

**INTERNATIONAL INDIGENOUS LAND RIGHTS: A
CRITIQUE OF THE JURISPRUDENCE OF THE INTER-
AMERICAN COURT OF HUMAN RIGHTS IN LIGHT OF
THE UNITED NATIONS DECLARATION ON THE
RIGHTS OF INDIGENOUS PEOPLES**

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*Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources . . .*¹

- Preamble, United Nations Declaration on the Rights of Indigenous Peoples

I. INTRODUCTION

When the Declaration on the Rights of Indigenous Peoples was formally adopted by the United Nations General Assembly on September 13, 2007, the Inter-American human rights system already had a well-developed body of case law reflecting many of the principles enshrined in the Declaration. Since the adoption of the Declaration, the Inter-American system has continued to expand its international indigenous jurisprudence. Much of the case law of the Inter-American Court of Human Rights (hereinafter, “Inter-American Court” or “Court”) supports the principles enshrined in the UN Declaration, but in other areas the Court has not been equally visionary. Especially in the area of natural resources on ancestral indigenous lands, the Court has taken a more conservative approach than did the UN Declaration, although the Court’s position is supported by other international bodies and commentators.

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¹ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

The Inter-American System, which was established by the Organization of American States (OAS), protects and enforces human rights in the states of the Western hemisphere, nineteen of which have indigenous populations.² Domestic laws in some of these states do not recognize many indigenous rights. In others, formal laws may exist, but there is no political will to enforce them. When indigenous peoples have not found relief in their states' courts, many have filed complaints with the Inter-American human rights system.

Every American state is subject to one of the two enforcement organs of the Inter-American human rights system. By virtue of having ratified the Charter of the Organization of American States, all independent states of the Western Hemisphere accepted the competence of the Inter-American Commission on Human Rights (hereinafter, "Inter-American Commission" or "Commission) to consider individual human rights violations committed in their jurisdictions.³ For example, a complaint was filed with the Inter-American Commission against the United States (U.S.) by the Dann sisters, who are members of the Western Shoshone Peoples of the Southwest United States. Their complaint alleged that the U.S. government had illegally extinguished their land rights.⁴ The Inter-American Commission determined that the United States had not complied with international human rights norms when the U.S. Indian Claims Commission held that the sisters' claim to their ancestral lands was extinguished.⁵ If the state, as is the case with both the U.S. and

² INTER-AM. DEV. BANK, OPERATIONAL POLICY ON INDIGENOUS PEOPLES AND STRATEGY FOR INDIGENOUS DEVELOPMENT 5 (2006), <http://www.iadb.org/sds/doc/ind-111PolicyE.pdf>.

³ See Charter of the Organization of American States art. 106, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3; as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324; as amended by the Protocol of Cartagena de Indias, Dec. 5, 1985, 25 I.L.M. 527; as amended by the Protocol of Washington, Dec. 14, 1992, 33 I.L.M. 1005; as amended by the Protocol of Managua, June 10, 1993, 33 I.L.M. 1009, available at <http://www.oas.org/juridico/english/charter.html>.

⁴ Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 2 (2003).

⁵ Dann, Case 11.140, ¶¶ 139-142. The Commission determines whether the State violated the protections set forth in the American Declaration on the Rights and Duties of Man. American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States (1948), reprinted in ORG. AM. STATES [OAS], BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OAS/Ser.L/V/I.4 rev.12 (2007), <http://www.cidh.oas.org/Basicos/English/Basic.TOC.htm> (last visited Apr. 9, 2009).

Canada, has not ratified the American Convention on Human Rights,⁶ the Commission's recommendation to the state is the final stage in the Inter-American system.

Those American states that also have ratified or acceded to the American Convention on Human Rights, may be subject to the jurisdiction of the Inter-American Court,⁷ but only after the Inter-American Commission has completed its consideration of a complaint. At that point, either the Commission or the State Party may refer the case to the Court, provided that the state has also accepted the jurisdiction of the Court either *ipso facto* for all cases or by special agreement in that particular case.⁸ Consequently, some indigenous rights cases, including those against the U.S., Canada, and Belize, were decided solely by the Inter-American Commission, whereas the Inter-American Court has also issued judgments in cases brought against Nicaragua, Guatemala, and Paraguay.⁹

In resolving indigenous complaints, the Inter-American Commission and Court have had the opportunity to rule on many of the tenets set forth in the UN Declaration on the Rights of Indigenous Peoples. Although the Declaration is not binding on the enforcement organs of the Inter-American human rights system, it has been recognized by the Inter-American Commission and the Court. For example, in *Saramaka People v. Suriname*, a decision on natural resources in indigenous ancestral territory issued by the Inter-American Court, subsequent to the adoption of the United Nations Declaration, the Court quoted the UN Declaration on

⁶ OAS, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, *supra* note 5.

⁷ The basic documents of the Inter-American human rights system and all opinions and decisions of the Inter-American Court of Human Rights can be accessed on the Court's website. Inter-American Court of Human Rights, <http://www.corteidh.or.cr/> (last visited Apr. 9, 2009).

⁸ American Convention on Human Rights, *supra* note 6, arts. 61-62. Twenty-one of the twenty-four States Parties to the American Convention have also recognized the jurisdiction of the Inter-American Court. These states are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, *supra* note 5. For a more complete discussion of the functioning of the Inter-American human rights system, see JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1-25 (2003).

⁹ *See, e.g.*, *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 153-155 (Aug. 31, 2001); *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶¶ 85-87 (Nov. 19, 2004); *Sawhoyamaya Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 247-248 (Mar. 29, 2006).

the Rights of Indigenous Peoples.¹⁰ The UN Declaration has also been recognized domestically in at least one American state. The Supreme Court of Belize, in a decision supporting the collective and individual rights to the traditionally owned land and resources of Mayan communities, cited the UN Declaration, which had been adopted by the UN General Assembly only one month earlier.¹¹ While acknowledging that the Declaration was not binding on Belize, the Supreme Court found it to be of importance that Belize had voted for the Declaration, which embodies “general principles of international law relating to indigenous peoples and their lands and resources.”¹²

The OAS has long been in the process of drafting an American Declaration on the Rights of Indigenous Peoples.¹³ The American Declaration has proceeded through several drafts. The parties to the drafting process have yet to agree on the wording or inclusion of certain provisions, and, thus, it has not yet been formalized or submitted to the OAS General Assembly for adoption.

This article analyzes the jurisprudence on indigenous land rights of the Inter-American Court of Human Rights in light of the UN Declaration on the Rights of Indigenous Peoples, statements of the United Nations Rapporteur on Indigenous Rights, International Labor Organization (ILO) Convention 169 on the Rights of Indigenous and Tribal Peoples, and World Bank policies. The article illustrates when the Inter-American Court gives judicial voice to principles set forth in the UN Declaration and when it arguably fails to conform to the lofty principles of the UN Declaration on the Rights of Indigenous Peoples. It concludes that the Inter-American Court’s decisions generally conform to the principles set forth in the UN Declaration except in the area of state expropriation of natural resources on indigenous ancestral lands. In that area, the Inter-American Court charts a middle ground, allowing the State some residual rights in the development of those resources to the detriment of the indigenous peoples.

¹⁰ *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 131 (Nov. 28, 2007).

¹¹ *Cal v. Attorney Gen.*, [2007] Consol. Claims Nos. 171 & 172, ¶¶ 131-134 (Belize).

¹² *Id.* ¶ 132.

¹³ OAS, Permanent Council, Comm. on Juridical & Political Affairs, Working Group to Prepare the Draft Am. Declaration on the Rights of Indigenous Peoples, *Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples*, OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev.3 (Dec. 30, 2008).

II. LAND RIGHTS UNDER THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the UN General Assembly with 143 votes in favor, four against, and eleven abstentions.¹⁴ The four states that voted against the Declaration were the United States, Canada, Australia, and New Zealand—states having large indigenous populations.¹⁵ Nonetheless, other states with large indigenous populations, such as Guatemala, Mexico, and Peru voted in favor of the Declaration.¹⁶ For approximately two decades, the Declaration had been under discussion and in the drafting stages in the United Nations.¹⁷ The declaration, as adopted, sets forth an all-encompassing overview of indigenous rights and aspirational principles to be applied in state relations with indigenous peoples. Some of the most controversial provisions of the UN Declaration involve the

¹⁴ Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' towards Human Rights for All, Says President, U.N. Doc. GA/10612 (Sept. 13, 2007), <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>. "In 2009, the government of Australia announced that it endorsed the Declaration." See Australia Backs UN on Indigenous Rights, Sidney Morning Herald (April 3, 2009); Jenny Macklin, Statement on the United Nations Declaration on the Rights of Indigenous Peoples <http://www.apc.org.nz/pma/AustDecl0409.pdf> (lasted visited Aug. 11, 2009). As of July 2009, the government of New Zealand had not yet publicly affirmed and recognized the Declaration, but the Prime Minister of New Zealand had indicated that he would like to see the country move to support it. [Http://www.parliament.nz/en-NZ/PB/Business/QOA/a/5/0/49HansQ_20090730_00000008-8-Declaration-on-the-Rights-of-Indigenous.htm](http://www.parliament.nz/en-NZ/PB/Business/QOA/a/5/0/49HansQ_20090730_00000008-8-Declaration-on-the-Rights-of-Indigenous.htm) (last visited Aug. 11, 2009).

¹⁵ John R. Crook, *Contemporary Practice of the United States Relating to International Law: United States Votes Against Adoption of UN Declaration on Indigenous Peoples*, 101 AM. J. INT'L L. 866, 884 (2007).

¹⁶ The eleven states abstaining from the vote were Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa, and the Ukraine. U.N. GAOR, 61st Sess., 107th plen. mtg. at 19, U.N. Doc. A/61/PV.107 (Sept. 13, 2007).

¹⁷ *Id.* at 10. The tenth session of the drafting meetings were attended by representatives of sixty-four state governments, five United Nations specialized agencies and bodies, and sixty-eight indigenous and non-governmental organizations. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, ¶ 3, U.N. Doc. E/CN.4/2005/89 (Feb. 28, 2005). Although a declaration is not binding, even on the states that vote in favor of it, it may come to be evidence of customary international law.

rights of indigenous peoples to their ancestral rights and to the natural resources located on or under those lands.¹⁸

A. INDIGENOUS PEOPLES RIGHT TO MAINTAIN THEIR SPIRITUAL RELATIONSHIP WITH THEIR ANCESTRAL LANDS

*Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.*¹⁹

- United Nations Declaration on the Rights of Indigenous Peoples, Article 25

The basis for indigenous land rights is the spiritual relationship that indigenous peoples have with their ancestral lands. Therefore, any discussion of these rights must begin with an understanding of that fundamental relationship. The UN Declaration, the Inter-American Court, and most other international sources recognize this spiritual and cultural relationship between indigenous people and their traditional lands. In the words of James Anaya, the United Nations Rapporteur on the Rights of Indigenous Peoples, “their ancestral roots are embedded in the lands in which they live” or in which they have lived.²⁰ The cultural and spiritual identity of indigenous peoples is inextricably linked to their traditional territory. The International Labor Organization Convention 169 mandates states to respect the special cultural importance and spiritual values embodied in indigenous peoples’ relationship with their lands and territories.²¹ These ancestral lands, which contain the sacred sites where generations of ancestors have worshiped, are essential to the transmission of

¹⁸ Crook, *supra* note 15, at 885 (the U.S. identified “self-determination, lands, and resources, [and] redress” as core flawed provisions in the Declaration). See also *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, *supra* note 17, ¶¶ 27-39 (describing the informal discussions on lands, territories, natural resources, and self-determination).

¹⁹ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 25.

²⁰ S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3 (2nd ed. 2004). On March 26, 2008, the United Nations Human Rights Council appointed Prof. S. James Anaya to serve for an initial period of three years as the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. A United Nations rapporteur reports to the Human Rights Council on a particular subject.

²¹ International Labour Organisation [ILO], *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, art. 13(1), June 27, 1989, 72 ILO Official Bulletin 59, 1650 U.N.T.S. 383 [hereinafter ILO Convention No. 169].

their culture and beliefs to future generations. In short, their traditional lands embody their legacy to the future.

The Inter-American Court held in *Saramaka Peoples v. Suriname* that indigenous peoples have a right to maintain their “spiritual relationship with the territory they have traditionally used and occupied.”²² This spiritual basis of indigenous property rights has been repeatedly recognized in the jurisprudence of the Inter-American Court and the Inter-American Commission on Human Rights. For example, in *Plan de Sánchez Massacre v. Guatemala*, the Court acknowledged that for the members of indigenous communities, “harmony with the environment is expressed by their spiritual relationship with the land.”²³ Their spiritual relationship is further demonstrated by “the way they manage their resources and [their] profound respect for nature.”²⁴ Similarly, in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Court stated that:

[i]ndigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but [have] a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.²⁵

In *Saramaka People v. Suriname*, the Court, thereby, conceded that the ancestral lands of indigenous and tribal peoples are a fundamental source of their cultural identity and are part of the “social, ancestral,

²² *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 95 (Nov. 28, 2007).

²³ *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 85 (Nov. 19, 2004).

²⁴ *Id.*

²⁵ *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001). The Inter-American Commission made a similar observation in the *Dann* case. The Commission stated that “continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples and that control over the land refers both [to] its capacity for providing the resources which sustain life, and to the geographic space necessary for the cultural and social reproduction of the group.” *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 128 (2003).

and spiritual essence” of indigenous peoples.²⁶ Thus, the Inter-American Court holds—in accordance with the UN Declaration and existing and evolving international standards on indigenous human rights—that it is necessary to protect indigenous rights to their ancestral territory, not only to safeguard the physical survival of indigenous peoples, but also to ensure their cultural survival.²⁷ Considering this deep, long-standing relationship, it is essential to the cultural existence of indigenous peoples that they are allowed to continue occupying their ancestral lands and to assert or reassert collective ownership of these lands.

**B. INDIGENOUS PEOPLES RIGHT TO THE LANDS THEY HAVE
TRADITIONALLY OCCUPIED**

*Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.*²⁸

- United Nations Declaration on the Rights of Indigenous Peoples, Article 26(1) and (2).

Indigenous peoples in the Americas possessed their lands before the colonization of the Western Hemisphere. They hold much of their land collectively with ownership centered on the group or community rather than solely on the individual. This communal land tenure system

²⁶ *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 82. The Inter-American Court applies the same community property principles to indigenous and tribal peoples who hold land collectively and who have an “all-encompassing relationship” with their lands. *Moiwana Cmty. v. Suriname*, 2005 Inter-Am Ct. H.R. (ser. C) No. 124, ¶ 133 (June 15, 2005). In *Saramaka* and *Moiwana Community*, the Court extended these rights to the Maroons, descendants of escaped former slaves. The Court stated that although they were not indigenous to the area they “share[d] similar characteristics with indigenous peoples, such as having social, cultural, and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions.” *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 79-80; *Moiwana Cmty.*, 2005 Inter-Am Ct. H.R. (ser. C) No. 124, ¶ 86(1)-(6).

²⁷ *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 90.

²⁸ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 26, para. 2. The UN Declaration preliminarily states that “[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.” *Id.* art. 26, para. 1.

reflects their “collective understanding of the concepts of property and possession.”²⁹

Indigenous peoples have long suffered violations of their basic land rights, either perpetrated by the state or by third parties who operate free of state interference. As a result, some indigenous land rights have been involuntarily extinguished,³⁰ and the indigenous people who long occupied that land are seeking to reclaim the lands or to get compensation in the form of other lands or financial reparations.³¹ In other cases, in which indigenous peoples continue to occupy their ancestral lands, they are handicapped by a lack of official title to their lands and by the state’s failure to establish boundaries.³² These omissions often result in third party incursions into indigenous territory for non-indigenous homesteading or for the exploitation of natural resources.³³

Protests by the indigenous inhabitants are seldom successful. Foreign companies, to which the state has granted natural resource concessions on indigenous lands, may resort to intimidation and violence when confronted by indigenous peoples’ objections to their presence. For example, an Argentine oil company that received Ecuadoran governmental permission to explore for oil on Sarayaku ancestral lands, beat and threatened indigenous villagers, planted land mines in their traditional hunting areas, and detonated explosives that destroyed their springs and sacred sites.³⁴ In Guatemala, a Guatemalan indigenous anti-mining activist was assassinated.³⁵ In Columbia, where there have been

²⁹ *Sawhoyamaya Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 120 (Mar. 29, 2006); *see also Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 122 (indigenous peoples have an inextricable connection with their territory and therefore have the right to use and enjoy natural resources on the land); *Mayagna (Sumo) Awas Tingni Cmty.*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (“[T]here is a communitarian tradition regarding a communal form of collective property of the land”).

³⁰ *See, e.g., Dann*, Case 11.140, ¶¶ 140-142.

³¹ *See Sawhoyamaya Indigenous Cmty.*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 128-130.

³² *See Mayagna (Sumo) Awas Tingni Cmty.*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 103.

³³ *See id.*

³⁴ *Matter of Pueblo Indígena Sarayaku (Ecuador) [Sarayaku Indigenous Cmty. V. Ecuador]*, 2004 Inter-Am. Ct. H.R., ¶ 2 (July 6, 2004).

³⁵ No one has yet been charged with the death of Antonio Morales. Morales was a national leader of indigenous organizations that oppose hydroelectric projects, large scale mining operations, and the privatization of water. Montana Exploring, a subsidiary of the Canadian corporation Goldcorp Inc., has reportedly spent thousands of dollars attempting to halt a plebiscite on mining exploration and extraction. *Indigenous Leader Murdered in Guatemala Ahead of International Day of the World’s Indigenous People*, FREE SPEECH RADIO NEWS, Aug. 8, 2008, <http://www.fsrn.org/content/headlines-package-august-8%2C-2008/2993>.

many instances of indigenous abuse, Escué Zapata, an indigenous leader, was assassinated by government troops.³⁶

The right to property enshrined in the American Convention on Human Rights, as interpreted by the Inter-American Court, protects the communal land rights of indigenous peoples. The Court has repeatedly stated that the “close ties that members of indigenous communities have with their traditional lands and the natural resources associated with their culture” and the intangible and spiritual aspects of those ties must be secured by the American Convention.³⁷ The jurisprudence of the Inter-American Court supports the right of indigenous peoples to the ownership of their ancestral lands. In *Sawhoyamaxa Indigenous Community*, the Court held that “traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title.”³⁸ Thus, both the private and communal property rights of indigenous peoples are recognized and protected by the American Convention.³⁹ Indigenous rights to the land mean little unless they have official title to their lands. In this regard, the Court maintains that “[a]s a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for [its] consequent registration.”⁴⁰

³⁶ Escué-Zapata v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 165, ¶¶ 1-3 (July 4, 2007).

³⁷ *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 118 (Mar. 29, 2006); Escué-Zapata v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 165, ¶¶ 1-3 (July 4, 2007). *see also* Saramaka People v. Suriname, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 88 (Nov. 28, 2007); Yakye Axa Indigenous Cmty. v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 137 (June 17, 2005).

³⁸ *Sawhoyamaxa Indigenous Cmty.*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 128.

³⁹ *Id.* ¶¶ 116-121.

⁴⁰ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct.H.R., (Ser. C) No. 79, ¶ 151 (2001). For an analysis of national courts' treatment of the common law doctrine on aboriginal or native title, see Jérémie Gilbert, *Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title*, 56 INT'L & COMP. L.Q. 583 (2007). National courts have held that indigenous land rights result from indigenous customary laws which survived colonization. *Id.* at 590.

C. STATE OBLIGATION TO OFFICIALLY TITLE AND DEMARCATÉ INDIGENOUS ANCESTRAL LAND

*States shall give legal recognition and protection to [traditionally-owned indigenous] lands, territories and resources.*⁴¹

- United Nations Declaration on the Rights of Indigenous Peoples, Article 26(3).

The Inter-American Court held, in *Sawhoyamaxa Indigenous Community v. Paraguay*, that indigenous peoples' traditional possession of their ancestral lands entitles them to official State recognition of their ownership and to the registration of title to their land.⁴² The state must also establish the official boundaries to the land in consultation with the indigenous peoples to grant title to the land. Convention 169 supports this position by requiring that governments take the necessary steps to identify indigenous peoples' traditional lands and to protect "their rights of ownership and possession."⁴³

Although some state constitutions recognize indigenous ancestral land rights, recognition is not sufficient in itself. Indigenous rights must be protected through land titles. The Inter-American Court specified that the "merely abstract or juridical recognition of indigenous lands, territories, and resources" is meaningless on the practical plane "if the property [has] not [been] physically delimited and established."⁴⁴ The Court explained the need for formal legal title in stating:

[R]ather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment . . . This title

⁴¹ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 26, para. 3. The UN Declaration also mandates that "[s]tates shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process." *Id.* art. 27.

⁴² *Sawhoyamaxa Indigenous Cmty.*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 128.

⁴³ ILO Convention No. 169, *supra* note 21, art. 14(2).

⁴⁴ *Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 143 (June 17, 2005); *cf.* Amnesty Int'l, *Brazil: "Foreigners in Our Own Country": Indigenous Peoples in Brazil*, AI Index AMR 19/002/2005, Mar. 30, 2005, available at <http://www.amnesty.org/en/library/info/AMR19/002/2005> (discussing the implementation problems with Brazil's constitutional goal of demarcating all Indian land).

must be recognized and respected, not only in practice, but also in law, in order to ensure its legal certainty.⁴⁵

In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (the *Awas Tingni* case), for example, the Inter-American Court ordered Nicaragua to demarcate and title the lands of the Awas Tingni People of the Atlantic coast of Nicaragua.⁴⁶ The indigenous people's representatives had filed a complaint in the Inter-American human rights system to oppose the governments grant of a logging concession on lands long-possessed by the Awas Tingni, an indigenous community.⁴⁷ The community did not have deed or title to the lands which had been inhabited by their people since time immemorial even though the Nicaraguan Constitution recognized the right of indigenous peoples to communal ownership of their land.⁴⁸ In its judgment, the Inter-American Court ordered Nicaragua to officially recognize the Awas Tingni's right to their ancestral lands, and to adopt the legislative and administrative measures necessary to delimit, demarcate, and title their lands.⁴⁹

In subsequent cases, the Court ordered Paraguay to return and demarcate the ancestral lands of the Yakye Axa⁵⁰ and Sawhoyamaxa⁵¹ peoples, and Suriname to return and demarcate the lands of the Moiwana⁵² and Saramaka people⁵³ who are tribal peoples composed of former escaped slaves rather than indigenous peoples. In *Moiwana v. Suriname* and *Saramaka v. Suriname*,⁵⁴ the Inter-American Court applied the same community property principles to tribal peoples who held land collectively and who had an "omni-comprehensive relationship" with their

⁴⁵ *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 115 (Nov. 28, 2007) (citing *Mayagna (Sumo) Awas Tingni Cmty.*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153; *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 215; *Moiwana Cmty. v. Suriname*, 2005 Inter-Am Ct. H.R. (ser. C) No. 124, ¶ 209 (June 15, 2005)) (footnote omitted).

⁴⁶ *Mayagna (Sumo) Awas Tingni Cmty.*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 173.

⁴⁷ *Id.* ¶ 103. The Awas Tingni community was made up of more than six hundred people. *Id.*

⁴⁸ *Id.* ¶¶ 103(g), 116.

⁴⁹ *Id.* ¶ 173.

⁵⁰ *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 242(6).

⁵¹ *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 248(6) (Mar. 29, 2006).

⁵² *Moiwana Cmty. v. Suriname*, 2005 Inter-Am Ct. H.R. (ser. C) No. 124, ¶ 209 (June 15, 2005).

⁵³ *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 96 (Nov. 28, 2007).

⁵⁴ *Moiwana Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 133; *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 85-86.

lands.⁵⁵ The Court stated that although the communities were not indigenous to the area, they “share[d] similar characteristics with indigenous peoples, such as having social, cultural, and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions.”⁵⁶

International treaties as interpreted by international courts are not alone in advocating State duty to demarcate indigenous and tribal lands. Organizations, such as the World Bank, who have control of much needed funds, can use the power of the purse to encourage states to fulfill their international duty to demarcate and title indigenous and tribal lands. For example, in 2002, the World Bank conditioned the release of funds to Nicaragua on legislative passage of a land demarcation law.⁵⁷ Although the Nicaraguan General Assembly did enact a law on land demarcation, which recognized indigenous land rights on the Atlantic coast, the Awas Tingni, who won their case before the Inter-American Court, continued to face long and frustrating procedural delays.⁵⁸ The international economic pressure, however, had some positive effect.

⁵⁵ *Moiwana Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 133; *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 85-86.

⁵⁶ *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 79.

⁵⁷ Leonardo J. Alvarado, *Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua*, 24 ARIZ. J. INT'L & COMP. L. 609, 623-24 (2007); see also Press Release, World Bank, World Bank, Government of Nicaragua Sign US\$32.6 Million Credit to Support Land Administration, 2002/378/LAC (June 24, 2002), <http://go.worldbank.org/6DOY3U19W0>.

⁵⁸ See Alvarado, *supra* note 57, at 623-26.

D. STATE OBLIGATION TO OBSERVE INDIGENOUS LAND TENURE SYSTEMS WHEN RECOGNIZING INDIGENOUS ANCESTRAL LANDS

*[State] recognition [of traditionally-owned indigenous lands, territories and resources] shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.*⁵⁹

- United Nations Declaration on the Rights of Indigenous Peoples, Article 26(3)

When states recognize indigenous land rights, they must respect the customs, traditions, and land tenure systems of indigenous peoples.⁶⁰ As stated in the preamble to the UN Declaration on the Rights of Indigenous Peoples, indigenous peoples “possess collective rights which are indispensable for their existence, well-being, and integral development as peoples.”⁶¹ Indigenous customary land tenure emphasizes collective land ownership and use by the community. Their community settlements typically include a central area of houses, gardens, plantations, and surroundings.⁶² The forested area surrounding the nucleus of the settlement is open to the people communally to hunt and gather medicinal plants, nuts, and fruits.

In general, the Inter-American Court has held that the American Convention’s provision protecting the right to property includes the right

⁵⁹ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 26, para. 3. The UN Declaration also mandates that “States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.” *Id.* art. 27.

⁶⁰ Indigenous customary law, within this context, refers to the long-held customs and practices of a people that they regard as legally mandated by their own system.

⁶¹ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1.

⁶² For example, “Article 3 of [Paraguayan] Law No. 43/89, in turn, states that the settlement of the indigenous communities encompasses a ‘physical area including the nucleus of dwellings, natural resources, crops, plantations, and their milieu, linked inasmuch as possible to their cultural tradition.’” *Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 139 (June 15, 2005). Additionally, “it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.” *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 148 (Aug. 31, 2001).

to own property collectively.⁶³ Thus, the provision is more comprehensive in scope than the individual right to own property. The legislative history of the American Convention supports this interpretation. The draft provisions on property initially referred only to “private property.” The adjective “private” was subsequently deleted without explanation.⁶⁴ The Inter-American Court’s interpretation of the right to property enshrined in the American Convention recognizes the close relationship binding indigenous peoples with their traditional territories and to the natural resources on that territory.⁶⁵

Some doubt arises, however, whether the Inter-American Court will consistently recognize indigenous rights to communal property if the state’s domestic law does not provide for communal land ownership, and the state has not ratified other treaties that provide for collective indigenous land ownership. In the *Saramaka* case against Suriname, for example, the applicants had neither individual nor collective title to the land traditionally occupied by them.⁶⁶ Moreover, Surinamese domestic law does not recognize communal property rights.⁶⁷ Rather than relying exclusively on Suriname’s ratification of the American Convention for the authority to enforce indigenous communal land rights, the Inter-American Court specified that Suriname had ratified the UN Covenant

⁶³ *Mayagna (Sumo) Awas Tingni Cmty.*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 145, 148-149. However, Article XXIII of the American Declaration provides that “[e]very person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.” American Declaration of the Rights and Duties of Man, *supra* note 5, art. XXIII. For a discussion of cases involving collective indigenous rights before the Inter-American Commission, see generally Osvaldo Kreimer, *Collective Rights of Indigenous Peoples in the Inter-American Human Rights System, Organization of American States, AM. SOC’Y INT’L L. PROC.*, Apr. 2000, at 315.

⁶⁴ *Mayagna (Sumo) Awas Tingni Cmty.*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 145 & n.57.

⁶⁵ *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 137. Article 21 of the American Convention on Human Rights states that “[e]veryone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.” American Convention on Human Rights, *supra* note 6, art. 21. ILO Convention No. 169 and some states’ domestic laws recognize the right to restitution of indigenous lands. Article 13 of the ILO Convention states that “governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.” ILO Convention No. 169, *supra* note 21, art. 13. Paraguay incorporated Convention 169 in its domestic legislation, Law No. 234/93. *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 130, 136.

⁶⁶ *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 93, 98-100 (Nov. 28, 2007).

⁶⁷ *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 86(5) (June 15, 2005); *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 93.

on Civil and Political Rights,⁶⁸ as well as the UN Covenant on Economic and Social Rights,⁶⁹ both of which have been interpreted to include the right to communal property. Thus, the Court stated that “in the present case” the indigenous community has a right to “enjoy property in accordance with their communal tradition.”⁷⁰

The Inter-American Court’s reasoning could result in the untenable result that the Court will recognize the right to indigenous ancestral communal property in some states that have ratified other international treaties as well as the American Convention on Human Rights, but not in states that have only ratified the American Convention. The Inter-American Court should interpret the American Convention consistently to protect the communal ancestral land rights of indigenous peoples irrespective of the domestic law in that state and also irrespective of other treaties that the state has ratified.

The Inter-American Court has jurisdiction to interpret and apply the provisions of the American Convention on Human Rights.⁷¹ The Court has reasoned that its interpretation of the Convention must be “in accordance with the canons and practice of International Law in general, and with International Human Rights Law specifically.”⁷² Moreover, the Court’s interpretation must offer the “greatest degree of protection to the human beings under its guardianship.”⁷³ The Inter-American Court takes an evolutionary approach to the meaning of human rights provisions, interpreting the Convention “within the framework of the entire legal system prevailing at the time of the interpretation.”⁷⁴

When interpreting the rights protected by the American Convention, the Inter-American Court cannot restrict those rights to an extent greater than they are protected by state law or treaties to which the state

⁶⁸ *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 93; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, U.N. GAOR, 1496th plen. mtg., U.N. Doc. A/6316 (Dec. 16, 1966).

⁶⁹ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), at 49, U.N. GAOR, 1496th plen. mtg., U.N. Doc. A/6316 (Dec. 16, 1966).

⁷⁰ *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 95.

⁷¹ American Convention on Human Rights, *supra* note 6, art. 62(3).

⁷² *Benjamin v. Trin. & Tobago*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 81, ¶¶ 70-71 (Sept. 1, 2001).

⁷³ *Id.* ¶ 70.

⁷⁴ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Mex.)*, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, OC-16/99, ¶¶ 113-115 (Oct. 1, 1999).

is a party.⁷⁵ The Court has cited the protections offered by the state's domestic laws and treaties ratified by the state.⁷⁶ Constitutions and laws in some states, such as Nicaragua⁷⁷ and Paraguay,⁷⁸ protect communal indigenous ancestral lands. Nicaraguan law provides that communal property is comprised of "the lands, waters, and forests that have traditionally belonged to the Communities of the Atlantic Coast" and that communal lands are "inalienable" and can not be sold, donated, encumbered, or taxed.⁷⁹ The Paraguayan Constitution provides that, "[i]ndigenous peoples have the right to communal landholding, with an area and quality sufficient for conservation and development of their specific form of life."⁸⁰ Other treaties have been interpreted to protect indigenous peoples' communal rights to property. These treaties include: ILO Convention 169, which has not been widely ratified,⁸¹ the International Covenant on Civil and Political Rights,⁸² and the International Covenant on

⁷⁵ The American Convention provides that "[n]o provision of this Convention shall be interpreted as: . . . b. Restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party." American Convention on Human Rights, *supra* note 6, art. 29(b).

⁷⁶ For example, Nicaraguan Law No. 28, regulating the Autonomy Statute of the Regions of the Atlantic Coast of Nicaragua, states in Article 36:

Communal property are the lands, waters, and forests that have traditionally belonged to the Communities of the Atlantic Coast, and they are subject to the following provisions:

1. Communal lands are inalienable; they cannot be donated, sold, encumbered nor taxed, and they are inextinguishable.
2. The inhabitants of the Communities have the right to cultivate plots on communal property and to the usufruct of goods obtained from the work carried out.

Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 150 (Aug. 31, 2001); *see also Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 130, 139 (June 17, 2005); *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 92-96 (Nov. 28, 2007).

⁷⁷ "[A]rticle 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua." *Mayagna (Sumo) Awas Tingni Cmty.*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 148.

⁷⁸ *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 138.

⁷⁹ *Mayagna (Sumo) Awas Tingni Cmty.*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 150.

⁸⁰ *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 138 (quoting CONSTITUCIÓN POLÍTICA DE 1992 [Constitution] art. 64 (Para.)).

⁸¹ ILO Convention No. 169, *supra* note 21. The ILO Convention has been ratified by twenty states. *See* ILOLEX: Convention No. C169, <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C169> (last visited Mar. 11, 2009).

⁸² International Covenant on Civil and Political Rights, *supra* note 68. The ICCPR has been ratified by 164 parties. *See* Multilateral Treaties Deposited with the Secretary-General, Status of the

Economic, Social and Cultural Rights,⁸³ which have both been widely ratified.

The Inter-American Court's interpretation of the rights protected by the American Convention should not, however, depend on a state's domestic law or even on the treaties ratified by the state. As stated by the Court in the *Awás Tingni* case, "[t]he terms of an international human rights treaty have an autonomous meaning."⁸⁴ Consequently, these terms "cannot be made equivalent to the meaning given to them in domestic law."⁸⁵ The Court applies the Vienna Convention on the Law of Treaties, which provides that "a treaty shall be interpreted in good faith."⁸⁶ Treaty interpretation also must accord with the ordinary meaning of the treaty's terms taken in context and in the light of the "object and purpose" of the treaty.⁸⁷ The object and purpose of the American Convention is to protect the human rights of all individuals "irrespective of their nationality, both against the state of their nationality and all other contracting states."⁸⁸ Also, the Court must interpret the Convention so "as to give full effect to the system of human rights protection."⁸⁹

If domestic law does not already provide for indigenous communal ownership, the state may be required to take special measures that guarantee the full exercise and enjoyment of indigenous property rights to ensure the survival of the traditions and culture of indigenous peoples.⁹⁰ ILO Convention 169 also specifies that the State must adopt

International Covenant on Civil and Political Rights, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=322&chapter=4&lang=en> (last visited Mar. 24, 2009).

⁸³ International Covenant on Economic, Social and Cultural Rights, *supra* note 69. The ICESCR has been ratified by 160 parties. See Multilateral Treaties Deposited with the Secretary-General, Status of the International Covenant on Economic, Social and Cultural Rights, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=321&chapter=4&lang=en> (last visited Mar. 22, 2009).

⁸⁴ *Mayagna (Sumo) Awás Tingni Cmty.*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 146.

⁸⁵ *Id.*

⁸⁶ Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331.

⁸⁷ *Id.*

⁸⁸ The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 & 75) (Inter-Am. C.H.R.), 1982 Inter-Am. Ct. H.R. (ser. A) No. 2, Advisory Op. OC-2/82, ¶ 29 (Sept. 24, 1982).

⁸⁹ Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights) (Chile), 1997 Inter-Am. Ct. H.R. (ser. A) No. 15, OC-15/97, ¶ 29 (Nov. 14, 1997).

⁹⁰ *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 85 (Nov. 28, 2007) (citing *Mayagna (Sumo) Awás Tingni Cmty.*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 148-149, 151); *Sawhoyamaya Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No.

special measures “as appropriate for safeguarding the persons, institutions, property, labor, cultures and environment of the peoples concerned.”⁹¹ The aim and purpose of these measures, according to the Inter-American Court, is to guarantee that indigenous peoples “may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States.”⁹² The Inter-American Court has held that states have a positive obligation to adopt special measures to guarantee to indigenous peoples “the full and equal exercise of their right to the territories they have traditionally used and

146, ¶¶ 118-121 (Mar. 29, 2006). *Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 124, 131, 135-137, 154 (June 17, 2005). The Saramaka and Moiwana peoples are not indigenous to Suriname. Rather, they are the descendents of escaped slaves who formed communities in the interior of the country. *Moiwana Cmty. v. Suriname*, 2005 Inter-Am Ct. H.R. (ser. C) No. 124, ¶ 86(1) (June 15, 2005); *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 79-84. The Inter-American Court found that tribal people, like indigenous people, have an important spiritual, cultural, and material relationship with their traditional lands and that their occupation of the land for many years and their relationship should suffice to provide them with government recognition of their property. *Moiwana Cmty.*, 2005 Inter-Am Ct. H.R. (ser. C) No. 124, ¶ 86(6); *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 82, 95-96. As reparations, the Court ordered Suriname to demarcate the land and grant the people collective title to the land and the traditional resources on it. *Moiwana Cmty.*, 2005 Inter-Am Ct. H.R. (ser. C) No. 124, ¶ 199(2)(f).

⁹¹ ILO Convention No. 169, *supra* note 21, art. 4(1).

⁹² *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 121. These measures, which could include legislation, would not be discriminatory as international law provides that “unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination.” *Id.* ¶ 103 (citing *Connors v. United Kingdom*, Eur. Ct. H.R., App. No. 66746/01, ¶ 84 (2004), available at <http://www.echr.coe.int/ECHR/EN/hudoc> (declaring that States have an obligation to take positive steps to provide for and protect the different lifestyles of minorities as a way to provide equality under the law)); *cf.* Inter-Am. Comm’n on Human Rights, *Report on the Situation of Human Rights in Ecuador*, OEA/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.”); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), art. 1(4), U.N. GAOR, 1406th plen. mtg., U.N. Doc. A/6014 (Dec. 21, 1965) (“[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination”); U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendations on the Rights of Indigenous Peoples*, annex V, ¶ 4, U.N. Doc. A/52/18 (Aug. 18, 1997) (calling upon States to take certain measures in order to recognize and ensure the rights of indigenous peoples).

occupied.”⁹³ If they have lost those lands involuntarily, the state may have an obligation to return them.

E. INDIGENOUS RIGHTS TO RESTITUTION OF THEIR ANCESTRAL LANDS

*Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.*⁹⁴

- United Nations Declaration on the Rights of Indigenous Peoples, Article 28(1).

The Inter-American Court holds that indigenous peoples “who have unwillingly left or lost possession of their ancestral lands continue to have a right to their property, even though they lack title, unless the lands have been transferred legitimately and in good faith to other parties.”⁹⁵ The Court also specified, in *Sawhoyamaxa Indigenous Community v. Paraguay*, that “members of indigenous peoples that involuntarily lost possession of their lands, which have been legitimately transferred to innocent third parties, may have the right to recover them or alternately to obtain other lands of equal size and quality.”⁹⁶ Thus, the right to property set forth in the American Convention may require that the state return ancestral lands to indigenous peoples.

For example, the *Yakye Axa* and *Sawhoyamaxa* cases against Paraguay present facts that are representative of the plight of many indigenous peoples who have lost their lands and subsequently attempted to regain them. Both the *Yakye Axa* and *Sawhoyamaxa* peoples, who had ancestrally populated the Paraguayan region known as the Chaco, petitioned the Paraguayan government for the return of their ancestral lands.⁹⁷ Originally, these communities had satisfied their basic needs by hunting, fishing, and gathering throughout the large area of their com-

⁹³ *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 91.

⁹⁴ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 28(1).

⁹⁵ *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 128 (Mar. 29, 2006).

⁹⁶ *Id.*

⁹⁷ *Id.* ¶¶ 2, 73(5); *Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 2-3, 38(d) (June 17, 2005).

munally-owned lands.⁹⁸ Near the end of the nineteenth century, however, the traditional lands of indigenous peoples in Paraguay were sold by the government to British business owners without the permission or even the knowledge of the indigenous inhabitants of the area.⁹⁹ Subsequently, the Anglican Church of England attempted to convert the indigenous peoples to Christianity and to help them in finding employment on grain ranches.¹⁰⁰ Thus, the Yakye Axa and Sawhoyamaxa peoples, as well as the other indigenous peoples of the area, were employed as laborers on land that for centuries had been their own.¹⁰¹ They received a salary but still relied on subsistence activities of hunting, fishing, and gathering on these lands to satisfy their basic needs.¹⁰² Over time, their ability to conduct these subsistence activities has been severely restricted as their traditional territory has been transferred to and divided among private non-indigenous owners.¹⁰³

In an attempt to right the wrongs that had been inflicted on indigenous peoples, in the 1980s the Anglican Church purchased lands for new indigenous settlements and provided the indigenous groups that moved to these settlements with a limited amount of agricultural, sanitary, and educational assistance.¹⁰⁴ At that time, the conditions of the Yakye Axa People, who were still living as workers on their ancestral land, were economically difficult and physically dangerous. The Yakye Axa men received either no pay or low wages for their work, the women were sexually exploited by Paraguayan workers, and the entire community suffered from insufficient quantities of food and the absence of health services.¹⁰⁵ Due to these conditions, the members of the Yakye Axa People left their ancestral lands in 1986 and moved to the new settlement.¹⁰⁶ The move, however, did not improve their living conditions. The land was overcrowded for subsistence hunting and gathering, there

⁹⁸ *Sawhoyamaxa Indigenous Cmty.*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 73(2).

⁹⁹ *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 50.10; *Sawhoyamaxa Indigenous Cmty.*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 73(1).

¹⁰⁰ *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 50.10-11; *Sawhoyamaxa Indigenous Cmty.*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 247-248.

¹⁰¹ *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 50.11; *Sawhoyamaxa Indigenous Cmty.*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 73(3).

¹⁰² *Sawhoyamaxa Indigenous Cmty.*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 73(4).

¹⁰³ *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 50.10-15; *Sawhoyamaxa Indigenous Cmty.*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 73(4).

¹⁰⁴ *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 50.12.

¹⁰⁵ *Id.* ¶ 50.13.

¹⁰⁶ *Id.*

was little food and water, and the Yakye Axa people, who were not native to that area, were marginalized by local indigenous groups.¹⁰⁷

In the early 1990s, the Yakye Axa and Sawhoyamaxa peoples attempted to begin proceedings in Paraguayan domestic courts for the restitution of their ancestral lands.¹⁰⁸ At that time, several Yakye Axa and Sawhoyamaxa families moved outside the entrances of the territory they claimed.¹⁰⁹ The state considered returning the lands to the indigenous peoples. However, even though the Paraguayan Constitution provides that indigenous peoples have the right to their ancestral land,¹¹⁰ the private owners of the range land that was claimed by the Yakye Axa were not willing to sell part of the ranch to the state for restitution to the Yakye Axa.¹¹¹ Paraguayan law specifies that indigenous peoples can only reclaim their ancestral land if one of the following conditions applies (1) it is state-owned land, (2) the current owners are not making rational use of the land, or (3) the current owners are willing to sell the land to the state.¹¹² As none of these conditions applied, Paraguay did not return the land to the Yakye Axa people. The Yakye Axa and Sawhoyamaxa peoples then took their cases to the Inter-American human rights system. After lengthy proceedings in which the state, indigenous peoples, and experts gave testimony, the Inter-American Court ordered Paraguay to return the ancestral lands to the indigenous peoples or give them substitute lands.¹¹³

Even when the state willingly or under the order of an international court agrees to provide indigenous groups with land, questions arise as to which land must be provided. The Inter-American Court allows states discretion in identifying the ancestral lands to be returned to indigenous peoples. The state's obligation to identify indigenous ancestral lands is to be guided by certain factors. The state must take into ac-

¹⁰⁷ *Id.* ¶ 50.15.

¹⁰⁸ *Id.* ¶ 50.16.

¹⁰⁹ *Id.* ¶ 50.92; *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 73(7) (Mar. 29, 2006).

¹¹⁰ *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 138 (quoting CONSTITUCIÓN POLÍTICA DE 1992 [Constitution] art. 64 (Para.)).

¹¹¹ *Id.* ¶ 50.35.

¹¹² *Id.* ¶ 97.

¹¹³ *Id.* ¶¶ 217, 242(6); *Sawhoyamaxa Indigenous Cmty.*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 210. In 2009, Paraguayan lawmakers voted against the return of ancestral lands to the Yakye Axa indigenous community, despite the 2005 decision by the Inter-American Court. See Amnesty International at <http://www.amnesty.org/en/news-and-updates/news/paraguayan-congress-risks-lives-of-90-indigenous-families-20090628> (last visited Aug. 11, 2009).

count that “[t]he possession of traditional their territory is indelibly recorded in [the] historical memory [of the members of the Community], and their relationship with the land is such that severing that tie entails the certain risk of an irreparable ethnic and cultural loss, with the ensuing loss of diversity.”¹¹⁴ Nonetheless, it is the state that makes the final determination, with the participation of the peoples, as to the exact location of the lands that will be returned. In the request for an interpretation of the judgment in the *Yakye Axa* case made by the representatives of the victims, it appeared that the state was ignoring the community’s request that it be awarded particular lands and was instead planning to give them other lands in the area the state asserted to be within the indigenous peoples’ greater traditional territory.¹¹⁵ Although the Court reminded the state of the people’s connection to their ancestral lands, it left the ultimate determination to the state to fix the exact location of the lands to be awarded to the Yakye Axa people.¹¹⁶

As a practical matter, the Court cannot become involved in every dispute between the state and indigenous peoples regarding the identification of indigenous lands. The Court does not deem itself competent to identify traditional lands; rather, the Court’s role is to determine whether the state has respected and guaranteed the right of indigenous peoples to their communal property.¹¹⁷ The Court stated that it is for the state to delimit, demarcate, title, and return the lands to the people because it is the state that possesses the technical and scientific expertise to do so.¹¹⁸ It is incumbent upon the state to fulfill the spirit as well as the letter of the Court’s order to return ancestral lands to indigenous peoples. Unfortunately, reliance on the state often results in continued disappointment for indigenous peoples.

A further complicating factor to the state’s obligation to demarcate and title ancestral lands is that due consideration must be given to neighboring peoples or individuals who may have overlapping claims to the land at issue.¹¹⁹ In its ruling on the request for interpretation of its

¹¹⁴ *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 215-216.

¹¹⁵ *Yakye Axa Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 142, ¶ 18 (Feb. 6, 2006). *Id.* ¶¶ 21-26.

¹¹⁶ *Id.* ¶¶ 21-26.

¹¹⁷ *Id.* ¶¶ 22-23 (citing *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 215).

¹¹⁸ *Id.* ¶ 23.

¹¹⁹ *Moiwana Cmty. v. Suriname*, 2005 Inter-Am Ct. H.R. (ser. C) No. 124, ¶¶ 133, 210 (June 15, 2005).

judgment in *Moiwana Community v. Suriname*, the Inter-American Court specified that the state must determine the boundaries of the Moiwana traditional lands with the participation and informed consent of the Moiwana people and of the neighboring villages and indigenous communities.¹²⁰ It would be inequitable for the state to title the lands of the applicants who were victorious in a suit before an international tribunal without determining the rights of neighboring claimants. For example, the implementation of the *Awes Tingni* decision in Nicaragua has been delayed by a territorial dispute between three indigenous communities who have overlapping claims to the land.¹²¹ At the same time, it must be recognized that a land titling procedure that would recognize the rights to all possible competing and overlapping claims to land may well take longer than the period the Court granted to the state to make reparations by titling the land in question.

Demarcating and titling ancestral lands is only possible if the indigenous people are living on the land or if the state can return their ancestral home to the people. In some instances, where restitution of their original lands is not possible, the state must provide alternative lands or compensation.

F. INDIGENOUS RIGHTS TO ALTERNATIVE LANDS OR COMPENSATION WHEN THE STATE CANNOT RETURN ANCESTRAL COMMUNAL LAND

*Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.*¹²²

-UN Declaration, Article 28(2)

States cannot return ancestral land to indigenous peoples in all instances. In those cases in which it is not possible, the state should, with the concurrence of the indigenous peoples involved, attempt to find them alternative lands. The alternative lands should be compatible with the customs and values of the people and their use of the land.¹²³ ILO

¹²⁰ *Moiwana Cmty. v. Suriname*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 145, ¶ 19 (Feb. 8, 2006).

¹²¹ Alvarado, *supra* note 57, at 628-32.

¹²² United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 28(1).

¹²³ *Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 151, 217 (June 17, 2005).

Convention 169, quoted by the Inter-American Court, provides that whenever possible, if ancestral land cannot be returned to indigenous people, the people shall be given “lands of quality and legal status at least equal to that of the lands previously occupied by them.”¹²⁴ The substitute lands must be “suitable to provide for their present needs and future development.”¹²⁵ These lands should be identified through the agreement of the people and the state, or, if agreement cannot be reached, through appropriate procedures.¹²⁶ Alternately, with their agreement the people should be given compensation for the land. That compensation should principally take into account “the meaning of the land for them.”¹²⁷

The Inter-American Commission considered the principles of restitution and compensation in *Mary and Carrie Dann* case, finding that the United States Government had violated the ancestral land rights of Mary and Carrie Dann, members of the Western Shoshone indigenous people of the Southwest United States.¹²⁸ The U.S. government argued that the rights of the Western Shoshone to the lands in question had been extinguished in 1872 through the encroachment of non-Native Americans.¹²⁹ In 1977, the U.S. Indian Claims Commission (ICC) agreed that the Western Shoshone would be compensated for the loss of their ancestral lands at a rate of approximately fifteen cents per acre in accordance with 1872 land values.¹³⁰ The ICC’s sole authority was to financially compensate tribes. It did not have authority to order the restitution of land to the Western Shoshone. The Western Shoshone refused the compensation, which was then placed in a U.S. Government trust fund for them.¹³¹

When the U.S. Supreme Court affirmed the ICC ruling, the Dann sisters brought their case to the Inter-American Commission.¹³² The In-

¹²⁴ *Id.* ¶ 150 (quoting ILO Convention No. 169, *supra* note 21, art. 16(4)).

¹²⁵ *Id.*

¹²⁶ *Id.* ¶ 151.

¹²⁷ *Id.* ¶ 149.

¹²⁸ *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Serv.L./V/II.117, doc. 1 rev. 1 ¶¶ 1-2 (2003). The petitioners also claimed violations of their right to equality before the law, religious freedom, right to a family, right to work, and right to a fair trial. *Id.* ¶ 35.

¹²⁹ *Id.* ¶¶ 3, 82.

¹³⁰ *Id.* ¶ 85.

¹³¹ *Id.* ¶¶ 3, 85.

¹³² A complainant may pursue a case before the Inter-American Commission on Human Rights only after exhausting all domestic remedies. American Convention on Human Rights, *supra* note 6, art. 46(1)(a).

ter-American Commission held that the Dann sisters' domestic property claims to their ancestral lands had not been determined through a fair process that complied with international human rights norms.¹³³ The Commission found that the decision of the ICC that the land rights of the Western Shoshone had been extinguished had been based upon an agreement between the U.S. Government and only one band of the Western Shoshone people.¹³⁴ Other Western Shoshone bands, such as the one to which the Danns belonged, were not allowed to intervene in the proceedings, although the ICC's determination also extinguished their rights to much of their ancestral land.¹³⁵ The Inter-American Commission concluded that the Danns had not been afforded equal protection of the law in the ICC proceedings.¹³⁶ The case could not be referred to the Inter-American Court because the U.S. has not ratified the American Convention or accepted the jurisdiction of the Court.

Whether indigenous peoples live on their ancestral lands or are given other lands to compensate for their loss, they should have the same rights as non indigenous peoples to conserve and protect the environment on their lands. The practices of indigenous peoples often succeed in preserving natural resources.

G. INDIGENOUS PEOPLES RIGHT TO THE CONSERVATION AND PROTECTION OF THEIR ENVIRONMENT

*Indigenous peoples have the right to the conservation and protection of the environment . . .*¹³⁷

-UN Declaration, Article 29(1)

Indigenous peoples, especially those who live in forested areas, have become noted internationally for the conservation and protection of their land and natural resources. Their guardianship over those resources contributes to the international community's efforts to practice sustainable development. The Preamble to the UN Declaration on the Rights of Indigenous Peoples recognizes that "respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable

¹³³ *Dann*, Case 11.140, ¶ 142.

¹³⁴ *Id.* ¶¶ 140-142.

¹³⁵ *Id.* ¶¶ 140-142.

¹³⁶ *Id.* ¶ 117.

¹³⁷ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 29(1).

development and proper management of the environment.”¹³⁸ The World Bank also recognizes that “Indigenous Peoples play a vital role in sustainable development.”¹³⁹ Agenda 21, an action plan developed at the UN Conference on Environment and Development (UNCED), states that indigenous peoples “have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment.”¹⁴⁰ At the Earth Summit, a United Nations forum, national and international authorities were encouraged to “accommodate, promote, and strengthen the role of indigenous people and their communities” so as to implement environmentally sound and sustainable development.¹⁴¹

An example of how protecting indigenous peoples’ territorial rights supports global environmentalists’ efforts to preserve the planet’s remaining viable ecosystems is shown in the *The Awas Tingni* case. The Awas Tingni people consider themselves to be “guardians of the forest.”¹⁴² At least some of Central America’s forestlands, which as of 2002 were being destroyed, could be protected if indigenous peoples had full control over their ancestral lands and resources.¹⁴³ The 1992 United Nations Conference on Environment and Development recognized that:

Indigenous people . . . have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.¹⁴⁴

¹³⁸ *Id.* p.mbl.

¹³⁹ WORLD BANK, OPERATIONAL MANUAL, OP 4.10–INDIGENOUS PEOPLES ¶ 2 (2005), <http://go.worldbank.org/UBJJIRUDP0>.

¹⁴⁰ U.N. Conference on Env’t and Dev., June 3-14, 1992, Agenda 21, annex II, ¶ 26.1, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) (June 14, 1992), available at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter26.htm>; see also Eric Dannenmaier, Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine, 86 Wash. U. L. Rev. 53, 79 (2008).

¹⁴¹ *Agenda 21*, *supra* note 140, ¶ 26.1.

¹⁴² *Case of the Mayagna (Sumo) Community of Awas Tingni: Transcript of the Public Hearing on the Merits*, 19 ARIZ. J. INT’L & COMP. L. 129, 147 (2002) (testimony of witness Charlie Mclean). The witness is the Manager of the Forest and the Secretary of the Awas Tingni Territorial Commission. *Id.* at 145.

¹⁴³ See Jennifer A. Amriott, Note, *Environment, Equality, and Indigenous Peoples’ Land Rights in the Inter-American Human Rights System: Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua*, 32 ENVTL. L. 873, 902-03 (2002).

¹⁴⁴ U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, ¶

In 2005, the Inuit indigenous community in Alaska sought international relief from detrimental environmental practices that were negatively affecting their lands.¹⁴⁵ They filed a petition with the Inter-American Commission against the United States, asking the Commission for “relief from human rights violations resulting from the impacts of global warming and climate change caused by acts and omissions of the United States.”¹⁴⁶ The petitioners reasoned that the United States, as the largest emitter of greenhouse gases, bears the greatest responsibility for the global warming that is destroying the Inuit’s arctic physical environment.¹⁴⁷ As their culture is closely related to their physical environment, they alleged violations of their rights to property, culture, health, physical integrity, life, security, subsistence, residence, movement, and the inviolability of the home.¹⁴⁸ The Inter-American Commission refused to consider the petition finding that the information provided by the Inuit people did not sufficiently establish facts that demonstrated a violation of rights protected by the American Declaration of the Rights and Duties of Man.¹⁴⁹

Integrally related to the rights of indigenous peoples to conserve and protect their lands is their right to control the productive capacity of the natural resources on those lands. The harvesting of natural resources by third parties can result in environmental degradation, and it can interfere with the relationship of indigenous people with their land.

62, E/CN.4/2003/90 (Jan. 21, 2003) (prepared by Rodolfo Stavenhagen) (quoting U.N. Conference on Env’t and Dev., June 3-14, 1992, *Rio Declaration on Environment and Development*, annex I, princ. 22, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) (June 14, 1992)) [hereinafter *Report of the Special Rapporteur on Human Rights and Fundamental Freedoms*].

¹⁴⁵ Petition of Sheila Watt-Cloutier to the Inter-American Comm’n on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States at 1, 7 (Dec. 7, 2005), <http://inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>.

¹⁴⁶ *Id.* at 1.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 5.

¹⁴⁹ See Andrew C. Revkin, *Americas: Inuit Climate Change Petition Rejected*, N.Y. TIMES, Dec. 16, 2006, at A9; Jessica Gordon, *Inter-American Commission on Human Rights to Hold Hearing After Rejecting Inuit Climate Change Petition*, SUSTAINABLE DEV. L. & POL’Y, Winter 2007, at 55.

H. RIGHT TO THE PRODUCTIVE CAPACITY OF INDIGENOUS LANDS

*Indigenous peoples have the right to the . . . productive capacity of their lands or territories and resources.*¹⁵⁰

- UN Declaration, Article 29(1).

A primary difficulty in state recognition of the land claimed as indigenous ancestral lands is the extent of the land claimed. Indigenous people traditionally lived by hunting and gathering over large areas. Many states have long considered this land as state land which could be tapped for natural resource development to increase the wealth of the nation. Thus, even when the State has recognized the legal right of indigenous peoples to their communal property, conflicts may arise over the control of natural resources on or beneath that land.

States sometimes grant concessions to third parties authorizing them to exploit the natural resources on lands that have historically been in the possession of indigenous peoples or on lands that have been titled communally to them. For example, in recent years, the Nicaraguan government granted logging rights on untitled indigenous lands to a Korean company;¹⁵¹ the government of Belize granted logging rights and oil exploration rights on Mayan reservations to a private company;¹⁵² and the Ecuadorian government, which retains the right to exploit subsurface minerals, granted exploration rights on indigenous lands to private foreign companies.¹⁵³ Such contracts can be lucrative for national governments and for the state officials who facilitate them. The companies who have been granted the concessions can be ruthless in attempting to gain access to indigenous communal property.

The natural resources on their ancestral lands support indigenous peoples' subsistence economy and are important to the religious and cul-

¹⁵⁰ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 29(1). The U.N. Declaration further specifies in this respect that "States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination." *Id.*

¹⁵¹ *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153 (Aug. 31, 2001).

¹⁵² *Maya Indigenous Cmty. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶ 2 (2005). The contract provided that if the company were to find oil, it could exploit the resource for twenty-five years. *Id.* ¶ 30.

¹⁵³ OAS, Inter-Am. Comm'n on Human Rights, *Report on the Human Rights Situation of the Indigenous People of the Americas*, OEA/Ser.L/V/II.108, doc. 62, at 314 (Oct. 20, 2000) (citing U.N. Ctr. on Transnat'l Corps., *Transnational Investments and Operations on the Lands of Indigenous Peoples*, E/CN.4/Sub.2/1991/49, at 22, ¶ 6 (July 17, 1991)).

tural lives of the people. Many indigenous people live by hunting in forested areas and fishing in the streams and rivers. Their access to the natural resources on their traditional lands is directly linked to their culture, their lifestyle, and their ability to obtain adequate food and clean drinking water.¹⁵⁴ The Inter-American Court recognized the importance of their lands and natural resources to indigenous peoples, in stating:

[t]he culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity.¹⁵⁵

Although the Inter-American Court acknowledged that “the right to use and enjoy their territory would be meaningless” for indigenous and tribal communities if that right was not accompanied by the corresponding right to use and enjoy the “natural resources that lie on and within the land,”¹⁵⁶ the Court does not mandate that all resources on indigenous lands should be safe-guarded from the state or third parties. According to the Inter-American Court, the rights of indigenous peoples’ to the natural resources on or beneath these ancestral lands is limited to those resources that are related to their culture.¹⁵⁷ In the *Saramaka* Case, the Court held that only those “natural resources traditionally used and necessary for the very survival, development and continuation of [indigenous and tribal] people’s way of life” are protected by the American Convention’s right to property.¹⁵⁸ According to the Inter-American Court, indigenous peoples’ have the right to own and use only those natural resources within their territory that they have traditionally used.¹⁵⁹ Their right to the natural resource is based on the “same reasons that they have a right to own the land they have traditionally used and occupied

¹⁵⁴ *Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 167 (June 17, 2005); see generally Peter Manus, *Sovereignty, Self-Determination, and Environment-Based Cultures, The Emerging Voice of Indigenous Peoples in International Law*, 23 WIS. INT’L L.J. 553 (2005) (arguing that control over indigenous lands, water, and resources gives rise to the most violent conflicts and human rights violations).

¹⁵⁵ *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 135.

¹⁵⁶ *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 122 (Nov. 28, 2007).

¹⁵⁷ *Id.* ¶ 120.

¹⁵⁸ *Id.* ¶ 122.

¹⁵⁹ *Id.* ¶ 121.

for centuries.¹⁶⁰ Thus, with certain restrictions, the state may have the right to harvest or to grant concessions to third parties to harvest other resources on indigenous lands.

Other international sources seem more protective of indigenous rights to the natural resources on or beneath their lands than is the Inter-American Court. For example, ILO Convention 169 requires that the rights of indigenous peoples to the natural resources on their lands must be safeguarded, and that they must have the right to participate in the “use, management and conservation of these resources.”¹⁶¹ The Special Rapporteur on Human Rights and Indigenous Peoples concluded that “[t]he issue of extractive resource development and human rights involves a relationship between indigenous peoples, Governments and the private sector which must be based on the full recognition of indigenous peoples’ rights to their lands, territories and natural resources, which in turn implies the exercise of their right to self-determination.”¹⁶²

The Inter-American Court acknowledges that any exploration and extraction activity in indigenous territory could affect the peoples’ use and enjoyment of some natural resources traditionally used and necessary for the survival of the indigenous peoples.¹⁶³ The Court specifies that indigenous rights to clean natural water could be affected by mining concessions,¹⁶⁴ recognizing that the “extraction of one natural resource is most likely to affect the use and enjoyment of other natural resources that are necessary for the survival” of indigenous or tribal peoples.¹⁶⁵ Nonetheless, the Inter-American Court holds that under the American Convention, the rights of indigenous peoples to their ancestral lands and resources does not prevent the state from granting concessions for the exploration and extraction of natural resources within indigenous territory when certain conditions are met.¹⁶⁶ Thus, it holds to the detriment of indigenous communal landholders that their rights to the natural resources on their lands may be restricted.

¹⁶⁰ *Id.*

¹⁶¹ ILO Convention No. 169, *supra* note 21, art. 15(1).

¹⁶² *Report of the Special Rapporteur on Human Rights and Fundamental Freedoms, supra* note 144, ¶ 66.

¹⁶³ *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 126.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

III. RESTRICTIONS ON INDIGENOUS PROPERTY RIGHTS UNDER THE AMERICAN CONVENTION

The right to property under the American Convention is not absolute. The American Convention and the jurisprudence of the Inter-American Court set forth guidelines to determine admissible restrictions on the enjoyment and the exercise of rights in general, including the right to property.¹⁶⁷ Any restrictions on indigenous property rights must comply with the strict requirements established by the Inter-American Court.¹⁶⁸ The American Convention's explicit restriction on the right to property allows state law to subordinate the use and enjoyment of property "to the interest of society."¹⁶⁹ The Court specified that "[t]he necessity of legally established restrictions will depend on whether [the restrictions] are geared toward satisfying an imperative public interest."¹⁷⁰ It would be insufficient for the state to merely demonstrate that the law fulfills a useful or opportune purpose.¹⁷¹

In accordance with the American Convention, the Inter-American Court requires that state exercise of this restriction be (1) previously established by law; (2) necessary; (3) proportionate, and (4) with the aim of achieving a legitimate objective in a democratic society.¹⁷² The Court clarified that "the restriction must be proportionate to the interest that justifies it."¹⁷³ Any restriction must be closely tailored to ac-

¹⁶⁷ *Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 144 (June 17, 2005).

¹⁶⁸ *Saramaka People v. Suriname*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 34 (Aug. 12, 2008).

¹⁶⁹ American Convention on Human Rights, *supra* note 6, art. 21(1). Article 30 of the American Convention provides that "[t]he restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established." *Id.* art. 30.

¹⁷⁰ *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 145.

¹⁷¹ *Id.*

¹⁷² See American Convention on Human Rights, *supra* note 6, art. 30; *Saramaka People*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 34; *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 144;

¹⁷³ *Canese v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 96 (Aug. 31, 2004); see *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 145 n.198 (referring to *Canese*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 96 (Aug. 31, 2004); *Herrera-Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 123 (July 2, 2004). The *Canese* and *Ulloa* cases deal with restrictions in the context of freedom of expression.

comply with a legitimate objective. Moreover, it must be carried out with the least amount of interference possible without sacrificing the effective exercise of the restricted right.¹⁷⁴ To be compatible with the Convention, the restrictions should be justified according to collective objectives that, by their importance, clearly predominate over the necessity for the full enjoyment of the right restricted.¹⁷⁵ In this regard, the Court emphasized that:

States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations. Property of the land ensures that the members of the indigenous communities preserve their cultural heritage.¹⁷⁶

The Court has added a fourth requirement with which the state must comply when restricting indigenous rights to their traditional lands and the natural resources on these lands. The state's restriction must not result in a denial of indigenous traditions and customs, so as to endanger the survival of the people.¹⁷⁷ The term "survival," according to the Court, signifies more than the physical survival of the people.¹⁷⁸ It should be understood to enable indigenous peoples, with the assistance of the state, to "preserve, protect and guarantee the special relationship that [indigenous people] have with their territory"¹⁷⁹ and, thus, allow them to "continue living their traditional way of life."¹⁸⁰ If a state failed to recognize the

¹⁷⁴ *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 145.

¹⁷⁵ *Id.*

¹⁷⁷ *Id.* ¶ 146.

¹⁷⁷ *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 128 (Nov. 28, 2007). The Inter-American Court cited the case of *Länsman v. Finland*. U.N. Human Rights Comm., *Länsman v. Finland*, ¶ 9.4, Comm. No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1994). The U.N. Human Rights Committee stated that "measures whose impact amounts to a denial of the right will not be compatible with the obligations under [ICCPR] article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27." *Id.* Also, General Comment on Article 27 states that minorities and indigenous groups "have a right to the protection of traditional activities such as hunting, fishing . . . and that measures must be taken 'to ensure the effective participation of members of minority communities in decisions which affect them.'" *Id.* ¶ 9.5.

¹⁷⁸ *Saramaka People v. Suriname*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 37 (Aug. 12, 2008).

¹⁷⁹ *Id.* (quoting *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 129.).

¹⁸⁰ *Saramaka People*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 37. The Court further stated that the "distinct cultural identity, social structure, economic system, customs, beliefs, and traditions [of indigenous peoples must be] respected, guaranteed, and protected." *Id.*

right of indigenous communities to their ancestral lands, it could negatively affect their other basic rights, specifically their right to cultural identity and to their very survival as individuals and as a people.¹⁸¹

Moreover, the Court noted that to preserve “cultural identities in a democratic and pluralist society” it could be necessary to restrict individual private ownership of property that is in conflict with indigenous communal rights.¹⁸² Such a restriction would be proportional if just compensation were made to those who must give up their private property.¹⁸³ As stated, the American Convention permits the subordination of the use and enjoyment of property rights “to the interest of society.”¹⁸⁴ The Court’s position that the recognition of indigenous ancestral property rights is important to the survival of cultural diversity in a democratic society would support a permissible restriction on private property to the interest of society.

Although the Court’s pronouncements appear to favor the return of indigenous ancestral lands, even when they have been legally titled to third parties, the Court also stated that “[t]his does not mean that every time there is a conflict between the territorial interests of private individuals or of the State and those of the members of the indigenous communities, the latter must prevail over the former.”¹⁸⁵ For example, when the Yakye Axa people asked for an interpretation of the Court’s judgment, because Paraguay appeared unwilling to expropriate the private land claimed by the people, and instead intended to provide other land in the general area, the Court would not dictate to the state which specific lands were to be returned by Paraguay to the Yakye Axa people.¹⁸⁶

Somewhat surprisingly, considering its earlier jurisprudence, in the *Saramaka v. Suriname* case, the Inter-American Court interpreted the American Convention’s restriction of property rights to “the interest of society” to permit the state to grant concessions on indigenous ancestral lands to third parties to harvest natural resources even for investment and development purposes.¹⁸⁷ The state argued that it was balancing indigen-

¹⁸¹ *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 147.

¹⁸² *Id.* ¶ 148.

¹⁸³ *Id.*

¹⁸⁴ American Convention on Human Rights, *supra* note 6, art. 21(1).

¹⁸⁵ *Yakye Axa Indigenous Cmty.*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 149.

¹⁸⁶ *Yakye Axa Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 142, ¶¶ 21-26 (Feb. 6, 2006).

¹⁸⁷ *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 127 (Nov. 28, 2007).

ous property rights against the economic development of the country as a whole, rather than against individual rights.¹⁸⁸ One could argue that logging and mining indigenous lands benefits the larger society when at least some of the monies paid are deposited in the public coffers. However, this would also be true if the state decided to strip the natural resources from private lands.

The multi-pronged test to determine what restrictions are permissible, as applied by the Inter-American Court in the *Sawhoyamaxa* and *Yakye Axa* cases, was applied in very different circumstances in the *Saramaka* case. In, *Sawhoyamaxa* and *Yakye Axa*, the indigenous peoples were reclaiming ancestral lands that they had lost, which were already in the hands of third parties. In contrast, the Court used the test in *Saramaka* to balance the indigenous people's communal rights to the natural resources on their ancestral lands against the rights of private parties who had been granted concessions by Suriname to harvest some of those natural resources.¹⁸⁹ This test, which determines whether the communal interests of the indigenous peoples or the for-profit interest of the concession holders will be restricted, is to be applied by the states that granted the private concessions in the first place. Accordingly, the outcome of these decisions seems evident.

IV. SAFEGUARDS LIMITING STATE RESTRICTIONS TO INDIGENOUS PROPERTY RIGHTS

Although the Court holds that states are allowed to restrict indigenous property rights in certain circumstances, the Inter-American Court laid down three safeguards limiting state restrictions. These safeguards require (1) the effective participation of the people in any development or investment plan on their territory, (2) benefit-sharing with the people, and (3) prior environmental and societal impact studies. The purpose of the safeguards is to protect, preserve, and guarantee the special relationship that indigenous peoples have with their ancestral lands, which ensures their survival as a people.¹⁹⁰

¹⁸⁸ *Saramaka People v. Suriname*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 185, ¶¶ 28-29 (Aug. 12, 2008).

¹⁸⁹ *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 127.

¹⁹⁰ *Id.* ¶ 129.

The United Nations Special Rapporteur on Indigenous Rights, in his study on the impact of large-scale and major development projects on the rights of indigenous peoples, similarly suggested the type of safeguards subsequently set forth by the Inter-American Court. The Special Rapporteur concluded that “[f]ree, prior, informed consent is essential for the human rights of indigenous peoples in relation to major development projects.”¹⁹¹ Moreover, the safeguards “should involve ensuring mutually acceptable benefit sharing, and mutually acceptable independent mechanisms for resolving disputes between the parties involved, including the private sector.”¹⁹² In the area of consent, however, the Rapporteur’s safeguard appears to be more stringent than that of the Inter-American Court.

**A. CONSULTATION AND FREE, INFORMED AND PRIOR CONSENT
“WHERE APPLICABLE”**

*Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources . . . States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*¹⁹³

- UN Declaration, Article 32(1) and (2).

International authorities vary as to whether indigenous peoples have only the right to free, prior, and informed “consultation” before state authorities implement projects that will affect their lands and resources, or whether they have the right to give or withhold their free and informed “consent” prior to these undertakings on their lands. It has become generally accepted by international bodies that, at the very least, indigenous peoples must be consulted prior to the commencement of any projects on their land. As such, state and international decisions that affect indigenous peoples should only be made in conjunction with the ac-

¹⁹¹ *Report of the Special Rapporteur on Human Rights and Fundamental Freedoms*, *supra* note 144, ¶ 66.

¹⁹² *Id.*

¹⁹³ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 32(1)-(2).

tive participation of the people in question.¹⁹⁴ Such consultations must be culturally appropriate and procedurally adequate, in that the indigenous peoples must have access to sufficient information to permit them to participate meaningfully in the decisions that will impact their communities.¹⁹⁵ Moreover, measures adopted by states to protect indigenous peoples “shall not be contrary to the freely-expressed wishes of the peoples concerned.”¹⁹⁶

The World Bank, for instance, will only finance projects when states engage in “free, prior, and informed consultation” with the indigenous communities that would be affected by the project.¹⁹⁷ World Bank policy specifies that the Bank will refuse to provide financing unless this consultation results in broad community-based indigenous support for the project.¹⁹⁸ The Bank specifies, however, that the requirement of free, prior, and informed consultation “does not constitute a veto right for individuals or groups.”¹⁹⁹ Veto power by groups is not as essential if the Bank refuses to fund any project that does not have the broad-based support of the indigenous communities that will be affected by the project.

¹⁹⁴ See ILO Convention No. 169, *supra* note 21, art. 2 (stating that any action planned or taken by the State with respect to indigenous peoples should be undertaken “with the participation of the peoples concerned”).

¹⁹⁵ James Anaya, *Indigenous Peoples’ Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT’L & COMP. L. 7, 11, 16 (2005). “The concept of consulting the indigenous communities that could be affected by the exploration or exploitation of natural resources includes establishing a genuine dialogue between both parties characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord.” *Id.* at 7 n.19 (quoting ILO, *Report of the Committee Set up to Examine the Representation Alleging Non-Observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL)*, ILO Doc. GB.282/14/2, ¶ 38 (Nov. 14, 2001)).

¹⁹⁶ ILO Convention No. 169, *supra* note 21, art. 4(2). See also U.N. Human Rights Comm., *General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights*, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994) (observing that “[t]he enjoyment of [indigenous] 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”).

¹⁹⁷ WORLD BANK, *supra* note 139, ¶ 1. The required consultation with the indigenous peoples must be “culturally appropriate” and must include both men and women and be intergenerational in that it also addresses the concerns of youth and children. *Id.* ¶¶ 1, 10.

¹⁹⁸ *Id.* ¶ 1.

¹⁹⁹ *Id.* ¶ 1 n.4.

ILO Convention 169 addresses the issue of consent when the state retains all subsurface mineral rights in the country. In that instance, indigenous peoples may only have the same right to consultation accorded non-indigenous property owners. ILO Convention 169 provides that:

[i]n cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands.²⁰⁰

Stravenhagen, former Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, would likely require more than mere consultation in some circumstances. He stated that “indigenous communities should be involved directly whenever major economic development projects that affect their lives and livelihoods are being considered.”²⁰¹ He further stated that:

[t]he free, informed and prior consent, as well as the right to self-determination of indigenous communities and peoples, must be considered as a necessary precondition for such strategies and projects. Governments should be prepared to work closely with indigenous peoples and organizations to seek consensus on development strategies and projects, and set up adequate institutional mechanisms to handle these issues.²⁰²

Accordingly, the Special Rapporteur would give the communities veto power over certain large-scale projects. In this regard, he opined that in-

²⁰⁰ ILO Convention No. 169, *supra* note 21, art. 15(2).

²⁰¹ *Report of the Special Rapporteur on Human Rights and Fundamental Freedoms*, *supra* note 144, ¶ 36. In his report on the impact of large scale and major development projects on the rights of indigenous peoples and their communities, the Special Rapporteur defined “major development project” as “a process of investment of public and/or private, national or international capital for the purpose of building or improving the physical infrastructure of a specified region, the transformation over the long run of productive activities involving changes in the use of and property rights to land, the large scale exploitation of natural resources including subsoil resources, the building of urban centers, manufacturing and/or mining, power, extraction and refining plants, tourist developments, port facilities, military bases, and similar undertakings.” *Id.* ¶ 6; *see also Id.* ¶ 36 (referring specifically to the six-dam project on the Bio-Bio).

²⁰² *Id.* ¶ 73. The Special Rapporteur also stated that “[a]ny development projects or long-term strategy affecting indigenous areas must involve the indigenous communities as stakeholders, beneficiaries and full participants, whenever possible, in the design, execution, and evaluation stages.” *Id.*

indigenous peoples have the right to “determine their own pace of change” and that includes “their right to say no.”²⁰³

The Inter-American Court takes a middle ground, always requiring consultation with indigenous peoples, but only requiring their consent for larger projects that would have a greater impact on their people and environment. The Court recognizes that indigenous people have the right to participate in decisions affecting them and that those decisions must reflect their customary law and culture.²⁰⁴ The Court requires that “the State must ensure the effective participation of the members of [indigenous and tribal] people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan” within their territory.²⁰⁵ To do so, the state must “actively consult” with the people “in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.”²⁰⁶ Fulfillment of this state duty mandates that the state engage in consultations in accordance with the traditions of the people during the initial stages of the plan and remain in constant communication with the people, “not only when the need arises to obtain approval from the community *if such is the case*.”²⁰⁷

²⁰³ *Id.* ¶ 66. The Special Rapporteur stated that Indigenous peoples who will be adversely affected by a project should participate in its planning and freely consent to its implementation. *See Id.* ¶ 56. The Rapporteur cited Philippines’ Indigenous Peoples’ Rights Act which “provides for free and prior informed consent and enables an indigenous community to prevent the implementation of any project which affects its ancestral domain in any way by refusing consent to the project.” *Id.* ¶ 58. In practice, however, this law is sometimes ignored by the authorities. *Id.*

²⁰⁴ *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 164 (Aug. 31, 2001). The Inter-American Court requires that indigenous peoples must be consulted when the State undertakes to fulfill a Court-ordered remedy. For example, in ordering reparations in *Awas Tingni*, the Inter-American Court specified that the State should undertake the demarcation and titling of the Community’s ancestral lands with full participation of the Community, taking into account its customary law, values, customs, and mores. *Id.* In *Yakye Axa*, the Court also explained that when ancestral lands cannot be returned to indigenous peoples, the decision to award them alternative land or to pay them just compensation must be made by agreement with the peoples involved and in accordance with their consultation procedures, values, and customary law. *Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 151 (June 17, 2005).

²⁰⁵ *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 129 (Nov. 28, 2007).

²⁰⁶ *Id.* ¶ 133.

²⁰⁷ *Id.* (emphasis added). The State must both accept and disseminate information during the ongoing consultations between the parties. *Id.* The State must make the indigenous people aware of possible risks, including health and environmental risks, so that “the proposed development or investment plan is accepted knowingly and voluntarily.” *Id.* Consent might have avoided the wasteful logging of Saramaka territory. *See id.* ¶ 151.

The interaction between state authorities and the people must be in accordance with the peoples' traditional means of decision-making.²⁰⁸

According to the Inter-American Court in the *Saramaka People v. Suriname* case, the free, prior, and informed consent of indigenous peoples is only necessary when the state is considering "large-scale development or investment projects that would have a major impact" on the territory of indigenous or tribal peoples.²⁰⁹ The Court defined "development or investment plan" to mean "any proposed activity that may affect the integrity of the lands and natural resources within the territory of the [indigenous] people, particularly any proposal to grant logging or mining concessions."²¹⁰ The Court further identified these "major development or investment plans as those that may have a profound impact on the property rights" of the people "to a large part of their territory" and thus require the informed consent of the Saramaka people.²¹¹ Until the state has granted the indigenous peoples title to their land and has established legal boundaries, the state or third parties with the acquiescence of the state may not act in any way that will "affect the existence, value, use or enjoyment of the territory to which the members of the Saramaka people are entitled, unless the State obtains the free, informed and prior consent of the Saramaka people."²¹²

Thus, the requirements set forth by the Inter-American Court do not seem to completely coincide with the UN Declaration on the Rights of Indigenous Peoples, which calls for "free and informed consent prior to the approval of any project affecting their lands or territories and other resources."²¹³ The limitation that the consent of indigenous people is on-

²⁰⁸ *Id.* ¶ 133.

²⁰⁹ *Id.* ¶ 134. Prior to the Inter-American Court's decision in *Saramaka People*, the Inter-American Commission specified that any State determination as to the maintenance of the rights of indigenous peoples to their ancestral land must be "based upon a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives." *Maya Indigenous Cmty. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶ 142 (2005). In *Maya Indigenous Communities*, the Inter-American Commission specified that "one of the central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories." *Id.*

²¹⁰ *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 129 n.127.

²¹¹ *Id.* ¶ 137 (emphasis added).

²¹² *Id.* ¶ 214(5).

²¹³ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 32(2).

ly necessary when major development or investment projects will have a “profound impact” on a “large part of their territory,” seems to give the state leeway to grant smaller for-profit logging and mining concessions that could seriously impact indigenous communities close to their villages. If their ancestral lands are titled to the indigenous communities as the Court has held, then the communities should have the right to harvest their own resources if they so choose.

B. BENEFIT SHARING

*States shall provide effective mechanisms for just and fair redress for any [project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources].*²¹⁴

- United Nations Declaration on the Rights of Indigenous Peoples, Article 32(3)

Indigenous peoples often bear the heaviest costs when the state undertakes natural resource-extractive industries such as logging, damming waterways, mining, industrial fishing and even eco-tourism and some conservation projects.²¹⁵ These activities and projects may be considered to be in the national interest, or they may be market-driven to develop new economic projects that will maximize profits and productivity.²¹⁶ The effects of these projects on indigenous peoples may include the loss of their ancestral lands, depletion of the resources necessary for their cultural or even physical survival, or the pollution and destruction of their environment.²¹⁷

Pursuant to evolving standards of international law, indigenous peoples must share in the benefits of natural resources taken from their territory.²¹⁸ Whether the state must only consult with the indigenous peoples or receive their consent for projects, international sources coincide that benefit sharing with indigenous peoples is required. ILO Convention 169 provides that even when the state retains ownership of natural resources, it must share the benefits of any exploitation activities on

²¹⁴ *Id.* art. 32(2)–(3).

²¹⁵ See *Report of the Special Rapporteur on Human Rights and Fundamental Freedoms*, *supra* note 144.

²¹⁶ *Id.* ¶ 8.

²¹⁷ *Id.* at 2.

²¹⁸ ILO Convention No. 169, *supra* note 21, art. 15(2).

ancestral lands with the indigenous peoples.²¹⁹ The ILO treaty provides that “[t]he peoples concerned shall wherever possible participate in the benefits of [natural resources exploration or exploitation] activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.”²²⁰ These benefits could entail compensatory damages or the receipt of services from projects such as dams that create electricity. The indigenous peoples should be considered partners in these projects with their contribution being their natural resources, which would entitle them to share in the benefits.²²¹

Likewise, the World Bank specifies that when the Bank funds projects for the commercial development of natural or cultural resources on traditionally indigenous lands, the indigenous peoples must “share equitably in the benefits to be derived from such commercial development” and that those benefits must be received in a “culturally appropriate way.”²²² As such, the Bank clarifies that the social and economic benefits accorded to the communities must be “gender and inter-generationally inclusive.”²²³ According to World Bank policies, indigenous peoples must receive benefits and compensation that are “at least equivalent to that to which any landowner with full legal title to the land would be entitled in the case of commercial development on their land.”²²⁴

The Inter-American Court also mandates that states reasonably share the benefits of projects with the indigenous and tribal peoples whose land or natural resources are affected.²²⁵ To date, the Court has only addressed the issue of benefit sharing through compensation rather than through the sharing of the receipt of services from development projects. For instance, in the *Saramaka* case the Court awarded the Saramaka people \$75,000 in material damages for the valuable timber tak-

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Report of the Special Rapporteur on Human Rights and Fundamental Freedoms*, *supra* note 144, ¶ 52 (referring specifically to a project in India). The concept of partnership could be for every such project, assuming, of course that the indigenous people were in agreement.

²²² WORLD BANK, *supra* note 139, ¶ 19. Natural resources that may be commercially developed may include hydrocarbon resources, minerals, water, forests, or hunting/fishing grounds. *Id.* ¶ 18.

²²³ *Id.* ¶ 1.

²²⁴ *Id.* ¶ 18.

²²⁵ *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 129, 138-140 (Nov. 28, 2007).

en and the property damage to their forests due to state-awarded logging concessions.²²⁶

The Court bases this requirement on the “inherent to the right of compensation” for the taking of property set forth in the American Convention.²²⁷ Article 21 provides that “[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”²²⁸ In the view of the Inter-American Court, the takings clause (of the right to property) extends to the “deprivation of the regular use and enjoyment” of property as well as to the total deprivation of property title through state expropriation.²²⁹

Historically, promised benefit-sharing with indigenous peoples often has failed to materialize. For example, in the U.S., a series of dams built on the Missouri River in the 1950s and 60s flooded more than 100,000 acres of the best lands of indigenous peoples.²³⁰ The initial guarantee that in return for the land lost, a substantial area of other indigenous land would be irrigated was not fulfilled.²³¹ It is also likely that indigenous peoples would confront difficulties in enforcing any state promises of benefit sharing in future projects. Nonetheless, benefit sharing is equitable, and such commitments should be enforced.

C. ENVIRONMENTAL AND SOCIAL IMPACT STUDIES

*Appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*²³²

United Nations Declaration on the Rights of Indigenous Peoples, Article 32(3)

One method of mitigating the negative impact of development projects is to determine in advance whether the project will have adverse consequences for the people living on the land, and if so, change or ab-

²²⁶ *Id.* ¶ 199.

²²⁷ *Id.* ¶ 138.

²²⁸ American Convention on Human Rights, *supra* note 6, art. 21(2).

²²⁹ *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 139.

²³⁰ *See Report of the Special Rapporteur on Human Rights and Fundamental Freedoms*, *supra* note 144, ¶ 60 (citing a World Commission of Dams report).

²³¹ *Id.*

²³² United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 32(3). This article also provides that “States shall provide effective mechanisms for just and fair redress for any such activities.” *Id.*

andon the project. The jurisprudence of the Inter-American Court, in accordance with other international sources, now specifies that social and environmental impact studies must be conducted before the state undertakes development or investment activities on ancestral indigenous lands.²³³ This third safeguard dictated by the Inter-American Court requires that assessments be conducted by technically competent and independent entities, under the supervision of the state, and prior to the award of any concessions for development or investment projects in indigenous territory.²³⁴

The purpose of an impact assessment is to assess any potential impact or damage that a future development or investment project may have on the property and people who will be affected and to provide an objective measure of the possible impact.²³⁵ The Inter-American Court specified that the impact assessment must conform to “relevant international standards and best practices.”²³⁶ In this context, the Court cited the Akwé: Kon Guidelines²³⁷ as one of the most comprehensive and utilized standards.²³⁸ Impact assessments must address the “cumulative impact” of both existing and proposed projects on the property and the community.²³⁹ They must be completed before any concessions are granted on indigenous lands so as to ensure that the peoples are aware of proposed projects.²⁴⁰ An acceptable level of impact would be determined on a case-by-case basis, but it must not deny the indigenous peoples their survival as a people.²⁴¹

²³³ See ILO Convention No. 169, *supra* note 21, art. 7(3); WORLD BANK, *supra* note 139, ¶ 9; *Report of the Special Rapporteur on Human Rights and Fundamental Freedoms*, *supra* note 144, ¶ 74.

²³⁴ *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 129, 194(e); *Saramaka People v. Suriname*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 41 (Aug. 12, 2008).

²³⁵ *Saramaka People*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 40.

²³⁶ *Id.* ¶ 41.

²³⁷ SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, AKWÉ: KON GUIDELINES-VOLUNTARY GUIDELINES FOR THE CONDUCT OF CULTURAL, ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENTS REGARDING DEVELOPMENTS PROPOSED TO TAKE PLACE ON, OR WHICH ARE LIKELY TO IMPACT ON, SACRED SITES AND ON LANDS AND WATERS TRADITIONALLY OCCUPIED OR USED BY INDIGENOUS AND LOCAL COMMUNITIES (2004), <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf>.

²³⁸ *Saramaka People*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 41 n.23.

²³⁹ *Id.* ¶ 41.

²⁴⁰ *Id.*

²⁴¹ *Id.* ¶ 42.

Similarly, ILO Convention 169 requires impact studies, when appropriate, before beginning development activities that will affect indigenous lands. The ILO Convention specifies that:

Governments shall ensure that, whenever appropriate, studies are carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.²⁴²

The World Bank, prior to funding projects that involve the territory of indigenous peoples, requires that the state undertake a social assessment to evaluate the project's potential positive and negative effects.²⁴³ The social assessment must be conducted by social scientists whose qualifications and experience are acceptable to the World Bank.²⁴⁴ The extent of the social assessment must be proportional to the nature and scale of the proposed project and its potential effects on the indigenous peoples.²⁴⁵ If the effects on the indigenous peoples will be significant and adverse, the social assessment must examine project alternatives.²⁴⁶

A former Special Rapporteur on Indigenous Rights was more specific in explaining what should be included in a social assessment report. He stated that:

[p]otential long-term economic, social and cultural effects of major development projects on the livelihood, identity, social organization and well-being of indigenous communities must be included in the assessment of their expected outcomes, and must be closely monitored on an ongoing basis. Such effects would include health and nutrition status, migration and resettlement, changes in economic activities, levels of living, as well as cultural transformations and socio-psychological conditions, with special attention given to women and children.²⁴⁷

A detailed assessment, as suggested by the Special Rapporteur, would address most issues that could befall indigenous communities, and could result in changes to development plans.

²⁴² ILO Convention No. 169, *supra* note 21, art. 7(3).

²⁴³ WORLD BANK, *supra* note 139, ¶ 9.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Report of the Special Rapporteur on Human Rights and Fundamental Freedoms, supra* note 144, ¶ 74.

These studies could predict unintended negative consequences that could befall indigenous peoples and, therefore, require alternate plans. Logging and mining, for example, may cause extensive damage beyond the removal of the targeted natural resources. In the *Saramaka* case, expert witnesses who visited logged areas on Saramaka lands testified to the severe and traumatic impact of a logging concession on the lives of the people.²⁴⁸ Sub-standard bridges built by the logging company had blocked creeks that served as the primary source of potable water for the community.²⁴⁹ As a result, there was a shortage of water for drinking, cooking, washing, field irrigation, and gardens. Many subsistence farms had to be abandoned, streams could no longer be fished,²⁵⁰ and the indigenous peoples could no longer hunt or gather in the logged area.

The protection offered by impact studies is dependent on the quality of the study as well as the state's willingness to alter the project if the study demonstrates a strong negative effect on the indigenous peoples. In reality, impact studies can be withheld²⁵¹ or rejected by state authorities. For example, the Chilean government rejected studies that described the cumulative harmful effects of a series of dams on the indigenous peoples of the area.²⁵² These studies, although potentially valuable, are not an adequate substitute for the prior informed consent of indigenous peoples to the project in question.

These safeguards to indigenous property rights, including indigenous participation in decision-making, benefit sharing, and assessment studies, if observed by states, will increase the protection and preservation of the special relationship that indigenous peoples have with their ancestral lands. Thus, the UN Declaration on the Rights of Indigenous Peoples and the Inter-American human rights system are taking essential step in ensuring the survival of indigenous peoples.

²⁴⁸ *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 151-152 (Nov. 28, 2007).

²⁴⁹ *Id.* ¶ 152.

²⁵⁰ *Id.*

²⁵¹ *Report of the Special Rapporteur on Human Rights and Fundamental Freedoms*, *supra* note 144, ¶ 33. An evaluation study of a major Chilean hydroelectric dam project commissioned by the World Bank, which had partially financed the project, was highly critical of the first dam built, pointing to the fact that the poor indigenous population in the area had not benefited at all from it. Distribution of the report to the indigenous Pehuenche people was withheld. *Id.*

²⁵² *Id.* ¶ 34.

V. CONCLUSION

Generally, the progressive jurisprudence of the Inter-American Court of Human Rights relating to the land rights of indigenous peoples reflects the principles set forth in the United Nations Declaration on the Rights of Indigenous Peoples. The Court has consistently recognized the spiritual relationship indigenous peoples have with their ancestral lands, and that their lands are a source of their cultural identity and part of their legacy to future generations. Moreover, the Court has held that possession of their ancestral lands should suffice for indigenous communities to obtain official title to their property, and that in certain circumstances ancestral lands should be returned to indigenous peoples.

Although supportive of indigenous rights, in the area of state-granted concessions for national resource development on indigenous lands, the Inter-American Court arguably has not been as supportive thereof as the United Nations Declaration. The Inter-American Court does not sustain the right of indigenous peoples to all natural resources on their lands. Rather, the Court holds that indigenous peoples have the right only to those natural resources that they had used traditionally and which were necessary for their “very survival, development and continuation of [the indigenous and tribal] people’s way of life.”²⁵³ This holding allows the state, subject to certain safeguards of indigenous rights, to harvest natural resources on indigenous communal lands or to grant concessions to third parties to harvest resources.

The safeguards established by the Court to protect indigenous peoples conform partially to those set forth in the United Nations Declaration. The state must share the benefits of resource development with the indigenous peoples from whose ancestral lands the resources were taken. Moreover, the state must commission prior environmental and sociological impact studies before such projects are undertaken. The state also must allow for the effective participation of indigenous peoples in any development or investment plan on their territory. Although this requirement means that the state must consult with the indigenous people prior to all development, it is not essential that the state get the free, prior, and informed consent of the peoples in all instances.

²⁵³ See, e.g., *Saramaka People*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 122.

In the *Saramaka* case, the Inter-American Court held that the free, prior, and informed consent of tribal and indigenous peoples is only necessary when the state is considering “large-scale development or investment projects that would have a major impact” on the peoples’ territory.²⁵⁴ The Court stated that this holding applies to those major development or investment projects on traditional lands that may have a “profound impact” on indigenous rights “to a large part of their territory.”²⁵⁵ Conversely, the UN Declaration on the Rights of Indigenous Peoples calls for “free and informed consent prior to the approval of any project affecting their lands or territories and other resources.”²⁵⁶ The limitation that the consent of indigenous people is only necessary when major development or investment projects will have a “profound impact” on a “large part of their territory” seems to give states leeway to grant smaller for-profit logging and mining concessions that could still negatively impact indigenous communities. Thus, the jurisprudence of the Inter-American Court, while generally reflecting the principles of the United Nations Declaration, does not completely coincide with those principles or give indigenous peoples the optimum level of protection in the area of natural resource ownership and development.

²⁵⁴ *Id.* ¶ 134.

²⁵⁵ *Id.* ¶ 137 (emphasis added).

²⁵⁶ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 32(2).