peoples “have the right to *maintain and develop* their political . . . institutions”<sup>186</sup> and that they “have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves *in accordance with their own procedures*.”<sup>187</sup> It also states that “[i]ndigenous peoples have the right to maintain and strengthen their distinct political . . . institutions, while retaining their rights to participate fully, if they so choose, in the political . . . life of the State.”<sup>188</sup> Article 19 refers to the obligation of states to act through *indigenous peoples’ own representative institutions* to obtain their “free . . . and informed consent” before adopting or implementing “any legislative or administrative measures that may affect them.”<sup>189</sup> Similarly, the ILO Convention No. 169 affirms that governments shall “establish means for the full development of these peoples’ own institutions.”<sup>190</sup> Likewise, the U.N. Declaration of Principles on the Rights of Indigenous Peoples states that “no State shall deny any indigenous nation, community, or people residing within its borders the right to participate in the life of the State in whatever manner and to whatever degree they may choose.”<sup>191</sup> Finally, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities guarantees minorities in general the right to maintain their own associations.<sup>192</sup>

Within the Inter-American human rights system, the Proposed American Declaration stresses that indigenous peoples have the right to “equal opportunities to access and participate in all state institutions.”<sup>193</sup> The Proposed Declaration affirms that indigenous communities may participate in the political processes of the dominant society “directly or through representatives chosen by them *in accordance with their own procedures*” in addition to having the right to maintain their own “indigenous decision-making institutions.”<sup>194</sup> In addition, Article XVII states that “[t]he States shall facilitate the inclusion in their national organizational structures, the institutions and traditional practices of indigenous peoples.”<sup>195</sup> As explained in the following section, several countries within the Inter-American system allow indigenous peoples to elect representatives and form political parties

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186. U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 121, art. 20 (emphasis added).

187. *Id.* art. 18 (emphasis added).

188. *Id.* art. 5.

189. *Id.* art. 19.

190. ILO Convention 169, *supra* note 120, art. 6.1(c).

191. Declaration of Principles Adopted by the Indigenous Peoples, ¶ 10, U.N. Doc. E/CN.4/Sub.2/1987/22, Annex V (July 27-31, 1987), *available at* <http://www.cwis.org/fwdp/International/indigprn.txt>.

192. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, *supra* note 150, art. 2.4 (“Persons belonging to minorities have the right to establish and maintain their own associations.”).

193. Proposed American Declaration, *supra* note 122, art. XV(2).

194. *Id.* (emphasis added).

195. *Id.* art. XVII(2).

according to their own customs and traditions.<sup>196</sup> Specifically, the laws of Mexico<sup>197</sup> (including those of the Mexican states of Oaxaca,<sup>198</sup> Chiapas,<sup>199</sup> Jalisco,<sup>200</sup> Durango,<sup>201</sup> Nayarit,<sup>202</sup> San Luis Potosí,<sup>203</sup> and Veracruz<sup>204</sup>), Bolivia,<sup>205</sup> Colombia,<sup>206</sup> and Ecuador<sup>207</sup> have affirmed this right.

## V. DOMESTIC LEGAL PRACTICE OF LATIN AMERICAN STATES RECOGNIZING INDIGENOUS PEOPLES' RIGHT TO POLITICAL PARTICIPATION

In addition to the provisions of already adopted and developing international written instruments just discussed, the domestic laws of states can also be seen as reflecting or giving rise to customary international law. Domestic legislation of states in the Inter-American system increasingly reflect the norms embodied in international practice that recognize the right to effective political participation of indigenous groups in accordance with their customary laws, values, and traditions. States within the Inter-American system affirm the right of indigenous peoples in particular to participate in the national politics of the state.

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196. *See infra* Part V.

197. Constitución Política de los Estados Unidos Mexicanos [Const.] tit. I, ch. I, art. 2, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

198. Constitución Política del Estado Libre y Soberano de Oaxaca [Const.], *as amended*, tit. II, art. 25, Periódico Oficial del Estado de Oaxaca, 8 de Agosto de 1998 (Mex.).

199. Constitución Política del Estado de Chiapas [Const.], *as amended*, tit. II, art. 13, Periódico Oficial del Estado de Chiapas, 14 de Octubre de 2006 (Mex.).

200. Constitución Política del Estado de Jalisco [Const.], *as amended*, tit. III, ch. I, art. 15(III), Periódico Oficial del Estado de Jalisco, 13 de Julio de 1994 (Mex.).

201. Constitución Política del Estado Libre y Soberano de Durango [Const.], *as amended*, tit. I, ch. I, art. 2, Periódico Oficial del Estado de Durango, 26 de Noviembre de 2000 (Mex.).

202. Constitución Política del Estado Libre y Soberano de Nayarit [Const.], *as amended*, tit. I, ch. III, art. 7, Periódico Oficial del Estado de Nayarit, 17 de Mayo de 2004 (Mex.).

203. Constitución Política de San Luis Potosí [Const.], *as amended*, tit. I, ch. I, art. 9, Periódico Oficial del Estado de San Luis Potosí, 15 de Agosto de 2006 (Mex.).

204. Constitución Política del Estado Libre y Soberano de Veracruz-Llave [Const.], *as amended*, tit. I, ch. II, art. 5, Gaceta Oficial de Estado de Veracruz, 29 de Enero de 2007 (Mex.).

205. Constitución Política del Estado de Bolivia [Const.], *as amended*, pt. 2, tit. IX, ch. II, arts. 222, 6 de Julio de 2005.

206. Constitución Política de Colombia de 1991 [Const.], *as amended*, tit. IX, ch. IV, art. 329, 27 de Julio de 1991.

207. *Cf.* Ley No. 27, 8 October 1997, Ley Especial de Descentralización del Estado y de Participación Social [Special State Decentralization and Social Participation Law] art. 42 (Ecuador).

Specifically, Ecuador,<sup>208</sup> Mexico,<sup>209</sup> Guatemala,<sup>210</sup> Nicaragua,<sup>211</sup> and Paraguay<sup>212</sup> articulate this right in their constitutions and legislation. Since the early 1990s, various countries in Latin America have recognized indigenous peoples' rights to political participation under conditions of equality through the adoption of legislation or constitutional reforms that establish affirmative action measures specially targeted to encourage or guarantee this participation. These special rights are in addition to the right to political participation guaranteed to all citizens.<sup>213</sup>

The special mechanisms included in the following constitutions and laws shed light on the possible ways to comply with the obligations noted above to ensure the effective participation of indigenous peoples in national political structures. The special mechanisms include: (1) creating guaranteed indigenous seats within political parties and in national political bodies (Colombia, Peru, and Venezuela),<sup>214</sup> (2) creating special indigenous voting districts (Panama and Mexico),<sup>215</sup> and (3) creating autonomous regions for indigenous self-government, and granting these autonomous regions the right to elect representatives in the national government (Nicaragua, Colombia, Panama, and Ecuador).<sup>216</sup> In addition, several countries within the Inter-American system, including Mexico,<sup>217</sup>

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208. *See* Constitución Política de la República de Ecuador de 1998 [Const.] tit. III, ch. 5, § 1, art. 84(14) ("The State recognizes and guarantees indigenous peoples . . . the following collective rights: . . . [the right to] participate through representatives, in official bodies." (author's translation)).

209. Constitución Política de los Estados Unidos Mexicanos [Const.] tit. I, ch. I, art. 2(A)(III), (VII), Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.) ("[The Constitution guarantees] the right of peoples and communities . . . to elect in accordance with their norms, procedures and traditional practices, their authorities or representatives for the exercise of their own forms of internal government . . . . [T]he constitutions and laws . . . will recognize and regulate these rights in the municipalities, with the purpose of strengthening the participation and political representation in conformity with their traditional and internal norms." (author's translation)).

210. Agreement on Identity and the Rights of Indigenous Peoples, *supra* note 143, pt. IV.D.

211. Ley No. 28, 2 September 1987, Estatuto de Autonomía de las Regiones Autónomas de la Costa Atlántica de Nicaragua [Autonomy Statute for the Autonomous Regions of the Atlantic Coast of Nicaragua] arts. 10, 11(7), La Gaceta [L.G.], 30 October 1987 (Nicar.).

212. Constitución de la República de Paraguay de 1992 [Const.] tit. II, ch. V, art. 65 ("[The State] guarantees the right of indigenous peoples to participate in the . . . political life of the state, in accordance with their customary uses." (author's translation)).

213. *See, e.g.*, sources cited *supra* note 135.

214. *See* YATAMA Amicus Curiae, *supra* note 71, at 28-39.

215. *See id.*

216. *See id.*

217. Constitución Política de los Estados Unidos Mexicanos [Const.] tit. I, ch. I, art. 2, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).



Bolivia,<sup>218</sup> Colombia,<sup>219</sup> and Ecuador,<sup>220</sup> allow indigenous peoples to elect representatives and form political parties according to their own customs and traditions.

On their own, these domestic protections might be insufficient to afford indigenous peoples adequate access to national political structures,<sup>221</sup> as was made clear by Nicaragua's actions in *YATAMA v. Nicaragua*. Indigenous peoples still face fundamental challenges that hinder their political participation, including high rates of poverty and inequality, failure of states to implement national legislation, and lack of recognition of indigenous claims to land and natural resources.<sup>222</sup> Therefore, these provisions might be only a beginning step towards solving the problem of lack of effective political participation of indigenous groups.<sup>223</sup> Nevertheless, even if not yet fully implemented, "domestic state practice, together with relevant practice at the international level, builds customary international law."<sup>224</sup> In addition, advancements in domestic laws "constitute legal obligations for state officials . . . and give rise to expectations of conforming behavior on the part of the international community."<sup>225</sup> Therefore, these mechanisms represent part of the emerging customary law that promotes indigenous peoples' rights to political participation through the development of special mechanisms designed to encourage this participation. The mechanisms that have been employed in countries throughout the Inter-American system are briefly discussed here.

### **A. Bolivia**

On March 6, 2006, Bolivian President Evo Morales signed a historic law convening a special assembly to rewrite the Bolivian Constitution to give more power to indigenous groups by decentralizing government power and increasing

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218. Constitución Política del Estado de Bolivia [Const.], *as amended*, pt. 2, tit. IX, ch. II, art. 222, 6 de Julio de 2005.

219. Constitución Política de Colombia de 1991 [Const.], *as amended*, tit. IX, ch. IV, art. 329, 27 de Julio de 1991.

220. *Cf.* Ley No. 27, 8 October 1997, Ley Especial de Descentralización del Estado y de Participación Social [Special State Decentralization and Social Participation Law] art. 42 (Ecuador).

221. *See* Richard B. Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 WIS. L. REV. 171, 205-07 (1969).

222. Otilia Lux de Cojti, *Indigenous Peoples, Democracy, and Political Participation*, POLITICAL DATABASE OF THE AMERICAS, available at <http://pdba.georgetown.edu/IndigenousPeoples/introduction.html> (last visited Mar. 4, 2006).

223. Bilder, *supra* note 221, at 205-07.

224. Anaya & Williams, *supra* note 111, at 59.

225. *Id.* at 58-59.

regional autonomy.<sup>226</sup> The special assembly's objective was the "total reform" of the Bolivian Constitution with the goal of increasing the representation and participation of indigenous peoples in the country's decision-making bodies.<sup>227</sup> While the specific structure of the new Constitution is unknown at this time, it will inevitably have significant impacts on the political participation of the country's indigenous groups.<sup>228</sup>

Even before this recent major constitutional reform effort, the Bolivian Constitution and laws included several provisions designed to encourage the political participation of indigenous groups.<sup>229</sup> In early 2004, Bolivia reformed its Constitution to increase citizen participation, create new forms of participation, and consolidate democracy.<sup>230</sup> While the pre-2004 Constitution allowed only for citizen participation in elections by joining a political party, the recent constitutional reforms state that "popular representation can be exercised through political parties, citizen groups, and indigenous organizations."<sup>231</sup> Furthermore, Bolivia designed the Popular Participation Law of 1994 to increase social participation at the municipal level through decentralization of the executive power.<sup>232</sup> The law rearranges territorial jurisdictions, creating, in some cases, Indigenous Municipal Districts.<sup>233</sup> In their respective jurisdictions, indigenous groups (organized according to their own customs and traditions, and elected

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226. See Ley No. 3364, 6 March 2006, Ley Especial de Convocatoria a la Asamblea Constituyente [Special Law to Convoke Constituent Assembly] (Bol.).

227. See *id.* arts. 3-4; Dan Keane, *Bolivia Begins to Rewrite Constitution*, WASHINGTONPOST.COM, Aug. 6, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/06/AR2006080600847.html>.

228. For a discussion on the rewriting of the Bolivian Constitution, see, for example, sources cited *supra* note 227; Lisa Garriques, *Bolivia Launches Constitutional Reform*, INDIAN COUNTRY TODAY (N.Y.), July 3, 2006, available at <http://www.indiancountry.com/content.cfm?id=1096413231>; David King, *Constitutional Reform in Bolivia*, REVISTA: HARV. REV. LATIN AM., Spring/Summer 2006, at 12.

229. Constitución Política del Estado de Bolivia [Const.], *as amended*, pt. 2, tit. IX, ch. II, art. 222, 6 de Julio de 2005; Ley No. 1551, 20 April 1994, Ley de Participación Popular [Popular Participation Law] art. 1 (Bol.), *amended by* Ley No. 1702, 11 July 1996 (Bol.).

230. See Oscar Hassenteufel, Presidente de la Corte Nacional Electoral [President of the Nacional Electoral Court] Informe de Instalación de Labores de la Gestión 2005 del Organismo Electoral, Corte Nacional Electoral (Jan. 26, 2005), available at [http://www.cne.org.bo/centro\\_doc/discursos.aspx?IdDocumento=cddi01](http://www.cne.org.bo/centro_doc/discursos.aspx?IdDocumento=cddi01).

231. Constitución Política del Estado de Bolivia [Const.], *as amended*, pt. 2, tit. IX, ch. II, art. 222, 6 de Julio de 2005 (author's translation).

232. Ley No. 1551, 20 April 1994, Ley de Participación Popular [Popular Participation Law] art. 1 (Bol.), *amended by* Ley No. 1702, 11 July 1996 (Bol.).

233. *Id.* arts. 1-2.

according to their traditional voting methods)<sup>234</sup> may oversee local development policies and participate in the elaboration of municipal plans.<sup>235</sup>

## **B. Colombia**

The Constitution of Colombia promotes minority participation in mainstream politics by reserving seats for indigenous and ethnic minority representatives in both the Senate of the Republic and the Chamber of Representatives.<sup>236</sup> Article 171 reserves two senate seats for indigenous representatives.<sup>237</sup> Article 171 further promotes the election of indigenous leaders by requiring that candidates wishing to be elected to the special seats have exercised a position of traditional authority within their community or have been a leader of an indigenous organization.<sup>238</sup> With 2 out of the 102 seats in the national Senate reserved for indigenous peoples, Colombia has created a nearly proportional level of representation for indigenous peoples, who make up approximately 2% of the total population.<sup>239</sup> Colombia also expanded the designation of special indigenous seats to the Chamber of Representatives. Article 176 of the Colombian Constitution provides that up to five special seats in the Chamber of Representatives could be created for minority representatives.<sup>240</sup>

## **C. Ecuador**

The Ecuadorian Constitution explicitly recognizes the general right of indigenous peoples to participate in the country's political life.<sup>241</sup> In addition, it

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234. *Id.* art. 3(1).

235. *Id.* arts. 7-8.

236. Constitución Política de Colombia de 1991 [Const.], tit. VI, ch. V, arts. 171, 176, as amended 27 de Julio de 1991.

237. *Id.* tit. VI, ch. V, art. 171.

238. *Id.*

239. See Mona Lena Crook & Diana O'Brien, The Politics of Group Representation: Quotas for Women and Minorities Worldwide, Paper Presented at the Annual Meeting of the Midwest Political Science Association, Chicago, IL (Apr. 12-15, 2007), available at <http://krook.wustl.edu/doc/Krook%20and%20OBrien%20MPSA%202007%204.doc>; José Aylwin, *Land and Resources*, CULTURAL SURVIVAL Q., Dec. 15, 2006, available at <http://www.culturalsurvival.org/publications/csq/csq-article.cfm?id=1937>.

240. Constitución Política de Colombia de 1991 [Const.], as amended, tit. VI, ch. V, art. 176, 27 de Julio de 1991.

241. See Constitución Política de la República de Ecuador de 1998 [Const.] tit. III, ch. 5, § 1, art. 84. "The State recognizes and guarantees the right of indigenous peoples, in conformity with this constitution and the law . . . the following collective rights: . . . [t]o conserve and develop their traditional forms of living and social organization . . . and exercise of authority" and "[t]o participate through their representatives, in the official

outlines several affirmative-action-type policies to encourage indigenous political participation.<sup>242</sup> The constitutional reforms of 1996 and 1999 facilitated the participation of indigenous groups in the Ecuadorian electoral process by allowing candidates who are not affiliated with or supported by political parties to participate in national elections.<sup>243</sup> Likewise, the Special State Decentralization and Social Participation Law of 1997 encourages indigenous political participation at the local level.<sup>244</sup> It stipulates that indigenous peoples may represent their communities in municipal bodies and other public entities through their traditional forms of organization.<sup>245</sup> The constitutional reforms of 1998 also expanded indigenous peoples' rights to political participation at the local level through the creation of special indigenous territories.<sup>246</sup> Articles 224 and 228 of the Constitution recognize the existence of indigenous autonomous districts, though they do not specifically guarantee political representation of these districts in the national political bodies.<sup>247</sup>

#### **D. Mexico**

The Mexican Constitution has made several important amendments regarding indigenous political participation, including articles that mention: (1) redistricting to create indigenous voting territories,<sup>248</sup> and (2) granting indigenous peoples the right to elect and be elected according to traditional customs and practices.<sup>249</sup> Article 2 recognizes indigenous communities' right to self-determination, and their autonomy to "[e]lect, in municipalities with indigenous people, representatives to municipal governments . . . with the purpose of strengthening indigenous participation and political representation in conformity with the peoples' traditions and internal standards."<sup>250</sup> The Constitution also states: "In order to establish the territorial demarcation of uninominal districts, the

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organizations determined by the law." *Id.* tit. III, ch. 5, § 1, arts. 84(7), (14) (author's translation).

242. *Id.* tit. IV, ch. 1, art. 98.

243. *Id.*

244. Ley No. 27, 8 October 1997, Ley Especial de Descentralización del Estado y de Participación Social [Special State Decentralization and Social Participation Law] art. 42 (Ecuador).

245. *Id.*

246. *See* Constitución Política de la República de Ecuador de 1998 [Const.] tit. XI, ch. I, art. 224, tit. XI, ch. 3, art. 228.

247. *Id.*

248. Constitución Política de los Estados Unidos Mexicanos [Const.] tit. I, ch. I, art. 2(B)(I), Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

249. *Id.* tit. I, ch. I, art. 2(A)(VII).

250. *Id.* tit. I, ch. I, art. 2(A)(I), (III), (VII) (author's translation).

location of the indigenous peoples and communities should, when feasible, be taken into consideration, *in order to foster their political participation.*"<sup>251</sup>

Special mechanisms to encourage indigenous political participation in Mexico are most significant at the state level. Various states have enacted constitutional provisions, laws, and decrees creating affirmative mechanisms to support political participation of indigenous groups. Most notably, the State of Oaxaca allows indigenous peoples to elect local political representatives according to their own customs and traditions (*usos y costumbres*).<sup>252</sup> These practices are based on historical and traditional practices, and are explicitly recognized in the State's Constitution.<sup>253</sup> Article 25 of the Oaxaca Constitution states, "the law shall protect the democratic traditions and practices of indigenous communities, which they have used until now to elect their municipal governments (*ayunamientos*)."<sup>254</sup> The electoral reform in Oaxaca formally recognized traditional uses and customs for the appointment of municipal governments, and is practiced in 430 of the 570 municipalities of the State.<sup>255</sup> As noted by the Inter-American Commission on Human Rights, these electoral methods "are consistent with political pluralism, the right to participation, and freedom of expression."<sup>256</sup> Other Mexican states have also recognized and protected indigenous forms of political organization and election in their constitutions, including Chiapas,<sup>257</sup> Jalisco,<sup>258</sup> Durango,<sup>259</sup> Nayarit,<sup>260</sup> San Luís Potosí,<sup>261</sup> and Veracruz.<sup>262</sup>

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251. *Id.* Decreto Reformando la Constitución Política de los Estados Unidos Mexicanos [Decree Reforming the Const.], art. 3, Diario Oficial de la Federación [D.O.], 14 de Agosto de 2001 (Mex.) (emphasis added) (author's translation).

252. *See* Decreto No. 285, Código de Instituciones Políticas y Procedimientos Electorales de Oaxaca [CIPPEO] [Code of Political Institutions and Electoral Procedures of Oaxaca] arts. 109-13.

253. Constitución Política del Estado Libre y Soberano de Oaxaca [Const.], *as amended*, tit. II, art. 25, Periódico Oficial del Estado de Oaxaca, 8 de Agosto de 1998 (Mex.).

254. *Id.* (author's translation).

255. Comisión Interamericana de Derechos Humanos [CIDH] [Inter-Am. C.H.R.], Informe Sobre La Situación de Los Derechos Humanos en México, OEA/Ser.L/V/II.100, doc. 7 rev. 1, ¶ 518 (1998).

256. *Id.* (author's translation).

257. Constitución Política del Estado de Chiapas [Const.], *as amended*, tit. II, art. 13, Periódico Oficial del Estado de Chiapas, 14 de Octubre de 2006 (Mex.) ("The right of the indigenous communities to elect their traditional authorities in accordance with their uses, customs, and traditions, is recognized and protected." (author's translation)).

258. Constitución Política del Estado de Jalisco [Const.], *as amended*, tit. III, ch. I, art. 15(III), Periódico Oficial del Estado de Jalisco, 13 de Julio de 1994 (Mex.) ("The laws will promote the social, economic, political, and cultural development of [the indigenous] communities . . . based on respect for their traditions, customs, uses . . . and specific forms of social organization." (author's translation)).

**E. Nicaragua**

Articles 5, 89, and 180 of the Nicaraguan Constitution recognize the validity of the customary law of indigenous peoples.<sup>263</sup> The Constitution says that the concept of indigenous peoples brings with it the recognition of collective rights, including the rights to elect their own authorities and to administer their local affairs, in conformity with their customs and traditions.<sup>264</sup> The Nicaraguan Constitution guarantees the communities of the Atlantic Coast “the free election of their authorities and representatives.”<sup>265</sup> It also defines their autonomous status and their relationship with other political authorities in the State.<sup>266</sup> The Autonomy Statute for the Autonomous Regions of the Atlantic Coast of Nicaragua, adopted in 1987, outlines most of the details regarding the Atlantic Coast’s autonomous status.<sup>267</sup> The Autonomy Statute recognizes the right of the people of the Atlantic Coast to “elect and be elected as the authorities of the

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259. Constitución Política del Estado Libre y Soberano de Durango [Const.], *as amended*, tit. I, ch. I, art. 2, Periódico Oficial del Estado de Durango, 26 de Noviembre de 2000 (Mex.). “[T]he laws recognize cultural diversity and will protect and promote the development of [the state’s] ethnicities, their languages, cultural values, uses, customs, resources, and forms of social organization.” *Id.* tit. I, ch. I, art. 2 pml. (author’s translation). “This Constitution recognizes and guarantees the indigenous peoples and communities . . . the autonomy to . . . elect, in the municipalities with indigenous populations, representatives before the municipal bodies, with the purpose of strengthening their participation and political representation in accordance with their traditions and internal norms.” *Id.* tit. I, ch. I, art. 2(A)(VII) (author’s translation).

260. Constitución Política del Estado Libre y Soberano de Nayarit [Const.], *as amended*, tit. I, ch. III, art. 7, Periódico Oficial del Estado de Nayarit, 17 de Mayo de 2004 (Mex.) (“[The indigenous peoples and communities have the] . . . autonomy to choose their internal forms of . . . social organization . . . in the creation of their normative systems, their uses and customs, [and] their forms of traditional government.” (author’s translation)).

261. Constitución Política de San Luis Potosí [Const.], *as amended*, tit. I, ch. I, art. 9, Periódico Oficial del Estado de San Luis Potosí, 15 de Agosto de 2006 (Mex.). “The indigenous communities will elect and designate their representatives . . . before municipal bodies . . . in accordance with their normative systems and forms of community organization.” *Id.* tit. I, ch. I, art. (9)(XI).

262. Constitución Política del Estado Libre y Soberano de Veracruz-Llave [Const.], *as amended*, tit. I, ch. II, art. 5, Gaceta Oficial de Estado de Veracruz, 29 de Enero de 2007 (Mex.) (“The Law will promote and protect [the indigenous peoples’] uses and customs, resources, and specific forms of social organization.” (author’s translation)).

263. Constitución Política de la República de Nicaragua [Cn.] [Constitution] tit. I, ch. I, art. 5, tit. IV, ch. VI, art. 89, tit. IX, ch. II, art. 180, La Gaceta [L.G.] 9 January 1987.

264. *Id.*

265. *Id.* tit. IX, ch. II, art. 180 (author’s translation).

266. *See id.* tit. I, ch. I, arts. 1-2.

267. *See* Ley No. 28, 2 September 1987, Estatuto de Autonomía de las Regiones Autónomas de la Costa Atlántica de Nicaragua [Autonomy Statute for the Autonomous Regions in the Atlantic Coast of Nicaragua], La Gaceta [L.G.], 30 October 1987 (Nicar.).

autonomous region”<sup>268</sup> and establishes a Regional Council and a Regional government for each of the regions of the Atlantic Coast.<sup>269</sup> Representatives to the Regional Councils are elected by universal, direct, free, equal, and secret suffrage by all habitants of the region.<sup>270</sup> In *YATAMA v. Nicaragua*, the Inter-American Court found that Nicaragua should have taken into consideration these domestic laws to guarantee the right of political participation to indigenous peoples.<sup>271</sup> However, the 2000 Electoral Law actually had the effect of limiting the rights to political participation for indigenous peoples, and thus violated both the American Convention and domestic laws in Nicaragua.

## **F. Panama**

Panama has fostered indigenous political participation through the creation of special indigenous electoral circuits and semiautonomous reserves. The 1972 Constitution created a temporary special “electoral circuit” for the Chiriquí province, mostly populated by the Guaymí indigenous group.<sup>272</sup> Between 1953 and 2000, the government provided semiautonomous status and special voting rights to five indigenous groups: (1) the Kuna Yala, (2) the Ngobe-Bugle, (3) the Embera Wounaan, (4) the Kuna de Madungandi, and (5) the Kuna de Wargandi.<sup>273</sup> The reserves are divided into special electoral circuits (sometimes more than one electoral circuit), and the elected representatives of

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268. *Id.* art. 11(7) (author’s translation).

269. *Id.* art. 15.

270. *Id.* art. 19.

271. *YATAMA v. Nicaragua* Case, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 205 (June 23, 2005).

272. Constitución Política de la República de Panamá de 1972 [Const.], *as amended*, tit. XV, ch. 2, art. 321(1)(1), 1994.

273. *Id.* tit. III, ch. 5, art. 123 (Pan.); *see* Ley No. 16, 19 February 1953, Ley por la cual se organiza la Comarca de San Blas (Kuna Yala) [Law Creating the San Blas Region (Kuna Yala)], Gaceta Oficial No. 12.042, 7 April 1953 (Pan.), *reprinted in* ARESIO VALIENTE LÓPEZ, DERECHOS DE LOS PUEBLOS INDÍGENAS DE PANAMÁ 69-74 (2002), *available at* <http://www.oit.or.cr/unfip/publicaciones/panama.pdf>; Ley No. 22, 8 November 1983, Ley por la cual se crea la Comarca Emberá de Darién [Law Creating the Emberá de Darién Region], Gaceta Oficial No. 19.976, 17 January 1984 (Pan.), *reprinted in* LÓPEZ, *supra*, at 83-33; Ley No. 24, 12 January 1996, Ley por la cual se crea la Comarca Kuna de Madungandi [Law Creating the Kuna de Madungandi Region], Gaceta Oficial No. 22.951, 15 January 1996 (Pan.), *reprinted in* LÓPEZ, *supra*, at 121-25; Ley No. 10, 7 March 1997, Ley por la cual se crea la Comarca Ngöbe-Buglé [Law Creating the Ngöbe-Buglé Region], Gaceta Oficial No. 23.242, 11 March 1997 (Pan.), *reprinted in* LÓPEZ, *supra*, at 137-48; Ley No. 34, 25 July 2000, Ley que crea la Comarca Kuna de Wargandi [Law Creating the Kuna de Wargandi Region], Gaceta Oficial No. 24.106, 28 July 2000 (Pan.), *reprinted in* LÓPEZ, *supra*, at 195-200.

these circuits represent their territories in the National Assembly.<sup>274</sup> With these provisions, Panama has effectively created seven seats in the National Assembly for indigenous representatives. Panama has also generally recognized the right to political participation free from any kind of discrimination based on race or ethnicity.<sup>275</sup>

### **G. Peru**

The Peru Electoral Law of 2002 reserves 15% of candidates for the municipal and regional elections to representatives of indigenous communities in Peru.<sup>276</sup> Article 12 of the Regional Electoral Law establishes the same quota for candidates to the Regional Council, stating that “[t]he list of candidates to the Regional Council shall be conformed by . . . a minimum of 15% of representatives from native communities . . . in every region where they exist.”<sup>277</sup> This system allows voters to select from an ethnically diverse group of candidates, though it does not guarantee that any specific number of minority candidates will actually

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274. The 1994 Constitution provided that the San Blas reserve, populated by Kuna-Yala Indians, would be divided into two electoral circuits, and each of these electoral circuits could elect one legislator to the National Assembly. *Constitución Política de la República de Panamá de 1972* [Const.], *as amended*, tit. V, ch. 1, art. 141, 1994. Article 141 also divides the Darién Province, populated mostly by Emberá Indians (though not a designated semiautonomous indigenous reserve), into two electoral circuits. *Id.* Each of these circuits is to be represented by one legislator in the National Assembly. *Id.* Additionally, three seats in the National Assembly were added for the Ngöbe-Bugle Region in the 2004 elections. Decreto Ejecutivo No. 194, 25 August 1999, *La Carta Orgánica Administrativa de la Comarca Ngöbe-Buglé* [Administrative Organic Law for the Ngöbe-Buglé Region] arts. 162-63, *Gaceta Oficial* No. 23.882, 9 September 1999 (Pan.), *reprinted in* LÓPEZ, *supra* note 273, at 172. The Executive Decree Number 194 states, “the reserve will be divided into 3 electoral circuits” and “the (3) legislators will be elected in the general national elections of 2004,” and will have the same rights as other Legislators of the Republic. *Id.* (author’s translation).

275. Ley No. 49, 2 February 1967, *Convención Internacional Sobre La Eliminación de Todas Las Formas de Discriminación Racial* [International Convention on the Elimination of All Forms of Racial Discrimination] art. 5(c), *Gaceta Oficial* No. 15.824, 15 March 1967 (Pan.) (“[The State] undertake[s] to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . Political rights, in particular the right to participate in elections, to vote and to stand for election, on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.” (author’s translation)).

276. Ley No. 26864, 26 September 1997, *Ley de Elecciones Municipales* [Municipal Election Law] art. 10, *amended by* Ley No. 27734, 28 May 2002, art. 10(3) (Peru).

277. Ley No. 27683, 14 March 2002, *Ley de Elecciones Regionales* [Regional Election Law] art. 12 (Peru) (author’s translation).



win the elections. The goal of this law is to “facilitate, promote, and guarantee the exercise of the rights of political participation” of the native communities in the regional and municipal electoral processes.<sup>278</sup>

### **H. Venezuela**

Article 125 of the 1999 Venezuelan Constitution declares broadly that “indigenous peoples have the right to political participation.”<sup>279</sup> In addition, it allows indigenous leaders to assume positions of power in the national government by granting them the right to be elected to positions in various national political bodies.<sup>280</sup> Article 125 states, “[t]he State will guarantee indigenous representation in the National Assembly, and in the deliberating bodies of federal and local entities, with indigenous representation.”<sup>281</sup> The provisions also ensure that indigenous leaders are elected to the special positions by requiring that candidates meet at least one of the following criteria: (1) have held a traditional leadership position in their respective community, (2) have worked to promote the recognition of indigenous cultural identity, (3) have participated in projects benefiting indigenous people, and (4) have participated in a legally recognized indigenous organization for at least three years.<sup>282</sup> These special mechanisms are buttressed by the general recognition of indigenous peoples’ rights to social and political organization in the Constitution.<sup>283</sup>

## **V. CONCLUSION**

The *YATAMA v. Nicaragua* ruling represents a landmark international legal precedent for guaranteeing indigenous peoples the right to participate in electoral processes under conditions of equality and in accordance with their traditional forms of organization and customs. This decision authoritatively interprets the right to political participation for indigenous peoples, which is grounded in the general human rights of equality and political participation. The

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278. Resolución No. 1235-2006-JNE, 11 July 2006, Reglamento de Inscripción de Miembros de Comunidades Nativas como Candidatos en el Proceso de Elecciones Regionales y Municipales del año 2006 [Regulations for the Registration of Members of Indigenous People Communities for the 2006 Regional and Municipal Elections] art. 1 (Peru) (author’s translation).

279. Constitución Política de la República Bolivariana de Venezuela [Const.] tit. III, ch. VII, art. 125, Gaceta Oficial, 30 de Diciembre de 1999 (author’s translation).

280. *Id.*

281. *Id.* tit. III, ch. VII, art. 125 (author’s translation).

282. *Id.* Disposición Transitoria Séptima.

283. *Id.* tit. III, ch. VIII, art. 119 (“The state recognizes the existence of the indigenous peoples and communities, their social, political, and economic organization, their cultures, customs and traditions (*usos y costumbres*).” (author’s translation)).

holding of *YATAMA v. Nicaragua* is also reflected in and reinforces international practice and the domestic practice of states in the Inter-American system. International and domestic practices acknowledge that special mechanisms are necessary to facilitate access of indigenous groups to national political structures. International and state practices also accord indigenous peoples the right to participate in accordance with their own traditional forms of organization and customs so that one-size-fits-all electoral laws do not arbitrarily discriminate against groups with different organizational and electoral practices. Thus, emerging customary international law—to which the *YATAMA v. Nicaragua* decision contributes—affirms that the right to political participation for indigenous peoples includes two more specific rights: (1) the right to special remedial measures to guarantee participation and (2) the right to participate in national political elections in accordance with their traditional organizational structures. Furthermore, by recognizing the rights of indigenous peoples to effectively participate in the national politics of the state, in accordance with their traditional forms of organization and practices, *YATAMA v. Nicaragua* and the other developments reviewed in this Note help advance the right to self-determination of indigenous peoples.

