

**A Guide to  
Indigenous Peoples' Rights in the  
Inter-American Human Rights System  
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## I. Summary

Indigenous peoples of the Americas continue to suffer serious abuses of their human rights. In particular, they are experiencing heavy pressure on their lands from logging, mining, roads, conservation activities, dams, agribusiness and colonization. Although most American states have laws which recognize and protect Indigenous peoples' rights, to varying degrees, these laws are often violated. In other cases, adequate laws are not in place. Also, in many American states, national laws are inconsistent with the binding obligations of these same states under international human rights law.

The Inter-American human rights system has mechanisms designed to address these very real problems. The system places **binding** obligations on all American states to comply with human rights standards. These rights include the rights of Indigenous peoples, among others:

- ❑ To lands, territories and resources traditionally occupied and used, to a healthy environment and to be free from forcible relocation;
- ❑ To cultural and physical integrity;
- ❑ To meaningful participation in decisions that affect them;
- ❑ To maintain and use their own cultural, social and political institutions;
- ❑ To be free from discrimination and to equal protection of the law.

Procedures exist for filing complaints about the abuse of these rights with the Inter-American bodies charged with oversight and protection of human rights. Decisions of the Inter-American Court on Human Rights, one of these bodies, are **binding** upon states. On human rights matters, the Court is effectively the highest court of the Americas to which Indigenous peoples can seek redress of their grievances.

This booklet sets out in detail how the Inter-American human rights system works. It summarizes what rights are protected, with a focus on those of particular importance to Indigenous peoples. It also provides detailed guidance on how to submit petitions to the Inter-American Commission on Human Rights. Summaries of relevant cases and judgments that have already passed through the system or ones that are in progress are also included. These cases and judgments provide show how the system deals with Indigenous rights and provide concrete examples of how a case can be moved through the system as a way of illustrating some of the points made in the section on how to submit a petition.

We hope that this booklet will provide Indigenous peoples with a better understanding of their rights and encourage them to use these international procedures to gain redress. We also hope it will help spur American states to reform their domestic laws and judicial procedures so that they provide **effective and meaningful** protections for the rights of the Indigenous peoples within their jurisdictions.

## II. Introduction

Indigenous peoples' rights have assumed an important place in international human rights law and a discrete body of law confirming and protecting the individual and collective rights of Indigenous peoples has emerged and concretized in the past 20 years. This body of law is still expanding and developing through Indigenous advocacy in international fora; through the decisions of international human rights bodies; through recognition and codification of Indigenous rights in international instruments presently under consideration by the United Nations and Organization of American States; through incorporation of Indigenous rights into conservation, environmental and development-related instruments and policies; through incorporation of these rights into domestic law and practice; and through domestic judicial decisions. Taken together, this evolution of juridical thought and practice has led many to conclude that some Indigenous rights have attained the status of customary international law and are therefore generally binding on states.<sup>1</sup>

International bodies mandated with protection of human rights have paid particular attention to Indigenous rights in recent years. The UN Committee on the Elimination of Racial Discrimination, the UN Human Rights Committee, the International Labour Organization's Committee of Experts and the Inter-American Commission on Human Rights all stand out in this respect. These bodies have contributed to progressive development of Indigenous rights by interpreting human rights instruments of general application to account for and protect the collective rights of Indigenous peoples.<sup>2</sup> Even the African Commission on Human and Peoples' Rights, by far the weakest human rights body, has begun to address Indigenous peoples' rights by taking the important step of establishing a working group on Indigenous peoples in Africa.<sup>3</sup>

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<sup>1</sup> See, among others, S.J. Anaya, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (Oxford and New York: OUP, 1996), at 49-58, 107; S. Wiessner, *The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 *Harv. Human Rights J.* 57 (1999), at 128; R. Torres, *The Rights of Indigenous Peoples: The Emerging International Norm*, 16 *Yale Journal Int'l Law* 127; and C. Iorns Magallanes, *International Human Rights and their Impact on Indigenous Peoples' Rights in Australia, Canada and New Zealand*, in P. Havemann (ed.) *INDIGENOUS PEOPLES' RIGHTS IN AUSTRALIA, CANADA AND NEW ZEALAND*. (Auckland: OUP, 1999), at 238 ("Since the 1970s international law has reflected 'a new generation of international consensus on indigenous peoples' rights'"); at 242 ("Further significant international legal developments provide evidence that customary international law has accepted the right of cultural self-determination for indigenous peoples and the consequent autonomous control necessary to achieve that ...."); and, S.J. Anaya & R. Williams, *The Protection of Indigenous Peoples' Rights over Land and Natural Resources under the Inter-American Human Rights System*. 14 *Harv. Hum. Rts. J.* 33 (2001).

<sup>2</sup> Instruments of general application refer to those human rights instruments applying to all persons rather than instruments focused exclusively on the rights of Indigenous peoples.

<sup>3</sup> African Commission on Human and Peoples' Rights, *Resolution on the Rights of Indigenous People/Communities in Africa*, Cotonou, Benin, 6 November 2000. The mandate of the Working Group is described in the resolution as to: "examine the concept of indigenous people and communities in Africa ; study the implications of the African Charter on Human Rights and well being of indigenous communities especially with regard to : the right to equality (Articles 2 and 3) the right to dignity (Article 5) protection against domination (Article 19) on self-determination (Article 20) and the promotion of cultural development and identity (Article 22); [and to] consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities."

Arguably, the bodies of the Inter-American human rights system, the Inter-American Commission on Human Rights and, to a lesser extent, the Inter-American Court on Human Rights, are taking a leading role.<sup>4</sup> These Inter-American bodies are presently litigating Indigenous rights issues at the international level. The decisions of the Court resulting from this litigation are, as a matter of international law, binding upon states. This stands in stark contrast to UN and ILO bodies who may only make recommendations to states. While the first case dealing directly with Indigenous rights was litigated in 1999 and 2000, the Inter-American Commission will undoubtedly bring further cases to the Court with greater frequency in the coming years.

Despite these advances in international law, violations of Indigenous rights are all too common. Much of this abuse is associated with heavy pressure to exploit the natural resources in Indigenous peoples' territories. Indigenous peoples in tropical forest areas have suffered especially severely from this intensifying pressure on their lands, which is resulting in rapid deforestation as a result of logging, mining, agricultural expansion, colonization and infra-structure projects. Environmental conservation initiatives also often do not account for Indigenous rights. Further, many of the international developments related to Indigenous rights have yet to be translated into concrete changes at the national and local levels. National laws in many countries, for instance, continue to be substantially at odds with international human rights standards.

This *Guide to Indigenous Peoples' Rights in the Inter-American Human Rights System*, one of a series produced by the Forest Peoples Programme, aims to provide Indigenous peoples and organizations with practical information to support their effective use of Inter-American human rights mechanisms and procedures for the vindication of their rights.<sup>5</sup> While these procedures are far from perfect and certainly will not remedy all human rights problems, their use by Indigenous peoples has led to concrete gains at the national and local levels in the past and can be expected to continue to do so in the future. Their use also further reinforces and develops Indigenous rights norms at the international level, which provides additional strength to local and national advocacy and reform efforts.

Parts III and IV of the Guide provide an overview of the institutions of and rights protected under the instruments of the Inter-American system and Part V introduces the Inter-American Commission and Court on Human Rights. Part VI outlines the procedures and requirements for filing complaints with the Inter-American Commission including the measures that the Commission may employ to address human rights concerns. Part VII discusses and summarizes the jurisprudence of the Commission and the Court pertaining to Indigenous rights. While all human rights are relevant to Indigenous peoples, this section only deals with those cases that address rights peculiar to Indigenous peoples, i.e., territorial rights. Throughout the text, links are made to web sites containing relevant documents and the full text of cases or reports discussed.

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<sup>4</sup> For an official OAS publication on Inter-American human rights activities concerning Indigenous peoples, see, *The Human Rights Situation of Indigenous People in the Americas*. OEA/Ser.L/V/II.108 Doc. 62, 20 October 2000. English: <http://www.cidh.org/Indigenas/TOC.htm>  
Spanish: <http://www.cidh.org/Indigenas/indice.htm>

<sup>5</sup> Guides have also been written on the UN Human Rights Committee, the International Labour Organization and the African Commission on Human and Peoples' Rights.

### **III. The Organization of American States and human rights**

The Organization of American States (OAS) is composed of all of the states of the Americas and the Caribbean (Cuba's membership has been suspended). Its main offices are in San José, Costa Rica and in Washington DC. It also maintains country offices in most of the capital cities of the Americas. The OAS is governed by the 1948 Charter of the Organization of American States (Charter), a multilateral treaty that acts as its Constitution. Article 3(d) and 3(j) of the Charter provide, respectively, that "The solidarity of American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy" and, "The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex."

In the OAS system, human rights are protected under two interrelated frameworks. The first is based upon the Charter and the 1948 American Declaration of the Rights and Duties of Man (Declaration). The Declaration draws its legal force from the conclusion that it represents an authoritative interpretation of the Charter's provisions on human rights and customary international law. The second is founded upon the American Convention on Human Rights (Convention). The Convention is applicable to and binding on only those states that have ratified it, whereas the Declaration is applicable to and binding on all OAS member-states.<sup>6</sup>

### **IV. Rights protected by Inter-American human rights instruments**

The rights defined in the Convention and, to lesser extent, in the Declaration are primarily individual, civil and political rights. For instance, the right to life, the right to be free from discrimination and to equal protection of the law, the right to due process of the law, the right to freedom of assembly, association and religion, the right to property, etc. The preamble to the Convention, however, recognizes the importance of economic, social and cultural rights and their indivisibility from other human rights: "the idea of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights." The Declaration also includes some economic, social and cultural rights.

The 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also known as the Protocol of San Salvador, sets forth a number of economic and social rights, including a right to a healthy environment, the right to health and the right to food. Under this Protocol, states-parties are obligated to take progressive measures according to their relative resources to give effect to the rights

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<sup>6</sup> The American Declaration is binding on all members of the OAS for two reasons: first, as an elaboration of state obligations pertaining to human rights set forth in the OAS Charter and second, the Declaration as a whole has been determined to be customary international law. See, among others, *Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89 of July 14, 1989, Inter-American Court of Human Rights, Series A No. 10, at paras. 42-46.

contained therein.<sup>7</sup> The Inter-American Commission on Human Rights (IACHR) also looks at economic, social and cultural rights in individual cases and in its country situation reports and friendly settlement agreements.

The Proposed American Declaration on the Rights of Indigenous Peoples contains rights, both collective and individual, directly and exclusively applicable to Indigenous peoples. According to the IACHR, the “Proposed Declaration should be understood to provide guiding principles for inter-American progress in the area of indigenous rights.”<sup>8</sup> The Proposed Declaration is presently under consideration by a Working Group of the OAS Permanent Council’s Committee on Juridical and Political Affairs.<sup>9</sup> When this instrument is approved by the OAS General Assembly it will become an important reference point for Indigenous rights in the Inter-American human rights system.

Finally, other Inter-American human rights instruments include the 1985 Convention to Prevent and Punish Torture, the 1990 Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the 1994 Convention on Forced Disappearance of Persons, the 1994 Convention on Prevention, Punishment and Eradication of Violence Against Women, and the 1999 Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities.<sup>10</sup> Although not dealt with here, complaints may be submitted to the IACHR complaining of violations of a right or rights set forth in these instruments, provided that the procedural requirements set out in the respective instruments and the IACHR’s Rules of Procedure are complied with (*Articles 23 and 27, IACHR Rules of Procedure*).

The American Convention, American Declaration and the Additional Protocol can be found at: English: <http://www.cidh.org/basic.htm>; Spanish: <http://www.cidh.org/document.htm>

The text of the Proposed American Declaration on the Rights of Indigenous Peoples can be found at: English: <http://www.cidh.org/Indigenas/chap.2g.htm>  
Spanish: <http://www.cidh.org/Indigenas/Cap.2g.htm>

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<sup>7</sup> The Protocol of San Salvador entered into force on 16 November 1999 and, as of May 2001, has been ratified by the following states: Brazil (1996), Colombia (1997), Costa Rica (1999), Ecuador (1993), El Salvador (1995), Guatemala (2000), Mexico (1996), Panama (1993), Paraguay (1997), Peru (1995), Suriname (1990), Uruguay (1996).

<sup>8</sup> *Third Report on the Human Rights Situation in Colombia*. OEA/Ser.L/V/II.102 Doc. 9 rev. 1 (26 February 1999), Ch. X, at para. 9.

<sup>9</sup> This Working Group met in November 1999 and April 2001. For documents on the proceedings in the Working Group, see, [www.summit-americas.org/Indigenous/W-Group-Oct99/Wgroupoct99-INDEX.htm](http://www.summit-americas.org/Indigenous/W-Group-Oct99/Wgroupoct99-INDEX.htm) and; Forest Peoples Programme briefings on the First and Second Sessions of the OAS Working Group: <http://www.gn.apc.org/forestpeoples/briefings.htm> The briefing on the First Session is in English and Spanish and contains an annex describing the contents of the Proposed Declaration. See, also, *Authorities and Precedents in International and Domestic Law for the Proposed American Declaration on the Rights of Indigenous Peoples*. OEA/Ser.L/V/II.110 Doc. 22, 1 March 2001 : In English: <http://www.cidh.org/Indigenas/Indigenas.en.01/index.htm>  
In Spanish: <http://www.cidh.org/Indigenas/Indigenas.sp.01/Indice.htm>

<sup>10</sup> The texts of these Conventions and a list of ratifying states is located at: <http://www.cidh.org/basic.htm>

## **A. Articles 1 and 2 and related articles of the American Convention**

Two of the most important provisions of the American Convention are the generic obligations set out in Articles 1 and 2. These articles obligate states-parties

*to respect the rights and freedoms recognized [in the Convention] and to ensure their free and full exercise to all persons subject to their jurisdiction, and to adopt, if necessary, such legislative or other measures as may be necessary to give effect to those rights and freedoms.*<sup>11</sup> (emphasis added)

As stated repeatedly by the Inter-American Court on Human Rights (Court) and IACHR, Article 1 not only provides that the states-parties have an *immediate* obligation to respect and ensure the free and full exercise of the rights set out in the American Convention, it also “imposes an affirmative duty on the states” and requires them “to take all necessary measures to remove any impediments which might exist that would prevent individuals from enjoying the rights the Convention guarantees.”<sup>12</sup> Article 1 also prohibits discrimination with regard to the exercise and enjoyment of the rights set out in the American Convention. This prohibition “extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties ... have undertaken to maintain their laws free of discriminatory regulations.”<sup>13</sup>

Article 2 of the American Convention imposes a specific and affirmative duty on states-parties to adopt and/or amend domestic legislation and other measures to give full effect to the rights recognized in the Convention and to fill any gaps in domestic legislation concerning human rights.<sup>14</sup> Conversely, article 2 also requires that states-parties not adopt legislative or other measures that contravene the rights recognized in the American Convention.

These two provisions are very relevant to Indigenous peoples because they require that legislation or other measures be adopted or changed to ensure that rights are recognized in domestic law, without discrimination, and that those rights can be enforced through the courts and other means. Many laws affecting Indigenous rights are discriminatory or below

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<sup>11</sup> *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94, December 9, 1994, Inter-American Court of Human Rights, Series A No. 14, at para. 32.

<sup>12</sup> *Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights)*, Inter-American Court of Human Rights, Advisory Opinion No. OC-11/90, August 10, 1990, Series A No.11, at para. 34.

<sup>13</sup> *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, January 19, 1984, Inter-American Court of Human Rights, Series A No.4, at para. 54.

<sup>14</sup> *Dissenting Opinion of Judge A.A. Cançado Trindade, Cabellero Delgado and Santana Case, Reparations (Art. 63(1) of the American Convention on Human Rights)*, Judgment of January 29, 1997, Inter-American Court of Human Rights, Series C No. 31, at para. 9. See, also, *Separate Opinion of Judge Hector Gross Espiell, Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-7/86, August 29, 1986, Inter-American Court of Human Rights, Series A No. 7, at para. 6; *Separate Opinion of Judge Rodolfo E. Piza Escalante, Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-7/86, August 29, 1986, Inter-American Court of Human Rights, Series A No. 7, at paras. 23-33.



standard when compared with international guarantees and in many cases the procedures by which Indigenous rights can be protected are absent or ineffective. These two provisions, which relate to all the rights recognized in the Convention, directly address this issue.

Articles 8 and 25 of the Convention are also important in this context. Article 8(1) recognizes the “right of every person to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law . . . for the determination of his rights and obligations of a civil, labor, fiscal, or any other measure.”<sup>15</sup> Article 25 of the American Convention obligates states-parties to provide prompt, simple and effective judicial remedies for violations of rights recognized by the Convention.<sup>16</sup> As stated by Judge Trindade of the Court,

Together, Articles 25 and 1(1) require the American Convention’s direct application in the States Parties’ domestic legislation. In a situation in which obstacles of domestic law are alleged to exist, Article 2 of the Convention comes into play, requiring as it does its *harmonization* with the laws of the State Parties. The State Parties are obliged, under Articles 25 and 1(1) of the Convention, to institute a system of simple and prompt remedies and to give them *effective* application. If they do not do so *de facto*, owing to alleged lacunae or deficiencies in the domestic law, they incur a violation of Article 25, 1(1) and 2 of the Convention.<sup>17</sup> (emphasis in original)

These articles are also relevant to the issue of exhaustion of domestic remedies discussed below (page 14).

## **B. Other international instruments**

An important feature of IACHR proceedings is that the IACHR can look to international instruments other than those adopted by the Inter-American system to support its decisions and to determine the obligations of states. This is true both for the Declaration and the Convention. In the case of the Convention, Article 29(b) provides that , “No 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.”<sup>18</sup> For the Declaration, the IACHR has stated that the provisions of the Declaration must be interpreted with regard to “other

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<sup>15</sup> *Genie Lacayo Case*, Judgment of January 29, 1997, Inter-American Court of Human Rights, Series C No. 30, at para. 74.

<sup>16</sup> *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87 of Oct. 6, 1987. Inter-American Court of Human Rights, Series A No. 9, at para. 23.

<sup>17</sup> *Dissenting Opinion of Judge A.A.Cançado Trindade, Genie Lacayo Case*, Order of the Court of September 13, 1997, at para. 21.

<sup>18</sup> See, also, “*Other Treaties*” *Subject to the Consultative Jurisdiction of the Court (Requested by Peru)*, Advisory Opinion No. OC-1/82 of September 24, 1982, Inter-American Court on Human Rights, at para. 12; and, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Inter-American Court of Human Rights, Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, at para. 51, - the American Convention “must be interpreted in the light of the concepts and provisions of instruments of a universal character”

international obligations of member states which may be relevant” and with regard to the “overall framework of the juridical system in force at the time of interpretation.”<sup>19</sup>

The preceding has allowed the IACHR to look at state obligations under a variety of international instruments to determine if a violation of the American Declaration or Convention has occurred. It has made reference, for instance, to the International Covenant on Civil and Political Rights, particularly Article 27 dealing with minority rights, ILO Conventions Nos. 107 and 169 on Indigenous peoples, European human rights law, international humanitarian law codified in the Geneva Conventions and, various treaties, declarations and resolutions adopted by the UN and its specialized agencies. In the future we may see the IACHR using the UN and OAS Declarations on the Rights of Indigenous peoples, particularly the latter, to determine to the obligations of states under the American Declaration and Convention.

## **V. The Inter-American Commission and Court on Human Rights**

The oversight and enforcement mechanism for both the Declaration and the Convention is the Inter-American Commission on Human Rights established in 1960.<sup>20</sup> The IACHR was made a principal organ of the OAS with the amendment of Article 51 of the OAS Charter in 1967.<sup>21</sup> The IACHR, headquartered in Washington DC, is composed of seven, independent experts of recognized competence in the field of human rights, elected by the OAS General Assembly from a list of nominees submitted by the member-states. Each member serves for a four-year term. The Convention has an additional mechanism, the Inter-American Court of Human Rights. Located in San José, Costa Rica, the Court has seven judges that are elected by the states-parties to the Convention for six-year terms. Each member may be re-elected for one additional term. Importantly, the judgments of the Court are legally binding. Also, the Court may, and has, awarded damages to victims of human rights abuses.

The IACHR is responsible for monitoring the implementation of the rights contained in both the Convention and the Declaration according to its functions and powers as defined by Article 41 of the Convention. It does this in a number of ways including receiving and examining petitions from individuals, groups of individuals and NGOs. It is also empowered to initiate studies of human rights situations in OAS member-states. Some of these studies have highlighted the human rights situations of Indigenous peoples: Guatemala (1981; 1983 and 1993), Nicaragua (1978; 1981 and 1983), Ecuador (1997), Brazil (1997) Paraguay (1978; 1987), Colombia (1981, 1993), Bolivia (1981) and Suriname (1985). These studies have had some positive effect and states have modified their

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<sup>19</sup> *Report No 109/99 (Case 10.951-United States)*, Inter-American Commission on Human Rights, at para. 40, (“... it would be inconsistent with general principles of law for the Commission to construe and exercise its Charter-based mandate without taking into account other international obligations of member states which may be relevant. ‘[A]n international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of interpretation.’”).

<sup>20</sup> *Resolution of the Fifth Meeting of Consultation of Ministers of Foreign Affairs* (Santiago, Chile, 1959), OEA/Ser.C/II.5, 4-6.

<sup>21</sup> The Charter was amended by the 1967 Protocol of Buenos Aires.

behaviour to various degrees in response. More recent studies are discussed in Section VI(C), below.

The Inter-American Court was established by Article 33 of the Convention. Its composition, jurisdiction and functions are defined in Articles 52 - 71 of the Convention. It has two main functions: 1) authoritative interpretations of treaties and other instruments promulgated by the OAS system (its *advisory jurisdiction*) and; 2) to resolve cases and disputes submitted by IACHR or OAS member-states (its *contentious jurisdiction*).<sup>22</sup> Under Article 62 of the Convention, states-parties must specifically consent to the contentious jurisdiction of the Court. ***Only the IACHR or a member-state may submit cases to the Court.***

To date, most of the states that have ratified the Convention have registered declarations of consent to the Court's jurisdiction (see, Annex I). Without a declaration of consent, the state in question cannot be subject to proceedings before the Court. For the IACHR to submit a petition to the Court, the proceedings therein must have been completed, and the case submitted within three months of final decision. The Court's proceedings are public, although it conducts its deliberations privately.

Generally, a case in the Court will have three phases: 1) *preliminary objections*, where the state will raise procedural issues such as failure to exhaust domestic remedies; 2) *merits*, where the Court will examine arguments about whether a violation of human rights has or has not occurred; and, in cases where a violation is judged to have occurred, 3) *reparations*, where the Court sets the compensation or other remedies that the state is required to make in the case. The Court's decisions are published, legally binding and, should the need arise, its awards are self-executing or, in other words, enforceable in domestic courts. Its decisions have included rulings that remedies and appropriate compensation be provided to victims, when a state has been found in violation. Compensation includes reparation for actual damages, emotional harm and expenses incurred during litigation.

In 1998, the first case concerning Indigenous land and other rights was submitted by the IACHR to the Court for adjudication (see below for description of the case). This case was originally submitted to the IACHR by the Mayagna Indian Community of Awas Tingni of Nicaragua and the Indian Law Resource Center. The petition complains that Nicaragua has violated the American Convention, the American Declaration and other provisions of international human rights law because of its failure to take timely measures to secure the land and resource rights of the Awas Tingi and active violation of those rights caused by government grants of logging concessions on Indigenous lands.<sup>23</sup>

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<sup>22</sup> "The advisory jurisdiction of the Court differs from its contentious jurisdiction in that there are no 'parties' involved in the advisory procedure nor is there any dispute to be settled. The sole purpose of the advisory function is 'the interpretation of [the American] Convention or of other treaties concerning the protection of human rights in the American states.'" *Reports of the Inter-American Commission on Human Rights*, Advisory Opinion OC 15-97 of November 14, 1997. Series A No. 15, at para. 25

<sup>23</sup> For a copy of the original IACHR petition, see, S. James Anaya, *The Awas Tingi Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers and Government Neglect in Nicaragua*, 9 *St. Thomas Law Review* 157 (1996).

**Note:** Available from the OAS is a publication entitled, *Basic Documents Pertaining to Human Rights in the Inter-American System*.

English: <http://www.cidh.org/basic.htm> Spanish: <http://www.cidh.org/document.htm>

Portuguese: <http://www.cidh.org/base.htm>

This publication contains the relevant OAS human rights instruments and the Statute and Regulations of the IACHR and the Court. Note, however, that the IACHR has adopted new Rules of Procedure in place of its Regulation found in the Basic Documents publication. The new Rules are located at: English: <http://www.cidh.org/annualrep/2000eng/chap.7.htm>

Spanish: <http://www.cidh.org/annualrep/2000sp/cap.7.htm>

Hard copies of IACHR documents can be obtained at the following address:

**Inter-American Commission of Human Rights**

Organization of American States,

Executive Secretariat,

1889 F Street, NW.

Washington DC 20016, USA.

Tel. 1.202.458.6002 Fax. 1.202.458.3992

The IACHR Documents Section can be reached directly at the following number: 1.202.458.3997

Most IACHR documents in English and Spanish can now be found at: [www.cidh.org](http://www.cidh.org)

For information and documentation concerning the Court only:

**Inter-American Court of Human Rights**

Secretary

PO Box 6906-1000

San José, Costa Rica

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One of the primary ways that Indigenous peoples and individuals can seek protection of their rights is through the petition or complaints procedure of the IACHR. This procedure allows complaints to be submitted against states concerning violations of the American Convention and American Declaration. The following section discusses the requirements and procedures to be followed for submitting such petitions.

## **VI. Submitting a petition to the Inter-American human rights system**

The IACHR may receive petitions complaining of violations of the rights defined in the Convention and the Declaration. It can receive petitions from individuals, groups of individuals and NGOs. The process for submitting petitions is set out in the Rules of Procedure of the IACHR, which parallel and expand upon the American Convention's provisions.<sup>24</sup> For petitions concerning the Convention, the IACHR's jurisdiction is provided for by Article 44 of the Convention and Article 23 of the IACHR Rules of Procedure. Articles 1(2)(b), 18, 20 and 24 of the Commission's Statute and article 49 of the IACHR Rules of Procedure provide for the IACHR's jurisdiction in cases concerning

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<sup>24</sup> The Rules of Procedure (entered into force 1 May 2001) replaced the Regulations of the IACHR and apply to all cases after 1 May 2001.

solely the American Declaration.<sup>25</sup> Despite this difference, petitions complaining about violations of the Declaration and the Convention are dealt with in basically the same manner (*Articles 23 and 50, IACHR Rules of Procedure*).<sup>26</sup>

The Rules of Procedure can be found at the following web site:

In English: <http://www.cidh.org/annualrep/2000eng/chap.7.htm>

In Spanish: <http://www.cidh.org/annualrep/2000sp/cap.7.htm>

All petitions under the Convention and the Declaration should be sent (by fax or certified mail) to the following address:

Dr. Santiago Canton, Executive Secretary  
Inter-American Commission on Human Rights/OAS  
1889 F Street, NW  
Washington DC 20006, USA  
Tel. 1.202.458.6002 Fax. 1.202.458.3992

#### **A. General requirements for submitting a petition**

- 1) If the petition involves the American Convention, the state alleged to be responsible for the violations must have ratified the Convention and, with one exception, the alleged violation must have occurred *after* the date the American Convention entered into force generally (18 July 1978) as well as for the state in question (the date it deposited its instrument of ratification,<sup>27</sup> see, Annex I below). The exception to this is if the violation(s) occurred prior to entry into force, but the effects of that violation(s) are ongoing and continuing.
- 2) the petition must be submitted by a person, group of persons or a NGO legally recognized in an OAS member-state. The term ‘legally recognized’ can mean a citizen, a legal alien, or in the case of NGOs, incorporation under the laws of an OAS member-state. The author (person submitting the petition) need not be a direct victim of the alleged violation. Indeed, the petition may be submitted by a third party without the knowledge or consent of the victim(s). Furthermore, the petition may allege general and widespread human rights violations not limited to a specific individual, group or event, or it may be submitted on behalf of numerous victims of a single event or pattern of abuses. The petitioner’s identity will not be disclosed without their consent. (*Article 23, IACHR Rules of Procedure*).
- 3) The IACHR will not examine petitions that involve the same subject matter *and* identical petitioners currently pending or previously settled by the IACHR or other international mechanisms, i.e., in the UN Human Rights Committee (*Article 33, IACHR Rules of Procedure*).

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<sup>25</sup> The IACHR’s Statute can be found in *Basic Documents Pertaining to Human Rights in the Inter-American System*. In English: <http://www.cidh.org/basic.htm>; Spanish: <http://www.cidh.org/document.htm>; and, Portuguese: <http://www.cidh.org/base.htm>

<sup>26</sup> Article 50, IACHR Rules of Procedure states that “The procedure applicable to petitions concerning member states of the OAS that are not parties to the American Convention shall be that provided for in the general provisions included in Chapter I of Title II; in Articles 28 to 43 and 45 to 47 of these Rules of Procedure.”

<sup>27</sup> Article 74, American Convention on Human Rights.

- 4) Domestic remedies must be exhausted prior to the submission of the petition unless an exception to this rule can be established (*Article 31, IACHR Rules of Procedure*). See, below for more information on this requirement.
- 5) The petition must be submitted within six months of the exhaustion of domestic remedies. The six month period begins on the date that the petitioner is informed that the domestic remedies have been exhausted. This requirement will be waived if it can be shown that the state is in some way responsible for the petitioner missing the deadline. Also, if domestic remedies are unavailable or the requirement is otherwise inapplicable, the petition must be filed within a reasonable period of time (*Article 32, IACHR Rules of Procedure*).

## **B. The process**

The following is a general description of the process followed by the IACHR when examining petitions.

### **1. Pre-admissibility screening (Articles 26-29, IACHR Rules of Procedure)**

Once received by the IACHR's Executive Secretariat, a petition is examined to determine if all the relevant information is present. If not, the secretariat may request that the petitioner provide additional information. The following information must be included in a petition to IACHR (*Article 28, IACHR Rules of Procedure*):

1. the name, citizenship, profession or occupation, address or domicile and signature of the author; NGOs must provide their name, address or legal domicile and the signature of their legal representative. A phone and fax number and email address, if available, should also be included. The petitioner may request that his or her identity be withheld from the state.
2. the petition must include as detailed statement of facts as is possible and all supporting documentation including, name(s) of victim(s), location and date of the alleged violation(s), information related to exhaustion of domestic remedies or why remedies need not be exhausted and, statements by witnesses or supporting evidence compiled by NGOs;
3. information about the amount of time taken to file the petition (see, *Article 31, IACHR Rules of Procedure*) and; whether the petition is pending before or has previously been resolved by another international body (see, *Article 33, IACHR Rules of Procedure*).
4. the name of the state involved, including the name(s) and position(s) of any state official(s) connected with the complaint, and evidence linking the state, or an agent of the state, to the alleged violations (showing the responsibility of the state for the violations);
5. some reference should be made to the specific article or rights defined by the Convention or the Declaration that have been violated, however, this is not required.

Basically, the point is to make the petition as detailed and specific as possible. This is particularly relevant given the financial and staffing constraints that IACHR must contend with: the more detailed the information, the faster it can be processed.

## **2. Admissibility (Articles 30-37, IACHR Rules of Procedure)**

If the secretariat determines that the petition meets the requirements set forth in Article 28 of its Rules of Procedure, as summarized above, the petition is sent to the state in question for a response. The state must respond within two months of the date it was sent, although an extension of up to an additional three months may be granted if the state can justify its need to do so (*Article 30, IACHR Rules of Procedure*). In the past, however, states normally have been given much longer than 90 days. The state's response is then transmitted to the petitioner who has 30 days in which to respond. The IACHR may schedule hearings, including at the petitioners request, involving the presentation of written and oral statements by the parties. Also, if officially invited by the state, it may conduct on-site, fact finding missions. That an official invitation is required is problematic and often leads to substantial delays in the proceedings, although it has not precluded these visits from occurring, one of the most recent involving a petition submitted on behalf of Indigenous peoples in Belize.

### **a. Exhaustion of domestic remedies (Article 46, American Convention and Article 31, IACHR Rules of Procedure)**

By far the most complicated aspect of filing a petition with the IACHR concerns the rule that all domestic remedies must be exhausted prior to seeking redress at the international level. This rule is intended to allow states to resolve a problem internally before allowing international scrutiny. The rule is not absolute however and a number of exceptions exist. Nonetheless, failure to exhaust domestic remedies or to establish applicability of an exception to the rule will lead to a petition being declared inadmissible. Reading the IACHR's admissibility decisions is a good way to better understand the domestic remedies requirement.

Domestic remedies relate to (primarily judicial and administrative) procedures that exist under national law that can be used to resolve alleged violations of human rights. These procedures may exist in relation to Constitutional rights, statutory provisions, common law rights or administrative law. The rule of exhaustion requires that all remedies be used and concluded prior to turning to international mechanisms. Article 31 of the IACHR's Rules of Procedure states the general rule:

1. In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.
2. The provisions of the preceding paragraph shall not apply when:
  - a. the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;
  - b. the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or,
  - c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.
3. When the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.

Sub-paragraph 2 of Article 31 sets out the exceptions to the exhaustion of domestic remedies rule. The rule shall not apply when: a) the remedies under domestic law do not exist (unavailable), are ineffective (inadequate) or when the legal system has proved to be so corrupt or biased that the petitioner cannot receive a fair and impartial hearing;<sup>28</sup> b) the state has denied the victim access to domestic remedies; or c) when domestic remedies take too long to resolve the issue and the petitioner is not at fault in causing this delay. This requires some explanation.

First, if remedies do not exist they obviously cannot be used and exhausted. For instance, if the national legal system does not in anyway recognize Indigenous peoples' right to collective ownership of land and resources, there is no basis for legally challenging state acts or omissions that violate that right. Therefore, the remedy is unavailable as it does not exist and thus cannot be used and exhausted. The Commission and the Court have both previously held that "when domestic remedies are unavailable as a matter of fact or law, the requirement that they be exhausted is excused."<sup>29</sup>

Second, a remedy is ineffective if it will not adequately address and resolve the alleged violation. As stated by the Court, "Adequate domestic remedies are those which are suitable to address an infringement of a legal right"<sup>30</sup> Following the example in the previous paragraph, the national legal system now recognizes a right to property that does protect Indigenous land rights, however, even if the court finds for the plaintiff the only title to land that can be issued is an individually-held lease of land. In this case, a remedy associated with the right to property exists but cannot adequately address the right to collective ownership to land. It is therefore an ineffective remedy and need not be exhausted. Similarly, the Court has also said that; "The rule of exhaustion of domestic remedies does not require the invocation of remedies . . . where this offers no possibility of success."<sup>31</sup>

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<sup>28</sup> As stated previously by the IACHR and the Inter-American Court of Human Rights and the Court: The exceptions provided for at Article 46(2) of the Convention aim to guarantee international action when the domestic remedies and the domestic legal system are ineffective in assuring respect for the victims' human rights. This being the case, the formal requirement on the non-existence of domestic remedies that guarantee the principle of due process (Article 46(2)(a) of the Convention) refers not only to the formal absence of domestic remedies, but also to cases in which they prove inadequate.

Case 11.405, Brazil, *Annual Report of the IACHR*, 1997, at para. 79. See, also, *Godinez Cruz Case*, Judgment of January 20, 1989, Inter-American Court of Human Rights, Series C No.5, para. 66; *Fairen Garbi and Solis Corrales Case*, Judgment of June 26, 1987, Inter-American Court of Human Rights, Series C No. 2, para. 87; *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-American Court of Human Rights Series C No. 4, para. 63.

<sup>29</sup> Report No. 53/97, Case 11.312 (Guatemala), *Annual Report of the Commission*, 1999, OEA/Ser.L/V/II.98, Doc. 7, rev., April 13, 1998, p.123, at para. 23. See, also, *Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights)*, Inter-American Court of Human Rights, Advisory Opinion No. OC-11/90, August 10, 1990, Series A No.11, at para. 17.

<sup>30</sup> *Godinez Cruz Case*, Judgment of January 20, 1989, Inter-American Court of Human Rights, Ser. C, Decisions and Judgments No.5, at para. 67.

<sup>31</sup> Report No. 31/99, Case 11.763 (Guatemala), *Annual Report of the Commission (Vol. I)* 1998, at 137. See, also, *Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights)*, Inter-American Court of Human Rights, Advisory Opinion No. OC-11/90, August 10, 1990, Series A No.11, at para. 33.



Third, remedies need not be exhausted if the state denies the victim(s) access to those remedies. For example, if a criminal act has been committed against the victim and the state is the only entity capable of bring criminal charges, and it refuses to do so, the victim has been denied access to domestic remedies. This is especially the case, when, as it is in many countries, criminal prosecution is a prerequisite to seeking redress under civil (non-criminal) proceedings.

Fourth, domestic remedies need not be exhausted if there has been an unwarranted delay in the courts. In Case 11.218 (Nicaragua), the Commission explained this exception in detail:

If a case is not resolved before the local courts within a reasonable time, complainant, petitioner, or victim is released from the obligation to exhaust domestic remedies (Article 46(2)(c) of the American Convention). In effect, the rule of prior exhaustion of domestic remedies has been established to the benefit of the states party to the Convention, as the petitioner is obliged to demonstrate that he has exhausted them, except, as in the instant case, where there is a manifest delay in the administration of justice.<sup>32</sup>

Reviewing its own jurisprudence as well as that of the Court and the European Commission and Court of Human Rights, the Commission found that a “reasonable time” in the context of undue delay is determined by reference to the following criteria: “1) the complexity of the case; 2) the conduct of the damaged party in terms of cooperating with the process as it evolves; 3) how the investigative stage of the process unfolds and; 4) the action of the judicial authorities.”<sup>33</sup>

Fifth, following to the jurisprudence of the Inter-American Court of Human Rights, remedies also need not be exhausted if the petitioner can establish that due to poverty or a “generalized fear” among the legal community (lawyers and judges) to take or hear the case, he or she was prevented from obtaining adequate legal representation to pursue the grievance in the domestic arena.<sup>34</sup>

Finally, Articles 1, 8 and 25 of the American Convention, discussed above, are relevant in the context of domestic remedies. Concerning the obligations of states under the American Convention, the Court has stated on a number of occasions that, “States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of the law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the

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<sup>32</sup> Case 11.218 (Nicaragua) Arges Sequeira Mangas, *Annual Report of the Commission 1997*, OEA/Ser.L/V/II.98 Doc.7 rev, April 13, 1998, at 720, para. 120.

<sup>33</sup> *Id.*, at 721, para. 122.

<sup>34</sup> *Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights*, Inter-American Court of Human Rights, Advisory Opinion No. OC-11/90 of August 10, 1990, at 32.

free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdictions (Art. 1).”<sup>35</sup> Elaborating further, the Court stated that

According to this principle, the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness; when Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy<sup>36</sup>

To conclude this section, domestic remedies issues require a great deal of thought and, ideally, planning to ensure that domestic legal actions account for rights and remedies that may be raised in a future complaint to the IACHR. If domestic cases are specifically designed with a future international complaint in mind, the relevant remedies can be exhausted saving a lot of time should it be necessary to submit such a complaint at a later date.

#### **b. Admissibility report**

The last step in the admissibility phase of the process is the adoption of a decision on admissibility. The decision to declare a case admissible or inadmissible is taken by the IACHR based upon a recommendation of a Working Group on admissibility composed of IACHR members that meets prior to the full session of the IACHR (*Article 36, IACHR Rules of Procedure*). The criteria relating to admissibility are set out in the preceding section. If a case is declared inadmissible, the IACHR terminates its consideration of the case. If the petition is found admissible, the case proceeds to an examination of the merits to determine if a violation has occurred. A written decision on admissibility setting forth the reasoning of the IACHR is published in the Annual Reports of the IACHR (*Article 37, IACHR Rules of Procedure*). These reports are available on the IACHR’s web site or in hard copies of its Annual Reports.

### **3. Merits (Articles 38-42, IACHR Rules of Procedure)**

Once a case has been declared admissible, the IACHR turns to the merits phase of the process. The merits phase is when the IACHR examines the situation to determine if a violation or violations of the rights recognized in the Declaration or the Convention has

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<sup>35</sup> *Velasquez Rodriguez, Judgment of July 29, 1988, Inter-American Court of Human Rights, Series C No. 4; Fairen Garbi and Solis Corrales and Godinez Cruz Cases, Preliminary Objections, Judgments of 26 June 1987, paras. 90, 90 and 92, respectively. Also, see, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of Oct. 6, 1987, Inter-American Court of Human Rights, Series A No. 9, at para. 24.*

<sup>36</sup> *Judicial Guarantees in States of Emergency, Id.*

occurred. This requires an analysis of the facts of the case and an application of human rights law to those facts.

The IACHR begins the merits phase by requesting the petitioner to submit their observations about the merits of the case within 60 days. These are then sent to the state in question, which has 60 days to respond (*Article 38(1), IACHR Rules of Procedure*). At the same time it will ask the petitioner and the state if they are interested in pursuing a friendly settlement of the case (see, below; *Article 38(2), IACHR Rules of Procedure*) and may convene a hearing to further discuss the case with the petitioner and the state (*Article 38(3), IACHR Rules of Procedure*).<sup>37</sup> The IACHR may also request the state's permission to conduct an on-site visit to view the situation in-country first hand and to hold meetings and interviews with affected and interested persons (*Article 40, IACHR Rules of Procedure*)

Should the state fail to respond to the IACHR's request for observations on the merits within the 60 day period, the IACHR has the option of applying *Article 39 of its Rules of Procedure*, which provides that: "The facts alleged in the petition ... shall be presumed to be true if the State has not provided responsive information during the maximum period set by the Commission under the provisions of Article 38 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion."

Once the IACHR has completed the evidence gathering phase of the case, and assuming that a friendly settlement process is not underway, it will deliberate on the merits of the case. This is done in private and involves an evaluation of the arguments before it, the evidence presented by the parties, any information gathered in hearings or on-site visits and "other information that is a matter of public knowledge" (*Article 42, IACHR Rules of Procedure*). Following its deliberations and a decision on the merits, in accordance with Article 43 of its Rules of Procedure, the IACHR may proceed in a number of ways.

First, if it finds that there has been no violation it will transmit a report stating so to the parties and publish the report in its Annual Report. In this instance, the case terminates (*Article 43(1)*). Second, if it finds a violation or violations have occurred, it prepares a preliminary report setting out the violations and making recommendations to the state to remedy the violation(s) (*Article 43(2)*).<sup>38</sup> This preliminary report is sent to the state along with a deadline by which the state must report on what it has done to comply with the recommendations (*Article 43(2)*). It also notifies the petitioner that the preliminary report has been sent to the state, and in cases against states which have accepted the jurisdiction of the Court, gives the petitioner one month to present their views on whether the case should be submitted to the Court for examination therein (see below; *Article 43(3)*).

If the violations have not been remedied to the satisfaction of the IACHR within three months of the date the preliminary report was sent to the state, and the case has not been sent to the Court, the IACHR may issue a final report that sets out its opinion, final

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<sup>37</sup> Hearings are addressed in Articles 59-68, IACHR Rules of Procedure.

<sup>38</sup> The preliminary report is also known as an Article 50 report, after Article 50 of the American Convention, which provides for these kinds of reports.

conclusions and recommendations (*Article 45(1), IACHR Rules of Procedure*).<sup>39</sup> This report is then sent to the petitioner and the state who are required, within a time period set by the IACHR, to submit information on measures taken to comply with the report's recommendations (*Article 25(2)*). The IACHR then reviews this information and makes a decision about publishing its report (*Article 45(3)*). The final report is normally published in the IACHR's Annual Reports to the OAS General Assembly. These reports, as well as admissibility reports are available on the IACHR's web site:

In English: <http://www.cidh.org/annualreports.htm>

In Spanish: <http://www.cidh.org/Anuales.htm>

After the IACHR has published its recommendations, or if a friendly settlement agreement has been reached, it may adopt a number of follow up measures, including additional hearings, on-site visits and requesting information from the parties, to monitor compliance with its decision or the settlement agreement (*Article 45(1), IACHR Rules of Procedure*).

Finally, IACHR recommendations are in theory non-binding. However, in the *Loayza Tamayo Case*, the Court qualified this and found that states do have an obligation to implement the recommendations of the IACHR. The relevant passage reads:

79. The Court has previously stated that, in accordance with the stipulation regarding interpretation contained in Article 31(1) of the Vienna Convention on the Law of Treaties, the term "*recommendations*" used by the American Convention, should be interpreted to conform to its ordinary meaning (*Caballero Delgado and Santana Case*, Judgment of December 8, 1995. Series C No. 22, para. 67, and *Genie Lacayo Case*, Judgment of January 29, 1997. Series C No. 30, para. 93).

80. However, in accordance with the principle of good faith, embodied in the aforesaid Article 31(1) of the Vienna Convention, if a State signs and ratifies an international treaty, especially one concerning human rights, such as the American Convention, it has the obligation to make every effort to comply with the recommendations of a protection organ such as the Inter-American Commission, which is, indeed, one of the principal organs of the Organization of American States, whose function is "*to promote the observance and defense of human rights*" in the hemisphere (OAS Charter, Articles 52 and 111).

81. Likewise, Article 33 of the American Convention states that the Inter-American Commission is, as the Court, competent "*with respect to matters relating to the fulfillment of the commitments made by the State Parties*", which means that by ratifying said Convention, States Parties engage themselves to apply the recommendations made by the Commission in its reports (emphasis in original).<sup>40</sup>

This is a very important statement that confirms that states have an obligation, at a minimum, to "make every effort to comply with the recommendations" of the IACHR. Compliance in principle, however, is very different from compliance in practice and the IACHR and, to a lesser extent, the Court both have relatively weak powers to follow up on

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<sup>39</sup> The Court discussed the IACHR's preliminary and final reports, and the possibility of amending these reports, in "*Reports of the Inter-American Commission on Human Rights*, Advisory Opinion OC 15-97 of November 14, 1997. Series A No. 15. See, [http://www.corteidh.or.cr/serieaing/a\\_15\\_ing.html](http://www.corteidh.or.cr/serieaing/a_15_ing.html)

<sup>40</sup> *Loayza Tamayo Case*, Judgment of 17 September 1997. Inter-American Court on Human Rights, Series C No. 33, at paras. 79-81

and enforce their decisions. Indigenous peoples and NGOs have a fundamental role to play in persuading and, if necessary, pressuring states to carry out the IACHR's recommendations. This may be done through publicity, symbolic and other actions and perhaps even by using the domestic legal system to enforce recommendations of the IACHR and judgments of the Court. The latter are self-executing requiring that domestic judicial bodies order compliance should the state fail to give effect to the Court's judgment.

#### **4. Other features of the process**

##### **a. Precautionary Measures**

The IACHR's Rules of Procedure permit it to grant precautionary measures in urgent cases that will cause "irreparable damage." In these cases the IACHR may request that the state involved suspend its activities, take preventative action or provide other remedial measures to protect the person or persons in question. Precautionary measures under *Article 25, IACHR Rules of Procedure* (previously Article 29 of the IACHR's Regulations) can be requested independently, in which case there is no requirement that domestic remedies be exhausted prior to the request, or specified and requested prominently in a formal petition. In extremely grave cases in which precautionary measures have failed to be effective, and the state has accepted the jurisdiction of the Court, the IACHR can request that the Court adopt provisional measures. Provisional measures are the Court's equivalent of precautionary measures and require that a state adopts preventative or other measures to protect persons. Information about provisional measures adopted by the Court can be found in the Annual Reports of the Court and IACHR.

Generally, precautionary measures are only issued in cases where life or other fundamental rights are threatened. However, in the case of Indigenous peoples the IACHR has employed an expansive interpretation of life and fundamental rights. The IACHR has granted precautionary measures in favour of Indigenous peoples in a number of cases: the following are highlighted here, Case 11.577 (Nicaragua), Case 11.140 (United States) and Case 12.053 (Belize). Two of these cases (Nicaragua and Belize) involved exploitation of natural resources on lands over which Indigenous peoples had asserted ownership and other rights, the other, extinguishment of land rights and confiscation of livestock belonging to two Native American women (United States). The facts of these cases are described in greater detail below.

##### **Awes Tingni Indigenous Communities (Nicaragua)**

In connection with Case 11. 577 relating to the Awes Tingni Indigenous Community, the Inter-American Commission on Human Rights requested the State of Nicaragua, on October 30, 1997, to adopt precautionary measures for the purpose of suspending the concession given by the government to the SOLCARSA Company to carry out forestry work on the lands of the Awes Tingni Indigenous Community.<sup>41</sup>

##### **Maya Indigenous Communities (Belize)**

On October 20, 2000, the IACHR granted precautionary measures on behalf of the Maya Indigenous Communities and their members (case 12.053) and requested the

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<sup>41</sup> *Annual Report of the Inter-American Commission of Human Rights*, OEA/Ser.L/V/II.98. Doc.7 rev., at 46 (1998).

State of Belize to take the necessary steps to suspend all permits, licenses, and concessions allowing for the drilling of oil and any other tapping of natural resources on lands used and occupied by the Maya Communities in the District of Toledo, in order to investigate the allegations in this case.<sup>42</sup>

### **Mary and Carrie Dann (United States)**

On June 28, 1999, the Commission issued precautionary measures in the case of Mary and Carrie Dann, case 11.140, and requested that the United States take appropriate measures to stay the efforts of the Bureau of Land Management to impound their livestock, until the Commission had the opportunity to fully investigate the claims raised in the petition. The Commission did not receive a response to this request.<sup>43</sup>

Note that in all three cases the precautionary measures requested were specifically designed to stop activities deemed prejudicial to the affected Indigenous peoples, at least until such time as the IACHR was able to fully investigate and rule on the human rights aspects of each situation.

### **b. Friendly Settlement (Article 41, IACHR Rules of Procedure)**

Article 48(f) of the American Convention requires that the IACHR attempt to achieve a friendly settlement of the complaints it receives. This is restated in *Article 41, IACHR Rules of Procedure* and requires that the IACHR attempt to resolve a dispute through negotiations between the parties before reaching and publishing an official decision on the merits of the petition. The jurisprudence of the Court has confirmed that the IACHR is required to attempt friendly settlement.<sup>44</sup> If a friendly settlement occurs and an agreement is reached, the IACHR prepares a report on the matter for publication in its Annual Report (*Article 41(5), IACHR Rules of Procedure*).

Both parties must consent to a friendly settlement procedure and may revoke their consent at any time during the procedure (*Article 41(2), IACHR Rules of Procedure*). The IACHR may also terminate its participation in the procedure if it decides that, given the nature of the case, settlement is not possible, if one of the parties withdraws its consent or if it determines that one of the parties does not “display the willingness” to reach a friendly settlement (*Article 41(4), IACHR Rules of Procedure*). In all cases, a friendly settlement agreement must be based upon respect for human rights recognized in the American Convention and Declaration (*Article 41(5), IACHR Rules of Procedure*).

This procedure is a useful option for Indigenous peoples to consider as greater progress may be achieved through direct negotiations with the state than in formal proceeding before the IACHR. This procedure is one of the few occasions in which Indigenous peoples can negotiate as equals with the state under the supervision of a neutral international body. The IACHR will also supervise compliance with any agreement reached in the settlement and,

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<sup>42</sup> Report No. 78/00 (Case 12.053-Admissibility), *Annual Report of the Inter-American Commission on Human Rights*, OEA/Ser.L/V/II.111doc. 20 rev. (2001).

<sup>43</sup> *Annual Report of the Inter-American Commission of Human Rights*, OEA/Ser.L/V/II.106 Doc.6 rev., at Ch. III, para. 67 (1999).

<sup>44</sup> *Caballero Delgado and Santana Case*, Preliminary Exceptions, Decision of January 21, 1994, at para. 27; *reaffirmed in, Genie Lacayo Case*, Preliminary Exceptions, Judgment of January 27, 1995.

should the settlement process not conclude in an agreement, will continue with its examination of the merits of the case (*Article 41(6), IACHR Rules of Procedure*). A friendly settlement reached with Indigenous peoples in Paraguay is described below. Friendly settlements were also attempted in the Awas Tingni (Nicaragua) and Maya Indigenous Communities (Belize) cases discussed below.

**c. Transmission to the Inter-American Court on Human Rights (Article 43(3)-44, IACHR Rules of Procedure)**

After adopting and transmitting to the state a preliminary report on the merits of a case, and if the state has accepted the jurisdiction of the Court, the IACHR will give the petitioner one month to present their views on whether the case should be sent to the Court as a contentious case (*Articles 43(3), IACHR Rules of Procedure*). If the petitioner is interested in forwarding the case to the Court, they are required to submit the following information to the IACHR (*Article 43(3)(a-e)*):

- a. the position of the victim or the victim's family members, if different from that of the petitioner;
- b. the personal data relative to the victim and the victim's family members;
- c. the reasons he or she considers that the case should be referred to the Court;
- d. the documentary, testimonial, and expert evidence available; and,
- e. the claims concerning the reparations and costs.

After receiving this information from the petitioner, the IACHR will determine if the state has complied with its recommendations made in the preliminary report. If it considers that the state has not complied and unless a decision has been taken by an absolute majority of the IACHR's members, the case will be transmitted to the Court (*Article 44(1), IACHR Rules of Procedure*). In deciding whether to forward a case to the Court, the IACHR takes the following into account (*Article 44(2), IACHR Rules of Procedure*):

- a. the position of the petitioner;
- b. the nature and seriousness of the violation;
- c. the need to develop or clarify the case-law of the system;
- d. the future effect of the decision within the legal systems of the member States; and,
- e. the quality of the evidence available.

Having summarized the process employed by the IACHR to examine petitions, we will now turn to an overview of some of the cases concerning Indigenous peoples dealt with by the IACHR and the Court. Some of these cases have already been decided, while others are still pending final decisions, decisions on admissibility or attempts at friendly settlement. Special country situation reports pertaining to Indigenous peoples are also summarized. It is important to note that the underlying cause of many of the violations discussed in these cases is the inadequate recognition and protection of rights to lands, territories and resources.

## VII. Jurisprudence of the Commission and Court

Against the background of UN interest in racial discrimination and protection of minorities, and submission of a number of petitions alleging violations of Indigenous peoples' human rights, the IACHR began to consider the human rights of Indigenous peoples in the early 1970's. Starting in 1971, the IACHR referred to Article II of the American Declaration (the right to equality before the law) and stated that Indigenous peoples had the right to special legal protections to counteract severe and pervasive discrimination. It also urged OAS member states to implement and respect Article 39 of the Inter-American Charter of Social Guarantees, adopted by the OAS General Assembly in 1948, which provides

In those countries in which the problem of the native population exists, the necessary measures shall be taken to provide the Indian protection and assistance, protecting his life, liberty, and property, and defending him from extermination, and safeguarding him from oppression and exploitation, protecting him from poverty, and providing adequate education. ... Institutions or services should be created to protect the Indians, and in particular to ensure respect for their lands, to legalize their possession by them, and to prevent the invasion of such lands by outsiders.

A year later, in 1972, the IACHR issued a resolution entitled, "Special Protection for Indigenous Populations, Action to Combat Racism and Racial Discrimination" that called upon member states "to act with the greatest zeal in defense of the human rights of indigenous persons, who should not be the object of discrimination of any kind."<sup>45</sup> This resolution further stated:

That for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states;

That on various occasions this Commission has had to take cognizance of cases in which it has been verified that abuses of power committed by government officials responsible for administrative work in connection with indigenous communities have caused very serious injury to the human rights of their members;

That these offenses against human rights are all the more reprehensible considering that they are committed by agents of the public power and have as their victims persons or groups for whom the effective exercise of their means of defense established by the laws of the respective states is particularly difficult . . . .

In conclusion, the IACHR recommended

That all the states pay very special attention to the suitable training of the officials who are to perform their work in contact with [Indigenous] populations, awakening in those officials an awareness of the rights of indigenous persons, who should not be the object of discrimination of any kind.

The IACHR followed this resolution by addressing Indigenous peoples' human rights in its 1973 Annual Report to the OAS General Assembly. It noted, among others, violations of

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<sup>45</sup> OEA/Ser.P.AG/doc. 305/72, rev. 1, March 14, 1973, pp. 90 - 91.



the right to life, particularly in connection with attempts to dispossess Indigenous peoples of their lands and the systematic discrimination and denial of legal protections to Indigenous peoples. During 1973-74, the IACHR attempted to monitor legislative, judicial and administrative measures concerning Indigenous peoples in OAS member-states. However, due to its growing work load and small staff, it abandoned these efforts soon thereafter. Until 1989, when it began work on the American Declaration on the Rights of Indigenous Peoples, the IACHR only paid sporadic attention to the human rights concerns of Indigenous peoples, adopting an *ad hoc* approach rather than coordinated action. Presently, the IACHR regularly examines the situation of Indigenous peoples in its country reports, on-site visits and hearings and is processing a record number of cases involving Indigenous peoples.

## A. Friendly Settlements

### 1. Enxet-Lamenxay and Kayleyphapopyet (Riachito) Indigenous Communities<sup>46</sup>

This case was initiated in December 1996 when the Lamenxay and Riachito (Kayleyphapopyet) Enxet Indigenous communities filed a petition with the IACHR. The petition alleged that Paraguay had violated the rights of the Indigenous communities and their members to a fair trial, judicial protection, property, residence, and the benefits of culture, as set out in Articles 8, 25, 21, and 22 of the American Convention on Human Rights and Article XIII of the American Declaration of the Rights and Duties of Man.

**Facts:** The origins of this case date back to 1885 when Paraguay began selling land to colonists in the Paraguayan Chaco. This region is the ancestral territory of the Enxet Indigenous people, which by 1950 had been entirely occupied by colonists. About 6,000 Enxet live in the area.

In 1991, the Enxet instituted administrative proceeding in the Rural Welfare Institute (*Instituto de Bienestar Rural – IBR*) to regain ownership of their land. They also sought an injunction from the court in order to ensure that no changes were made to the status of their land while the IBR was reviewing the case. This was granted in February 1994, however, the Enxet alleged that the colonists failed to obey to court order. “They explained that this failure to abide by the court’s decision undermined the possibility of land ownership by the Enxet indigenous communities of Santa Juanita, Riachito, Laguna Pato, and Los Lapachos, and that two years after the injunction was issued, the case was still at the preliminary stage.”

**Friendly Settlement:** After the petition was filed in 1996, the IACHR invited Paraguay and the Enxet to meet to try to resolve the situation amicably. The first friendly settlement negotiation took place in Paraguay in July 1997 during which it was agreed that Paraguay would purchase the lands referred to in the complaint (approximately 21,884.44-hectares) from the colonists and return them to the Indigenous communities. In March 1998, the parties met again at the IACHR’s headquarters in Washington D.C., where they formally

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<sup>46</sup> Report No. 90/99 (Case 11.713) The Enxet-Lamenxay and Kayleyphapopyet (Riachito) Indigenous Communities (Paraguay). In, *The Human Rights Situation of the Indigenous People of the Americas*. OEA/Ser.L/V/II.108 Doc. 62 (2000), at 173-77.

signed a friendly settlement agreement, which “recognized the existence of the indigenous communities’ right to the land, at both the domestic and international levels ....”<sup>47</sup> Additionally, the parties agreed to the following:

14. The State agreed to hand over the land to these communities with minimal delay so they could occupy, use, and enjoy it while the deeds of ownership were being drawn up; it was also agreed that an inventory of all property, accessories, electrical and mechanical installations, etc. in place on the land would be prepared.

15. In addition, the Paraguayan State agreed to provide the communities with the necessary assistance: foodstuffs, medicines, tools, and transportation to move the different families and their belongings from their current residences to their new homes. The State also guaranteed the indigenous communities that the people then working the purchased land would be removed, together with their belongings and those of the former landowners.

16. Similarly, Paraguay guaranteed that the Enxet-Lamenxay and Kayleyphapopyet (Riachito) communities would be given sanitary, medical, and educational assistance in their new settlements, and that the access roads leading to their property would be kept in good repair.

17. Both parties agreed that should there be a dispute in the interpretation of any of the Agreement’s obligations, they would consult with the Commission for it to interpret the scope of the obligations and rights it contains; they also agreed to publicize the Agreement widely.

18. The petitioners, in turn, stated that all of their claims in connection with the incidents that gave rise to the case had been satisfied, and they noted that the Commission’s mediation had played a decisive role in reaching a friendly settlement in this case.<sup>48</sup>

After the friendly settlement agreement was concluded a number of follow up meetings took place between the Enxet, Paraguay and the IACHR to ensure that the agreement was implemented, including an on-site visit to Paraguay in July 1999 by members of the Commission. During this on-site visit, the IACHR attended the ceremony where the President of Paraguay formally issued the title deeds to the land to the Enxet.

Web link: English: <http://www.cidh.org/annualrep/99eng/Friendly/Paraguay11.713.htm>  
Spanish: <http://www.cidh.org/annualrep/99span/Solución%20Amistosa/Paraguay11713.htm>

## **B. Decisions on Cases and Reports Issued by IACHR**

### **1. Yanomami<sup>49</sup>**

In 1980, a group of NGOs filed a petition with the IACHR complaining of human rights violations under the American Declaration, perpetrated by Brazil against the Yanomami people. Specifically, it alleged violations of: Article I (rights to life, liberty and personal

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<sup>47</sup> Report No. 90/99 (Case 11.713) The Enxet-Lamenxay and Kayleyphapopyet (Riachito) Indigenous Communities (Paraguay). In, *The Human Rights Situation of the Indigenous People of the Americas*. OEA/Ser.L/V/II.108 Doc. 62 (2000), at 175.

<sup>48</sup> *Id.*, at 175-76.

<sup>49</sup> Yanomami Decision, Res. No. 12/85, Case No. 7615, *Annual Report of the Inter-American Commission of Human Rights 1984-85*, OEA/Ser.L/V/II.62, doc.10 rev.1 (1985).

security); Article II, (right to equality before the law); Article III, (right to religious freedom and worship); Article IX, (right to preservation of health and to well-being); Article XII, (right to education); Article XVII, (right to recognition of juridical personality and of civil rights); and, Article XXIII, (right to property).

**Facts:** The Yanomami petition centers around the devastating effects of resource exploitation, road construction and the subsequent migration of colonists and independent gold miners on the environment, health and culture of the Yanomami. In the 1960's, the Brazilian government authorized the construction of a trans-Amazonian highway that would pass through Yanomami territory. It also approved a resource exploitation plan for the Amazon region that included parts of Yanomami territory. Consequently, thousands of miners and prospectors followed the highway into Yanomami territory in search of gold and other minerals, frequently in collaboration with outside interests and certain political factions within Brazil.

The highway itself, forced a number of Yanomami communities located near the construction path to abandon their communities and means of subsistence. Many of the inhabitants of these communities were forced to turn to prostitution and begging to support themselves. The massive influx of outsiders introduced a number of diseases, to which the Yanomami had no immunity, resulting in many deaths. Contact with outsiders also caused widespread social and cultural disintegration and dislocation. Furthermore, a number of violent confrontations occurred between the Yanomami and the miners.

The Brazilian government and FUNAI - the government agency that acts as legal guardian to Indigenous Peoples, as they were declared incompetent to act for themselves under Brazilian law - did next to nothing to prevent and alleviate the negative effects upon the Yanomami. The government had been taking steps to recognize the territory of the Yanomami by creating a Yanomami Indian Park, however, the discussions to that end had been ongoing for almost 13 years without progress. In 1982, during the IACHR's preliminary investigation, and after an intensive campaign by human rights and Indigenous organizations, the government finally took concrete steps to legally recognize Yanomami territory. However, this territory failed to include a number of established Yanomami communities. Consequently, in 1984, a second proposal was submitted that would enlarge the territory by some 2.5 million hectares and incorporate the communities excluded under the first plan. This second plan remained unimplemented during the IACHR's consideration of the petition. FUNAI was delegated responsibility for protecting the boundaries and the inhabitants of the territory.

**The Decision:** In 1985, the IACHR found that Brazil had violated the rights of the Yanomami as defined by the Declaration. Specifically, Brazil was found in violation of the rights to life, liberty, personal security (Article I), residence and movement (Article VIII), and preservation of health and well-being (Article XI). The IACHR found that these violations had occurred because of the failure of the government and FUNAI "to take timely and effective measures on behalf of the Yanomami" that would have avoided, or at least alleviated the impact of the road, colonists and miners.

The IACHR made a number of recommendations to Brazil with regard to its treatment of the Yanomami. First, that it implement the 1984 proposal for the demarcation of a Yanomami territory. Second, that the government take preventative health measures to protect the Yanomami from contagious diseases. Third, that education, health related and social integration programs administered by qualified, technical personnel be instituted in cooperation with the Yanomami. Finally, that the government report to the IACHR on the steps taken in furtherance of the recommendations outlined above.

The Yanomami Indian Park was not officially created until 1992, more than seven years after the IACHR's final decision. Furthermore, as the massacre of up to 30 Yanomami living on the Brazil-Venezuela border in the summer of 1993 illustrates, the Yanomami are far from secure in their territory.<sup>50</sup> Invasions of miners, prospectors and colonists continue to occur. FUNAI, although it has increased its efforts to protect the Yanomami Park, remains subject to severe criticism for the inadequacy of its efforts. Also, the efforts of wealthy business interests in Brazil continue to focus on opening up Yanomami territory and other Indigenous territories to resource extraction operations.

This ongoing series of problems, led the IACHR to re-visit the Yanomami situation in its 1997 *Report on the Situation of Human Rights in Brazil*.<sup>51</sup> It concluded that "The Yanomami people have obtained full recognition of their right to ownership of their land. Their integrity as a people and as individuals is constantly under attack by both invading prospectors and the environmental pollution they create. State protection against these constant pressures and invasions is irregular and feeble, so that they are constantly in danger and their environment is suffering constant deterioration."<sup>52</sup> It then recommended that Brazil "institute federal protection measures with regard to Indian lands threatened by invaders, with particular attention to those of the Yanomami . . . including an increase in controlling, prosecuting and imposing severe punishment on actual perpetrators and architects of such crimes, as well as state agents who are active or passive accomplices."<sup>53</sup>

The Yanomami case illustrates some of the institutional limitations that international human rights procedures operate under and the degree to which external, political considerations influence human rights evaluations. The Yanomami case should be viewed in its political context. The IACHR was aware that Brazil, which at that time was under military rule, would not be willing to cooperate, other than minimally, with its investigation. Therefore, it framed its decision accordingly, praising the positive steps that Brazil had taken with regard to the situation of the Yanomami - promoting the creation of an Indian Park, providing inoculations against diseases, etc. In its decision, it chose to attribute the violations it found to the failure of Brazil to take preventative measures to

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<sup>50</sup> This massacre was itself the subject of a formal case before the IACHR – *Case No. 11.706 Massacre of a Yanomami Indigenous Community*. On December 10, 1999, a friendly settlement agreement was reached by which Venezuela affirmed its obligation to ensure the community's physical integrity, its right to health and to change legislation to guarantee Yanomami rights. As part of the settlement, a bilateral agreement was also concluded between Venezuela and Brazil committing both countries to implement a plan to monitor and control mining activities in the Yanomami region.

<sup>51</sup> *Report on the Situation of Human Rights in Brazil*. OEAA/Ser.L/V/II.97 Doc 29 rev. 1 (1997).

<sup>52</sup> *Id.* at 112.

<sup>53</sup> *Id.*

protect the Yanomami, rather than cite examples of positive government behaviour that may have contributed to, or caused the violations. The IACHR also took into account the fact that Brazil was in the process of transferring power from the military regime to a democratically elected government.

The Yanomami case also illustrates how human rights procedures can indirectly promote changes in state policy. Although, the IACHR's decision was not directly responsible for the creation of the Yanomami Indian Park, it certainly influenced the debate within Brazil and the ultimate demarcation of Yanomami territory. Aside from focusing public and international attention of the situation of the Yanomami, the IACHR's proceedings forced Brazil to publicly account for its behaviour before an international tribunal. The government consequently took a number of steps to address some of the criticisms of its actions in order to improve its position before the IACHR, including speeding up legal measures to recognize Yanomami territory and providing medical services to the Yanomami.

Web link: Spanish only: <http://www.cidh.org/annualrep/84.85sp/Brasil7615.htm>

Web link: *Report on the Situation of Human Rights in Brazil* (1997):

English: <http://www.cidh.org/countryrep/brazil-eng/chaper%206%20.htm>

Spanish: [http://www.cidh.org/countryrep/Brasesp97/capitulo\\_6%20.htm](http://www.cidh.org/countryrep/Brasesp97/capitulo_6%20.htm)

Portuguese: <http://www.cidh.org/countryrep/brazil-port/Cap%206.htm>

## **2. Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin<sup>54</sup>**

The complaint that initiated the Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin (Miskito Report) was submitted in early 1982. Formal allegations against Nicaragua were made by a number of parties including: MISURASATA (an Indigenous organization representing the Miskito, Sumo and Rama peoples), the Indian Law Resource Center, the Moravian Church and various leaders of the Indigenous nations of the Atlantic coast of Nicaragua. The complaints alleged violations of the following rights under the Convention: to life, to personal liberty, to personal security, to due process, to residence and movement, and to property. The complaints also alleged violations of the rights of Indigenous Peoples (or, as stated by the IACHR, the "special rights of ethnic groups"), not specified in the Convention, to be free from genocide, to self-determination and autonomy, to lands and territories and to cultural integrity.<sup>55</sup>

**The Facts:** The situation that gave rise to the Miskito Report has historical roots that trace back to the 19th Century and earlier. However, the events that it reports on primarily occurred in 1980-83, following the Sandinista revolution that overthrew the Somoza regime. The United States' undeclared war on Nicaragua also played a prominent role in the conflict and the resulting human rights abuses. Additionally, it is quite likely that pressure from the United States was instrumental in the amount of attention paid by the

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<sup>54</sup> *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc.26 (1984).

<sup>55</sup> *Id.*, at 75, para. 3.

IACHR and the speed with which it reached its decision - less than two years from initiation to final decision. Compare this with the five years that it took the IACHR to reach a decision in the Yanomami case.

At first, the Indigenous peoples of Nicaragua (Miskito) were supportive of the Sandinista revolution. However, as the government began to implement a program of territorial and cultural integration and assimilation, the Miskito began to resist these measures and assert their rights to cultural, political and territorial autonomy. The government responded by defining the Miskito as a counterrevolutionary and separatist movement and initiated a number of extensive and brutal military operations in Miskito territory. Numerous human rights violations attributed to the military were recorded during this period including murder, torture, illegal detention, rape, disappearances, harassment of political leaders and destruction of property. One result of these abuses, was that many thousands of Miskito fled Nicaragua for refugee camps inside Honduras.

The government also forcibly relocated thousands of Miskito from the region near the Honduran border to camps in the interior of the country. Relocation often involved forced marches without adequate food, medical services and protections for children, the disabled and the elderly. After the Miskito were removed the military burned their communities and slaughtered their livestock.

**The IACHR Process and the Decision:** The first formal complaint against Nicaragua was submitted in February 1982. It was forwarded to the government of Nicaragua for comment shortly thereafter. In the following months other complaints and information were also heard in special sessions of the IACHR devoted to the situation of the Miskito. Nicaragua responded to the complaints by extending an invitation to the IACHR to conduct an on-site, fact finding mission to view the situation. The fact finding mission occurred in May 1982, during which time the IACHR visited detention centers, refugee camps in Honduras, relocation camps and other affected areas. It also interviewed Indigenous representatives, leaders and people, NGOs and state officials.

Upon the conclusion of the fact finding mission, the IACHR issued a set of "Preliminary Recommendations" aimed at improving the human rights situation of the Miskito. The Preliminary Recommendations addressed: the situation of the Miskito that had been resettled and those living as refugees in Honduras; the reunification of families separated by the conflict; improving the treatment of the Miskito imprisoned by the government and; providing fair trial and due process guarantees. Nicaragua accepted the recommendations and stated that it would implement them.

In June 1982, the IACHR adopted the "Special Report on the Situation of Human Rights of the Miskito Indians of Nicaragua."<sup>56</sup> This report details the IACHR's analysis of the situation and contains a study on the special rights that the Miskito may have as an ethnic group. The report also contains a number of specific conclusions and recommendations over and above those contained in the Preliminary Recommendations. This report was

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<sup>56</sup> *Special Report on the Situation of Human Rights of the Miskito Indians of Nicaragua*. OEA/Ser.L/V/II.56, doc. 11, rev. 1 (1983).

forwarded to Nicaragua, which responded with the request that the IACHR act as mediator with a view to pursuing a friendly settlement of the conflict. This proposal was accepted by the IACHR.

However, subsequent to the adoption of the Special Report, evidence was submitted of further violations of the Miskito's human rights. In particular, more killings, forcible relocation, harassment of Indigenous leaders, disappearances and detentions. The IACHR also had difficulties in determining who the other party to the negotiations with Nicaragua should be. This was a problem because Nicaragua had delegitimized MISURASATA and other Indigenous organizations, whose leaders were either in exile or in detention facing criminal charges. Also, there were internal divisions among the Miskito as to who should represent them. Furthermore, Nicaragua refused to allow the leaders of MISURASATA to return because of the serious criminal charges pending against them and refused to have the charges dropped or suspended citing judicial independence as a justification. Ultimately, Nicaragua's refusal to guarantee that the exiled MISURASATA leaders would not be detained if they were to attend negotiations caused the abandonment of any attempt to reach a friendly settlement. The IACHR then decided to publish a final report of its findings, which was issued in 1984.

The final report contains a detailed analysis of the alleged violations of the rights of the Miskito.<sup>57</sup> It also contains an analysis of the rights that the Miskito may enjoy under international law based on their status as a distinct cultural and ethnic group. As mentioned previously, the complaints submitted to the IACHR on behalf of the Miskito, stated that Nicaragua has violated the Miskito's rights to self-determination and autonomy, cultural integrity, to be free from ethnocide and to lands and territories. While recognizing that the Convention guarantees only the rights of individuals, as opposed to groups or peoples, the IACHR found that

The present status of international law does recognize the observance of the principle of self-determination of peoples, which it considers to be the right of a people to independently choose their form of political organization and to freely establish the means it deems appropriate to bring about their economic, social and cultural development. This does not mean, however, that it recognizes the right to self-determination of any ethnic group as such.<sup>58</sup>

With regard to Nicaragua's policy of cultural assimilation and integration, the IACHR stated that "the absence of a right to political autonomy or self-determination on the part of the Miskitos, Sumos and Ramas of the Atlantic coast [does not] grant the government the unrestricted right to impose complete assimilation on those Indians."<sup>59</sup> In deciding that Nicaragua could not impose complete assimilation on the Miskito, the IACHR added that

Although the current status of international law does not allow the view that the ethnic groups of the Atlantic zone of Nicaragua have a right to political autonomy and self-

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<sup>57</sup> *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*. OEA/Ser.L/V/II.62, doc.26.(1984).

<sup>58</sup> *Id.*, at 78, para. 9.

<sup>59</sup> *Id.*, at 81, para. 11.

determination, special legal protection is recognized for the use of their language, the observance of their religion, and in general, all those aspects related to the preservation of their cultural identity. To this should be added the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands. Non-observance of those rights and cultural values leads to a forced assimilation with results that can be disastrous. For that reason, the Commission considers that it is fundamental to establish new conditions for coexistence between the ethnic minorities and the Government of Nicaragua, in order to settle historic antagonisms and the serious difficulties present today. In the opinion of the IACHR, the need to preserve and guarantee the observance of these principles in practice entails the need to establish an adequate institutional order as part of the structure of the Nicaraguan state. Such an institutional organization can only effectively carry out its assigned purposes to the extent that it is designed in the context of broad consultation and carried out with the direct participation of the ethnic minorities of Nicaragua, through their freely chosen representatives.<sup>60</sup>

With regard to relocation, the IACHR found that “The preponderant doctrine” holds that the principle of consent is of general application to cases involving relocation.<sup>61</sup> This is an important statement that in essence declares that involuntary or forcible relocation of Indigenous peoples is in violation of international human rights law.

As can be seen from the preceding, the IACHR does recognize that the Miskito have some inherent rights as a distinct culture. It also recognizes that the state is required to adopt measures to observe those rights. In particular, the protection of “all those aspects related to cultural integrity” including language, religion, subsistence and economic activities and “the issue of ancestral and communal lands” are required. While the recognition of the need to protect subsistence practices and issues pertaining to lands is important, it is clear that the IACHR has looked to Article 27 of the ICCPR for guidance here, but has failed to exceed the rights protected under that article. Furthermore, precisely what is meant by “the issue of ancestral and communal lands” is unclear, except by reference to the statement that “a study [should be undertaken to find] a solution to the problem of the Indians’ ancestral lands that would take into account both the aspirations of the Indians and the economic interests and territorial unity of [Nicaragua]” contained in the final report’s conclusions and recommendations.<sup>62</sup>

The IACHR’s examination of the human rights situation of the Miskito concluded in 1984 with the publication of its final report and the issuance of a resolution expressing the IACHR’s conclusions and recommendations.<sup>63</sup> However, in September 1984, the Nicaraguan government extended an invitation to one of the leaders of MISURASATA to resume a dialogue. This was accepted and led to a round of negotiations that began in Bogota, Colombia in December 1984 and continued until the late 1980’s. The stated purpose of these negotiations was to enter into a dialogue about the structure and

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<sup>60</sup> *Id.*, at 81, para. 15.

<sup>61</sup> Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, *OEA/Ser.L/V/II.62, doc.26. (1984), 120.*

<sup>62</sup> *Id.*, at 133, para 3(j).

<sup>63</sup> *Id.*, at 135. *Resolution on the Friendly Settlement Procedure Regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin.*



parameters of an autonomous, Atlantic region for the Miskito, Sumo and Rama peoples. The final result was the 1987 Autonomy Statute.<sup>64</sup>

The Autonomy Statute essentially established two, semi-autonomous regions in the Atlantic zone, one for the North and one for the South. Each region has an elected Regional Council of limited authority. Each is authorized to participate in the national development program for the Atlantic region and to administer local functions including health, education, cultural, transportation and community services programs. Additionally, each Regional Council is authorized to submit legislation for consideration to the national legislature, develop policies in coordination with the state for the rational use of natural resources and develop a regional taxation policy.

The Autonomy Statute also provides for the inalienable, collective and individual ownership of communal lands free from taxation by the state and, subject to the state's national development plan, the right to use natural resources.<sup>65</sup> Furthermore, rights pertaining to cultural integrity including bilingual education, religious and cultural freedoms and culturally-appropriate social programs are recognized. Although, many of the so-called autonomy rights recognized by the Autonomy Statute are ultimately subject to state law and regulation and are certainly substantially lower than those rights demanded by the Miskito, Nicaragua has arguably complied with the conclusions and recommendations set forth by the IACHR. Whether the Autonomy Statute and the decision to enter into a dialogue with the Miskito are directly attributable to the IACHR action is uncertain. However, if it is not directly attributable, the correspondence between the measures adopted by Nicaragua and the IACHR's recommendations more than suggest that the two are substantially related.

It is important to note that thinking on Indigenous rights within the IACHR has evolved considerably since the *Miskito Report* was issued in 1984 and many of the conclusions reached therein – on autonomy and self-government, for instance – are no longer valid.

Web link: Spanish only: <http://www.cidh.org/countryrep/Miskitosesp/Indice.htm>

### **3. Report on the Situation of Human Rights in Ecuador<sup>66</sup>**

The Ecuador Report is a general report on human rights in Ecuador that includes two chapters concerning the rights of Indigenous Peoples: Chapter VIII, "Human Rights Situation of the Inhabitants of the Interior of Ecuador Affected by Development Activities;" and, Chapter IX, "Human Rights of Special Relevance to the Indigenous Inhabitants of the Country." Published in 1997, these two chapters are an important addition to Indigenous rights in the Inter-American system, particularly in the area of human rights and the environment.

**Facts:** The chapters on Indigenous rights in the *Ecuador Report* arose in part from a petition filed in 1990 by CONFENIAE, the Indigenous umbrella organization for the

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<sup>64</sup> *Autonomy Statute of the Atlantic Coast Regions of Nicaragua*, Law No. 28 of 7 Sept. 1987.

<sup>65</sup> *Id.*

<sup>66</sup> *Report on the Situation of Human Rights in Ecuador*. OEA/Ser.L/V/II.96, Doc. 10 rev. 1 (1997)

Ecuadoran Amazon, and a non-Indigenous NGO based in the United States on behalf of the Huaorani people. In examining the petition, the IACHR decided that the complaints made were not unique to the Huaorani and should be looked at in the context of a general report on the human rights situation in Ecuador. The petition referred to the devastating impact of oil exploration and exploitation on the traditional lands, cultures and health of the Huaorani and other Indigenous Peoples of the Ecuadoran Amazon. In particular, the petition alleged that oil development threatened the physical and cultural survival of the Huaorani through massive environmental contamination. Evidence was submitted showing that oil development was taking place in or near Indigenous communities and that rivers and soil had become contaminated with toxic chemicals causing diseases, severe problems in providing food and water and possibly deaths. The Report noted that Ecuadoran law prohibited environmental contamination, but nonetheless, severe pollution was evident.

**The Decision:** In its analysis of the impact of oil development in the Amazon, the IACHR directly relates the right to life to environmental security stating that “The realisation of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.”<sup>67</sup> It added in its conclusions that “Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.”<sup>68</sup>

The report also recognized that state policy and practice concerning resource exploitation and land use cannot take place in a vacuum that ignores its human rights obligations. In doing so, the IACHR related human rights concerns to the regulatory framework and monitoring capacity of the state. Specifically, the Commission stated that it “recognizes that the right to development implies that each state has the freedom to exploit its natural resources, including through the granting of concessions and acceptance of international investment. However, the Commission considers that the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which could translate into violations of human rights protected by the American Convention.”<sup>69</sup> This last observation is important, because, as noted in the *Ecuador Report*, the fact that adequate laws are in place is not necessarily a safeguard for human rights; the laws must also be enforced and resource exploitation operations must be monitored to ensure compliance with the law.

Building upon principles adopted at the United Nations Conference on Environment and Development (see, Ch. 6) and various articles of the American Convention, the IACHR highlighted the right to participate in decisions affecting the environment.<sup>70</sup> For instance, the Rio Declaration on Environment and Development adopted at UNCED states in Principle 10 that: “Environmental issues are best handled with the participation of all

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<sup>67</sup> *Id.* at 88.

<sup>68</sup> *Id.* at 92.

<sup>69</sup> *Id.* at 89.

<sup>70</sup> *Id.* 92-5.

concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” Specifically addressing Indigenous peoples, principle 22, states: “Indigenous people and their communities, and other local communities, 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.”

An integral part of the right to participate is access to information in an understandable form. Emphasizing procedural guarantees and state obligations to adopt positive measures to guarantee the right to life, the IACHR stated that, “In the context of the situation under study, protection of the right to life and physical integrity may best be advanced through measures to support and enhance the ability of individuals to safeguard and vindicate those rights. The quest to guarantee against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.”

According to the IACHR, these rights are guaranteed by the following articles of the American Convention: Access to information, article 13 (right to freedom of thought and expression), article 23 (right to take part in the conduct of public affairs) and article 25 (right to judicial remedies) read in conjunction with article 8 (right to due process) and generic obligations under articles 1 and 2 (implementation without discrimination and effective remedies for violations of rights recognized in the Convention).

Prior to issuing its recommendations, the IACHR attributed responsibility for the human rights violations caused by oil development to the State of Ecuador and to the companies conducting the operations by stating that “‘Decontamination is needed to correct the mistakes that ought never to have happened.’ Both the State and the companies conducting oil exploitation activities are responsible for such anomalies, and both should be responsible for correcting them. It is the duty of the State to ensure that they are corrected.”<sup>71</sup> Based upon this, the IACHR’s recommendations stress:

- 1) the need to remedy present and prevent future contamination from oil development “which would threaten the lives and health” of the Indigenous Peoples living in the Amazon;
- 2) do the same for other extractive industries, like gold mining, which would pose the same threat;
- 3) take measures to ensure that all persons have the right to fully participate in decisions “which directly concern their environment;”

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<sup>71</sup> *Id.* at 94.

- 4) take measures to ensure that affected persons have access to justice for environmental contamination and the attendant human rights violations, and;
- 5) to facilitate enjoyment of the right to information, the State should take measures to increase public participation in decision making and improve the systems by which information is dispersed to the public.

In Chapter IX on Indigenous rights, the IACHR noted that “The indigenous peoples of the country face a number of serious obstacles to obtain the full enjoyment of their rights and freedoms under the American Convention. Significant segments of the indigenous population suffer the effects of pervasive poverty, and little social spending is directed towards this sector. Indigenous individuals are subjected to discrimination, from both public and private sectors. They experience obstacles in seeking to pursue their traditional relationship with the lands and resources that have supported them for thousands of years, and in seeking to practice and preserve their own cultures.”<sup>72</sup> The IACHR then proceeded to divide its discussion into the following categories: the right to equal protection and to be free from discrimination; land, resources and property rights; respect for Indigenous expression, religion and culture; the impact of development activities; and the human rights of uncontacted Indigenous peoples. Concerning non-discrimination and equal protection, the IACHR highlighted the fact that Indigenous persons were frequently not provided translation in judicial proceeding and the fact that there were few Indigenous persons represented in the Government.

Having noted that Indigenous peoples experience discrimination with regard to land rights, the IACHR added that

The situation of indigenous peoples in the [Ecuadorian Amazon] illustrates, on the one hand, the essential connection they maintain to their traditional territories, and on the other hand, the human rights violations which threaten when these lands are invaded and when the land itself is degraded. . . . For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers to both its capacity for providing the resources which sustain life, and to ‘the geographical space necessary for the cultural and social reproduction of the group.’<sup>73</sup>

The rights to freedom of expression, religion, association and assembly were highlighted as rights that can only be enjoyed in community with others. The IACHR then described these rights for Indigenous peoples as “essential to the enjoyment and perpetuation of their culture.” After discussing these rights in the context of ICCPR, Article 27, it added that “the OAS, for its part: has established, as an action of priority for the member states, the preservation and strengthening of the cultural heritage of these ethnic groups and the struggle against discrimination that invalidates their members’ potential as human beings through the destruction of their cultural identity and individuality as indigenous peoples.”<sup>74</sup>

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<sup>72</sup> *Id.* at 98.

<sup>73</sup> *Id.* at 115.

<sup>74</sup> *Id.* at 104.

The IACHR addressed this issue previously in its *Third Report on the Situation of Human Rights in The Republic of Guatemala*, where it found violations of Indigenous peoples “ethnic identity and against development of their traditions, their language, their economies, and their culture”<sup>75</sup> It characterized these rights, generically referred to as the prohibition of ethnocide or cultural genocide, as “human rights also essential to the right to life of peoples.” This position is supported by other instruments and documents which assert that: ethnocide results when a group is unable to live and develop in its unique way,<sup>76</sup> and; that ethnocide is a serious violation of international human rights law (see, also, Art. 7(b) UN Draft Declaration).<sup>77</sup>

Respect for Indigenous forms of social, political and internal organization was also discussed in the context of cultural rights. Quoting Stavenhagen, the IACHR asserted that “Indigenous community life, and therefore the viability of indigenous culture, depends upon the vitality of the groups social organization and, in many instances, the active implementation of local customary law. . . . [N]on-recognition . . . by the state legal system and public administration . . . contributes to the weakening and eventual disappearance of indigenous cultures.”<sup>78</sup> It added in this context that “‘The prevention of discrimination, on the one hand, and the implementation of special measures to protect minorities, on the other, are merely two aspects of the same problem: that of fully ensuring equal rights of all persons.’ These protections also serve to establish the essential precondition for the enjoyment of other rights . . . .”<sup>79</sup>

In its conclusions and recommendations, the IACHR reiterated the need for special guarantees for Indigenous peoples. It stated that: “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.”<sup>80</sup> Following this it recommended that:

- 1) training for public officials about Indigenous rights and adequate “supervision to ensure that public services are performed in a non-discriminatory manner;”
- 2) prevention and punishment of human rights violations perpetrated by the private sector against Indigenous Peoples;
- 3) to remedy discrimination by giving more attention to the equitable distribution of resources and social spending in Indigenous areas;
- 4) respect for Indigenous cultural rights, including bi-lingual and bi-cultural education programmes;

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<sup>75</sup> *Third Report on the Situation of Human Rights in The Republic of Guatemala*. OEA/Ser.L/V/II. 67, doc. 9 1986, at 114. Web link: Spanish only: <http://www.cidh.org/countryrep/Guatemala85sp/indice.htm>

<sup>76</sup> *U.N.E.S.C.O Declaration on Ethnocide and Ethnodevelopment*, San José 1981.

<sup>77</sup> *Revised and Updated Report on the Question and Prevention and Punishment of the Crime of Genocide*, UN Doc. E/CN.4/Sub.2/1985/6.

<sup>78</sup> *Report on the Situation of Human Rights in Ecuador*, at 105-6.

<sup>79</sup> *Id.* at 106.

<sup>80</sup> *Id.* at 115.

- 5) that the state take steps to establish adequate protective measures to prevent damage to Indigenous peoples by oil development and other activities before damage occurs;
- 6) to ensure that Indigenous peoples participate meaningfully and effectively in decisions about development activities and “have full access to the information that will facilitate their participation;”
- 7) for the State “to take the steps necessary to resolve pending claims over title, use and control of traditionally indigenous territory, including those required to complete any pending demarcation projects,” and;
- 8) to take all necessary steps to protect the life and physical integrity of uncontacted Indigenous peoples in Ecuador, including legal protections for their lands.

Although it fails to fully address the serious and pervasive nature of human rights violations connected with the oil industry in Ecuador, the *Ecuador Report* is a significant elaboration of state obligations with regard to the rights of Indigenous peoples under the American Convention on Human Rights and an important case in Inter-American human rights jurisprudence.

Web links: English: <http://www.cidh.org/countryrep/ecuador-eng/index%20-%20ecuador.htm>  
 In Spanish: <http://www.cidh.org/countryrep/Ecuador-sp/indice.htm>

#### 4. Pending Cases

The IACHR is present processing around 40 cases involving Indigenous peoples from various parts of the Americas. This section will discuss only four of these cases, two of which have been declared admissible, the other two are pending a decision on admissibility. The former will be discussed in some detail, the latter only briefly mentioned.

##### a. Maya Indigenous Communities and Their Members (Belize-Admissibility decision)<sup>81</sup>

This case was initiated in August 1998 by the Toledo Maya Cultural Council and the Indian Law Resource Center on behalf of the Mayan communities and their members of the Toledo District of southern Belize. The petition alleges violations of rights guaranteed by the American Declaration, specifically, the right to life (Article I), the right to equality before the law (Article II) the right to religious freedom and worship (Article III), the right to a family and protection thereof (Article VI), the right to the preservation of health and to well-being (Article XI), the right to judicial protection, (Article XVIII), the right to vote and to participate in government (Article XX), and the right to property (Article XXIII). Belize has not ratified the American Convention. The petition was declared admissible by the IACHR in October 2000.

In 1993, Belize began issuing numerous concessions for logging and oil exploration on lands traditionally occupied and used by the Toledo Mayan communities. These concessions affected 38 communities and were issued without consultation with or participation by the Maya. The Maya challenged this by filing a motion for Constitutional Redress in the Supreme Court of Belize in December 1996 asserting violations of property

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<sup>81</sup> *Maya Indigenous Communities and their Members* (Case 12.053 (Belize)), Report No. 78/00 (Admissibility). For an on-line English article about this case, see, S.J. Anaya, *Maya Aboriginal Land and Resource Rights and the Conflict Over Logging in Southern Belize*, 1 *Yale Hum. Rts. Dev. L.J.* 1 (1998) [http://diana.law.yale.edu/yhrdlj/vol01iss01/anaya\\_james\\_article.htm](http://diana.law.yale.edu/yhrdlj/vol01iss01/anaya_james_article.htm)

and other rights guaranteed by the Constitution of Belize. These property rights were based upon the Maya's traditional occupation and use of their lands and resources. In April 1998, the Maya sought an injunction from the Court to suspend all logging and other activities until the claim concerning ownership of the land had been resolved by the Supreme Court. The request for the injunction was postponed indefinitely by the Court at the request of the Attorney-General of Belize. Since they were filed, neither the Constitutional motion nor the request for an injunction have been decided upon or produced any results in the courts in Belize. For this reason, the Maya filed a petition with the IACHR seeking its assistance to address the alleged human rights violations. The Maya also requested that the IACHR apply precautionary measures suspending the logging and oil concessions in order to avoid irreparable harm to them (see above, page 21).

The petition filed by the Maya requested that the IACHR recommend that Belize:

1) suspend all future and current concessions in the Toledo District until a suitable arrangement is negotiated between the State and the indigenous communities concerned; 2) engage in dialogue with the Maya communities; 3) establish a legal mechanism under domestic law recognizing Maya customary land tenure and resource use; 4) implement a plan with the affected communities to reduce environmental harm caused by logging and oil development activities; 5) pay moral and pecuniary damages incurred by the Maya communities as a result of the concessions and all costs incurred by the communities and petitioner in defending the communities' rights; and 6) provide any other relief that the Commission considers appropriate and just.<sup>82</sup>

The IACHR transmitted the Maya petition to the state of Belize in September 1998. Without responding to the issues raised by the petition, Belize wrote to the IACHR in November 1998 requesting that it facilitate a friendly settlement between the state and the Maya. This was agreed to by the Maya and the IACHR. This was followed by a series of meetings and attempts to resolve the case until August 2000, when it became clear that friendly settlement was not possible.<sup>83</sup> Noting that Belize had not responded to numerous requests for information about the allegations made in the petition, about domestic remedies and about the Maya's request for precautionary measures, the IACHR declared to case admissible in October 2000.

Discussing the positions of the parties on domestic remedies, the IACHR stated that the Maya asserted: 1) that they attempted to resolve their complaints numerous times at the domestic level, including through judicial action, without result; 2) that attempts at friendly settlement failed largely due to bad faith on the part of Belize and; 3) that they be exempted from the exhaustion of domestic remedies requirement because of an undue delay in the case filed with the Supreme Court in Belize, which had been before the court since December 1996. The IACHR noted again that Belize had failed to provide any information on the domestic remedies aspects of the case.

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<sup>82</sup> *Maya Indigenous Communities and their Members* (Case 12.053 (Belize)), Report No. 78/00 (Admissibility), at para. 6.

<sup>83</sup> *Id.*, paras. 9-26.

According to the IACHR, the Maya case raised two separate domestic remedies issues: 1) whether there had been an undue delay in the case filed with the Supreme Court of Belize that would exempt the Maya from the exhaustion rule and; 2) “whether the State’s silence by not responding to the Commission’s communications constitutes a waiver to object to non-exhaustion of domestic remedies as established by the Inter-American Court’s and the Commission’s jurisprudence.”<sup>84</sup> The IACHR also referred to Article 37(3) of its Regulations (now *Article 31(3), IACHR Rules of Procedure*) which provides that “When the petitioner contends that he or she is unable to prove compliance with the [exhaustion of domestic remedies] requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted....”

On the first issue, the IACHR found that there had been an undue delay in the domestic proceedings and, for this reason, the Maya were exempted from the exhaustion rule. On the second, it held that “in accordance with generally accepted principles of international law that the State tacitly waived its right to object to the admissibility of the petition based upon the exhaustion of domestic remedies rule.”<sup>85</sup> In reaching this decision, the IACHR made reference to its and the Court’s jurisprudence on the issue. This jurisprudence is important for understanding the domestic remedies requirement and for that reason is quoted here:

Under Article 46(1) of the Convention and in accordance with general principles of international law, it is for the state asserting non-exhaustion of domestic remedies to prove that such remedies in fact exist and that they have not been exhausted (Velásquez Rodríguez Case, Preliminary Objections, *supra* 39, para. 88; Fairén Garbí and Solís Corrales Case, Preliminary Objections, *supra* 39, para. 87, and Godínez Cruz Case, Preliminary Objections, *supra* 39, para. 90.)<sup>86</sup>

Generally recognized principles of international law indicate, first, that this is a rule that may be waived, either expressly or by implication, by the state having the right to invoke it, as this Court has already recognized (see Viviana Gallardo et al. Judgment of November 13, 1981, no. G 101/81. Series A, para. 26). Second, the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed. Third, the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective.<sup>87</sup>

Finally, the IACHR also found that Belize had failed met the standard set in its Regulations (now *Art. 31(3), IACHR Rules of Procedure*) because it had failed prove that domestic remedies had not been exhausted. Additionally, according to the Court “the State that alleges non-exhaustion must indicate which domestic remedies should be exhausted and

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<sup>84</sup> Id., at para. 47.

<sup>85</sup> Id., at para. 53.

<sup>86</sup> Id., at para. 49, *quoting*, *Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights*, Inter-American Court of Human Rights, Advisory Opinion No. OC-11/90 of August 10, 1990, at 32, para. 41.

<sup>87</sup> Id., at para. 50, *quoting*, *Godínez Cruz Case, Preliminary Objections*. Inter-American Court on Human Rights, Judgment of June 28, 1987, at para. 90



provide evidence of their effectiveness.”<sup>88</sup> Should the state not do so, it will have failed to meet the burden of proof required and the petition can be declared admissible.

The Maya case is still pending before the IACHR awaiting a decision on the merits. This decision has been delayed in part by renewed attempts by Belize and the Maya to reach a friendly settlement agreement. The IACHR recently conducted an on-site visit to Belize where it held further discussions on the case with the Maya and the state.

Web links: English:

<http://www.cidh.org/annualrep/2000eng/ChapterIII/Admissible/Belize12.053.htm>

Spanish: <http://www.cidh.org/annualrep/2000sp/CapituloIII/Admisible/Belice12.053.htm>

**b. Mary and Carrie Dann (United States-Admissibility decision)<sup>89</sup>**

The petition that initiated this case was filed in 1993 by the Indian Law Resource Center on behalf of the Dann sisters, members of the Dann Band of the Western Shoshone Nation, against the United States of America. The petition alleges violation of the American Declaration, Article II, the right to equality before the law, Article XVII, the right to recognition of juridical personality and civil rights, and Article XVIII, the right to a fair trial, as well as violation of the Charter of the United Nations, the Universal Declaration of Human Rights and other international human rights instruments. The United States has not ratified the American Convention.

The Dann sisters’ land is a ranch and surrounding areas located within the lands of the Western Shoshone Nation in the western United States, lands guaranteed under an 1866 treaty between the United States and the Western Shoshone. The sisters raise and sell livestock to meet their basic needs. The lands surrounding the ranch were indirectly confiscated under United States law by gradual encroachment of settlers despite the Danns’ assertion that they had valid aboriginal title to the area by virtue of their immemorial occupation and use as well as treaty rights guaranteeing their use and enjoyment.

In 1974, the US government went to court to have the Danns’ removed from the lands that they grazed their livestock on and sought a declaration from the court that the US government owned the lands in question. At the same time, a case was being processed through the Indian Claims Commission, a US government body set up to compensate Native Americans for lost lands, to compensate the Danns’ for the loss of their lands. The Dann sisters did not participate in the Claims Commission case, which resulted in a final judgment awarding compensation to the Danns in 1979. The award was deposited in a bank account but never paid to the Danns. While the sisters refused to recognize the validity of this award, the US government maintained that the award constituted a further extinguishment of any rights or title the sisters had in their grazing lands.

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<sup>88</sup> *The Mayagna (Sumo) Awajitjani Community Case, Preliminary Objections*. Judgment of February 1, 2000, Series C No. 66, at para. 53, *citing*, among others, *Cantoral Benavides case, Preliminary Objections*. Judgment of September 3, 1998. Series C No. 40, para. 31; *Durand and Ugarte case, Preliminary Objections*. Judgment of May 28, 1999. Series C No. 50, para. 33.

<sup>89</sup> *Mary and Carrie Dann* (Case 11.140 (United States)), Report No. 99/99 (Admissibility). For an on-line English article about the Danns’ situation, see, <http://www.law-lib.utoronto.ca/Diana/fulltext/duss.htm>

The 1974 case eventually reached the US Supreme Court, which ruled in favour of the government in 1985, sending the case back to the Federal trial court for additional examination. The Danns lost that case as well as the subsequent appeal filed against the judgment in the Federal Appeals court. Around the same time the Western Shoshone National Council filed suit seeking protection of hunting and fishing rights over their traditional lands, including those occupied by the Danns. The Federal trial court ruled against the National Council in 1990, a decision later affirmed by the Federal Appeals Court. The Supreme Court denied review of the Appeals Court decision two years later effectively ending the case. The petition on behalf of the Dann sisters was filed with the IACHR in April 1993.

In August 1993, the US government's Bureau of Land Management (BLM) published a notice that it intended to confiscate all livestock found on the lands where the Danns graze their animals. The petitioners informed the IACHR of this and stated that loss of livestock would have devastating consequences for the sisters. A month later the IACHR wrote to the US asking that it not confiscate any livestock until a decision had been made on the merits of the Danns' case. The US responded stating that the case was inadmissible and did not represent a human rights violation, but did not impound any livestock. A number of other exchanges of information and documentation took place between the IACHR and the parties in the following years culminating in a hearing in October 1996. At the hearing the Danns informed the IACHR that their grazing lands had been acquired by a gold mining company that had recently issued a notice that it would begin exploring for gold deposits.

Two years later, the BLM issued further notices that it intended to impound the Danns' livestock. The IACHR again wrote to the US and requested that it halt any confiscations until a decision had been reached in the case. The BLM however issued more notices and orders demanding that the Danns remove their animals and requiring that they pay a fine of US\$288,191.78 for illegal grazing. The Danns challenged the BLM's actions through a BLM administrative process, but this failed. They also attempted to reach a settlement with the BLM, which also failed and the BLM again issued notices and orders stating that their livestock would be confiscated. In June 1999, the IACHR formally requested that precautionary measures be adopted until it had had the opportunity to fully investigate the case (see above, page 21).

On 27 September 1999, the IACHR declared the case admissible. The petitioner maintained that all domestic remedies had been exhausted prior to filing the petition with the IACHR. The US government, on the other hand, asserted that further remedies remained available to the Danns, in particular a claim based upon individual aboriginal title. The IACHR determined that the Danns had in fact exhausted all domestic remedies and that the US had failed to prove otherwise. This case is still pending before the IACHR awaiting a decision on the merits almost eight years after it was originally submitted.

Web links: English: <http://www.cidh.org/annualrep/99eng/Admissible/U.S.11140.htm>  
Spanish: <http://www.cidh.org/annualrep/99span/Admisible/EstadosUnidos11.140.htm>

**c. Carrier Sekani Case (Case 12.279 (Canada))**

This case was submitted by the Chiefs of the Member Nations of the Carrier Sekani Tribal Council in 1999. An amended petition was submitted in May 2000. The petition seeks the IACHR's assistance to reverse the acts and omissions of the Canadian Federal government and the Provincial government of British Columbia. Specifically, the petitioners are challenging Canada's failure to recognize and guarantee their ancestral land and natural resource rights, violation of those and other rights caused by grants of logging concessions to corporate interests in their territory without their participation and consent, and violation of cultural, subsistence and other rights caused by logging activities. As Canada has not ratified the American Convention, the petition alleges violations of the American Declaration and other human rights instruments.

The petitioners requested that the IACHR make itself available to mediate a friendly settlement and also requested that it grant precautionary measures. The requested precautionary measures include: immediate suspension of all new permits, licenses, and concessions for logging and other natural resource development activity on lands used and occupied by the Member Nations of the Carrier Sekani Tribal Council, suspension of the reallocation of lease rights within that area, and measures to ensure that the logging and other natural resource development activity is not increased or continues without the petitioners' agreement. The IACHR is still processing this case and has yet to reach a decision on its admissibility.

**d. Association of Indigenous Communities Lhaka Honhat (Case 12.094 (Argentina))**

This case was filed in the year 2000 by 35 Indigenous communities acting through the Association of Indigenous Communities Lhaka Honhat. The petition cites violations of the rights to life and health, to cultural integrity, to property, and to a healthy environment under the American Convention and other international instruments. These violations are alleged to have taken place in connection with the construction of a road through Argentina linking Brazil to Chile, an international bridge between Argentina and Paraguay and a plan to urbanize the Indigenous area. The road passes through the communities' lands and has already disrupted subsistence activities and caused damage to the environment. The communities maintain that once heavy, commercial traffic begins to move along the road they will experience additional severe problems that may affect their ability to survive as distinct peoples.

The petitioners requested that the IACHR mediate a friendly settlement and requested precautionary measures to avoid irreparable harm due to loss of land, the construction project and associated environmental degradation.<sup>90</sup> The request for precautionary measures included preparation of an environmental impact assessment, consultation with the communities, a halt to construction activities taking place in Indigenous territory and measures to recognize and guarantee collective ownership rights over that territory. In October 2000, a formal hearing was held before the IACHR in Washington DC to discuss the case. At this hearing the IACHR gave Argentina 30 days to communicate the measures it intended to take to guarantee the rights of the affected communities. A proposal for

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<sup>90</sup> Two NGOs filed a brief in support of the case, which can be found at the following web site (English only): <http://www.ciel.org/Publications/WichiAmiciCuriae2.pdf>

friendly settlement of the case is presently under discussion and the IACHR has yet to rule on the admissibility of the case.

### **C. Recent Special Country Situation Reports of the IACHR**

This section will briefly summarize some of the main conclusions and recommendations made by the IACHR in recent special country situation reports. Links to the full text of the sections of the reports on Indigenous peoples are located at the end of the discussion on each report.

#### **1. Mexico (1998)<sup>91</sup>**

Chapter VII of the *Report on the Human Rights Situation in Mexico* largely deals with serious human rights violations caused by militarization and suppression in Indigenous areas in Mexico, i.e., Chiapas, Oaxaca, Guerrero. It begins with a general review of the situation of Indigenous peoples throughout Mexico concluding that

Mexico's indigenous peoples are disadvantaged in comparison with the rest of the population in terms of access to State services. In many areas of the country they live in deplorable conditions of poverty without access to social and health services. Also, official studies show that, while indigenous municipalities represent one-third of all municipalities in the country, they account for 48 per cent of those that are "highly disadvantaged" and 82 per cent of those that may be described as "extremely disadvantaged".<sup>92</sup>

The political rights of Indigenous peoples, as guaranteed under Article 4 of the Mexican Constitution, are also discussed. These rights are in part implemented through various laws that recognize traditional Indigenous institutions and customs and practices.<sup>93</sup> In some cases, municipal elections are conducted on the basis of traditional Indigenous decision-making processes and a law called 'Indigenous Institutions and Practices'. In Oaxaca, for example, the Report states that 430 out of 570 municipal elections are based on Indigenous customs and practices rather than the regular elections procedure employed in non-Indigenous areas. The IACHR observed that information gathered during its on-site visit to Mexico demonstrates that "these [Indigenous] electoral methods are consistent with political pluralism, the right to participate and freedom of expression."<sup>94</sup>

The majority of the Report deals with the situation in Chiapas following the 1994 Zapatista uprising. On-going human rights violations, including a massacre of 45 Indigenous persons by a paramilitary group, and the peace negotiations aimed at settling the situation in Chiapas are also discussed. Concerning the latter, in September 1995, an agreement was reached concerning the agenda, format and rules of procedure to govern peace negotiations. A Committee on the Rights and Cultures of Indigenous peoples was established shortly thereafter. This Committee met for a six-week period and included working groups on: "community and autonomy; rights of indigenous peoples; guarantees of justice for indigenous people; political representation and participation of indigenous people; status,

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<sup>91</sup> *Report on the Human Rights Situation in Mexico*. OEA/Ser.L/V/II.100 Doc. 7 rev. 1 (24 September 1998).

<sup>92</sup> *Id.*, at para. 510.

<sup>93</sup> *Id.*, paras. 516-21.

<sup>94</sup> *Id.*, at para. 518.

rights, and culture of indigenous women; access to the communications media; promotion and development of indigenous cultures.”<sup>95</sup> These issues were then discussed at the national level in November and December 1995. In February 1996, the *San Andrés Agreements on Indigenous identity and culture* were signed by State representatives, Indigenous intellectuals and leaders associated with the Zapatista movement.

The IACHR appears to see this process of negotiating settlements to rights issues, with full Indigenous participation, as consistent with Mexico’s (and presumably other states’) international obligations. The Report states that

It is important to note that this action by the State is consistent with the international commitment undertaken in article 23 of the American Convention on Political Rights, and in Articles 2, 6 and 7 of ILO Convention 169, in which Mexico pledged to engage in coordinated and systematic action, with the participation of the indigenous peoples through their representative institutions, to protect their rights and guarantee their integrity.

The Report’s conclusions contain a number of interesting statements. First, they touch upon the right to development stating that “It is the obligation of the State of Mexico, based on its constitutional principles and on internationally recognized principles, to respect indigenous cultures and their organizations and to ensure their maximum development in accordance with their traditions, interests, and priorities.”<sup>96</sup> This language clearly indicates that development efforts must be consistent with Indigenous traditions, interests and priorities, all of which presuppose and require a substantial measure of Indigenous participation in development activities.

Second, the IACHR found that disparities in the enjoyment of basic services, as evidenced by statistics on health, education and mortality, amounted to illegal discrimination: “Economic and social rights, measured by standard indicators (access to educational and health opportunities, infant mortality rates, etc.), exhibit major shortcomings which in themselves translate into suffering and injustice, in other words, indigenous peoples are discriminated against in comparison with the average situation of the rest of the population.”<sup>97</sup>

Finally, the Report addresses the responsibility of states for human rights violations, even if those violations were not directly carried out by the state. Its states that

Although some of these confrontations and even the crimes connected with them have not been perpetrated by State agents, the State may bear responsibility for at least two reasons: in many cases, State authorities or organizations or authorities and organizations connected to the Government facilitate, tolerate or cover up the actions of some of these groups; and also because it is the obligation of the State to organize

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<sup>95</sup> Id., at para. 568.

<sup>96</sup> Id., at para. 577.

<sup>97</sup> Id., at para. 578.

its institutions in such a way as to prevent crimes of this sort and to investigate and punish them in accordance with the law.<sup>98</sup>

This statement is highly relevant to many situations in which Indigenous peoples' rights are violated by persons other than state agents. The activities of paramilitary groups, colonists, gunmen hired by landowners and corporate interests or security forces employed by them, among others, that violate human rights may all be imputable to the state if the state tolerates, facilitates or covers up these activities or if it fails to punish the violations.

In English: <http://www.cidh.org/countryrep/Mexico98en/Chapter-7.htm>

In Spanish: <http://www.cidh.org/countryrep/Mexico98sp/capitulo-7.htm>

## **2. Colombia (1999)<sup>99</sup>**

Chapter X of the *Third Report on the Situation of Human Rights in Colombia* deals with Indigenous peoples' rights. It commences with an overview of Indigenous rights in the 1991 Colombian Constitution and in legislation noting some of the advances made by Colombia.<sup>100</sup> It also discusses progress made in titling and demarcating Indigenous lands observing that "As several Colombian laws have recognized that the indigenous peoples had the right to have the State recognize their full ownership over such areas, not as a discretionary act of the State but rather as an obligation, these proceedings do not constitute mere transfers but rather should be seen as a process of 'production of evidence establishing the prior ownership of the communities.'"<sup>101</sup>

The Report also discusses the problems encountered in titling and demarcating Indigenous territories finding that the main problems were due to bureaucratic delays, including the failure of the state to provide Indigenous peoples with a certificate needed to complete transfer of lands, and threats and violence by non-Indigenous landowners, settlers and paramilitary units seeking to acquire Indigenous lands.<sup>102</sup> In one case, four Zenú Indigenous leaders were assassinated prompting the IACHR to request in 1996 and 1997 that precautionary measures be adopted to protect other Zenú leaders.<sup>103</sup> Due to further assassinations and intimidation, the IACHR requested that the Court grant provisional measures to protect the leaders. These measures were granted by the Court in 1998.<sup>104</sup>

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<sup>98</sup> Id., at para. 579.

<sup>99</sup> *Third Report on the Human Rights Situation in Colombia*. OEA/Ser.L/V/II.102 Doc. 9 rev. 1 (26 February 1999)

<sup>100</sup> The Constitution and other laws of Colombia affecting Indigenous peoples are discussed in greater detail in the *Second Report on the Human Rights Situation in Colombia*. OEA/Ser.L/V/II.84 Doc. 39 rev. (14 October 1993). Web links: English: <http://www.cidh.org/countryrep/93ColS&E/ecol12.htm#CHAPTER%20XI>; Spanish: <http://www.cidh.org/countryrep/93ColS&E/scol13.htm#CAPITULO%20XI:%20LOS%20DERECHOS%20DE%20LOS%20INDIGENAS%20EN%20COLOMBIA>.

<sup>101</sup> *Third Report on the Human Rights Situation in Colombia*, Ch. X, at para 19.

<sup>102</sup> Id., paras. 23-7.

<sup>103</sup> Id., para. 27.

<sup>104</sup> Provisional measures are the Court's equivalent of precautionary measures.

The IACHR's recommendations on land rights were as follows:

The State should take appropriate measures to ensure that the process of legal demarcation, recognition and granting title to land and use of natural resources to indigenous communities is not hindered or delayed by bureaucratic difficulties.

The State should ensure that indigenous communities enjoy effective control over lands and territories designated as indigenous territories, resguardos or other community lands without interference by individuals who seek to maintain or to take control over these territories through violence or any other means in detriment of the rights of the indigenous peoples.

The next two sections of the Report deal with resource exploitation and the impact of mega-projects, particularly infrastructure projects. Concerning the former, the IACHR noted that Colombian law vests ownership of subsoil resources in the state, but it also requires consultation with Indigenous peoples prior to exploitation. It further notes that a number of complaints were received about lack of consultation with regard to oil and mining activities. One of these complaints, filed by the U'wa people, complains of state authorized oil activities on U'wa lands, without adequate consultation, that may have serious consequences for the U'wa's future survival as a people. A formal petition on this case is currently under review by the IACHR. Concerning resource exploitation and mega-projects, the IACHR recommended that

The State should ensure that the exploitation of natural resources found at indigenous lands should be preceded by appropriate consultations with and, to the extent legally required, consent from the affected indigenous communities. The State should also ensure that such exploitation does not cause irreparable harm to the religious, economic or cultural identity and rights of the indigenous communities.

The State should ensure that major development projects in or near indigenous lands or areas of indigenous population, carried out after complying with the requirements of the law, do not cause irreparable harm to the religious, economic or cultural identity and rights of indigenous communities.

The remainder of the Report discusses human rights issues related to political violence against Indigenous persons in the context of armed conflict between insurgents and the Colombian state and the latter's attempts to eradicate illegal drug crops, such as coca. On the former, the IACHR stated that "the State incurs responsibility for violations of the right to life and the right to physical integrity, guaranteed in Articles 4 and 5 of the American Convention, when State agents or paramilitary groups acting with the assistance or tolerance of State agents commit these acts."<sup>105</sup> For the latter, the IACHR recommended that "The State should take special measures, in connection with its actions against illicit drug trafficking and production, to ensure the physical safety of indigenous persons and to respect their other rights, land, property, culture and organization."

In English: <http://www.cidh.org/countryrep/Colom99en/table%20of%20contents.htm>

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<sup>105</sup> *Third Report on the Human Rights Situation in Colombia*, Ch. X, at para 46.

In Spanish: <http://www.cidh.org/countryrep/Colom99sp/indice.htm>

### 3. Peru (2000)<sup>106</sup>

Chapter X of the *Second Report on the Human Rights Situation in Peru* concerns Indigenous peoples' rights. According to the report, the IACHR received numerous complaints about human rights violations against Indigenous peoples in Peru both before and during its on-site visit there in 1999. These complaints included failures to recognize communal lands, violations related to resource extraction (logging, mining and oil) and associated environmental degradation, rights to participation and consultation, and "the high percentage of indigenous families in extreme poverty, with problems of chronic malnutrition and high mortality, especially maternal and infant mortality."<sup>107</sup>

The Report begins with a review of domestic legislation, highlighting both positive and negative aspects, and concluding with regard to territorial rights that "the legal framework does not offer the native communities effective security and legal stability over their lands."<sup>108</sup> Discussing territorial rights, the IACHR reiterated its conclusion reached in the *Ecuador Report* that "Land, for the indigenous peoples, is a condition of individual security and liaison with the group. The recovery, recognition, demarcation, and registration of the lands represents essential rights for cultural survival and for maintaining the community's integrity."<sup>109</sup> In this context, the IACHR recommended that Peru "adopt appropriate measures to guarantee the process of legal demarcation, recognition, and issuance to the indigenous communities of land titles, and to ensure that this process not prejudice the normal development of property and community life."<sup>110</sup>

The Report also notes the severe impact of resource extraction operations on the Indigenous communities of the Amazon region, stating that "The actions of the lumber and oil companies in these areas, without consulting or obtaining the consent of the communities affected, in many cases lead to environmental degradation and endanger the survival of these peoples."<sup>111</sup> The corresponding recommendation states "that all projects to build infrastructure or exploit natural resources in the indigenous area or that affect their *habitat* or culture is processed and decided on with the participation of and in consultation with the peoples interested, with a view to obtaining their consent and possible participation in the benefits."<sup>112</sup> The language "with a view to obtaining their consent" is taken from Article 6 of ILO 169, ratified by Peru. The Report makes frequent reference to Peru's obligations under this instrument.

Concerning participation rights in general, the Report recommends that Peru adopt a law "that guarantees the mechanisms of participation of indigenous persons in the adoption of

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<sup>106</sup> *Second Report on the Human Rights Situation in Peru*. OEA/Ser.L/V/II.106 Doc. 59 rev. (2 June 2000)

<sup>107</sup> *Id.*, Ch. X, at para. 3.

<sup>108</sup> *Id.*, at para. 19.

<sup>109</sup> *Id.*, at para. 16. See, also, *Ecuador Report*, *supra* note 73.

<sup>110</sup> *Id.*, at para. 39(4).

<sup>111</sup> *Id.*, at para. 26.

<sup>112</sup> *Id.*, at para. 39(5).



political, economic, and social decisions that affect their rights, and that they be accorded greater political participation in the adoption of decisions at the national level.”<sup>113</sup>

Discrimination against Indigenous peoples is also discussed, both generally<sup>114</sup> and in connection with health and education.<sup>115</sup> Concerning the latter, the Report notes that the Peruvian Constitution provides for a special regime for Indigenous education that includes bilingual and bicultural education. It further observes that the failure of the state to implement and adequately support this special regime is “one of the main problems affecting the children from ethnic minorities and explains the fact that 22% of the children from the rural jungle areas do not attend school, the highest percentage in the country.”<sup>116</sup> Consequently, the Report recommends that Peru “improve access to the public services, including health and education, for the native communities, to offset the existing discriminatory differences, and to provide them dignified levels in keeping with national and international standards;”<sup>117</sup> and, “[t]hat it help strengthen the role of the indigenous populations so that they may have options and be able to retain their cultural identity, while also participating in the economic and social life of Peru, with respect for their cultural values, languages, traditions, and forms of social organization.”<sup>118</sup>

In English: <http://www.cidh.org/countryrep/Peru2000en/TOC.htm>

In Spanish: <http://www.cidh.org/countryrep/Peru2000sp/indice.htm>

#### **4. Guatemala (2001)<sup>119</sup>**

As with other reports, Chapter XI of the *Fifth Report on the Situation of Human Rights in Guatemala* begins with an overview of the situation of Indigenous peoples in Guatemala and the domestic legal framework applying to them. Noting that more than half of Guatemala’s rural and urban population is Indigenous, the IACHR observed that

Historically, the indigenous peoples of Guatemala have been discriminated against for ethnic reasons, comprise a large percentage of the poor or persons living in abject poverty and the majority in the departments with the highest rates of social exclusion. The same situation exists in poor urban areas. However, whether they live in rural or urban areas, they maintain an intense level of activity and social organization, a rich culture, and are continuously adapting to situations imposed by the exigencies of historical change, while protecting and developing their cultural identity.<sup>120</sup>

With regard to the domestic legal framework, the IACHR remarks that Indigenous rights are included in both the Constitution and in various laws and that the preceding ten years were marked by an increased recognition of those rights. Guatemala also ratified ILO 169 in 1997.

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<sup>113</sup> Id., at para. 39(1).

<sup>114</sup> Id., para. 32.

<sup>115</sup> Id., paras. 35-8.

<sup>116</sup> Id., at para. 37.

<sup>117</sup> Id., at para. 39(2).

<sup>118</sup> Id., at para. 39(7).

<sup>119</sup> *Fifth Report on the Situation of Human Rights in Guatemala*. OEA/Ser.L/V/II.111 doc. 21 rev. (6 April 2001).

<sup>120</sup> Id., at para. 4.

The human rights impact of the 34 year-long internal, armed conflict in Guatemala is discussed, including the disproportionate impact of the conflict on Indigenous peoples. By some estimates 83 percent of the victims of violations related to the conflict were Indigenous. This fact is explained in part by reference to historical relations between Indigenous and non-Indigenous peoples:

From colonial times to the present, Guatemala has engaged in discriminatory and racist practices manifested by a system of violent and dehumanizing relations, traditionally tied to State actions aimed at maintaining social exclusion through the perpetuation of conditions characterized by the concentration of power and productive wealth and opportunities for access to social services in the hands of a small and privileged sector of the population.<sup>121</sup>

State policy and institutionalized racism are also identified as major contributors:

As the CEH has stated, racism, expressed as a doctrine of superiority and practiced by the Guatemalan State, was one of the causes of armed conflict and "is a major factor in explaining the particularly brutal and indiscriminate manner with which military operations were conducted against hundreds of Maya communities in the western and north-western part of the country, particularly between 1981 and 1983, when more than half of the massacres and razing of their land took place." The disproportionate response to the guerillas is explained by the fact that the counterinsurgency policy was aimed not only at destroying the social bases of the guerillas, but also at destroying the cultural values that fostered cohesion and collective action in the indigenous communities.<sup>122</sup>

The armed conflict was officially ended with the conclusion of twelve peace agreements, one of which directly addressed Indigenous peoples' rights: *The Agreement on Identity and Rights of Indigenous Peoples*. This agreement include a series of wide ranging provisions intended to address and reverse institutionalized racism and to put in place measures related to "the identity of indigenous peoples, combating discrimination, cultural rights, and civil, political, social, and economic rights, including customary law, rights related to the lands of indigenous peoples, and regularization of land holdings."<sup>123</sup> However, the Report states that very little has been done to implement the Agreement and the Constitutional reform process, agreed upon during the peace negotiations, that was to have given further Constitutional protection to Indigenous peoples failed to achieve its objectives. The latter was largely attributed to the failure of the state to properly inform and educate the general population about the importance of the amendments. In the IACHR's view, "the agreements reached during the peace negotiations, if incorporated into the Constitution and implemented, would provide an important educational, political, and legal tool for combating the discrimination and segregation that has such a debilitating effect on the Guatemalan nation and state."<sup>124</sup>

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<sup>121</sup> Id., at para. 15.

<sup>122</sup> Id., at para. 16 (footnotes omitted).

<sup>123</sup> Id., at para. 19.

<sup>124</sup> Id., at para. 34.

Discussing economic, social and cultural rights, the IACHR repeated its conclusion reached in its 1993 report on Guatemala that the living conditions of the poor in Guatemala, the vast majority of whom are Indigenous, are “discriminatory and deplorable.” The majority of fertile land is held by non-Indigenous owners who employ Indigenous peoples from other regions to seasonally harvest crops. These migrant workers are subject to illegal working conditions, substandard facilities and their attempts to form unions are routinely attacked. The Report states that the IACHR “has verified time and time again the weakness of the State apparatus for protecting the rights of domestic migrant workers, who, for the most part, are indigenous.”<sup>125</sup> Additionally, “Insufficient food, abject poverty, and the absence of preventive health policies are the cause of health problems among the indigenous population in Guatemala. The main causes of disease and health problems of the indigenous peoples are linked to the environmental health conditions in the communities and the working conditions of paid agricultural workers.”<sup>126</sup>

Turning to land rights, the IACHR restated the many commitments that Guatemala has made to recognize and respect Indigenous land rights including the relevant provisions of ILO 169. It observes that the “indigenous population is structured on the basis of its profound relationship with the land, which, in the case of Guatemala, means a significant portion of the territory where indigenous peoples have lived and worked since ancestral times.”<sup>127</sup> Despite this, land is unequally distributed in favour of non-Indigenous, mostly large-scale, agricultural enterprises. However, this is not the only problem:

The unequal distribution of land is compounded by the current legal uncertainty regarding the property rights, particularly those of the indigenous communities, which makes them especially vulnerable and open to conflicts and violation of rights. In most instances, the indigenous communities have property titles that are not recognized under common law, that are at odds with other titles, or that have not been fully registered and recognized. Added to these difficulties is the fact that in some instances, the courts are unaware of the rights derived from their ancestral ownership and use, and do not recognize custom-based indigenous legal provisions. This blocks or considerably limits their ability to assert these rights, as well as recognition of ancestral possession of their lands.<sup>128</sup>

This is an important and instructive statement that is repeated in a number of IACHR’s reports and decisions on petitions, as well as in the Court’s recent judgment in the *Awas Tingni Case* (see, below). For a state to effectively protect Indigenous property rights, those rights, defined by traditional occupation and use, must be recognized in the law, the area must be demarcated, titles must be issued and duly registered, and adequate and effective procedures must exist in the law that permit Indigenous individuals, communities and peoples to assert and defend their rights before independent, judicial bodies. This point is reiterated in the IACHR’s concluding remarks and recommendations, which state, respectively, that:

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<sup>125</sup> Id., at para. 46.

<sup>126</sup> Id., at para. 48.

<sup>127</sup> Id., at para. 56.

<sup>128</sup> Id. at para. 57.

Legal uncertainty and the fact that the State has been slow to recognize and enforce indigenous rights with respect to their lands and resources are not only creating conditions that are conducive to conflict arising from individual violation of rights, but are also endangering the fragile system of democracy that is beginning to take root in Guatemala, after so many years of fratricidal warfare.”<sup>129</sup>

and, Guatemala should “Take the necessary steps and establish rapid and effective special mechanisms for settling conflicts related to ownership, and provide guarantees and legal security to the indigenous communities regarding the ownership of their properties, and provide state lands to the communities that need them for their development, as set forth in Article 68 of the Guatemalan Constitution.”<sup>130</sup>

Other relevant recommendations are that Guatemala should:

2. Fulfill all its obligations made in the peace agreements with respect to indigenous communities and their members and spelled out in the Agreements on the Identity and Rights of Indigenous Peoples, Socio-Economic Aspects and Agrarian Reform, and the Strengthening of Civil Authority and the Function of the Army.
3. Based on the wealth of documentation and evidence that exists, investigate, prosecute, and punish all persons responsible for the massacres and violation of the rights of individuals and indigenous communities to life, integrity, and other human rights which occurred during the armed conflict.
5. Foster respect for the labor rights of indigenous people taking into account the provisions set forth in ILO Convention 169 and monitor compliance with labor laws, especially those pertaining to domestic seasonal migrant workers who move to farms in the south and on the coast, and impose sanctions on employers who violate provisions in effect, as required by law.
6. Adopt, as soon as possible, the measures and policies necessary to establish and maintain an effective preventive health and medical care system, to which all members of the different indigenous communities have access, take advantage of the medicinal and health resources of indigenous cultures, and provide these communities with resources to improve their environmental health conditions, including drinking water and sewage services.
7. Develop policies aimed at the qualitative improvement of and social investment in rural areas in order to guarantee indigenous peoples equal opportunities and access to primary and secondary educational services, thereby improving internal efficiency and reducing illiteracy in these communities.
8. Take positive steps in the educational, legislative, and other spheres regarding the general population, in order to reduce division and discrimination towards different ethnic groups in particular, to achieve equal opportunities, to reduce stereotypes and mistrust, and to reestablish the right of all Guatemalan citizens to dignity, free of discrimination.

In English: <http://www.cidh.org/countryrep/Guate01eng/chap.11.htm>

In Spanish: <http://www.cidh.org/countryrep/Guatemala01sp/cap.11.htm>

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<sup>129</sup> Id., at para. 66.

<sup>130</sup> Id., at para. 66(4).

## 5. Paraguay (2001)<sup>131</sup>

Chapter IX of the *Third Report on the Situation of Human Rights in Paraguay* begins with an overview of the situation of Indigenous peoples in Paraguay and a review of domestic legislation, including ILO 169, ratified by Paraguay in 1994. The case of the Ache people, which the IACHR received in 1974, concerning torture, slavery and murder of Indigenous persons is mentioned. Paraguay was found responsible for human rights violations against the Ache in an IACHR report issued in 1977 on the basis of both its failure to protect the Ache and the active involvement of state agents in the violations.<sup>132</sup> The IACHR recommended that Paraguay “adopt vigorous measures to provide effective protection for the rights of the Aché tribe” and “punish, in accordance with Paraguayan law, those responsible for the events denounced.”<sup>133</sup>

Noting that the situation has improved in Paraguay since the *Ache Case*, the IACHR concludes that “Nonetheless, the indigenous population, which still maintains its ancestral traditions and organization, continues to be marginalized and to suffer the worst living conditions in Paraguay, in a precarious situation that constitutes an assault on the dignity of the human person.”<sup>134</sup> The IACHR’s 1999 on-site visit to Paraguay and the friendly settlement in the *Exnet Case*, summarized above, are also discussed. Complaints concerning inadequate health and education facilities, violation of labour rights, the impact of environmental degradation and the failure of the state to resolve outstanding land rights issues form the bulk of the rest of the report.

The discussion on the domestic legal framework summarizes Paraguayan Constitutional provisions and legislation recognizing or affecting Indigenous peoples’ rights. In this respect the IACHR observes that that Paraguayan Constitution “is consistent with the constitutional trend seen in the last decade in Latin America, as it contains provisions to recognize the rights of the indigenous peoples.”<sup>135</sup> These rights include communal property rights, cultural rights, linguistic rights, rights to participate in decision-making, right to identity and, to a certain extent, the recognition of Indigenous law. These positive developments, however, are not accompanied by state action and policies to adequately protect and fulfill these rights. Accordingly, the Report states that “While the legislation currently in force in Paraguay offers a favorable legal framework for the indigenous peoples, it is not sufficient for the due protection of their rights if not accompanied by state policies and actions that ensure the enforcement and implementation of the norms to which the State has sovereignly bound itself.”<sup>136</sup> The latter refers to international human rights norms.

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<sup>131</sup> *Third Report on the Human Rights Situation in Paraguay*. OEA/Ser.L/V/II.110 Doc.52 (9 March 2001)

<sup>132</sup> The *Ache Case* is discussed in S. Davis, *Land Rights and Indigenous Peoples. The Role of the Inter-American Commission on Human Rights*. Cultural Survival: Cambridge, MA (1988), pps. 27-40.

<sup>133</sup> *Resolution of the Inter-American Commission on Human Rights on Case 1802 (Paraguay)*, adopted at the 539th meeting, May 27, 1977 (41st Session). This resolution can be found at:

<http://www.wcl.american.edu/pub/humright/digest/interamerican/english/annual/77sec2part3/case1802.html>

<sup>134</sup> *Third Report on the Human Rights Situation in Paraguay*, Ch. IX, at para. 1.

<sup>135</sup> *Id.*, at para. 14.

<sup>136</sup> *Id.*, at para. 28.

The section on domestic law notes that while there is no discrimination against Indigenous peoples in Paraguayan law, discrimination clearly exists in practice. Health and education are discussed as examples of discriminatory practices. With regard to education, lack of adequate formal education services for Indigenous peoples, lack of bicultural education and inadequate bi-lingual education are highlighted. The IACHR accordingly recommended that Paraguay “Improve educational services, respecting cultural diversity and effectively realizing the right to free primary education, including the educational measures needed to diminish the drop-out rate and illiteracy.”<sup>137</sup> Indigenous peoples lack adequate health care facilities and suffer much higher rates of disease and negative health indicators than other sectors of Paraguayan society. The Report also finds that “there is a need for approaches to health that respect the traditional medicine of the indigenous peoples.”<sup>138</sup>

Discussing environmental degradation, the Report observes that “The environment is being destroyed by ranching, farming, and logging concerns, who reduce [Indigenous peoples’] traditional capacities and strategies for food and economic activity.”<sup>139</sup> It then recommends that Paraguay “Adopt the necessary measures to protect the habitat of the indigenous communities from environmental degradation, with special emphasis on protecting the forests and waters, which are fundamental for their health and survival as communities.”<sup>140</sup> This is an important statement that, consistent with other reports and statements issued by the IACHR, ties environmental integrity and degradation to respect for Indigenous peoples’ rights.

Chapter IX includes a lengthy examination of the land rights situation of Indigenous peoples in Paraguay stating that of 47 land claims more than half have yet to be adequately resolved. In this respect, the IACHR stated that

The process of sorting out territorial claims, to which the Paraguayan State committed itself more than 20 years ago, to benefit the indigenous communities, is still pending. This obligation is not met only by distributing lands. While the territory is fundamental for development of the indigenous populations in community, it must be accompanied by health, education, and sanitary services, and the protection of their labor and social security rights, and, especially, the protection of their habitat.<sup>141</sup>

This is another very important statement that illustrates how the IACHR views state obligations in connection with Indigenous territorial rights. Not only must sufficient lands be transferred to Indigenous peoples, a step fundamental to Indigenous development, the environmental integrity of those lands must be guaranteed and the state must ensure that Indigenous peoples enjoy adequate health, education and sanitary services, presumably of at least the same quality as those enjoyed by non-Indigenous persons.

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<sup>137</sup> Id., at 50(7).

<sup>138</sup> Id., at para. 34.

<sup>139</sup> Id., at para. 38.

<sup>140</sup> Id., at para. 50(8).

<sup>141</sup> Id., at para. 47.

To remedy the problems associated with land rights, the IACHR recommended that Paraguay:<sup>142</sup>

Enforce and implement, without further delay, the provisions of the Paraguayan Constitution concerning respect for and restoration of the community property rights of the indigenous peoples, and regarding the granting of lands, at no cost, of sufficient extent and quality to conserve and develop their ways of life.

Ensure the funds are allocated for carrying out the preceding recommendation.

Favorably resolve the applications claiming lands put forth by the indigenous communities and pending before Paraguay's administrative and legislative authorities, to this end annulling the regressive provisions adopted in late 2000. With respect to the claims already resolved, the Inter-American Commission recommends that they be given title in the name of the respective communities.

English: <http://www.cidh.org/countryrep/Paraguay01eng/chap9.htm>

In Spanish: <http://www.cidh.org/countryrep/Paraguay01sp/cap.9.htm>

#### **D. Cases Decided by the Inter-American Court on Human Rights**

To date, the Court has only decided one case dealing directly with Indigenous peoples' rights, the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. A case brought on behalf of Saramaka Maroons, an Afro-American Tribal people living in Suriname, has also been decided.<sup>143</sup> Both of these cases are discussed here, the latter mainly because the conclusions of the Court are very relevant to the situation of Indigenous peoples in the Americas as well as to understanding the issue of reparations in the Court.

##### **1. The Mayagna (Sumo) Awas Tingni Community v. Nicaragua<sup>144</sup>**

The *Awas Tingni Case* is one of the most important developments in Indigenous rights in the Inter-American system because of its affirmation of Indigenous peoples' own forms of communal property and other rights in a binding decision. It is the first time that an international judicial body has supported Indigenous territorial rights by confirming that those rights arise from traditional occupation and use and Indigenous forms of tenure, not from grants, recognition or registration by the state. This and the other principles set forth by the Court are applicable to all similar cases throughout the Americas. In effect, the Court has held that aboriginal title – rights to lands and resources based upon traditional or immemorial occupation and use – is part of binding inter-American human rights law calling into question, if not invalidating, centuries of American legal tradition that held that

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<sup>142</sup> Id., at paras. 50 (1)(2) and (4).

<sup>143</sup> The Saramaka Maroon people have also filed a complaint with the IACHR seeking its assistance to protect their land, treaty and other rights in light of the failure of Suriname to recognize and respect these rights, both by failing to enact legal guarantees protecting their land rights and by granting logging concessions within their territory without their participation and consent. This case, filed in October 2000, is presently pending a decision on admissibility.

<sup>144</sup> *The Mayagna (Sumo) Awas Tingni Community Case, Judgment on the Preliminary Objections of February 1, 2000*, Series C No. 66. A more complete summary of this case can be found at: [http://www.indianlaw.org/awas\\_tingni\\_summary.htm](http://www.indianlaw.org/awas_tingni_summary.htm)

Indigenous land rights were dependent upon a grant from and recognition by colonial authorities and the states that came after them. The IACHR justly described the Court's decision as "a historic step in the recognition of the right of indigenous peoples to their land."<sup>145</sup>

The case originated in a petition submitted to the IACHR by the Indian Law Resource Center and the Awas Tingni Indigenous community in October 1995.<sup>146</sup> It complained that Nicaragua had violated the rights of the Awas Tingni community by failing to effectively guarantee and protect their property rights based upon their traditional occupation and use, by actively violating those rights by granting a logging concession to a Korean company, by discriminating against the community and failing to provide it equal protection of the law, and by failing to provide adequate and effective judicial remedies to permit the community to assert and protect its rights before Nicaraguan courts. Specifically, the petitioners alleged that Nicaragua had violated Article 1, 2, 21, 24 and 25 of the American Convention as well as provisions of other international human rights instruments binding on Nicaragua. After a number of attempts to resolve the case through friendly settlements, in June 1998, the IACHR submitted the case to the Court for a decision.

**Facts:** The Awas Tingni community is situated on the northern subdivision of Nicaragua's Atlantic coast and consists of around 630 persons. Its economy is primarily subsistence based with agriculture, fishing, hunting and gathering satisfying most basic needs. These activities are conducted throughout Awas Tingni traditional territory, which is defined according to Indigenous custom and law.

In June 1995, the community was informed that the Regional Council of the Northern Atlantic Coast Autonomous Region (RAAN) had signed an agreement that would allow a Korean company, SOLARCSA, to commence operations within their territory.<sup>147</sup> They immediately protested that this decision had been taken without their participation and asked a local court to issue an injunction suspending issuance of a concession to the company. This application was rejected by the court on procedural grounds in September 1995 and the community submitted a petition to the IACHR in October 1995. The appeal against the September decision was rejected by the Nicaraguan Supreme Court over a year later in February 1997. In that same month the community appealed to the RAAN to support their efforts to demarcate their lands and to halt the concession.

Members of the RAAN filed a case with the Nicaraguan Supreme Court challenging the concession on Constitutional grounds as it had not been approved by the full plenary of the RAAN. Almost a year prior to the decision of the Supreme Court, in March 1996, SOLARCSA was granted a 30 year concession to exploit timber on Awas Tingni land and permission to build a road to access its concession. On 27 February 1997, the Supreme Court ruled on the case filed by RAAN and held that the concession was unconstitutional. Nicaragua did not withdraw the concession and SOLARCSA continued its activities. The

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<sup>145</sup> Inter-American Commission on Human Rights, *Press Release No. 23/01, Mayagna Awas Tingni Indigenous Community*, Washington D.C., 28 September 2001.

<sup>146</sup> *Mayagna (Sumo) Awas Tingni* (Case 11.577 (Nicaragua)).

<sup>147</sup> RAAN is part of the administrative structure for the Atlantic Coast established under the 1987 Autonomy Statute. See, the discussion of the *Miskito Report* above.



only action taken by state authorities was to resubmit the concession application to RAAN for another decision. The concession was approved by a majority vote of RAAN in October 1997 forcing the community to file a case in the courts against RAAN in the following month. In February 1998, the Supreme Court ordered that its 27 February judgment declaring the concession unconstitutional be executed. Three months later, in May 1998, the government finally notified SOLARCSA that its concession was invalid and that it must terminate its activities.

As noted above, the Awas Tingni had filed a petition with the IACHR in October 1995 complaining that Nicaragua had violated the American Convention and various other provisions of international law. This was followed in December 1995 by an additional request for precautionary measures aimed at seeking the IACHR's assistance to stop Nicaragua granting the logging concession to SOLARCSA. In May 1996, the parties agreed to pursue a friendly settlement of the case. After Nicaragua had rejected their original proposal for settling the case, the Awas Tingni proposed that Nicaragua agree to demarcate their territory and to suspend the concession until the demarcation had been completed.

At a third meeting on the friendly settlement held in October 1996, Nicaragua informed the IACHR that it had established a National Demarcation Commission to address the issue of titling and demarcation of Indigenous lands throughout Nicaragua. In April 1997, the Awas Tingni informed the IACHR that the Nicaraguan Supreme Court had declared the SOLARCSA concession invalid on Constitutional grounds, but that logging operations were still continuing. They repeated this point again in October 1997 and, on 31 October, the IACHR granted precautionary measures requesting that Nicaragua suspend the concession (see, page 21 above). Nicaragua replied stating that the RAAN had approved the concession and therefore it was now valid. The Awas Tingni responded by stating that the main issue raised in their petition to the IACHR – the failure of Nicaragua to guarantee and protect their territorial rights – still had not been addressed and asked that the IACHR proceed to issue a report on the merits of the case. In December 1997, due to the case filed by members of the RAAN challenging the concession, Nicaragua contented that domestic remedies had not been exhausted. It repeated this again in March 1998 and asked that the IACHR not process the case further.

On 3 March 1998, in accordance with Article 50 of the Convention, the IACHR approved Report No. 27/98 which concluded that

141. Based on the acts and omissions examined, (...) that the State of Nicaragua has not complied with its obligations under the American Convention on Human Rights. The State of Nicaragua has not demarcated the communal lands of the Awas Tingni Community or other indigenous communities, nor has it taken effective measures to ensure the property rights of the Community on its lands. This omission by the State constitutes a violation of Articles 1, 2 and 21 of the Convention, which together establish the right to the said effective measures. Articles 1 and 2 oblige States to take the necessary measures to give effect to the rights contained in the Convention.
142. The State of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the Convention, by granting a concession to the company

SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community.

143. [...] the State of Nicaragua did not guarantee an effective remedy to respond to the claims of the Awas Tingni Community regarding their rights to lands and natural resources, pursuant to Article 25 of the Convention.<sup>148</sup>

The Report then recommended that Nicaragua

- a. establish a procedure in its legal system, acceptable to the indigenous communities involved, that [would] result in the rapid official recognition and demarcation of the Awas Tingni territory and the territories of other communities of the Atlantic coast;
- b. suspend as soon as possible, all activity related to the logging concession within the Awas Tingni communal lands granted to SOLCARSA by the State, until the matter of the ownership of the land, which affects the indigenous communities, [has been] resolved, or a specific agreement [has been] reached between the State and the Awas Tingni Community; and
- c. initiate discussions with the Awas Tingni Community within one month in order to determine the circumstances under which an agreement [could] be reached between the State and the Awas Tingni Community.<sup>149</sup>

Nicaragua responded in May 1998, beyond the 60 day limit set by the IACHR, stating what it had done to comply with the IACHR's recommendations. The IACHR deemed these measures inadequate and submitted the case to Court on 28 May 1998. The proceedings before the Court were divided into two phases, preliminary objections and merits. The IACHR asked the Court to rule on whether the following articles of the Convention had been violated: 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 21 (Right to Property) and 25 (Right to Judicial Protection). It requested that the Court order that Nicaragua is obligated: 1) to establish a procedure to recognize and demarcate Awas Tingni lands; 2) to refrain from granting any concessions in the area until Awas Tingni ownership rights had been clarified and guaranteed and; 3) to award compensation to the community for violation of its rights. The IACHR also requested that the Court order that Nicaragua pay the petitioners costs incurred in prosecuting the case.

**Preliminary Objections:** The preliminary objections phase of the case dealt with Nicaragua's assertion that domestic remedies had not been exhausted and that, therefore, the case was inadmissible. Nicaragua has raised this issue in December 1997, over two years after the petition had been submitted to the IACHR, as well as in August 1998 after the case had been transmitted to the Court. The IACHR responded by asking that the Court dismiss the preliminary objections because Nicaragua had accepted its responsibility in the case when it indicated how it was complying with the IACHR's recommendations, because it had waived its right to raise domestic remedies issues due to its failure to invoke the rule early enough in the proceedings before the IACHR and because the arguments made by

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<sup>148</sup> Inter-American Commission of Human Rights, Report No. 27/98 (Nicaragua), *quoted in, The Mayagna (Sumo) Awas Tingni Community Case, Judgment on the Preliminary Objections of February 1, 2000*, Series C No. 66, para. 22.

<sup>149</sup> *Id.*

Nicaragua in support of the preliminary objections addressed the merits of the case rather than the preliminary objections.

In analyzing the arguments of Nicaragua and the IACHR, the Court repeated its previous jurisprudence on exhaustion of domestic remedies as follows:

Indeed, of the generally recognized principles of international law referred to in the rule on exhaustion of domestic remedies, the foremost is that the State defendant may expressly or tacitly waive invocation of this rule (*Castillo Páez case, Preliminary Objections*. Judgment of January 30, 1996. Series C No. 24, para. 40; *Loayza Tamayo case, Preliminary Objections*. Judgment of January 31, 1996. Series C No. 25, para. 40). Secondly, in order to be timely, the objection that domestic remedies have not been exhausted should be raised during the first stages of the proceeding or, to the contrary, it will be presumed that the interested State has waived its use tacitly (*Castillo Páez case, Preliminary Objections. Ibid*, para. 40; *Loayza Tamayo case, Preliminary Objections. Ibid*, para. 40; *Castillo Petruzzi case, Preliminary Objections* Judgment of September 4, 1998. Series C No. 41, para. 56). Thirdly, the State that alleges non-exhaustion must indicate which domestic remedies should be exhausted and provide evidence of their effectiveness (*Castillo Páez case, Preliminary Objections. Ibid*, para. 40; *Loayza Tamayo case, Preliminary Objections. Ibid*, para. 40; *Cantoral Benavides case, Preliminary Objections*. Judgment of September 3, 1998. Series C No. 40, para. 31; *Durand and Ugarte case, Preliminary Objections*. Judgment of May 28, 1999. Series C No. 50, para. 33).<sup>150</sup>

In accordance with the preceding, the Court held that Nicaragua has waived its right to object to non-exhaustion of domestic remedies due to its failure to invoke the rule in a timely manner during the proceedings before the IACHR. In other words, Nicaragua was barred from objecting to the case on domestic remedies grounds because it had failed to do so during the first stages of the proceedings before the IACHR.<sup>151</sup> The Court consequently decided to dismiss Nicaragua's preliminary objections and to continue with its consideration of the case.

**The Merits:** The hearing of the Court on the merits of the case took place 16-18 November 2000 in San José, Costa Rica. To substantiate their case, the Awas Tingni's lawyers presented a range of witnesses, including expert anthropologists, international development workers, national indigenous leaders, local lawyers, and Awas Tingni leaders. Nicaragua presented only one witness, a political appointee from the agency in charge of distributing rural lands, who argued that the Awas Tingni were recent migrants to the area, were not really Indigenous and, therefore, had no claim to the land based upon ancestral occupation.

The decision of the Court, issued in August 2001, affirmed that the Awas Tingni had collective rights to their traditional lands, resources and environment and demonstrated that failure to adequately and effectively recognize, guarantee, respect and enforce those rights

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<sup>150</sup> *The Mayagna (Sumo) Awas Tingni Community Case, Judgment on the Preliminary Objections of February 1, 2000*, Inter-Am. Ct. H.R. Ser. C No. 66, at para. 53.

<sup>151</sup> *Id.* at para. 54.

conflicted with state obligations under the American Convention. The relevant parts of the Court's reasoning are restated here:<sup>152</sup>

142. Article 21 of the American Convention establishes that:
  1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
  2. No 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.
  3. Usury and any other form of exploitation of man by man shall be prohibited by law.
143. Article 21 of the American Convention recognizes the right to private property. In this respect it establishes: a) that "everyone has the right to the use and enjoyment of his property"; b) that such use and enjoyment may be subordinated, by decree of law, to the "interest of society"; c) that a person may be deprived of his property for reasons of "public utility or social interest, and in the cases and according to the forms established by law"; and, d) that such deprivation of property will be permitted only upon payment of just compensation.
144. "Property" can be defined as those material goods capable of being acquired, as well as all rights that can be deemed to make up the assets of a person; this concept encompasses all movable and immovable goods, tangible and intangible goods as well as any other intangible object to which a value can be assigned.
145. During the study and deliberation of the preparatory work for the American Convention on Human Rights, the phrase "everyone has the right to *private property*, but the law may subordinate such use and enjoyment to the interest of society" was replaced by that of "everyone has the right to the *use and enjoyment* of his property. The law may subordinate such use and enjoyment to the interest of society." That is, it was deemed more appropriate to make reference to the use and enjoyment of property in place of "private property."
146. The terms of an international human rights treaty have autonomous meaning, such that they may not be limited by the meaning attributed to them under domestic law. Also, international human rights treaties are living instruments, the interpretation of which should be adapted to changes over time, and, in particular, to present-day conditions.
147. To that end, article 29(b) of the Convention establishes that no provision can be interpreted by "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."
148. Through an evolutionary interpretation of the international instruments for the protection of human rights, taking into account the applicable norms of interpretation

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<sup>152</sup> Indian Law Resource Center, *Unofficial English Translation of Selected Paragraphs of the Judgment of the Inter-American Court of Human Rights In the case of The Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua Issued 31 August 2001* (footnotes omitted) (on file with author).

and, in conformity with article 29(b) of the Convention--which prohibits a restrictive interpretation of those rights--, this Court deems that article 21 of the Convention protects the right to property in the sense that it comprises, among other things, the rights of members of indigenous communities within the framework of communal possession, a form of property also recognized by Nicaragua's Political Constitution.

149. Given the characteristics of the instant case, it is necessary to understand the concept of property in indigenous communities. Among indigenous communities, there is a communal tradition as demonstrated by their communal form of collective ownership of their lands, in the sense that ownership is not centered in the individual but rather in the group and in the community. By virtue of the fact of their very existence, indigenous communities have the right to live freely on their own territories; the close relationship that the communities have with the land must be recognized and understood as a foundation for their cultures, spiritual life, cultural integrity and economic survival. For indigenous communities, the relationship with the land is not merely one of possession and production, but also a material and spiritual element that they should fully enjoy, as well as a means through which to preserve their cultural heritage and pass it on to future generations.

150. In respect of this, Law number 28, published October 30, 1987 in The Gazette No. 238, Official Daily of the Republic of Nicaragua, which incorporates the Statute of Autonomy of the Regions of the Nicaraguan Atlantic Coast, declares in article 36 that:

Communal property is comprised of the land, water, and forest which 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 gifted, sold, seized, or encumbered, and are imprescriptible.
2. The Communities' inhabitants have the right to work parcels on the communal property and to the usufructory rights of the resources generated by that work.

151. The customary law of indigenous peoples should especially be taken into account because of the effects that flow from it. As a product of custom, possession of land should suffice to entitle indigenous communities without title to their land to obtain official recognition and registration of their rights of ownership.

152. As already mentioned, Nicaragua recognizes communal property of indigenous peoples, but it has not established the specific procedure for putting into practice that recognition, and hence there has been no issuance of titles of this type since 1990. Additionally, in the instant case, the State has not opposed the Awas Tingni Community's proposition that it should be declared a proprietor, although there is dispute as to the size of area of that claim.

153. The Court deems that, consistent with the terms of article 5 of the Political Constitution of Nicaragua, the members of the Awas Tingni Community have a communal property right over the lands they currently inhabit, without prejudice to the rights of the neighboring indigenous communities. However, the Court emphasizes that the limits of the territory over which that property right exists have not been effectively delimited and demarcated by the State. This situation has created a climate of permanent uncertainty among the members of the Awas Tingni Community inasmuch as they do not know with certainty the geographic extension of their right of

communal property, and consequently they do not know up to what point they may freely use and enjoy the corresponding resources. In this context, the Court considers that the members of the Awas Tingni Community have the right that the State,

- a) delimit, demarcate, and title the territory of the Community's property; and
- b) cease, until this official delimitation, demarcation and titling is performed, acts which could cause agents of the State, or third parties acting with its acquiescence or tolerance, to affect the existence, value, use, or enjoyment of the resources located in the geographic area in which the Community members live and carry out their activities.

Because of the reasons stated, and keeping in mind the criterion adopted by the Court in its application of article 29(b) of the Convention (*supra*, para. 148), the Court finds that, in light of article 21 of the Convention, the State has violated the right of the members of the Awas Tingni Mayagna Community to the use and enjoyment of their property, by not delimiting and demarcating their communal property, and by authorizing concessions to third parties for the exploitation of the land and natural resources in an area that, wholly or partially, corresponds to the lands that should be delimited, demarcated, and titled in their favor.

154. In addition, it must be remembered that, as established by this Tribunal, and grounded in article 1(1) of the American Convention, the State is obligated to respect the rights and liberties recognized in the Convention and organize its public administrative bodies to guarantee the persons under its jurisdiction the free and full exercise of their human rights. According to the rules of international State responsibility as applicable to International Human Rights Law, the act or omission of any public authority, regardless of its ranking within the hierarchy of the domestic system, constitutes an act imputable to the State, compromising its responsibility in the terms envisioned by the American Convention.
155. For the above reasons, the Court concludes that the State violated article 21 of the American Convention, to the detriment of the members of the Mayagna (Sumo) Community of Awas Tingni, in connection with articles 1(1) and 2 of the Convention.
164. For the preceding reason, in conformity with article 2 of the American Convention on Human Rights, this Court holds that the State must adopt measures of a legislative, administrative, and whatever other character necessary to create an effective mechanism for official delimitation, demarcation, and titling of the indigenous communities' properties, in accordance with the customary law, values, usage, and customs of these communities. Additionally, as a consequence of the violation of the rights contained in the Convention shown in this case, the Court orders that the State proceed to officially delimit, demarcate, and title the lands belonging to the Awas Tingni Community within a maximum period of 15 months, with the full participation of, and considering the customary law, values, usage, and customs of, the Community. Until such official delimitation, demarcation, and titling has been performed on the lands of the Community members, Nicaragua must cease acts which could cause agents of the State, or third parties acting with its acquiescence or tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area the Community of Awas Tingni inhabits and in which it carries out its activities.

As can be seen from the preceding, the judgment of the Court is far reaching and highly significant. In para. 46, the Court states that the right to property in the American Convention has a meaning separate from, and not limited by, definitions of property under domestic law. Therefore, Indigenous property rights, as protected under international law, may be defined differently from prevailing domestic legal understandings of those rights. The Court specifically stated that Indigenous property rights arise and are enforceable by virtue of traditional occupation and use and by virtue of Indigenous law: “The customary law of indigenous peoples should especially be taken into account because of the effects that flow from it. As a product of custom, possession of land should suffice to entitle indigenous communities without title to their land to obtain official recognition and registration of their rights of ownership” (para. 151).

Following this, Indigenous property rights are not dependent upon an act of or grant by the state, but exist by virtue of traditional occupation and use and the operation of Indigenous law. States are required to recognize and guarantee those rights through delimitation, demarcation and titling (para. 153). These measures must be undertaken with “the full participation of, and considering the customary law, values, usage, and customs of,” Indigenous peoples (para. 164). In addition to recognizing the independent and collective nature of Indigenous property rights, the Court also related them to cultural, spiritual, economic and religious rights (para. 149):

the close relationship that the communities have with the land must be recognized and understood as a foundation for their cultures, spiritual life, cultural integrity and economic survival. For indigenous communities, the relationship with the land is not merely one of possession and production, but also a material and spiritual element that they should fully enjoy, as well as a means through which to preserve their cultural heritage and pass it on to future generations.

The order of the Court in the case was as follows:<sup>153</sup>

By seven votes to one,

1. Declares that the State violated the right to judicial protection as contained in article 25 of the American Convention on Human Rights, to the detriment of the members of the Mayagna (Sumo) Community of Awás Tingni, in conjunction with articles 1(1) and 2 of the Convention, as set forth in paragraph 139 of this Judgment.

Judge *ad hoc* Montiel Argüello dissenting.

By seven votes to one,

2. Declares that the State violated the right to property as contained in article 21 of the American Convention on Human Rights to the detriment of the members of the Mayagna (Sumo) Community of Awás Tingni, in connection with articles 1(1) and 2 of the Convention, as set forth in paragraph 155 of this Judgment.

Judge *ad hoc* Montiel Argüello dissenting.

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<sup>153</sup> *Id.*, at para. 173.

Unanimously,

3. Decides that the State must adopt within its domestic legal system, in conformity with article 2 of the American Human Rights Convention, measures of a legislative, administrative, and whatever other character necessary to create an effective mechanism for official delimitation, demarcation, and titling of the indigenous communities' properties, in accordance with the customary law, values, usage and customs of these communities, as set forth in paragraph 138 and 164 of this Judgment.

Unanimously,

4. Decides that the State shall officially recognize, demarcate, and issue title for those lands belonging to the members of the Mayagna (Sumo) Community of Awas Tingni and, until this official delimitation, demarcation, and titling is performed, abstain from acts which could cause agents of the State, or third parties acting with its acquiescence or tolerance, to affect the existence value, use or enjoyment of that property located in the geographic area in which members of the Mayagna (Sumo) Community of Awas Tingni live and carry out their activities, as set forth in paragraphs 153 and 164 of this Judgment.

Unanimously,

5. Declares that this Judgment represents, in and of itself, a form of reparation for the members of the Mayagna (Sumo) Community of Awas Tingni.

By seven votes to one,

6. Decides, in equity, that the State should invest, as reparation for moral damages, within a period of 12 months, the sum total of US\$ 50,000 (fifty thousand dollars of the United States of America) in public works and services in the collective interest and for the benefit of the Mayagna (Sumo) Community of Awas Tingni, in accord with and under the supervision of the Inter-American Commission of Human Rights, as set forth in paragraph 167 of this Judgment.  
Judge *ad hoc* Montiel Argüello dissenting.

By seven votes to one,

7. Decides, in equity, that the State should pay the members of the Mayagna (Sumo) Community of Awas Tingni, through the Inter-American Commission on Human Rights, the sum total of US\$ 30,000 (thirty million dollars of the United States of América) for expenses and costs incurred by Community members and their representatives, both in domestic proceedings as well as international proceedings before the Inter-American system for the protection of human rights, as set forth in paragraph 169 of this Judgment.  
Judge *ad hoc* Montiel Argüello dissenting.

Unanimously,

8. Decides that the State should submit, every six months from the date of the notification of this Judgment, a report to the Inter-American Court of Human Rights on measures taken in compliance herewith.



Unanimously,

9. Decides that it shall supervise compliance with this Judgment and that this case shall be deemed to be closed once the State has given full implementation to the measures set forth in this Judgment.

Web link: Preliminary Objections:

Spanish: [http://www.corteidh.or.cr/serie\\_c/c\\_67\\_esp.html](http://www.corteidh.or.cr/serie_c/c_67_esp.html)

English: [http://www.corteidh.or.cr/seriecing/c\\_66\\_eng.html](http://www.corteidh.or.cr/seriecing/c_66_eng.html)

Judgment: Spanish: [http://www.indianlaw.org/Sentencia\\_de\\_la\\_Corte.pdf](http://www.indianlaw.org/Sentencia_de_la_Corte.pdf)

English: Not Yet Available

## **2. Aloeboetoe et al v. Suriname<sup>154</sup>**

The petition that initiated the *Aloeboetoe et al Case* was filed with the IACHR in January 1998 and subsequently transmitted to the Court in August 1990. The case involved the extra-judicial killing of 7 Saramaka Maroons by the National Army of Suriname in December 1987. Maroons are the descendants of escaped African slaves that fought themselves free from slavery and establish autonomous communities in Suriname's rainforest interior in the 18<sup>th</sup> century. Their freedom from slavery and rights to territorial and political autonomy were guaranteed in treaties concluded with Dutch colonial authorities in the 1760s.

The IACHR concluded its examination of the case in May 1990 when it drew up an Article 50 report finding that Suriname had violated Articles 1, 2, 4(1), 5(1), 5(2), 7(1), 7(2), 7(3), 25(1), and 25(2) of the American Convention. The report gave Suriname 90 days to implement the IACHR's recommendations, which included investigation of the incident, punishment of the perpetrators and payment of compensation to the victims' next of kin. Suriname failed to take action and the IACHR submitted the case to the Court for a decision.

The arguments of the IACHR were submitted in a memorial dated April 1, 1991. Suriname responded on 28 June 1991 and raised a number of preliminary objections such as failure to exhaust domestic remedies. On 3 August 1991, the Court ordered that a hearing be held during which arguments on the preliminary objections could be heard. This hearing took place on 2 December 1991. However, rather than present arguments supporting its preliminary objections, Suriname decided to accept responsibility for the killings and informed the Court of this decision. The Court noted Suriname's admission of responsibility and ordered that the case be retained in order to set reparations.<sup>155</sup> The reparations phase of the case deals only with compensation and other appropriate remedies

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<sup>154</sup> *Aloeboetoe et al. Case. Reparations (Art. 63(1) of the American Convention on Human Rights)*, Judgment of September 10, 1993. Inter-American Court on Human Rights, Series C No. 15. For detailed discussion of the *Aloeboetoe Case*, see, among others, R. Price, Executing Ethnicity: The Killings in Suriname, 10 *Cultural Anthropology* 437 (1995) and, D. Padilla, Reparations in *Aloeboetoe v. Suriname*, 17 *Human Rights Q* (1995).

<sup>155</sup> *Aloeboetoe et al. Case*, Judgment of 4 December 1991, Inter-American Court on Human Rights, Series C No. 11.

that the Court may order. A hearing on the reparations issues was set for 23 June 1992 and subsequently postponed until 7 July 1992.

Article 63(1) of the American Convention authorizes the Court to order reparations in cases in which a violation or violations have been established. It states that “If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.” According to the Court, Article 63 “codifies a rule of customary law which, moreover, is one of the fundamental principles of current international law....”<sup>156</sup> Additionally,

The obligation contained in Article 63(1) of the Convention is governed by international law in all of its aspects, such as, for example, its scope, characteristics, beneficiaries, etc. Consequently, this judgment must be understood to impose international legal obligations, compliance with which shall not be subject to modification or suspension by the respondent State through invocation of provisions of its own domestic law.<sup>157</sup>

In other words, states are bound to comply with judgments of the Court, including decisions on reparations, and they may not seek to avoid compliance by reference to national law.

The Court then stated that Article 63(1) has two components:

Article 63(1) of the Convention makes a distinction between the behavior that must be followed by the State responsible for the violation from the moment that the Court passes judgment and the consequences of that same State’s attitude in the past, that is, while the violation was in process. As regards the future, Article 63(1) provides that the injured party shall be ensured the enjoyment of the right or freedom that was violated. As for the past, the provision in question empowers the Court to impose reparations for the consequences of the violation and a fair compensation.<sup>158</sup>

The two components here are 1) ensuring the enjoyment of the right violated in the future and 2) reparations and compensation to remedy the consequences of the violation. Compensation is to cover actual damages, including indirect damages and loss of earnings, as well as moral damages.<sup>159</sup> Moral damages refer to intangible damages experienced by the victims normally related to mental or emotional anguish, suffering and pain. The right to compensation passes to any survivors of the victim in the case of the death of victim.

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<sup>156</sup> *Aloeboetoe et al. Case. Reparations (Art. 63(1) of the American Convention on Human Rights)*, Judgment of September 10, 1993. Inter-American Court on Human Rights, Series C No. 15, at para. 43.

<sup>157</sup> *Id.*, at para. 44.

<sup>158</sup> *Id.*, at para. 46.

<sup>159</sup> *Id.*, at para. 50.

Apart from being a landmark case on reparations in the Inter-American system, *Aloeboetoe* is very relevant to Indigenous peoples' rights because of the manner in which the Court decided reparations should be made. Most importantly, the Court determined that Saramaka law, rather than Surinamese law, must be considered when determining which persons were entitled to compensation for the killing of the seven men.<sup>160</sup> In reaching this conclusion, the Court placed a lot of emphasis on the fact that Surinamese family law was not effective and applied within Saramaka territory:

The only question of importance here is whether the laws of Suriname in the area of family law apply to the Saramaka tribe. On this issue, the evidence offered leads to the conclusion that Surinamese family law is not effective insofar as the Saramakas are concerned. The members of the tribe are unaware of it and adhere to their own rules. The State for its part does not provide the facilities necessary for the registration of births, marriages, and deaths, an essential requirement for the enforcement of Surinamese law. Furthermore, the Saramakas do not bring the conflicts that arise over such matters before the State's tribunals, whose role in these areas is practically non-existent with respect to the Saramakas. It should be pointed out that, in the instant case, Suriname recognized the existence of a Saramaka customary law.<sup>161</sup>

As Surinamese family law was not effective in Saramaka territory, the Court looked to Saramaka law to decide who were children, spouses and parents of the victims. However, the Court would refer to Saramaka law only to the extent that it was judged not to contravene Inter-American human rights law:

As already stated, here local law is not Surinamese law, for the latter is not effective in the region insofar as family law is concerned. It is necessary, then, to take Saramaka custom into account. That custom will be the basis for the interpretation of those terms [children, spouse, parent], to the degree that it does not contradict the American Convention. Hence, in referring to "ascendants," the Court shall make no distinction as to sex, even if that might be contrary to Saramaka custom.<sup>162</sup>

Importantly, the Court also noted that Suriname had not ratified ILO 169, implying that the provisions of that convention, particularly those applying to respect for Indigenous legal systems, institutions, customs and traditions, would be very relevant to resolution of the issues presented in *Aloeboetoe*.<sup>163</sup> Ten states in the Americas have ratified ILO 169. Its relevance to all aspects of cases in the Inter-American system must be continuously evaluated as the case progresses through the system.

Web link: In English: [http://www1.umn.edu/humanrts/iachr/b\\_11\\_15b.htm](http://www1.umn.edu/humanrts/iachr/b_11_15b.htm)  
In Spanish (PDF format): <http://www1.umn.edu/humanrts/iachr/111fndo.pdf>

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<sup>160</sup> Id., at para. 62.

<sup>161</sup> Id., at para. 58.

<sup>162</sup> Id., at para. 62.

<sup>163</sup> Id., at 61.

## Annex - Ratification of the American Convention on Human Rights<sup>164</sup>

<b>SIGNATORY COUNTRIES</b>	<b>DATE DEPOSIT RATIFICATION OR ACCESSION</b>	<b>DATE OF ACCEPTANCE OF THE JURISDICTION OF THE COURT</b>
Argentina	5 September 1984	5 September 1984
Barbados	27 November 1982	4 June 2000
Bolivia	19 July 1979	27 July 1993
Brazil	25 September 1992	10 December 1998
Chile	21 August 1990	21 August 1990
Colombia	31 July 1973	21 June 1985
Costa Rica	8 April 1970	2 July 1980
Dominica	3 June 1993	
Dominican Republic	19 April 1978	25 March 1999
Ecuador	28 December 1977	24 July 1984
El Salvador	23 June 1978	6 June 1995
Grenada	18 July 1978	
Guatemala	25 May 1978	9 March 1987
Haiti	27 September 1977	3 March 1998
Honduras	8 September 1977	9 September 1981
Jamaica	7 August 1978	
Mexico	2 March 1981	16 December 1998
Nicaragua	25 September 1979	12 February 1991
Panama	22 June 1978	3 May 1990
Paraguay	24 August 1989	11 March 1993
Peru	28 July 1978	21 January 1981
Suriname	12 November 1987	12 November 1987
Trinidad y Tobago	28 May 1991	28 May 1991
Uruguay	19 April 1985	19 April 1985
Venezuela	9 August 1977	24 June 1981

<sup>164</sup> Source: *Basic Documents Pertaining to Human Rights in the Inter-American System*. OAS/Ser.L/V/I.4 rev. 8, 22 May 2001