

**GUIDE TO
INDIGENOUS PEOPLES' RIGHTS
IN THE INTER-AMERICAN
HUMAN RIGHTS SYSTEM**

Fergus MacKay

IWGIA
Copenhagen 2002

GUIDE TO INDIGENOUS PEOPLES' RIGHTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

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SUMMARY

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.

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INTRODUCTION

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 the 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.¹

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.² 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.³

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.⁴ 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 that 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 infrastructure 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 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.⁵ 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. Parts 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, and 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. Finally, Part VIII deals with the Proposed American Declaration on the Rights of Indigenous Peoples. Throughout the text, links are made to web sites containing relevant documents and the full text of cases or reports discussed.

**THE ORGANIZATION
OF AMERICAN STATES
AND HUMAN RIGHTS**

CHAPTER I

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 D.C. 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.⁶

**RIGHTS PROTECTED
BY INTER-AMERICAN
HUMAN RIGHTS INSTRUMENTS**

CHAPTER II

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 contained therein.⁷ 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”.⁸ The Proposed Declaration is presently under consideration by a Working Group of the OAS Permanent Council’s Committee on Juridical and Political Affairs.⁹ 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. See Chapter VIII, below, for

more extensive discussion of the Declaration.

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.¹⁰ 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>

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.*¹¹ (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".¹² 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".¹³

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.¹⁴ 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 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".¹⁵ 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.¹⁶ 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.¹⁷ (emphases 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.”¹⁸ For the Declaration, the IACHR has stated that the provisions of the Declaration must be interpreted with regard to “other 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”.¹⁹

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.

THE INTER-AMERICAN
COMMISSION AND COURT
ON HUMAN RIGHTS

CHAPTER III

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 1960.²⁰ The IACHR was made a principal organ of the OAS with the amendment of Article 51 of the OAS Charter in 1967.²¹ The IACHR, headquartered in Washington D.C., 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 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 ju-

isdiction); and 2) to resolve cases and disputes submitted by IACHR or OAS member-states (its contentious jurisdiction).²² 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; and 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 Tingni and active violation of those rights caused by government grants of logging concessions on Indigenous lands.²³

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 D.C. 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

For information and documentation concerning the Court only:

Inter-American Court of Human Rights

Secretary

PO Box 6906-1000

San José, Costa Rica

Tel. (34) 0581, Fax. (34) 0584

Web Site: <http://www.corteidh.or.cr>

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.

**SUBMITTING A PETITION TO
THE INTER-AMERICAN HUMAN
RIGHTS SYSTEM**

CHAPTER IV

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.²⁴ 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 solely the American Declaration.²⁵ 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).²⁶

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 D.C. 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,²⁷ 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).
- 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)

6. 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 interna-

tional 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;²⁸ 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 any way 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".²⁹

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."³⁰ 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."³¹

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.³²

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."³³

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.³⁴

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 free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdictions (Art. 1).”³⁵ 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 remedy³⁶

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 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).³⁷ 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)).³⁸ 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 conclusions and recommendations (Article 45(1), IACHR Rules of Procedure).³⁹ 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.

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).⁴⁰

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 and enforce their decisions. Indigenous peoples and NGOs have a fundamental role to play in persuading and, if nec-

essary, 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.⁴¹

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 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.⁴²

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.⁴³

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.⁴⁴ 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, 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.

**JURISPRUDENCE OF
THE COMMISSION AND COURT**

CHAPTER V

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".⁴⁵ 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 connec-

tion 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 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 workload 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 Communities⁴⁶

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 signed a friendly settlement agreement, which “recognized the existence of the indigenous communities’ right to the land, at both the domestic and international levels...”⁴⁷ 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.⁴⁸

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/Solucion%20Amistosa/Paraguay11713.htm>

B. Decisions on Cases and Reports Issued by IACHR

1. Yanomami Case⁴⁹

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 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 educa-

tion); 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 acted 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.⁵⁰ 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.⁵¹ It concluded, "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."⁵² 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.”⁵³

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 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

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

Portuguese: <http://www.cidh.org/countryrep/brazil-port/Cap%206.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 Origin⁵⁴

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 ethnocide, to self-determination and autonomy, to lands and territories and to cultural integrity.⁵⁵

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 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 centres, 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".⁵⁶ 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 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.⁵⁷ 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.⁵⁸

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".⁵⁹ 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-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.⁶⁰

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.⁶¹ 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 that 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.⁶²

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 conclu-

sions and recommendations.⁶³ 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 parameters of an autonomous, Atlantic region for the Miskito, Sumo and Rama peoples. The final result was the 1987 Autonomy Statute.⁶⁴

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.⁶⁵ 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/Indexe.htm>

3. Report on the Situation of Human Rights in Ecuador⁶⁶

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 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."⁶⁷ 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.”⁶⁸

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”.⁶⁹ 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.⁷⁰ 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 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."⁷¹ Based upon this, the IACHR's recommendations stress the need to:

- 1) 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";
- 4) take measures to ensure that affected persons have access to justice for environmental contamination and the attendant human rights violations, and;
- 5) 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.”⁷² 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”.⁷³

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.”⁷⁴

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”.⁷⁵ 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;⁷⁶ and, that ethnocide is a serious violation of international human rights law (see, also, Art. 7(b) UN Draft Declaration).⁷⁷

Respect for Indigenous forms of social, political and internal organization was also discussed in the context of cultural rights. Quoting Rodolfo 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 ... Non-recognition ... by the state legal system and public administration ... contributes to the weakening and eventual disappearance of indigenous cultures.”⁷⁸ 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 ...”⁷⁹

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.”⁸⁰ Following this it recommended:

- 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) remedying 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;
- 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) ensuring 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) taking 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)*⁸¹

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 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.⁸²

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.⁸³ 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 the 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.

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."⁸⁴ 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.”⁸⁵ 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.)⁸⁶

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.⁸⁷

Finally, the IACHR also found that Belize had failed meet 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 provide evidence of their effectiveness.”⁸⁸ 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)⁸⁹

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 Dannels' 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 Dannels 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 Dannels 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 Dannels in 1979. The award was deposited in a bank account but never paid to the Dannels. 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.

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 Danna, in particular a claim based upon individual aboriginal title. The IACHR determined that the Danna 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.⁹⁰ 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 D.C. 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 friendly settlement of the case is presently under discussion and the IACHR has yet to rule on the admissibility of the case.

C. Special Country Situation Reports of the IACHR

IACHR Special Country Situation Reports focus on the general human rights situation in a given country and often include at least one chapter dealing with Indigenous peoples' rights. These reports

are often very useful sources of information as well as providing guidance on how the IACHR understands state obligations and Indigenous rights in a particular domestic context. This section will very briefly summarize some of the main conclusions and recommendations made by the IACHR in recent special country situation reports.

1. Mexico (1998)⁹¹

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, particularly the situation in Chiapas following the 1994 Zapatista uprising and the peace negotiations aimed at resolving the situation there.

The Report's conclusions contain a number of interesting statements. For instance, 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."⁹² 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.

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)⁹³

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.⁹⁴ 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.'"⁹⁵

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.⁹⁶ 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.

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

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

3. Peru (2000)⁹⁷

Chapter X of the Second Report on the Human Rights Situation in Peru concerns Indigenous peoples' rights and begins with a review of domestic legislation, concluding with regard to territorial rights that, "the legal framework does not offer the native communities effective security and legal stability over their lands."⁹⁸ In connection with this the IACHR stated 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 represent essential rights for cultural survival and for maintaining the community's integrity."⁹⁹ It then 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".¹⁰⁰

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."¹⁰¹ 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."¹⁰² The language "with a view to obtaining their consent" is appears to be taken from Article 6 of ILO 169, ratified by Peru. 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 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".¹⁰³

Discrimination against Indigenous peoples is also discussed, both generally¹⁰⁴ and in connection with health and education.¹⁰⁵ 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”;¹⁰⁶ and, “that 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.”¹⁰⁷

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

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

4. Guatemala (2001)¹⁰⁸

As with the 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. Addressing 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 observed 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”.¹⁰⁹ 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.¹¹⁰

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 Report's recommendations, which state that 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".¹¹¹

In English: <http://www.cidh.org/countryrep/Guate01eng/chap.11.htm>
In Spanish: <http://www.cidh.org/countryrep/Guatemala01sp/cap.11.htm>

5. Paraguay (2001)¹¹²

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. Noting that the situation has improved in Paraguay in recent years, 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."¹¹³ The discussion on the domestic legal framework concludes 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."¹¹⁴ The latter refers to international human rights norms.

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."¹¹⁵ 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".¹¹⁶ 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.¹¹⁷

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.

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

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) Awás Tingni Community v. Nicaragua*. A case brought on behalf of Saramaka Maroons, an Afro-American Tribal people living in Suriname, has also been decided.¹¹⁸ 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. Nicaragua¹¹⁹

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 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".¹²⁰

The case originated in a petition submitted to the IACHR by the Indian Law Resource Center and representatives of the Awas Tingni Indigenous community in October 1995.¹²¹ 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.¹²² 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 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 interna-

tional 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.¹²³

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.¹²⁴

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 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. 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. Thirdly, the State that alleges non-exhaustion must indicate which domestic remedies should be exhausted and provide evidence of their effectiveness.¹²⁵

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.¹²⁶ 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 held that failure adequately and effectively to recognize, guarantee, respect and enforce those rights conflicted with state obligations under the American Convention. The Court reached this conclusion, in part, by looking to other international instruments, as permitted by Article 29(b) of the American Convention. By virtue of this, it found 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..."¹²⁷ It then elaborated upon its understanding on Indigenous property rights and the source of those rights:¹²⁸

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.

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.

These two paragraphs are highly important as they reaffirm the centrality of Indigenous territorial rights to cultural integrity and locate the source of Indigenous property rights in Indigenous peoples' customs and possession of territory irrespective of whether the state has issued title or otherwise recognized Indigenous rights over that territory. Accordingly, the Court found that "the members of the Awas Tingni Community have a communal property right over the lands they currently inhabit..."¹²⁹

The Court then discussed that recognition of territorial rights without steps to ensure respect for and guarantee those rights is inad-

equate. In particular, the Court stated that guaranteeing respect for territorial rights includes issuance and registration of formal title and demarcation to fix and make known the boundaries of the territory. Pursuant to this, the Court stated 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.”¹³⁰

Due to Nicaragua’s failure to observe these rights, the Court found 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.¹³¹

Finally, the Court held 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.¹³²

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. 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 stated that Nicaragua had violated Articles 1, 2, 21 and 25 of the American Convention and required that the state must adopt measures to identify, demarcate and title Awas Tingni lands “in accordance with the customary law, values, usage and customs of these communities...”.¹³³ It also required that Nicaragua recognize, demarcate and title Awas Tingni lands and until this was done to refrain from taking any action that would “affect the existence, value, use or enjoyment of that property...”.¹³⁴

Web link: Preliminary Objections:

Spanish: http://www.corteidh.or.cr/serie_c/c_67_esp.html

English: http://www.corteidh.or.cr/seriecing/c_66_eng.html

Judgment:

Spanish: http://www.indianlaw.org/Sentencia_de_la_Corte.pdf

English: Not Yet Available.

2. *Aloeboetoe et al v. Suriname*¹³⁵

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 established autonomous communities in Suriname's rainforest interior in the 18th 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. 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.¹³⁶ The reparations phase of the case deals only with compensation and other appropriate remedies that the Court may order. A hearing on the reparations issues under Article 63 of the American Convention 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..."¹³⁷

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.¹³⁸ 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.¹³⁹

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.¹⁴⁰

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*.¹⁴¹ 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

In Spanish (PDF format): <http://www1.umn.edu/humanrts/iachr/!11fndo.pdf>

**THE PROPOSED
OAS DECLARATION ON
THE RIGHTS OF
INDIGENOUS PEOPLES**

CHAPTER VI

THE PROPOSED OAS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

This section concerns the Proposed American Declaration on the Rights of Indigenous Peoples, adopted by the IACHR in 1997, and the consideration of that Declaration by a Working Group of the OAS Permanent Council's Committee on Juridical and Political Affairs, established in 1999. It begins with the drafting process of the Declaration and a summary of the first two sessions of the Working Group. This is followed by an overview of substance of the Declaration as approved by the IACHR.

A. The Working Group of the Committee on Juridical and Political Affairs

1. Background

In what was widely regarded as a reaction to the adoption of ILO 169, the OAS General Assembly passed a Resolution in 1989, directing that an Inter-American instrument on the rights of Indigenous peoples be drafted.¹⁴² In 1992, the IACHR sent a questionnaire to OAS member-states, Indigenous peoples' organizations and others to request comments about the contents of a future instrument.¹⁴³ The rights included for comment in the questionnaire were based upon the American Convention and other rights described as collective rights. A preliminary draft was based upon the responses received and on a number of subsequent consultations, including a meeting of governments and institutions that took place in October 1993.

In February 1995, the IACHR reviewed a working draft of an instrument on the rights of Indigenous peoples written by its technical staff. It was supposed to be made public shortly thereafter, but the IACHR decided to review the document again for unspecified reasons. An official draft of an OAS Declaration was approved and made public in September 1995.¹⁴⁴ Subsequent to the publication of the document, the IACHR held a number of regional consultations on the draft (Canada, Guatemala, Ecuador) – widely considered

inadequate by Indigenous peoples and others – where it sought comments. These consultations did not involve direct Indigenous input and participation with regard to the specific language and content of the draft.

After the consultations, the IACHR approved a revised version of the draft declaration in February 1997, and issued it to the public as the proposed Inter-American Declaration on the Rights of Indigenous Peoples.¹⁴⁵ Later that year, the General Assembly requested that states, the Inter-American Indian Institute and the Inter-American Juridical Committee present their comments. Comments were received from only six governments – Argentina, Brazil, Colombia, Guatemala, the United States and Mexico. The Inter-American Indian Institute and the Inter-American Juridical Committee both submitted detailed comments.¹⁴⁶

The comments of the Juridical Committee severely criticized the proposed Declaration and suggested changes in language that would substantially reduce the protections and guarantees found in the version approved by the IACHR. For instance, it recommended that “peoples” be omitted in favour of “populations” despite the fact that the first article of the proposed Declaration explicitly states that use of “peoples” has no implications concerning the right to self-determination; deletion of the word “territories” dealing with Maroon and other Afro-American Tribal peoples in a separate declaration; rejection of Indigenous ownership and control of archaeological heritage; rejection of the right to restitution of lands, resources and intellectual and cultural property; objections to the right to autonomy and self-government and to the maintenance and operation of Indigenous legal systems; and, objections to parts of the territorial rights provision.

The proposed Declaration and the various comments noted above were then considered by the Meeting of Governmental Experts to Analyze the Proposed American Declaration on the Rights of Indigenous Populations, held in Washington from 10-12 February 1999, under the auspices of the Permanent Council of the OAS and its Committee on Juridical and Political Affairs (CJPA). This Experts Meeting was authorized by General Assembly resolution 1549 (XXVIII-O/98) and was charged with forwarding the draft to the General Assembly for adoption at its 1999 session.

The governmental experts had full authority to modify and amend the OAS Declaration and did so by completing a first reading of the preambular paragraphs, changing the language of some and delet-

ing others entirely. Indigenous persons were included as part of two government delegations (Canada and Bolivia) attending this meeting, but Indigenous participation was otherwise not formally included in the meeting. Last minute efforts by Indigenous peoples ensured that they could attend the meeting as observers and the Government of Antigua and Barbuda allowed Indigenous persons to sit on its delegation and, thereby, make interventions. The Experts Meeting agreed that there should be further discussion on the proposed Declaration and that Indigenous peoples should participate fully in these discussions.¹⁴⁷

The report of the Experts Meeting was submitted to the OAS General Assembly at its 1999 session in Guatemala. The General Assembly noted that the Experts Meeting had made some progress and decided to establish a working group of the Permanent Council to continue consideration of the proposed Declaration. The working group, which was formally installed on 28 July 1999, was invited by the General Assembly to “provide for the appropriate participation in its efforts by representatives of indigenous communities, so that their observations and suggestions may be considered”, and was requested to present a progress report to the next session of the General Assembly to be held in Canada in the year 2000.

2. The First Session of the Working Group (November 1999)

The first session of the Working Group on the proposed Declaration was opened by its Chair, Ambassador Claude Heller of Mexico. Following the opening session, the Chair explained the working procedures for the meeting, which had been decided upon beforehand by the CJPA. This was divided into two parts: first, that the Working Group would commence with a first reading of the operative sections of the proposed Declaration, section by section, including a discussion of certain concepts that would shape the overall focus of the Declaration: specifically, the scope and meaning of the terms “peoples”, “populations”, “self-determination”, “autonomy”, “self-government” and “territory”. Second, the Chair explained the procedures by which Indigenous peoples would participate in the session, also as decided beforehand by the CJPA. These procedures provided that Indigenous peoples could make statements at the beginning of the discussion on each section and, if time allowed, also make concluding statements at the end of the discussion on each section. These statements would be noted in the final report. The Chair then asked if the Indigenous peoples had an opening statement.

The Indigenous delegations had met in a preparatory meeting the day before to discuss among others the participation issue. In fact the majority of this meeting was taken up with the participation question and it was decided that the measures decided upon for the Working Group were wholly inadequate and unacceptable. It was further decided to meet with the OAS Secretary General prior to the opening session of the Working Group to raise this issue and to present an alternative procedure.

The statement read to the Secretary General, in pertinent part, stated that the Indigenous delegations “consider that the form of participation that has been presented is incompatible with the principles found in the resolution adopted by the General Assembly of the OAS in Guatemala” (AG/RES. 1610), and that “the participation offered to us ... represents clear discrimination, excluding dialogue between governmental and Indigenous representatives and, as such, it is a form of participation that is inadequate for Indigenous peoples”. The statement concluded by saying that, “the Indigenous delegations do not accept the mechanism defined for our participation. We recommend that in your capacity as Secretary General of the OAS that you urge the Chair of the Working Group to adopt urgent measures to increase the level of participation. We will join the session when an adequate mechanism is in place to ensure our right to form part of the consensus in the adoption of the proposed Declaration.”

A similar statement was read to the Working Group when the Indigenous delegations were asked if they had an opening statement and the Chair was asked to respond. In a manner that was to typify the rest of the meeting, the Chair ignored the Indigenous statement and request for a response and asked for presentations on the first section of the Declaration. This prompted the Indigenous delegations to walk out of the meeting.¹⁴⁸ While a number of statements were made by governments in support of the Indigenous position, notably Colombia, Canada, Costa Rica, Guatemala, the United States and some of the Caribbean states, the Chair ignored these and moved on with the discussion on the first Section. The Indigenous delegations stayed out of the meeting for almost two days. During that time various government delegations shuttled back and forth between the Working Group and the room where the Indigenous delegations were meeting to try to break the impasse, while Indigenous delegates lobbied government representatives in the halls outside the Working Group.

With assurances from some governments that greater Indigenous participation would be incorporated into the Working Group, the Indigenous delegations decided to return to the meeting. A statement was read which expressed that they still considered the procedures for their participation to be inadequate and in conflict with the instructions of the General Assembly but would participate under protest with the following conditions:

1. That they have the right to speak at both the beginning and end of each section, including responding to statements made by governments;
2. That Indigenous proposals be clearly reflected in the record of each session as well as in the final report on an equal basis with the proposals of states;
3. That if at any time during the meeting they felt that these conditions were not met that they would exercise their right to walk out again.

The Chair, who had obviously been pressured by some of the government delegations, stated that he believed that this was consistent with the procedure proposed and accepted by the CIPA for the Working Group and indicated that this was only a first reading and that major decisions would only be taken at the next session.

As the Chair and government delegations had already completed the first reading of the first four sections while the Indigenous delegations were out of the meeting, it was decided that the Indigenous delegations should make their presentations on the first four sections and then the meeting would proceed with Sections 5 and 6 in the manner agreed upon. Rather than note all of the points made during the presentations, some of which are summarized in the report of the Working Group, I will note only the main thematic issues and points of contention here, beginning with Section 1.¹⁴⁹

Section 1

Section 1 is entitled "Definitions". In the original version approved by the IACHR in 1997 it only included one article entitled "Scope and Definitions", which largely tracked Article 1 of ILO 169, stating that the Declaration applied to Indigenous peoples (without any attempt at defining the term) and other peoples "whose social, cultural and economic conditions distinguish them from other sections of national community, and whose status is regulated wholly or partially by their own customs or traditions or by special

laws or regulations". The second part of this article would apply to Maroons in Suriname, Colombia, Jamaica and elsewhere, so called "tribal peoples" under the ILO Convention. Also, that "Self-identification as indigenous shall be regarded as a fundamental criterion for determining the peoples to which the provisions of this Declaration apply", and that, "The use of the term 'peoples' in this instrument shall not be construed as having any implications with respect to any other rights that might be attached to that term in international law."

However, at the first session the Chair took it upon himself to issue a written proposal that Section 1 contain three articles under the heading "Definitions": Article 1: defining Indigenous peoples/populations, deleting tribal peoples altogether; Article 2: defining self-determination, autonomy and self-government; and, Article 3: defining lands and territories. A new Article 4 was also added, stating that "None of these definitions shall be interpreted to have the meaning that might be attributed to them in general international law". Remarkably, these proposals from the Chair all found their way into the appendix to the Report of the Chair issued at the end of the meeting, without any mention of their source, as if they were the original language of the proposed Declaration approved by the IACHR in 1997!

Apart from this, in the discussion on Section 1 some states raised again the issue of a definition for the term "Indigenous", as had been done in the UN. However, in the UN the call for a definition came mostly from Asian governments, not from American governments. Some of the states also objected to the use of the term "peoples" as it implicates the right to self-determination (the United States, Argentina, Chile; Suriname objected for other reasons), while others proposed that language used in ILO 169 be used to deprive "peoples" of its meaning in connection with self-determination (Brazil).

The Indigenous delegations unanimously noted the futility of attempting to define "Indigenous" and highlighted the UN's experience in this regard. They pointed out that all of the states present had not insisted on a definition in the UN process. They also highlighted that, as part and parcel of the right to self-determination and in light of the history of abuse by states, that Indigenous peoples had the individual and collective right to define who is an Indigenous person and people. The National Congress of American Indians, for instance, proposed that Section 1 be deleted in its entirety and replaced with the following language: "Indigenous

peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such."

While some governments noted that self-determination was an evolving concept in international law and could be achieved through negotiated agreements between Indigenous peoples and states at the national level (Canada, Colombia), the discussion in many ways tracked that taking place in the UN with some governments rejecting outright the application of the right to Indigenous peoples (Argentina, Chile, United States); some supporting inclusion of the right provided that it excluded any right to secede (Canada); most raising concerns about territorial integrity and state sovereignty; and most attempting to define the right as limited to autonomy and self-government, thereby creating a second class expression of the right in the case of Indigenous peoples (e.g., Brazil, Mexico).

The Indigenous delegations stated that the right to self-determination is well established in and defined by international law and that it was inappropriate for the OAS or its member-states to attempt to define the right otherwise, particularly when the result was clearly discriminatory. They proposed that any definition be dropped and that the right to self-determination as found in common Articles 1 of the International Covenants and Article 3 of the UN Draft Declaration on Indigenous Rights be added to the proposed Declaration. They also stated that the right of states to territorial integrity and sovereignty were both explicitly recognized and protected by general international law and by the specific language of the proposed Declaration and, therefore, states should not attempt to divert the discussion from the main issue: the right of all peoples to self-determination. To conclude, many of the Indigenous delegations stated that removing the term "peoples" from the proposed Declaration would render any discussion of the subsequent articles meaningless and of little interest to them.

On a positive note, some governments (Canada, Guatemala, Costa Rica, Colombia) stated that it would be appropriate to enter into further discussions about the scope and definition of the right to self-determination in light of the evolution of the right in contemporary international law. This was viewed, by the author at least, as an attempt to facilitate some form of dialogue with Indigenous peoples on the subject.

Many governments were opposed to the use of the term "territory", and proposed that "lands" be used instead, although some stated

that the term was used in their domestic legislation and Constitutions or did not raise concerns for them and therefore they had no objection to its use in the proposed Declaration.¹⁵⁰ Peru and Argentina proposed a definition for "lands" that was tied to national law, while Canada proposed that "lands" be defined as those lands owned or exclusively used by Indigenous peoples, whereas "territories" were those not owned or exclusively used, but where traditional activities were conducted pursuant to national law or agreement. The Indigenous delegations strongly urged that "territories" be retained and highlighted that the term "lands" was inadequate as that term did not nor could not capture the spiritual, cultural, cosmological and other relationships that they had with the total environment of their ancestral domain.

Finally, the issue of collective rights was discussed under Section 1. The Indigenous delegations stressed the importance of collective rights and how essential they were to an adequate recognition and protection of Indigenous cultural and other rights. With the notable exception of the United States, the majority of governments did not object to collective rights.

Section 2 – Human Rights

Most of the government proposals for this Section dealt with modifications to the existing language and, with the exception of the United States, which objected to collective rights, not with major conceptual difficulties. Some objections were raised to the ban on forcible assimilation found in Article V, with some governments preferring some reference to genocide instead (Paraguay, Peru), and to the requirement that "special guarantees" against discrimination be provided as stated in Article VI. Some states believed that it was inappropriate to obligate the state to undertaken measures over and above those provided for in domestic legislation. Brazil, Chile and Argentina all proposed that the recognition of the legal status or personality of Indigenous peoples be made subject to national legislation.

The Indigenous delegations all highlighted that respect for the right to self-determination is a prerequisite to respect for all other human rights and fundamental freedoms and must be included in this Section. A number of other modifications to strengthen the specific language of the text were made, especially to Articles V and VI on forcible assimilation and special guarantees against discrimination, respectively.

Section 3 – Cultural Development

In this section, the major objections were to the use of the term "restitution" in connection with cultural heritage, sacred relics and human remains and with the establishment of separate health, education and family regulations for Indigenous peoples. Some government characterized the latter as discriminatory and placing an undue burden on the state (Argentina, Brazil, Chile, Venezuela). Some governments also objected to the practice of traditional medicine and the use of traditional medicines (Argentina, Chile, Venezuela). There was broad support for the article on environmental protection (Article XIII).

The Indigenous delegations stressed the importance of the rights in Section 3 for Indigenous survival and future development and a number of proposals were made to strengthen the existing language. In general, they stated that the articles in Section 3 should place a greater emphasis on the affirmative obligations of states to ensure Indigenous cultural integrity and survival, obligations that already exist under other human rights instruments. The right to restitution was also strongly supported. It was proposed that the existing language did not go far enough and should be amended to express a preference for the restitution of lands lost or the provision of lands of equal value where this was not possible rather than simply the provision of compensation. The existing language relating to the adoption of Indigenous children was criticized as being inconsistent with the Genocide Convention and the treatment of the subject in the UN Draft Declaration. Bilingual and bicultural education was also stressed. A subsection of the article on environmental protection was criticized for allowing states to create protected areas/national parks in Indigenous territories without the consent of the affected people(s) and a number of presentations pointed to the effects of this in concrete situations in their own countries.

Section 4 – Organizational and Political Rights

Section 4 is one of the most important parts of the proposed Declaration including the right to autonomy and self-government, political participation rights, recognition of and respect for Indigenous legal systems, Indigenous participation in state agencies, and the right to freedom of assembly, association, expression and thought.

While some governments supported the inclusion of the right to autonomy and self-government (Canada, United States, Bolivia, Colombia, Guatemala),¹⁵¹ others stated that the use of the terms "autonomy", "self-government" and "political status" were unac-

ceptable, or at least raised serious concerns in light of the implications they had in domestic and international law (Brazil, Chile, Argentina).¹⁵² Due to these concerns the entire article was bracketed. Concerning the recognition of Indigenous legal systems, some governments stated that a parallel legal system was unacceptable and suggested that the article be deleted in its entirety (Argentina, Brazil and Chile), others proposed minor modifications to the text but accepted the principle (United States, Mexico), while others accepted the principle but stated that it should be tied to respect for fundamental rights defined by national and international law (Colombia, Guatemala). With the exception of the United States, which objected to the collective nature of the rights, there were no serious objections raised to the sub-paragraph on political participation rights.

The Indigenous delegations noted that the rights in this section were part and parcel of their right to self-determination and must be viewed in this context. They cited a number of international instruments, reports of experts meetings and other documents in support of this position. In this regard they stressed that autonomy and self-government may be the preferred means of exercising the right to self-determination but it is not a substitute for the full recognition of that right. For instance, a joint statement read by the Toledo Maya Cultural Council from Belize on behalf on that organisation, the National Congress of American Indians, the Upper Sioux Community and the Amerindian Peoples Association of Guyana suggested that the article on autonomy and self-government be modified to read as follows:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, spiritual and cultural development. As a specific form of exercising their right to self-determination, they have the right to autonomy and self-government with regard to, inter alia, culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, the environment and entry by non-members; and to determine ways and means for financing these autonomous functions.

With regard to Indigenous legal systems, the Indigenous delegations all urged that these articles be maintained with a few minor modifications to clarify and expand their intent and scope. They noted especially that Indigenous legal systems were necessary to operationalise and implement the right to autonomy and self-government within their territories and that Indigenous legal institutions were equally as important as Indigenous cultural and political institutions.

Section 5 – Social, Economic and Property Rights

Section 5 contains the proposed Declaration's primary territorial rights provision (Art. XVIII), an article on workers rights (XIX), intellectual property rights (XX), and the right to development (XXI).

Most attention in this section was focused on the territorial rights provision. While some general concerns were raised about the scope of the article in general and its relationship to domestic law, other than the sub-paragraph on restitution, there were no major conceptual disagreements with this article. Many of the states expressed concerns about restitution of Indigenous lands, in particular about the operative date to be used (Mexico, Chile, Peru). Argentina, Brazil and Venezuela proposed that it be deleted in its entirety. Canada also did not support its inclusion, referring to its domestic law, which committed the state to resolve outstanding land claims and proposed this as an alternative. Objections were also raised again to the use of the term "territory".

While some states proposed that Indigenous peoples should only benefit from the same protections as all citizens with regard to labour laws, only minor modifications to the article on worker's rights were proposed. With the exception of Mexico and Venezuela, which proposed that large sections be deleted entirely, there was also not much discussion on the article on intellectual property rights. Similarly, with the exception of Argentina and Brazil, which proposed that all of sub-paragraph 3 of the article on the right to development be deleted, there was little discussion on that article. Having said this, however, large sections of the language in the intellectual property and right to development articles were bracketed in the final report.

The Indigenous delegations stressed the importance of the articles in Section 5 and made a number of concrete proposals to strengthen the text. Of particular note was the sub-paragraph on the exploitation of natural resources, which requires only that Indigenous peoples participate in decision-making. The Indigenous representatives stated that this was inadequate and proposed that language similar to that found in the UN draft's Article 30 be used, which requires free and informed consent prior to authorising natural resource exploitation on or near Indigenous lands. Problems with the sub-paragraph on relocation were also mentioned as it presently permits the relocation of Indigenous peoples "in the public interest". A ban on relocation was proposed along with the requirement that if it became necessary to relocate Indigenous peoples,

that this only be done with the free and informed consent of the affected people(s). A proposal was also made by the Assembly of First Nations in Canada to include language providing for the establishment of independent dispute resolution mechanisms for addressing territorial rights issues.

Section 6 – General provisions

This section contains an article recognizing and affirming treaty rights and a number of technical provisions. The use of the term "treaty" in article XXII was objected to by many states and by the representative of the Inter-American Juridical Committee. Canada and the United States both stated that their domestic jurisprudence uses the term "treaty" to refer to agreements made between Indigenous peoples and states, but argued that these were considered to be purely domestic matters and therefore, the reference to an international dispute resolution mechanism was inappropriate. Mexico proposed that all of Section 6 be deleted. This was supported by Brazil, Argentina and Chile. Other delegations stated that at least three of the articles should be deleted (Venezuela, Honduras).

The Indigenous delegations, especially from the United States, Canada and Chile, all highlighted the importance of the article on treaty rights and noted that a major UN study on the subject had concluded that these instruments were and still are of an international character with rights and duties that must be respected. They urged that the article be maintained as written. The same was also true of the other articles in Section 6; the Indigenous delegations, with a few minor modifications, urged that they be maintained in the proposed Declaration.

Evaluation of State Positions at the first session¹⁵³

Opposed	Mostly Opposed	Uncommitted	Mostly Supportive	Supportive
Argentina	Mexico	Jamaica	Nicaragua	Antigua and Barbuda
Chile	Venezuela	Honduras	Panama	Canada
United States	Brazil	Suriname	Costa Rica	Colombia
	Peru	Ecuador		Guatemala
	Paraguay	Belice		Sta. Lucia

In the conclusions to their final statements on Section 6, many of the Indigenous delegations noted once again that they were dissatisfied with the procedures for their participation in the Working Group, hoped that states had realized that they had nothing to fear from Indigenous participation and urged that the participation procedures be revised and strengthened prior to the next session of the Working Group. This point was reiterated in a final closing statement read on behalf of the Indigenous delegations. At this point, the Chair stated that the first reading of the proposed Declaration had been completed and noted that a second session of the Working Group would be held sometime in the future to commence a second reading. He urged those who wished to submit written comments to do so for inclusion in the final report. With this, he declared the first session closed.

3. The Second Session (April 2001) ¹⁵⁴

After the first session, a new Chair of the Working Group was chosen, Ambassador Ronal Ochaeta of Guatemala. Cognizant of widespread Indigenous dissatisfaction with the participation procedures in the Working Group and criticism of the previous Chair, Ambassador Ochaeta decided to call for an informal inter-sessional meeting with Indigenous peoples and member states during which issues could be discussed and trust could be built. This meeting took place in Guatemala City in January 2001. Indigenous peoples stressed that their participation in the Working Group was inadequate and the procedures must be changed to ensure that there would be an interchange and dialogue with the states, and that Indigenous peoples would be part of the consensus in approving the Declaration by the Working Group. A final statement was issued stating this and calling for national, regional and hemispheric consultations between Indigenous peoples and states on the Declaration (see Annex B).

Immediately prior to the second session in Washington, the Indigenous Summit of the Americas was held in Ottawa, Canada. The Declaration was also discussed there and another statement was issued, again calling for better Indigenous participation and greater discussion about the Declaration (see, Annex C).

The second session was opened with speeches from the OAS Secretary General, the Chair of the OAS Permanent Council, the Chair of the Committee on Juridical and Political Affairs, the Chair of the Working Group and a representative of the Indigenous delega-

tions. The first day was an informal session aimed at further building trust between the Indigenous delegations and the state. Overall it was a positive discussion about some of the concepts found in the Declaration and set the tone for a much more open dialogue than had occurred at any point during the first session.

At the initiative of the Chair, the issue of changing the title from "Indigenous populations" to "Indigenous peoples" was discussed and consensus was reached that such a change was acceptable. This was a major achievement and ensures that "peoples" will be used throughout the Declaration. Some states are pushing to retain a caveat along the lines of ILO 169 to qualify the use of "peoples" (Brazil, Argentina, Chile, Venezuela), while others are seeking to develop and include a definition of self-determination at odds with article 1 of the International Covenants (Guatemala, U.S.A., Mexico, Paraguay, Peru, and to a lesser extent, Canada).

The other issue that deserves attention from the first day concerns the position of the US delegation, particularly as it is also very relevant in terms of progress on the UN Draft Declaration. In the last days of the Clinton Administration, an Executive Order was issued reversing 20 years of US policy on Indigenous peoples in international fora. Most importantly, the US position now accepts and advocates recognition of collective rights, the use of "peoples" and the right to (internal) self-determination. This is highly significant as the previous US position was largely responsible for the stagnation of the UN process and caused many problems during the first session of the OAS Working Group.

The first formal session (Day 2) focused on Section I of the proposed Declaration, which deals with definitions. Most of the states present wanted to include a definition for "Indigenous peoples", the major exceptions being Canada, Panama and the U.S. Other wanted definitions for terms such as "self-determination", "territories" and "peoples". The Indigenous delegations maintained that there was no need for a definition of "Indigenous", and defining self-determination contrary to the International Covenants was discriminatory and illogical. As the discussion on definitions was not going anywhere and threatened to take over the entire session, it was agreed that discussion of Section I would be deferred to a later session. Nonetheless, Mexico, Colombia and others repeatedly raised the issue throughout the remainder of the second session.

Days 3 and 4 were taken up with a detailed discussion of Articles II-VI (Section Two – Human Rights) and Article VII, the first article

in Section Three on Cultural Development. Other than the reference to restitution of property in Article VII(2) and the implementation language found in Article II(2) (Canada and US), there were no major objections to the language and concepts of Articles II-VII. However, while some of the brackets inserted in the first session were removed, there was no clear consensus on any of the articles. The majority of state proposals concerned minor modifications to the text and changing the title of Section 1 or some of its articles. Argentina and Chile repeatedly made reference to the need to tie rights in the Declaration to domestic constitutions and other laws.

The final formal session (Day 5) was delayed due to an extended meeting between states and the Chair. The purpose of this meeting was to discuss the proposal brought by Argentina and Chile to revisit and reverse the decision on changing the title to "Indigenous peoples" instead of "Indigenous populations". The Chair noted that this issue had already been decided and he stated that he would not reopen the discussion. The remainder of the session was taken up with closing speeches congratulating the Chair and other general comments. The Chair's final statement was positive and included a number of recommendations to be put before the CJPA prior to the next session. These included measures to enhance Indigenous participation and calls for national level consultations.

Overall the second session was encouraging and marked some important changes in the positions of some states. Some of this may be due to changes in personnel on the delegations (Panama, in particular), but there was clearly an advance in thinking compared to the first session. Most notable is the change in the US position, which has removed one of the main blockages to progress on some of the core themes in the OAS as well as the UN Declaration. Other states appeared to take more conservative positions than they did in the first session (Mexico, Colombia, Ecuador). Argentina and Chile remain major problems in the process and seem to give encouragement to others who are not very vocal or active opponents. Together with Ecuador, Brazil and Venezuela they form a block that is intent on substantially weakening the proposed Declaration or at least tying the rights recognized therein to standards found in domestic laws.

Acceptance of the use of "peoples" in the title is very important and significant and will be reflected throughout the text of the Declaration. It was one of the, if not the, major achievements of the second session. As it relates to self-determination, there appear to be two positions among the states: 1) to employ a caveat along the lines of

Evaluation of State Positions at the second session ¹⁵⁵

Opposed	Mostly Opposed	Uncommitted	Mostly Supportive	Supportive
Argentina Chile	Brazil Ecuador Venezuela	Caribbean States Guyana Uruguay	Honduras Nicaragua Bolivia Belice Paraguay Peru Mexico Colombia Costa Rica El Salvador	Canada Guatemala United States Panama

ILO 169 (some); and, 2) to recognize the right to self-determination, but to define the right in a different manner than that used in the International Covenants (many). With this in mind, most of the states supported recognition of the right to "self-determination" in the proposed Declaration, generally formulated as a right to "internal self-determination", or autonomy and self-government or some variant thereof. Brazil, however, stated that "self-determination is a political right and only marginally a human right" and appears set to oppose any reference to the right.

The second session illustrated how crucial it is and will be to have a Chair that is willing to work with Indigenous peoples and to address issues and concerns raised by them. The attitude of the Chair and his staff was key to increasing Indigenous participation and input, if only on an informal level at this session, and ensuring that Indigenous proposals were recognized and accounted for. For this reason, he was strongly criticized by a few states.

Despite the original intention of the OAS to expedite submission of the proposed Declaration to the OAS General Assembly for adoption, it appears as if the Working Group will continue to operate for a number of years to come. This session only partially dealt with six of a total of 27 articles and these articles are not very contentious. The issue of definitions will require substantial discussion. Consequently, it is possible that the process in the Working Group could take another five or more years. Recent developments, how-

ever, indicate that this may not be the case and the Declaration, if the work plan of the new Chair of the Working Group from Peru is followed, may be submitted to the General Assembly in June 2002 (see the following section below).

The Indigenous delegations continued to stress concerns about participation and most confined comments on the Declaration to general statements about the core themes and general principles involved. Some, mainly from North America and the Caribbean, made specific proposals for changes in language in the Declaration. With few exceptions (Chile, Argentina and Brazil), the states appear to have accepted Indigenous participation as part of the process, although few states seem interested in officially adopting improved participation procedures. In this context, it should be remembered that participation by non-state actors in OAS standard setting work is virtually unheard of. In fact, the second session marks only the third time that this has occurred; the first session was the second time.

Finally, while the second session was somewhat encouraging, much work is still needed to educate state delegations and ensure that Indigenous proposals are seriously considered and incorporated. The proposals of some states to include a definition of self-determination contrary to the classic formulation used in the Covenants and the UN Draft Declaration is disturbing and must be countered. Future sessions will deal with this and other contentious issues so there may be a long way to go before consensus can be developed on text that can be submitted to the General Assembly.

4. Activities since the second session

Since the second session a number of significant developments have occurred. First, the Third Summit of the Americas was held in Quebec City, Canada, at the end of April 2001. The Summit, attended by all the Heads of State of the Americas, adopted a political declaration and Plan of Action, both of which referred to the Working Group and OAS proposed Declaration. These documents stated, respectively, that:

We will work to ensure that the input from the Indigenous Conclave of the Americas, held in Guatemala, and the Indigenous Peoples Summit of the Americas, held in Ottawa, is reflected in the implementation of the Summit of the Americas Declaration and Plan of Action. We support efforts towards early and successful conclusion of negotiations on the

Proposed American Declaration on the Rights of Indigenous Peoples, which will promote and protect their human rights and fundamental freedoms.¹⁵⁶

Implementation of International Obligations and Respect for International Standards

Consider signing and ratifying, ratifying, or acceding to, as soon as possible and as the case may be, all universal and hemispheric human rights instruments, take concrete measures at the national level to promote and strengthen respect for human rights and fundamental freedoms of all persons, including women, children, the elderly, indigenous peoples, migrants, returning citizens, persons with disabilities, and those belonging to other vulnerable or discriminated groups, and note that the use of the term “peoples” in this document cannot be construed as having any implications as to the rights that attach to the term under international law and that the rights associated with the term “indigenous peoples” have a context-specific meaning that is appropriately determined in the multilateral negotiations of the texts of declarations that specifically deal with such rights.

16. INDIGENOUS PEOPLES

Support the process of reform of the Inter-American Indian Institute, based on extensive consultations among states and indigenous peoples of the Hemisphere, and further develop processes to ensure broad and full participation of indigenous peoples throughout the inter-American system, including in the discussions on the Proposed American Declaration on the Rights of Indigenous Peoples.¹⁵⁷

It is important to note the language used here that qualifies the use of the term “peoples”, as some states will undoubtedly attempt to maintain this language in the proposed Declaration. Argentina, Colombia and Venezuela have already proposed retention of this language in a document dated May 2001 and appended to the Chair’s Report on the second session.¹⁵⁸

Following the Summit, in June 2001, the OAS General Assembly passed a resolution, which stated, among others, these intentions:

1. To request the Permanent Council to continue considering the Draft American Declaration on the Rights of Indigenous Peoples.
2. To request the Permanent Council to study the possibility of establishing a specific body under the aegis of the Permanent Council to serve as the appropriate setting for a high-level discussion of the Draft American Declaration on the Rights of Indigenous Peoples as it relates to the mandate contained in the political declaration and the Plan of Action of Quebec. The mandate of that body will be to continue consideration of the above-mentioned

Draft Declaration until it is adopted and for that purpose to hold at least one special working meeting no later than the second week of March 2002 and before the thirty-second regular session of the General Assembly, in accordance with the resources allocated in the approved program-budget and other resources.

3. To recommend to the Permanent Council that it continue pursuing mechanisms for the accreditation and the appropriate means of participation in its deliberations of representatives of indigenous peoples so that their observations and suggestions may be taken into account.
4. To recommend to the Permanent Council the establishment of a specific fund consisting of voluntary contributions to support the participation of representatives of indigenous peoples in meetings related to the Draft Declaration. Mechanisms should also be sought to ensure indigenous participation in the utilization of the fund.¹⁵⁹

After the General Assembly a new Chair of the Working Group was elected, Ambassador Eduardo Ferrero Costa of Peru. The new Chair developed a work programme for the Declaration, approved in October 2001, that substantially departs from the previous procedure and, in many ways, may represent a setback for Indigenous peoples. This work programme is divided into five phases, two of which have been completed at the time of this writing. The first phase (October-December 2001) involved consideration of comments and proposals for the language of the proposed Declaration submitted by states, consideration of legal opinions drafted by the Inter-American Juridical Committee and the Inter-American Indian Institute, and culminated with the Chair preparing "a preliminary draft declaration" based on these submissions.¹⁶⁰ This is to be followed by phase II (December 15, 2001-January 15, 2002), which will involve internal discussions between state delegations at the OAS and their home governments and, "if possible ... national consultations with civil society/indigenous peoples, in preparation for the next phase."

The third phase, which encompasses the second half of January 2002 and February 2002, will include:

- Consideration of the Preliminary Draft Declaration prepared by the Chair on the basis of consultations;
- Subject to the availability of external funds, holding of a two-day technical meeting, with member state experts, on the human rights of indigenous peoples;
- Exchange of views among representatives of the member states with the participation of representatives of indigenous peoples.

This complies with the recommendation made in operative paragraph 3 of General Assembly resolution AG/RES. 1780 (XXXI-O/01) on ensuring the “participation in its deliberations of representatives of indigenous peoples so that their observations and suggestions may be taken into account”.

The fourth phase (March 2002) involves finalization and approval of the proposed Declaration by the Working Group and presentation to and approval of the proposed Declaration by the CAJP and Permanent Council. Finally, the fifth phase (April-June 2002) is presentation of the proposed Declaration to the OAS General Assembly for adoption.

This work programme is problematic to say the least. Assuming that national consultations are held, as proposed in phase II, Indigenous peoples will only have two chances to provide input to the language of the Declaration before it is submitted for approval to the General Assembly in June 2002. Only states participated in all of the meetings held during phase I and no record of those meetings has yet been made public. The draft Declaration that the Chair will develop will be based upon the conclusions of these meetings as well as the comments of the Juridical Committee and the Inter-American Indian Institute, the former of which severely criticized many of the key protections included in the proposed Declaration approved by the IACHR. It is unclear to what extent the IACHR's language will remain in the Chair's draft and it is equally unclear whether Indigenous proposals will be accorded sufficient weight. This draft appear to the basis for all future discussions on the Declaration, including the exchange of views between states with the participation of Indigenous peoples in February 2002 and the subsequent finalization of the Declaration by the Working Group in March 2002.

Given that Indigenous peoples were and remain, despite improvements in the second session, deeply dissatisfied with the level of their participation in the Working Group to-date, the process adopted by the present chair will likely be viewed as a return to the closed door policies of the OAS and rejected. What this means for the future of the chair's work plan, and the Declaration in general, is unclear. The Chair can either push forward with sending the document to the General Assembly and, as a consequence, face condemnation by Indigenous peoples, or the work plan will have to be modified to ensure adequate and active Indigenous participation. While the latter may be rejected by some states, it is clear that the majority of states participating in the Working Group are wary of

approving a Declaration that will be rejected by Indigenous peoples and may therefore support further discussions on the substance of the Declaration with some degree of Indigenous participation.

B. An Overview of the Substance of the Proposed American Declaration

1. General Comments

This section will discuss the version of the OAS proposed Declaration approved by the IACHR in 1997. In light of the preceding, this may not seem prudent; however, there are very good reasons for discussing this version. The OAS Declaration was drafted and approved by the IACHR, the body authorized to examine complaints under the American Convention and the American Declaration. Consequently, it is illustrative of thinking in that body about the rights of Indigenous peoples under those two instruments and may aid Indigenous organizations or communities in filing petitions with the IACHR complaining of violations of their rights under the American Convention and Declaration.

Also, some decisions of the IACHR concerning Indigenous peoples have stated conclusions similar to certain articles of the OAS proposed Declaration (the 1997 Ecuador Report, for instance) and it is probable that they will continue in this same line in the future. In this context, the IACHR has intimated in the past that they consider the OAS Declaration to be an elaboration and contextualization, and in certain instances, a restatement of, existing rights found in Inter-American human rights law. Put together, this indicates that the OAS Declaration, as approved by the IACHR, is very relevant despite the fact that it will almost certainly be changed in the near future.

The OAS Declaration is intended, in the words of the IACHR, to be regionally appropriate. However, this language should be translated to mean that the OAS Declaration will be one that is acceptable to the member-states of the OAS rather than one that is specifically tailored to meet the desires of the Indigenous peoples that live within those states. It was drafted in relative secrecy by the IACHR's technical staff without the participation of Indigenous peoples, NGOs and others. One result of this is that there are few background documents directly related to its drafting from which we can gain an understanding of the intent of the drafters, although

we can gain some understanding of its substantive provisions because many are taken from existing instruments.

The first general point to be made about the OAS Declaration is that it lacks the specificity, consistency and comprehensive coverage of the UN Draft Declaration and the rights recognized therein are generally weaker than those recognized in the UN instrument. It could accurately be described in terms of relative strength as somewhere in between the UN Draft Declaration and ILO 169. Nonetheless, as with ILO 169, it does contain a number of rights and principles of use to Indigenous peoples, which, if interpreted expansively, may substantially improve upon existing rights recognized in the domestic legislation of many states and IACHR jurisprudence.

The reference to IACHR jurisprudence also leads us to another important point about the OAS Declaration. Again in contrast to the UN Draft Declaration, the OAS instrument does not contain any language relating to implementation of the rights it recognizes by OAS member-states. However, the OAS system contains an existing enforcement mechanism - the IACHR and the Inter-American Court of Human Rights - that in theory should give some effect to the rights defined in the instrument.

Second, the OAS Declaration is an interesting, at times confusing and inconsistent, compilation of various standards (some modified or excerpted, others incorporated verbatim) from existing instruments and the UN Draft Declaration. It draws from: ILO 169;¹⁶¹ Inter-American Conventions and Declarations;¹⁶² UN Conventions and Declarations;¹⁶³ UN studies;¹⁶⁴ UN Draft Declaration;¹⁶⁵ American Constitutions and legislation;¹⁶⁶ and, the replies to the questionnaire sent out by the IACHR in 1992. However, while some important attempts have been made to further the evolution of human rights standards applicable to Indigenous peoples, the OAS Declaration does not go as far as it could or indeed should if effective guarantees are to be put in place.

In contrast to the UN Draft Declaration, which is structured around the right to self-determination, the OAS Declaration is more in line with ILO 169 in that its core theme is respect for Indigenous identity and existence, but falls short of recognizing self-determination as the vehicle to this end. It does however, recognize the right to autonomy and self-government, although, and again in contrast to the UN Draft Declaration, it does not clearly recognize political participation rights - in particular the requirement that free and

informed consent be obtained prior to adopting or implementing legislative, administrative or other measures that may affect Indigenous rights and interests - to the extent required to give full and meaningful effect to that right.¹⁶⁷ This is the case because Indigenous peoples will inevitably continue to be affected by the actions of the state and the balance of power between the state and Indigenous peoples will remain firmly tilted towards the state. Consequently, in the absence of an effective, working relationship based upon mutual respect and good faith, a veto power (free and informed consent) is required to provide additional guarantees to Indigenous peoples and check abuses of power by the state.

The OAS Declaration does recognize collective rights, although it does so in a way somewhat reminiscent of Article 27 of the ICCPR. For instance, Article II(2), It states that:

Indigenous peoples have the collective rights that are indispensable to the enjoyment of the individual human rights of their members. Accordingly the states recognize, inter alia, the right of indigenous peoples to collective action, to their cultures, to profess and practice their spiritual beliefs and to use their languages.

See, also, preambular paragraph 8, entitled "Enjoyment of collective rights" which states: "Recalling the international recognition of rights that can only be enjoyed when exercised collectively." Article XVIII(1) recognizes that Indigenous peoples have "the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories." This would certainly include collective ownership and, therefore, collective rights to lands and territories. This conclusion is supported by preambular paragraph 5, which defines "traditional collective systems" relating to land as a "necessary condition for [Indigenous peoples'] survival, social organization, development and their individual and collective well being...". Additionally, the right to autonomy and self-government is, by definition, a collective right.

Bearing in mind the comments above, we will now turn to the substance of the OAS Declaration. Its provisions can be broken down somewhat arbitrarily into the following categories: 1) respect for human rights; 2) rights pertaining to cultural integrity, including education; 3) health; 4) rights to autonomy and self-government, including those pertaining to development; 5) workers rights; 6) rights to lands, territories and resources, including environment and intellectual property; 7) treaty rights; and, 8) others. We won't attempt to address each group separately or in detail, but will

instead note the most important points. We also will not, other than in certain instances, address the preambular language.

2. To whom does the Declaration Apply?

Article I defines to whom the OAS Declaration applies. This article is modeled upon Article 1 of ILO 169, although, contrary to ILO 169, it does not provide a definition for Indigenous peoples. It states that the declaration applies to Indigenous peoples “ ... as well as peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws and regulations”. The OAS Declaration, therefore also applies to Tribal peoples such as, among others, Maroons in the Guyanas and Jamaica, Afro-Ecuadorans, Quilombos in Brazil and Cimarrones in Colombia. This part of the scope and definition, applying to Tribal peoples, has been deleted by the Working Group.

The rest of Article I is taken directly from ILO 169, Article 1. Sub-section 2 states that self-identification is a fundamental criterion, and sub-section 3 qualifies the use of the term “peoples” so as to deprive it of meaning in the context of the right to self-determination. It is unclear if the OAS Declaration is intending Article 1(3) in the same manner as the ILO - declaring itself incompetent to recognize Indigenous peoples as holders of the right to self-determination - or whether its intent is to explicitly preclude the applicability of the right to self-determination to those Indigenous peoples. The former is most likely the correct interpretation. Sub-section 2 has been deleted by the Working Group and sub-section 3 has been modified to also apply to the definition of territory, self-determination, autonomy and self-government proposed by the Chair.

3. Non-discrimination and Affirmative Action

Article VI is one of the OAS Declaration’s most important provisions in light of the historical and persistent discrimination, official and otherwise, experienced by Indigenous peoples. This article prohibits discrimination and recognizes that affirmative action programs (“special guarantees”) may be required to ensure that Indigenous peoples can fully enjoy human rights recognized under international and domestic law. Furthermore, Indigenous peoples must participate in the design of these affirmative action pro-

grammes. The effect of this article is not only to prohibit the multiple and various forms of discriminatory policies and laws that have been used by states to deny Indigenous peoples the full enjoyment of their rights, it also requires the state to take positive action, in certain cases, to address and remedy past and contemporary discrimination.

4. Autonomy and Self-government

There are a number of provisions in the OAS Declaration that are related to autonomy and self-government. The primary provision is Article XV(1), which is a curious combination of UN Draft Declaration Articles 3 and 31, with the word self-determination and a few others omitted. It states that:

Indigenous peoples have the right to freely determine their political status and freely pursue their economic, social, spiritual and cultural development, and accordingly, they have the right to autonomy and self-government with regard to inter alia culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, the environment and entry by non-members; and to determine ways and means for financing these autonomous functions.

Precisely, what the IACHR technical staff intended by this article is unclear, although they certainly do not intend to recognize Indigenous peoples as holders of the right to self-determination. If we reinstate the word "self-determination" - conceptually the wording amounts to the same thing - then this article may be viewed as an explicit limitation on the right to self-determination as it applies to Indigenous peoples in that it confines the exercise thereof to internal and local, autonomy and self-government. This is clearly the result, even if, as is certainly the case (recall Art. I(3)), the IACHR had no intention of raising the issue of self-determination. Whether the self-determination language prior to the words "and accordingly" will have any effect on the interpretation of this provision is also unclear, although it definitely adds substance to the article. What is clear, however, is that the failure to include the full, unqualified right to self-determination is cause for disappointment for many Indigenous peoples and has resulted in decreased interest in, and possibly future condemnation of, the instrument itself.

Despite the fact that the unqualified right to self-determination is not numbered among the OAS Declaration's provisions, the inclu-

sion of a right to autonomy and self-government is one of its most important and progressive aspects. It also accords with the stated preference of many Indigenous peoples as to how they would exercise their right to self-determination. It is supported by Article XV(2), which in part, recognizes the "right to maintain and develop ... indigenous decision-making institutions ..." without prejudice to rights to participate in the institutions of the state; and by Article XVI(2), which provides that:

Indigenous peoples have the right to maintain and reinforce their indigenous legal systems and also to apply them to matters within their communities, including systems related to such matters as conflict resolution, crime prevention and maintenance of peace and harmony.

It would appear that there is no limitation - such as references to overlapping jurisdiction or compliance with national law - on the operation of Indigenous legal systems within Indigenous communities and territories.

Article IV is also a positive and important measure in that it requires that states accord legal personality to Indigenous communities within their domestic legal systems. This recognizes that Indigenous communities - and presumably also Indigenous governments as the chosen representatives of those communities - have legal standing to act on behalf of their members in defense of their rights, in concluding legal agreements with outsiders and in other legal transactions previously available, in most cases, only to individuals. Also related to self-government, Article XIV protects rights to freedom of speech, peaceful assembly and association, especially as they relate to the use of sacred and ceremonial places and the right to unhindered cross border contact with other Indigenous peoples.

Article XXI, which is based upon Articles 23 and 30 of the UN Draft Declaration, recognizes the right of Indigenous peoples to determine the direction and nature of their development according to their own values, preferences and goals "even where they are different from those adopted by the national government or by other segments of society". This last point is an important and valuable statement because Indigenous and state ideas about development, even if at times they do share common elements, normally are divergent with regard to the process, underlying assumptions and objectives of development.

The state does not escape its obligation to facilitate and provide the means, without discrimination, for Indigenous self-development simply because Indigenous peoples determine its direction, nature and parameters (Art. XXI(1)). Also, the state is required, “[u]nless exceptional circumstances so warrant ...” to accord Indigenous peoples some degree of participation in, and obtain their free and informed consent about decisions relating to any development “plan, program or proposal affecting [their] rights or living conditions ...” Should any negative consequences be experienced by the people(s) concerned in spite of the procedural precautions noted above, a right to compensation or restitution in accordance with international law is provided for, as are measures relating to the provision of remediation or mitigation for any negative “environmental, economic, social, cultural or spiritual impact” caused by these activities (Art. XXI(2)).

We have a problem and apparent contradiction when it comes to the exploitation of mineral or other sub-surface resources pertaining to Indigenous lands and territories. On the one hand, Article XXI(2) requires that states obtain Indigenous peoples’ free and informed consent prior to proceeding with development initiatives. Presumably, this would also include plans for the exploitation of mineral and other resources. However, as we shall see in greater detail below, the OAS Declaration adopts the position, albeit slightly improved, of ILO 169 with regard to state-claimed sub-surface and other resources and does not recognize that free and informed consent must be obtained in connection with these activities. It would appear, therefore, that not all “plan[s], program[s] or proposal[s] affecting the rights or living conditions of indigenous peoples ...” are covered by the requirements of Article XXI.

5. Political Participation Rights

The OAS Declaration also contains a number of provisions concerning participation in the institutions and decision-making processes of the state. The exercise of these rights is without prejudice to rights to participate in, maintain and develop Indigenous peoples’ own systems of governance. There are two main articles that provide for political participation rights and one that recognizes participation rights, but is limited to the context of “development”. First, Article XV(2) states:

Indigenous peoples have the right to participate without discrimination, if they so decide, in all decision-making, at all levels, with regard to

matters that might affect their rights, lives and destiny. They may do so directly or through representatives chosen by them in accordance with their own procedures. They shall also have the right to maintain and develop their own indigenous decision-making institutions, as well as equal opportunities to access and participate in all state institutions and fora.

Second, Article XVII states that:

- 1) The States shall facilitate the inclusion in their organizational structures, the institutions and traditional practices of indigenous peoples, and in consultation and with the consent of the peoples concerned.
- 2) State institutions relevant to and serving indigenous peoples shall be designed in consultation and with the participation of the peoples concerned so as to reinforce and promote the identity, cultures, traditions, organization and values of those peoples.

Article XV(2) is a re-wording of Article 19 of the UN Draft Declaration and presumably has the same effect. However, Article 20 of the UN Draft Declaration, which provides specifically for the right to participate in the formulation of legislation and administrative measures and a right to veto (free and informed consent) those measures deemed unacceptable is not included. While it is likely that the right to participate to some degree in the formulation of legislative and administrative measures is covered by the phrase “participate ... in all decision-making, at all levels”, this article lacks the specificity of the UN Draft Declaration and, therefore, would benefit from the inclusion of the language of Article 20. Also, the failure to recognize a veto power is a major shortcoming. This is perhaps reflective of the fact that the right to self-determination is not included, but, nonetheless it is a major failure to not recognize that this right is also a necessary corollary to the right to autonomy and self- government.

This brings us to the third article mentioned above. Article XXI, entitled “The Right to Development” does contain a veto power and a right to participate in the decision-making process as it relates to development-related activities. Whether this article is defining development in a very narrow sense - local and programmatic/project oriented - as opposed to all development plans or policies formulated at the national level is unclear. However, when read together with Article XVIII(5) (see below), it appears that the intent here is to protect against development projects that directly or indirectly affect Indigenous lands and territories (narrowly de-

fined development), and, therefore does not envisage a veto power beyond this context. In other words, this veto power does not extend to development-related exploitation of sub-surface or other resources that the state claims to have rights to.

In conclusion, the political participation rights provide, among others, for the right to participate as peoples rather than as individuals, and as such they represent a positive step toward addressing existing inequalities with regard to representation in and access to the institutions and decision-making processes of the state. The problem is that they do not go far enough. The right to require that the state obtain Indigenous Peoples free and informed consent is a necessity if these inequalities are to be effectively addressed and Indigenous peoples are to have an effective voice in the affairs of the state.

6. Lands, Territories and Resources

The OAS Declaration's provisions on lands and territories are a mixture of articles taken from ILO 169 and the UN Draft Declaration. As with the document as a whole, we do not find the same kind of strength and detailed, comprehensive coverage of rights to lands and territories found in the UN Draft Declaration. Although, once again, we do see some important statements and the principles do improve upon the existing rights recognized in domestic and international law.

It should be remembered here that the management of land and resources falls under the right to autonomy and self-government as defined in Article XV and the control of Indigenous legal systems under Article XVI. However, the extent to which that autonomy and self-government can be exercised is limited with regard to the exploitation of sub-surface and other resources that the state claims to own or have rights to.

The provisions on rights to lands and territories are framed by, among others, preambular paragraphs 3 and 5. They state, respectively, that:

Recognizing the respect for the environment accorded by the cultures of indigenous peoples of the Americas and considering the special relationship between the indigenous peoples and the environment, lands, resources and territories on which they live and their natural resources.

Recognizing that in any indigenous cultures, traditional collective systems for the control and use of land, territory and resources, including bodies of water and coastal areas, are a necessary condition for their survival, social organization, development and their individual and collective well-being, and that the form of such control and ownership is varied and distinctive and does not necessarily coincide with the systems protected by the domestic laws of the States in which they live.

The recognition of Indigenous peoples' "special relationship" with their lands and territories and the significance of the collective nature of ownership, control and Indigenous understandings of lands and territories is important. These statements are reflected in Article XVIII(1), which recognizes the right to have Indigenous forms of land tenure, possession, use, relationship with and enjoyment of land, based upon Indigenous custom and law, recognized by the legal system of the state. Nevertheless, a substantive article, along the lines of UN Draft Declaration, Article 25¹⁶⁸ or ILO 169, Article 13,¹⁶⁹ should be included rather than reliance on the preamble and an implicit reference in XVIII(1).

Article XVIII(2), in common with the UN Draft Declaration, recognizes that Indigenous peoples have the right to the legal recognition and protection of: 1) their ownership and property rights to lands and territories "historically occupied" ;and, 2) their rights to use those lands to which they have "historically had access for their traditional activities and livelihood".¹⁷⁰ The use of the language "historically occupied" and "historically had access to", recognizes that Indigenous peoples have been, and continue to be, denied ownership and property rights, and in some cases, any rights, to their lands and territories by domestic legal systems and, therefore, speaks of historical occupation rather than lands or territories that are presently owned or regarded as property under domestic law. The result is to recognize ownership and property rights to lands and territories irrespective of obstacles in domestic law. In connection with this, Article XVIII(8), requires states to "give maximum priority" to the demarcation of Indigenous lands and territories and to take measures to prevent and punish unauthorized intrusions upon or use of those lands and territories. The latter should be carried out in cooperation with the people(s) concerned as Article XV(1) includes "entry by non-members" under the powers of autonomy and self-government.

Article XVIII(3) provides that titles to property as well as use rights that "arise from rights existing prior to the creation of ... States ..., shall [be legally recognized] ... and cannot be taken away unless by

mutual consent after the disclosure of all relevant information relating to the proposed changes". This article is problematic. Although, some of this language seems to be based on provisions of Constitutional law and legislation from Latin America, it should also encompass rights recognized under the common law doctrine of aboriginal title, including aboriginal rights to own resources, and rights to lands, territories and resources reserved in treaties concluded with colonial powers.¹⁷¹ How this relates to extinguishment of aboriginal rights under common law is unclear - extinguishment certainly is/was not by mutual consent, but by unilateral action. Furthermore, many, if not all, Indigenous peoples would assert that, by definition, the majority of their rights, recognized or otherwise, are based upon rights enjoyed prior to the creation of the states in which they now find themselves, as they have never voluntarily relinquished their status as sovereign, independent peoples, including their rights to own and govern their lands and territories in accordance with their laws and customs.

Another relevant question relates to the operative date concerning the creation of States: does this relate to the acquisition of sovereignty by a colonial power or the date that a State became independent (Suriname and Guyana, for instance, became independent in 1975 and 1966, respectively). While the former is almost certainly the case, this was a point of confusion and discussion at the Working Group.

Modeled upon Article 27 of the UN Draft Declaration, Article XVIII(7) recognizes that it may not be possible to return all historically occupied or used Indigenous lands and territories. Consequently, in addition to recognizing that Indigenous peoples have the right to the restitution of those lands and territories that "have been confiscated, occupied, used or damaged", it also provides for compensation in accordance with international law in those cases where restitution is not possible. Basically, although not necessarily, compensation means the payment of money, lands of equal value or other measures agreed upon by the parties. The Inter-American Court has decided that compensation must be "fair compensation" and should be determined according to the circumstances of each case, including, in one case, the customary law of a tribal people in Suriname.¹⁷²

In recognition of the cultural and spiritual significance of land for Indigenous peoples, the OAS Declaration also contains a provision recognizing that the deprivation of Indigenous lands impacts upon the right to cultural integrity and should be remedied by restitution

or compensation in accordance with international law (Art. VII(2)). This article, however, uses the word “property” (which may be construed as recognized rights under domestic law), rather than historically occupied lands and territories, but in light of Article XVIII(7) and the Court’s judgment in the *Awas Tingni Case*, it should be interpreted so as to be consistent with the latter. Nonetheless, Article 7(b) of the UN Draft Declaration is by far the better way to address this issue.¹⁷³

Paragraphs (4) and (5) of Article XVIII relate to natural resources pertaining to Indigenous lands. They are, with some changes in wording, taken directly from ILO 169, Article 15. Paragraph 4 states that:

Indigenous peoples have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage, and conserve such resources; and with respect to traditional uses of their lands, interests in lands, and resources, such as subsistence.

Note here that the right to own natural resources is not necessarily included in the scope of the article. However, according to the principles of non-discrimination and equal protection, resource ownership rights must be recognized in those states where non-Indigenous people can own resources. This does not help Indigenous peoples in states where the state claims to be the sole owner of all natural resources or sub-surface resources.

Paragraph (5) accounts for the fact that in many states, the state claims to have exclusive rights to sub-surface and other resources. It has been improved somewhat over ILO 169, Article 15(2), in that it uses the standard “participation” instead of the lower standard “consultation” to define the level of interaction with Indigenous peoples required before the state can proceed with plans to exploit resources pertaining to their lands and territories. This article requires that the state establish or maintain procedures that incorporate Indigenous participation to examine on a case-by-case basis the extent to which Indigenous interests may be prejudiced prior to commencing or authorizing resource exploitation on Indigenous lands and territories. It also states that Indigenous peoples must participate in any benefits derived from resource exploitation (also an improvement over ILO 169) and receive compensation for any material and immaterial damages related to these activities.

Given the devastating environmental, spiritual, social, cultural and economic impact that resource exploitation operations have on Indigenous peoples worldwide, it is extremely disappointing that the OAS Declaration does not follow the lead of the UN Draft Declaration and recognize that the standard “free and informed consent” is the only appropriate option here to provide meaningful guarantees. Also, in light of this article, autonomy and self-government with regard to “internal and local affairs, including ... land and resource management [and] the environment” must be viewed as severely compromised, should the state wish to exploit or authorize others (most likely transnational corporations) to exploit “state-owned” resources on or under Indigenous lands and territories.

Finally, borrowing from ILO 169,¹⁷⁴ Article XVIII(6), provides that “Unless exceptional and justified circumstances so warrant in the public interest” relocation may only take place subsequent to obtaining the free and informed consent of the people(s) concerned. The people(s) affected have the right to compensation in the form of lands of “similar or better quality ... [and of] the same legal status; and with the guarantee of the right to return” to their original lands should the reason(s) for relocation no longer apply. Clearly, the exception expressed in the first phrase of this article is unacceptably broad, particularly as in many countries the judiciary will not review government determinations of the public interest.

Before turning to the right to cultural integrity, mention should be made of Article XIII, concerning environmental rights. This article further adds to the status and evolution of the right to environment under international law, particularly the democratic aspects initiated at the United Nations Conference on Environment and Development and the connection between human rights and the environment.

In this article, we find the right to a healthy environment, which is declared to be “an essential condition for the enjoyment of the right to life and well-being” and, taken from the UN Draft Declaration, the “right to conserve, restore and protect their environment, and the productive capacity of their lands, territories and resources”.¹⁷⁵ Coupled with Article XV’s recognition that decisions relating to the environment are part of Indigenous peoples’ autonomy rights and Article XXI’s requirement that free and informed consent be obtained prior to initiating development projects and plans, these provisions recognize a substantial measure of control over the environment of Indigenous lands and territories. Also, see the various articles that provide for environmental impact studies and

remedies for environmental damage to Indigenous lands. Again, the failure to recognize full, Indigenous ownership and control of the resources pertaining to their lands and the inadequate constraints placed on the ability of the state and others to exploit these resources comes to mind, especially in light of the environmental, social and cultural impact of mining, oil exploration and extraction, logging and the infrastructure required to support these activities.

This article also: 1) provides for the participation of Indigenous peoples in the development and implementation of governmental, conservation programmes that apply to Indigenous lands and resources (Art. XIII(4)); 2) attempts to facilitate access to information relating to the environment so that Indigenous participation with regard to decisions relating to the environment is meaningful and effective (Art. XIII(2)); and, 3) states that Indigenous peoples have the “right to assistance” from the state with regard to environmental protection and “may request assistance from international organizations” for these purposes (Art. XIII(5)).

Article XIII(4) seems to contradict the recognition that “internal and local” matters relating to the environment and land and resource management are covered under the autonomy and self-government provision, in that it recognizes governmental conservation plans applying to Indigenous lands and resources. Consequently, taking into account the other provisions on resources, it would appear that the OAS Declaration is contemplating some form of co-management of natural resources, and possibly, also land, at least insofar as it relates to resources used by Indigenous peoples in the context of conservation. As it is possible that this may not be the case, some attempt should be made to clarify the relationship between the autonomy and self-government provision and the various provisions relating to resources.

A major problem in Art. XIII occurs in sub-section 7, which states that, “When a State declares an indigenous territory to be a protected area, and in the case of any lands, territories and resources under potential or actual claim by indigenous peoples, as well as lands used as natural biopreserves, conservation areas shall not be subject to any natural resource development without the informed consent and participation of the peoples concerned.” While the use of the standard “informed consent” is important in connection with resource exploitation, this article presumes that it is acceptable for the state to declare an Indigenous territory to be a protected area without the informed consent of the affected people(s). Numerous examples of this practice have shown that this is as much a viola-

tion of Indigenous rights as mining, logging or other activities. As proposed by a number of the Indigenous delegations at the Working Group, this article must be re-written to ensure that protected areas are not created on Indigenous lands and territories, including those “under potential or actual claim” without the participation and consent of the Indigenous owners thereof.

7. Cultural Integrity

Attempts to eradicate Indigenous cultural identity and existence, for whatever reason, frequently take the form of attempts to assimilate and integrate Indigenous peoples into the mainstream society or culture of the state. While some states are moving away from these policies and recognizing Indigenous peoples as distinct, cultural entities to be valued and protected, others continue to utilize them. Consequently, respect for Indigenous cultural identity, existence and future survival and development is one of the OAS Declaration’s core themes. Therefore, in addition to the articles mentioned above, especially those relating to autonomy and self-government and rights to lands and territories, it contains a number of articles specifically focusing on Indigenous identity and cultural integrity (see, Arts. III, V, VII, VIII, IX, X and XI). Article V, for instance, states that:

1. Indigenous peoples have the right to freely preserve, express and develop their cultural identity in all its aspects, free of any attempt at assimilation.
2. The States shall not undertake, support or favour any policy of artificial or enforced assimilation of indigenous peoples, destruction of a culture or the possibility of the extermination of any indigenous peoples.

Also, Article VII(1) and (3) state, respectively, that:

Indigenous peoples have the right to their cultural integrity and their historical and archaeological heritage, which are important both for their survival as well as for the identity of their members.

The states shall recognize and respect, indigenous ways of life, customs, traditions, forms of social, economic and political organization, institutions, practices, beliefs and values, use of dress, and languages.

Other articles provide for: the right to belong to an Indigenous community or nation; measures to ensure that Indigenous language programs are available in the media in Indigenous areas;

respect for Indigenous medical and health care practices and institutions; protection of, respect for and free access to sacred sites and the return of human remains and cultural property in the possession of the state; Indigenous-controlled, bilingual and culturally-appropriate education; and, religious and spiritual freedoms.

The OAS Declaration does not prohibit the adoption of Indigenous children outside of their communities (Art. XI(2)), whereas, the UN Draft Declaration defines the “removal of indigenous children from their families and communities under any pretext” as genocide (Art. 6)! Also, with regard to this article, it would appear that decisions relating to the “best interest” of Indigenous children “in matters relating to [their] protection and adoption ..., and in matters of breaking ties and other similar circumstances ...” are not included under the right to autonomy and self-government over internal and local affairs, including “culture, religion [and] ... social welfare.” Rather the “Courts and other relevant institutions” of the state are to review these matters with nothing more than consideration given to the “views” of Indigenous peoples. Even if the courts were to consistently defer to the customs and traditions of the peoples concerned, this article should be re-written to provide that Indigenous peoples have the right to control these and all other decisions relating to the status and well being of Indigenous children.

Furthermore, how this article relates to Article 30 of the Convention on the Rights of the Child, not to mention other provisions of the OAS Declaration, is unclear. Article 30 provides that Indigenous children have the right to enjoy their culture, practice their language and profess their religion in community with other members of their group. Should an Indigenous child be removed from their community to a non-Indigenous community, either by adoption, for their protection or in any other way contemplated by the OAS Declaration, it is difficult to see how Article 30 can be satisfied - unless it is determined that the legislation that authorizes the state to act in this area has “a reasonable and objective justification and [is] necessary for the continued viability and welfare of the minority as a whole”, which it would not appear to do.¹⁷⁶

The articles noted above, with the exception of Article XI(2), do take steps towards protecting Indigenous cultural integrity and certainly in rejecting forced assimilation as an appropriate means of relating to Indigenous peoples. However, a comparison with UN Draft Declaration, Articles 4, 6, 7, 8, 9 and Part III, among others, illustrates that the OAS Declaration could go much further than it

does. Without engaging in a detailed comparison of these articles, the following points should be made. First, the prohibition of ethnocide in Article 7(a-e) of the UN Declaration, consistently uses the phrase “with the aim or effect” of causing the prohibited activity. This recognizes that, in many cases, ethnocide or assimilation may occur through indirect as well as direct means. Indeed, policies to this end are often so diffused amongst the various agencies, sub-agencies and general bureaucracy of the state that it difficult to identify a coherent policy at all. Furthermore, overt forms of forced assimilation are less effective and engender greater resistance than do more subtle forms of assimilation and are therefore, less likely to be resorted to. Therefore, the OAS Declaration should make some attempt to address policies, programmes and actions that have an assimilationist or ethnocidal effect in addition to intent or design.

Second, language along the lines of UN Draft Declaration, Articles 4 and/or 8, should be included. Article 8 reads: “Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.” The inclusion of this and the point noted above would go far in remedying the inadequacies of the OAS Declaration’s provisions with regard to cultural integrity and Indigenous identity.

8. Treaties

The OAS Declaration imports almost verbatim Article 36 of the UN Draft Declaration to address the subject of Indigenous-state treaties and other agreements (Art. XXII). It reads as follows:

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements that may have been concluded with states or their successors, according to their spirit and intent, and to have states honor and respect such treaties, agreements and other constructive arrangements as well as rights emanating from those historical instruments. Conflicts and disputes which cannot be settled otherwise should be submitted to competent bodies.

This is an important statement given the history of unilateral abrogation of and disrespect for Indigenous-state treaties by states, and their relegation to the status of exclusive subjects of domestic law. Why the IACHR decided to omit the word “original” from the

phrase “according to their original spirit and intent” as used by the UN Draft Declaration and the implications of this omission are unclear. Presumably, it will not make much difference to its interpretation, as the “spirit and intent” of a treaty must in most cases make reference to its “original” spirit and intent. Consequently, this part of the provision is positive, provided that the language “spirit and intent” refers to historical context, including the sovereign, independent status of Indigenous Peoples, if applicable, rejects the unilateral abrogation or modification of Indigenous-state treaties, incorporates Indigenous understandings of treaties rather than strict, legalistic interpretations, and is not viewed as a limitation on the rights defined in the treaties. It could however be improved by amending the last sentence to read, “submitted to competent [international] bodies.”

9. Indigenous Women

The OAS Declaration contains an article requiring that the state take measures so that Indigenous women and men can enjoy rights without discrimination according to sex or gender. It also states that gender related violence, impairs the exercise of human rights.¹⁷⁷ It should be noted that certain Indigenous organizations, and particularly Indigenous women’s organizations and conferences, have stated that international standards should address the rights of Indigenous women over and above a general non-discrimination clause. Having said this, however, they believe that it is inappropriate for international organizations - in the case of the OAS Declaration, the IACHR’s technical staff - to define these standards without the full and meaningful participation of Indigenous women and Indigenous peoples in general.

10. Conclusion

What legal and practical effect will the OAS Declaration have in OAS member-states? As with the UN Draft Declaration, the OAS Declaration will be of a non-binding character. It will recommend, rather than mandate, to OAS member-states what policies, legislative reforms and actions they should adopt with regard to Indigenous peoples. Obviously, this is not as good as a Convention which legally obligates its states-parties to implement and respect the rights defined therein. However, a Convention is only applicable to those states that have ratified it, whereas a Declaration is applicable to all OAS member-states, and defines the minimum

standards which they should aim to achieve. Furthermore, should a Convention define standards that are in excess of those that a state or states find acceptable, they will not sign it, rendering it of little or no use.

The greatest value of the OAS Declaration will most likely be in its use by the IACHR as a guide to interpreting the provisions of the American Convention and the American Declaration; in guiding other relevant standards that states should follow; and, the effect it may have on state policy and the policy of other OAS or hemispheric organizations, such as the Amazon Pact and the Inter-American Development Bank. Consequently, in order to test the extent to which the IACHR will use and apply the standards defined in the OAS Declaration, Indigenous peoples will have to resort to filing petitions with the IACHR that complain of violations of their rights as defined by the American Convention and the American Declaration.

As noted above, recent decisions of the IACHR have been consistent with the provisions of the OAS Declaration – in this context, see, for example, Article XIII and the 1997 Ecuador Report. It should be noted that the decisions of the IACHR are non-binding, unenforceable recommendations to states that are sometimes ignored. IACHR decisions do, however, carry a great deal of moral authority and persuasive power, and states are often put under considerable pressure to abide by them. The decisions of the Court on the other hand, should a case be referred to it by the IACHR, are legally binding and enforceable in the domestic legal systems of those states that have accepted the Court's jurisdiction.

One problem is that the OAS Declaration itself cannot be the basis of the complaint; it will in some way have to be directly tied to a violation(s) of either the American Convention or the American Declaration. The IACHR will then, hopefully, interpret the provisions of these instruments in light of the provisions on the rights of Indigenous peoples found in the OAS Declaration. This may be of more help than it initially appears, as the IACHR has attempted to evaluate violations of rights complained of by Indigenous peoples in light of other instruments in the past, but has failed to find supporting evidence for, among others, rights to autonomy and self-government and effective rights to land (see, the 1984 Miskito Report). Therefore, should the IACHR look to international instruments to find support, for example, for a right to autonomy and self-government, it need look no further than its own Declaration on the Rights of Indigenous Peoples.

Finally, assuming that the UN Draft Declaration is approved essentially unchanged from its present form, what impact will it have on the OAS Declaration? This is extremely difficult to predict. What can be said is that the OAS Declaration contains a provision that states that: "Nothing in this instrument shall be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire." The American Convention contains a similar provision (Art. 29). This would mean that rights recognized in the UN Draft Declaration, including the right to self-determination, and other instruments (or even domestic legislation) of a higher standard than those recognized in the OAS Declaration, would in theory be applicable in the Inter-American system.

The relationship between the UN and OAS Declarations and their attendant Working Groups also requires some thought. In this context a number of Indigenous representatives present at the first and second session of the OAS Working Group observed that the implications of the OAS Declaration and process for the UN process must be fully evaluated and accounted for. Some delegations noted that there was some discussion about the OAS process among the Indigenous delegations present at the UN inter-sessional Working Group of the UN Commission on Human Rights (CHRWG) held in Geneva in 1999 and 2000, where concerns were expressed and at least one Indigenous organization, the International Indian Treaty Council, had urged that there be a moratorium on the OAS process.

The preceding implicitly advances an important point: the OAS Declaration raises a number of challenging questions in connection with the UN draft Declaration and its adoption process. First, during the drafting of the UN Draft Declaration and subsequent discussions in the CHRWG, Indigenous peoples have consistently stated that to recognize anything other than an unqualified right to self-determination, as that right applies to other peoples, is racist, illogical and discriminatory. The OAS Declaration certainly does not recognize this right. Given that the right to self-determination will undoubtedly be discussed extensively during future sessions of the CHRWG and it appears that the OAS instrument will be adopted prior to the UN, the OAS Declaration poses a number of tactical or strategic problems, especially with regard to the manner in which Indigenous peoples respond to it. Undoubtedly, some government will point to the OAS Declaration, assuming it is adopted in its present or a weaker form, as support for lowering the standards contained in the present UN Draft. While these concerns can be met with a simple condemnation of the OAS process and

Declaration, the positions taken both within the OAS Working Group and concerning the final product must be considered carefully.

ANNEXES

ANNEXES

Annex A:

Ratification of the American Convention on Human Rights¹⁷⁸

SIGNATORY COUNTRIES	DATE DEPOSIT RATIFICATION OR ACCESSION	DATE OF ACCEPTANCE OF THE JURISDICTION OF THE COURT
Argentina	5 September 1984	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
Annex B		

Annex B:

Declaration of the hemispheric caucus of representatives of indigenous populations, held in Guatemala City, on recommendations regarding participation in the working group of the OAS Permanent Council

Preamble

1. Considering resolutions AG/RES. 1022 (XIX-O/89), AG/RES. 1479 (XXVII-O/97), AG/RES. 1610 (XXIX-O/99), and AG/RES. 1708 (XXX-O/00), through which the General Assembly resolved to prepare an American Declaration on the Rights of Indigenous Populations, create a Working Group of the Committee on Juridical and Political Affairs of the Permanent Council, and establish mechanisms for suitable participation by representatives of indigenous populations in the discussions and for commenting on the Proposed Declaration;
2. Considering the declarations, agreements, and resolutions of other international organizations, mechanisms, and documents, such as the Second World Conference Against Racism, Agenda 21 of the 1992 United Nations Conference on Environment and Development, held in Brazil, Article 8(j) of the Convention on Biological Diversity and the resolutions of the Conference of the Parties to that Convention, as well as Convention No. 169 of the International Labour Organization, in particular Article 6, which recognize the right of indigenous populations to fully participate in matters that affect them;
3. Considering existing participation mechanisms in the UN Commission on Human Rights' open-ended intersessional working group on a draft declaration on the rights of indigenous peoples and the Convention on Biological Diversity intersessional working group, which represent significant progress in ensuring appropriate, full and effective participation by indigenous populations in the adoption of international instruments;
4. Considering that General Recommendation XXIII of the Committee on the Elimination of Racial Discrimination calls on States Parties to ensure that members of indigenous peoples

have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent;

9. That the Working Group adopt appropriate measures at its meetings to review and devise new processes to ensure full and effective participation by indigenous populations and organizations.
10. That the Working Group consider the example of the indigenous participation mechanisms established in the UN Commission on Human Rights' open-ended intersessional working group on a draft declaration on the rights of indigenous peoples, including the following elements:
 - a. A liaison committee of "Friends of the Chair" with equal participation by representatives of indigenous populations and organizations, as well as states.
 - b. Open discussion and dialogue between indigenous populations and organizations and the states, without restrictions or conditions on indigenous participation.
 - c. Mandatory consensus between the states and the indigenous populations and their organizations before any article of that Proposed Declaration is approved.
 - d. Participation by indigenous populations and organizations in the final drafting of all Working Group reports reflecting the position and contributions of the indigenous populations.
11. Recommend setting a new timeline or rescheduling the process for approving and adopting the OAS Proposed Declaration to allow for consultation with, and full and effective participation by, indigenous populations and organizations, with a view to adopting the Declaration.
12. Recommend institutionalizing and expanding participation by indigenous populations and their organizations in the OAS Working Group.

B. At the regional level:

13. That the governments promote regional consultation and participation processes for the Proposed Declaration, bearing in mind the following guidelines:
 - a. The regional consultations with indigenous populations and organization must be more extensive and deal with issues in greater depth.
 - b. Regional workshops should be held with indigenous and non-indigenous leaders and experts along with government and OAS representatives to clarify aspects of indigenous issues.

C. At the national level:

14. That the Working Group recommend that OAS member states conduct national consultations through the structures of indigenous populations and organizations on the American Declaration on the Rights of Indigenous Populations, bearing in mind the following:
 - a. That national consultation processes must include:
 - Timely and full information prior to the consultations, in the language of the indigenous populations, through mass and alternative media;
 - Internal consultation of the indigenous populations;
 - Consensus-building between indigenous populations and organizations and the states in order to establish genuine dialogue regarding the contents of the Proposed Declaration and commitments to defend their fundamental rights.
 - b. That the consultations be monitored by experts on the matter from the OAS and the indigenous populations.
15. That it is important that the consensus-building and consultation processes be open, informed and carried out in good faith, and not be restricted to participants invited by the state. We stress that they must allow full and effective indigenous participation, taking into account traditional indigenous forms of representation and consultation. Translations must be pro-

vided in indigenous languages, and the position of other indigenous populations on the Declaration must be reflected.

16. That indigenous populations be involved in drafting the report on the conclusions from the local and national consultations; that report must be published nationally and sent to the Working Group.
17. That, given the violence directed at indigenous leaders in many countries in the Americas, the national consultation processes must guarantee the safety of the participants.
18. That, in the national consultations, governments must take into account other international instruments and processes already in place on direct, full, effective, and appropriate participation by indigenous populations.
19. That governments that have not ratified ILO Convention No. 169 do so and that those that have adopted the Convention guarantee compliance therewith as an initial step in recognizing the rights of indigenous populations, overcoming its shortcomings at subsequent proceedings.

D. Given the structure of indigenous participation in the OAS:

- a. That, in the framework of discussions on the Proposed American Declaration on the Rights of Indigenous Populations, a technical working team of indigenous experts be formed to support indigenous populations and organizations in formulating the proposal based on their cosmovision and that this proposal be shared with the governments.
- b. That an information network be established for dialogue on the Declaration between indigenous populations and organizations and the governments, under the aegis of the OAS.

E. Financing:

20. To achieve full and effective participation by indigenous populations and organizations, we recommend:

- a. The establishment of a fund that is open to governmental and nongovernmental contributions and is administered by the OAS Secretary General, with the advisory services of representatives of indigenous populations and organizations.
- b. That the governments secure funds for the national and local consultations, without detriment to budgets already allocated for the social and economic development of indigenous populations in those countries.

Issued in Iximulew, Guatemala on January 26, 2001.

Annex C

Declaration of the Indigenous Peoples Summit of the Americas - Ottawa, Canada, March 31, 2001

Preamble

We, the representatives of Indigenous Peoples, Nations and organizations from the North, Central and South Americas and the Caribbean, have met in Ottawa, Canada at the "Indigenous Peoples Summit of the Americas", in unity and on the critical importance of protecting the inherent rights of Indigenous Peoples and becoming part of the new economy.

We have come together in one voice and, as a result of our deliberations on the present situation and future of our Peoples, we hereby declare:

Affirming that all of the Indigenous Peoples of the Americas are Peoples with the inalienable human right of self-determination, including the right of self-identification;

Affirming the Supremacy of the Great Creator – Our Maker, our provider, our protector, our very life essence, and the source of all our power;

Stating that Indigenous Peoples have, and have had since time immemorial, unique spiritual and physical relationships with the

universe, Mother Earth, and the natural world, including with our traditional lands and waters, and with the air and coastal waters, shorelines, ice, flora, fauna and minerals;

Emphasizing that Indigenous Peoples, have inherent, traditional and other collective systems for control and use of land and territories, including subsoil, bodies of water, coastal areas, islands, keys and coral reefs, and are a necessary condition for our economic, social and cultural survival and our collective and individual well-being;

Expressing deep concern about safeguarding the integrity of our environment, conserving the biodiversity of our territories, and exercising our responsibility for stewardship of Mother earth;

Recognizing that Indigenous Peoples are subjected to racism and racial discrimination, and have been and continue to be the victims of genocide, ethnocide, colonization, exclusion, marginalization and the dispossession of our lands, territories and resources;

Understanding that these actions continue to prevent us from exercising our rights to our own means of subsistence, to freely dispose of our own natural wealth and resources, and to economic, social, cultural and political development in accordance with our own values, priorities, needs and interests;

Insisting that economic initiatives should only proceed within a framework that upholds the principles and traditions of Indigenous Peoples and the imperative to respect our human rights;

Remembering that economic actions and agreements, such as the North American Free Trade Agreement (NAFTA) and the Market of the Southern Cone (MERCOSUR), that excluded Indigenous Peoples' effective participation, consultation and consent, have threatened international peace and security and violated Indigenous Peoples' human rights;

Noting that such trade and economic development agreements have had devastating adverse effects on the lives, health, cultures, economies, environment and territories of Indigenous Peoples;

Noting moreover that such devastating adverse affects have been suffered disproportionately by Indigenous women and children; *Concerned* that by the year 2005, State leaders are seeking to create a Free Trade Area of the Americas (FTAA) that would cover South, Central and North America and the Caribbean (except Cuba) and

would result in similar problems, violations and impacts as past economic and trade agreements;

Also deeply concerned that States continue to dispossess Indigenous Peoples by privatizing or otherwise exploiting and transferring our lands and resources, or the rights therein, to government entities, transnational corporations and other third parties without our consent;

Alarmed that the economic policies promoted by States, state affiliated corporations and such transnational financial institutions as the World Bank, the International Monetary Fund (IMF), the World Trade Organization (WTO) and the Inter American Development Bank (IDB), constitute grave breaches of the public trust and have transformed States into mere instruments of corporations under the WTO, interfering with the capacity of States to enact measures to protect the environment, the rights, and the social, economic and cultural well-being of Indigenous Peoples;

Recognizing the holistic and essential contributions of Indigenous women as the source of life, knowledge and skills which are fundamental to the worldview of Indigenous Peoples, and their ongoing contributions to the cultural, social, spiritual, economic and political development of Indigenous Peoples.

Recognizing also the important and unique contributions of our youth – who are the future of our Peoples — and Elders – who are the carriers of our wisdom and history, and ensuring their basic human rights and participation in all stages of policy and decision-making.

Therefore, the following principles and conclusions must be recognized, respected and followed by all member States, the Organization of American States (OAS), and other regional, national and international agencies or institutions that may, or have the power to, adversely affect the human rights of Indigenous Peoples of the Americas:

Basic Human Rights and Fundamental Freedoms of Indigenous Peoples

1. The fundamental collective human rights of Indigenous Peoples as Peoples, including particularly our right of self-determination, must be recognized and respected in accordance with international law. As such our rights are inalienable and not subject to extinguishment or termination.

2. These fundamental rights must include, *inter alia*:
 - a) The right to our lands and territories, including subsoil and natural resource rights;
 - b) Self-determination and self-governance and recognition of traditional authorities;
 - c) Respect and protection of our sacred cultural and ceremonial sites;
 - d) Protection of our heritage, and our intellectual and cultural property rights;
 - e) Respect for our oral histories and laws.
3. The human rights of Indigenous Peoples in all regions of the world must be recognized and respected in a fair and equal manner, on the same footing, and with the same emphasis. States with lesser democratic traditions than other American States must be held equally accountable for the human rights abuses against Indigenous Peoples.
4. States in the Americas must not invoke the particularities of their own legal and political system as an excuse for refusing to recognize and respect the human rights of Indigenous Peoples. This is especially important in regard to the territorial, land and resource rights, including subsoil rights, of Indigenous Peoples.
5. Where our rights may be affected, Indigenous Peoples have the right to full, direct and effective participation in domestic, regional and international institutions and processes, as a democratic entitlement. This right includes access to adequate financial resources for these purposes and right to share in the benefits of resource projects.
6. Crimes committed against Indigenous Peoples, including crimes of genocide, ethnocide and crimes against humanity, must be investigated, prosecuted and punished by governments and international criminal justice bodies. Such crimes include crimes committed against our Peoples in Guatemala, Colombia, Peru, Mexico and other States, the targeted physical elimination

of our leaders, the sterilization of our women against their will, and the taking of our children from our homes and communities.

United Nations Declaration on the Rights of Indigenous Peoples

7. The rights recognized in the *United Nations Declaration on the Rights of Indigenous Peoples* constitute the minimum standards for the survival, dignity and well-being of the Indigenous Peoples of the world. Efforts should be made to accelerate the work on the UN Declaration in order to be adopted and proclaimed by the UN General Assembly.

Proposed American Declaration on the Rights of Indigenous Peoples

8. Member states must ensure that the norms in the *Proposed American Declaration on the Rights of Indigenous Peoples*, or in other OAS standard setting processes, are not less than those in the *U.N. Declaration on the Rights of Indigenous Peoples* (as adopted by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities).
9. In particular, the Proposed Declaration must fully recognize the right of Indigenous Peoples as Peoples with the right of self-determination without discrimination.
10. The Proposed Declaration shall not be approved or otherwise adopted without the free and informed consent of Indigenous Peoples.

Necessary Principles for Trade

11. It must be explicitly recognized, in the text of the Free Trade Area of the Americas (FTAA), that the principles of democracy and respect for human rights are inseparable from free trade and that our fundamental human rights, including our right of self-determination, are paramount.
12. It must be explicitly recognized, in the text of the FTAA, that protection of the environment must be safeguarded, particu-

larly in or affecting Indigenous territories and lands. Trade and development must be environmentally, socially and culturally sustainable and equitable from the viewpoint of Indigenous Peoples.

13. The text of the FTAA must also provide mechanisms for the full implementation, monitoring and enforcement of environmental protection and the human rights of Indigenous Peoples.
14. Indigenous Peoples must have full, fair, adequate and effective participation at all stages of the FTAA process.
15. The FTAA must holistically benefit Indigenous Peoples, in accordance with our world view and aspirations and unique spiritual relationships, and include active measures to participate in resource development including employment, supplier development and joint ventures as measures to reduce the extreme impoverishment and socio-economic marginalization suffered by Indigenous Peoples.
16. More particularly, Indigenous women must participate equitably in the planning and decision-making concerning resources and investment, as well as in the implementation and evaluation of those decisions, and ensure access to the benefits generated by those resources. To ensure such full, active and effective participation in all aspects of trade and development, Indigenous women must have access to education and training.
17. That if a FTAA is developed, Indigenous Peoples adopt a strategy that ensures that Indigenous expertise is utilized throughout processes that involve the possibility of contracting with Indigenous business concerns, and that Indigenous Peoples be actively and meaningfully involved in all aspects of identification, approval and implementation of such contracts.

Reforms Within the OAS

18. The central purpose of the OAS must be to promote and protect human rights of all peoples without discrimination.

19. The OAS, in conjunction with Indigenous Peoples, must ensure that:
- a) the status and human rights of Indigenous Peoples are advanced in a manner that is wholly consistent with international law and without discrimination;
 - b) Indigenous Peoples are able to directly access and advance our rights at the OAS, particularly through an uncomplicated and non-bureaucratic complaints process; and,
 - c) the Inter-American Commission on Human Rights and Inter-American Court on Human Rights are provided with adequate resources to devote full-time to the promotion and protection of human rights and the conservation and protection of the environment, including our lands, territories and resources.
20. The Inter-American Indian Institute must be completely restructured and reconceived consistent with the concerns and proposals of Indigenous Peoples.
21. The OAS must take active and concrete steps to establish an effective and fully funded Permanent Forum of Indigenous Peoples within the organization.

World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR)

22. Indigenous Peoples and Nations have experienced discrimination within the WCAR. There has been a consistent refusal to recognize Indigenous Peoples as Peoples with the right of self-determination and a refusal to ensure the full, direct and effective participation of Indigenous Peoples at all stages of the WCAR.
23. The WCAR *Declaration* and *Programme of Action* must be formulated with the full participation of Indigenous Peoples and Nations and must include sufficient detail regarding Indigenous Peoples' concerns and recommended actions for follow up.

International Labor Organization Convention #169 on Indigenous and Tribal Peoples, 1989

24. All member States of the OAS who have ratified the ILO Convention #169 must comply with it and fully implement it, and member States who have not done so, must ratify this Convention.
25. Efforts must be made to improve upon this Convention in the future, without prejudice to national and international measures which may exceed the standards set out in this Convention.

Eradicating Impoverishment

26. The eradication of the extreme impoverishment suffered by Indigenous Peoples throughout the hemisphere must be established as an urgent priority in the *Declaration of the Summit of the Americas, 2001*; and the *Plan of Action*, therefore, must include comprehensive and concrete actions to solve this problem.
27. These concrete actions and plans must be developed in close cooperation and conjunction with Indigenous Peoples.

United Nations Permanent Forum on Indigenous Issues

28. It is recommended that the Leaders of the Summit of the Americas and the OAS member States actively support the recently established United Nations Permanent Forum to ensure that it is provided with adequate financial resources from the United Nations Regular Budget, broad powers, and a far-reaching mandate.

Protection of Indigenous Intellectual Property, Culture and Heritage

29. The past few centuries have witnessed the extinction of entire Indigenous Nations in the Americas and the extinguishments of entire cultures, heritages, languages and peoples, through

colonization, dispossession, disease, poverty, displacement, genocide and ethnocide. Our cultures are under serious threat throughout the Americas.

30. This extinction, exploitation, appropriation and dispossession of our cultural resources is ongoing, particularly under WTO international trade agreements such as the Agreement on Trade-Related Intellectual Property. Indigenous women have particularly been affected by the inadequate protection of their unique knowledge.
31. The knowledge and culture of Indigenous Peoples cannot be separated from our unique spiritual and physical relationship with our lands, waters, resources and territories.
32. Accordingly, to protect the traditional knowledge, culture and heritage of Indigenous Peoples from extinction, the OAS must immediately recognize our rights as Peoples which include, *inter alia*:
 - the right to control our lands, territories, and resources, including our cultural and intellectual resources;
 - the right and obligation to develop our own cultures and knowledge systems and to transmit this knowledge to future generations.
33. Indigenous Peoples are the exclusive owners and primary guardians and interpreters of our traditional knowledge and culture, whether created in the past or developed in the present or future.
34. Where the intellectual property of Indigenous Peoples is being used, particularly where it is being exploited for commercial purposes or studied with a view to commercial use, the free and fully informed consent of the Indigenous Peoples concerned must be obtained; Indigenous Peoples must be the primary beneficiaries; and must receive ongoing and objectively just and equitable compensation.
35. The intellectual property of Indigenous Peoples is collective, inalienable and intergenerational. No agreements with Indigenous Peoples with respect to our intellectual property can

seek in any form to extinguish, terminate, alienate, or transfer ownership of these rights.

36. The intellectual property rights of Indigenous Peoples, as recognized in the *Convention on Biological Diversity*, must be fully respected and implemented. Indigenous Peoples must have full, direct and effective participation in the Working Group on the implementation of Article 8(j) of this Convention.

Treaties and Agreements

37. All Member States of the OAS must recognize and renounce their discriminatory legal doctrines and attitudes concerning Treaties between Indigenous Nations and States, as well as taking corrective actions related to the abrogation of Treaty rights and the recognition of the status of such Treaties. Furthermore, the Indigenous Peoples Summit of the Americas proposes the implementation of the recommendations contained in the U.N. Study on Treaties, Agreements and other constructive arrangements.
38. The Indigenous Peoples Summit of the Americas calls upon the O.A.S. Members to honour and respect the Treaties as international agreements and that Indigenous Peoples have the right to the recognition, observance and enforcement of Treaties according to their original spirit and intent, and, according to Indigenous Peoples' understanding. Conflicts and disputes which cannot be otherwise settled should be submitted to competent international bodies such as the United Nations' Permanent Forum on Indigenous Issues.

Coordination and Cooperation Among Indigenous Peoples, Nations and Organizations

39. We are taking this historic opportunity, at this Indigenous Peoples Summit of the Americas, to strengthen the relationships between Indigenous Peoples, Nations and Organizations in the Americas and to make a reality of the dream of our ancestors of the union of the Eagle and the Condor.
40. From this time forward we are committed to working together in unity to ensure the rights of our Indigenous Peoples, Na-

tions and Organizations are promoted and protected in every forum.

41. We plan to intensify our spiritual, social, cultural, political and economic relationships and work together to achieve our common aspirations as Indigenous Peoples, Nations and Organizations.

The Spanish and English versions of this document are equally authoritative.

We, the undersigned Co-chairs of the Indigenous Peoples Summit of the Americas, do hereby ratify and affirm that the foregoing Declaration was adopted by the Summit participants on the 31st of March, 2001.

NOTAS

NOTAS

- 1 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).
- 2 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.
- 3 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."
- 4 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>
- 5 Guides have also been written on the UN Human Rights Committee, the International Labour Organization and the African Commission on Human and Peoples' Rights.
- 6 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.
- 7 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).
- 8 *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.
- 9 This Working Group met in November 1999 and April 2001. For documents on the proceedings in the Working Group, see, www.summit-americas.org/Indigenos/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>
- 10 The texts of these Conventions and a list of ratifying states are located at: <http://www.cidh.org/basic.htm>
- 11 *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.
- 12 *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.
- 13 *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.
- 14 *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.
- 15 *Genie Lacayo Case*, Judgment of January 29, 1997, Inter-American Court of Human Rights, Series C No. 30, at para. 74.

- 16 *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.
- 17 *Dissenting Opinion of Judge A.A. Cançado Trindade, Genie Lacayo Case*, Order of the Court of September 13, 1997, at para. 21.
- 18 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”.
- 19 *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.’”).
- 20 *Resolution of the Fifth Meeting of Consultation of Ministers of Foreign Affairs (Santiago, Chile, 1959)*, OEA/Ser.C/II.5, 4-6.
- 21 The Charter was amended by the 1967 Protocol of Buenos Aires.
- 22 “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
- 23 For a copy of the original IACHR petition, see, S. James Anaya, *The Awastingi Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers and Government Neglect in Nicaragua*, 9 *St. Thomas Law Review* 157 (1996).
- 24 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.
- 25 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>
- 26 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.”
- 27 Article 74, American Convention on Human Rights.
- 28 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, *Godínez Cruz Case*, Judgment of January 20, 1989, Inter-American Court of Human Rights, Series C No.5, para. 66; *Fairen Garbi and Solís Corrales Case*, Judgment of June 26, 1987, Inter-American Court of Human Rights, Series C No. 2, para. 87; *Velasquez Rodríguez Case*, Judgment of July 29, 1988, Inter-American Court of Human Rights Series C No. 4, para. 63.
- 29 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.
- 30 *Godínez Cruz Case*, Judgment of January 20, 1989, Inter-American Court of Human Rights, Ser. C, Decisions and Judgments No.5, at para. 67.
- 31 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.
- 32 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.
- 33 *Id.*, at 721, para. 122.
- 34 *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.
- 35 *Velasquez Rodríguez*, Judgment of July 29, 1988, Inter-American Court of Human Rights, Series C No. 4; *Fairen Garbi and Solís Corrales and Godínez 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.
- 36 *Judicial Guarantees in States of Emergency*, *Id.*
- 37 Hearings are addressed in Articles 59-68, IACHR Rules of Procedure.
- 38 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.
- 39 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/serieiaing/a_15_ing.html
- 40 *Loayza Tamayo Case*, Judgment of 17 September 1997. Inter-American Court on Human Rights, Series C No. 33, at paras. 79-81 (references omitted).
- 41 *Annual Report of the Inter-American Commission of Human Rights*, OEA/Ser.L/V/II.98. Doc.7 rev., at 46 (1998).
- 42 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).
- 43 *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).
- 44 *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.
- 45 OEA/Ser.PAG/doc. 305/ 72, rev. 1, March 14, 1973, pp. 90 - 91.
- 46 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.
- 47 *Id.*, at 175.
- 48 *Id.*, at 175-76.
- 49 *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).
- 50 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.
- 51 *Report on the Situation of Human Rights in Brazil*. OEAA/Ser.L/V/II.97 Doc 29 rev. 1 (1997).
- 52 *Id.* at 112.
- 53 *Id.*
- 54 *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).
- 55 *Id.*, at 75, para. 3.
- 56 *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).
- 57 *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).
- 58 *Id.*, at 78, para. 9.
- 59 *Id.*, at 81, para. 11.
- 60 *Id.*, at 81, para. 15.
- 61 *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.
- 62 *Id.*, at 133, para 3(j).
- 63 *Id.*, at 135. *Resolution on the Friendly Settlement Procedure Regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin*.
- 64 *Autonomy Statute of the Atlantic Coast Regions of Nicaragua*, Law No. 28 of 7 Sept. 1987.
- 65 *Id.*
- 66 *Report on the Situation of Human Rights in Ecuador*. OEA/Ser.L/V/II.96, Doc. 10 rev. 1 (1997).
- 67 *Id.* at 88.

- 68 *Id.* at 92.
- 69 *Id.* at 89.
- 70 *Id.* 92-5.
- 71 *Id.* at 94.
- 72 *Id.* at 98.
- 73 *Id.* at 115.
- 74 *Id.* at 104.
- 75 *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>
- 76 *U.N.E.S.C.O Declaration on Ethnocide and Ethnodevelopment*, San José 1981.
- 77 *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.
- 78 *Report on the Situation of Human Rights in Ecuador*, at 105-6.
- 79 *Id.* at 106.
- 80 *Id.* at 115.
- 81 *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
- 82 *Maya Indigenous Communities and their Members (Case 12.053 (Belize))*, Report No. 78/00 (Admissibility), at para. 6.
- 83 *Id.*, paras. 9-26.
- 84 *Id.*, at para. 47.
- 85 *Id.*, at para. 53.
- 86 *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.
- 87 *Id.*, at para. 50, quoting, *Godínez Cruz Case, Preliminary Objections*. Inter-American Court on Human Rights, Judgment of June 28, 1987, at para. 90.
- 88 *The Mayagna (Sumo) Awas Tingni 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.
- 89 *Mary and Carrie Dann (Case 11.140 (United States))*, Report No. 99/99 (Admissibility). For an on-line English article about the Dannels' situation, see, <http://www.law-lib.utoronto.ca/Diana/fulltext/duss.htm>
- 90 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>
- 91 *Report on the Human Rights Situation in Mexico.* OEA/Ser.L/V/II.100 Doc. 7 rev. 1 (24 September 1998).
- 92 *Id.*, at para. 577.
- 93 *Third Report on the Human Rights Situation in Colombia.* OEA/Ser.L/V/II.102 Doc. 9 rev. 1 (26 February 1999).
- 94 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>.
- 95 *Third Report on the Human Rights Situation in Colombia*, Ch. X, at para 19.
 96 *Id.*, paras. 23-7.
 97 *Second Report on the Human Rights Situation in Peru*. OEA/Ser.L/V/II.106 Doc. 59 rev. (2 June 2000)
 98 *Id.*, at para. 19.
 99 *Id.*, at para. 16. See, also, *Ecuador Report*, *supra* note 73.
 100 *Id.*, at para. 39(4).
 101 *Id.*, at para. 26.
 102 *Id.*, at para. 39(5).
 103 *Id.*, at para. 39(1).
 104 *Id.*, para. 32.
 105 *Id.*, paras. 35-8.
 106 *Id.*, at para. 39(2).
 107 *Id.*, at para. 39(7).
 108 *Fifth Report on the Situation of Human Rights in Guatemala*. OEA/Ser.L/V/II.111 doc. 21 rev. (6 April 2001).
 109 *Id.*, at para. 56.
 110 *Id.* at para. 57.
 111 *Id.*, at para. 66(4).
 112 *Third Report on the Human Rights Situation in Paraguay*. OEA/Ser.L/V/II.110 Doc.52 (9 March 2001)
 113 *Third Report on the Human Rights Situation in Paraguay*, Ch. IX, at para. 1.
 114 *Id.*, at para. 28.
 115 *Id.*, at para. 38.
 116 *Id.*, at para. 50(8).
 117 *Id.*, at para. 47.
 118 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.
 119 *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
 120 Inter-American Commission on Human Rights, *Press Release No. 23/01, Mayagna Awas Tingni Indigenous Community*, Washington D.C., 28 September 2001.
 121 *Mayagna (Sumo) Awas Tingni* (Case 11.577 (Nicaragua)).
 122 RAAN is part of the admionstrative structure for the Atlantic Coast established under the 1987 Autonomy Statute. See, the discussion of the *Miskito Report* above.
 123 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.
 124 *Id.*

- 125 *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 (references omitted).
- 126 *Id.*, at para. 54.
- 127 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), para. 148.
- 128 *Id.*, at paras. 149 and 151.
- 129 *Id.*, at para. 153.
- 130 *Id.*
- 131 *Id.*
- 132 *Id.*, at para. 164.
- 133 *Id.*, at para. 173.
- 134 *Id.*
- 135 *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).
- 136 *Aloeboetoe et al. Case*, Judgment of 4 December 1991, Inter-American Court on Human Rights, Series C No. 11.
- 137 *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.
- 138 *Id.*, at para. 62.
- 139 *Id.*, at para. 58.
- 140 *Id.*, at para. 62.
- 141 *Id.*, at 61.
- 142 OEA/Res. 1022 (XIX-0/89).
- 143 The replies it received are summarized in the *Annual Report of the IACHR, 1992-93*. Report on the First Round of Consultations on the Future Inter-American Instrument on the Rights of Indigenous Populations. Approved by the IACHR at its 83rd. Period of Meetings, March 1993, in Section V, *Annual Report of the IACHR 1992-1993*. OEA/Ser.L/V/II.83 doc. 14, corr. 1, March 12, 1993.
- 144 *Draft of the Inter-American Declaration on the Rights of Indigenous Peoples*, approved at the 1278 session of the IACHR held on September 18, 1995, OEA/Ser/L/V/II.90 Doc. 9 rev. 1, *September 21, 1995*.
- 145 Proposed OAS Declaration on the Rights of Indigenous Peoples (OEA/Ser/L/V/II.95 Doc. 6, Feb. 26, 1997). The text can be found on the internet at: www.cidh.oas.org/Indigenous.html
- 146 *Comments of the Inter-American Juridical Committee on American Declaration on the Rights of Indigenous Peoples*. OEA/Ser.GCP/doc.3052/98 rev.2, 12 May 1998; Inter-American Indian Institute, *Comments on the Proposed American Declaration on the Rights of Indigenous Peoples*, March 1998.
- 147 The report of the Governmental Experts Meetings was published as document: OEA/RECIDIN/doc.10/99. See, also, *Report of the Permanent Council on the Proposed American Declaration on the Rights of Indigenous Populations* (CP/CAJP-1489/99).
- 148 The walk out was not noted in the Report of the Chair.

- 149 *Report of the Chair, Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Populations*, OEA/Ser.K/XVI GT/DADIN/doc.5/99, 1 December 1999.
- 150 Argentina's written comments, for instance, states that "from a strictly legal point of view 'territory' is defined as the spatial limits within which the state legal system applies; therefore, only sovereign states, not indigenous peoples, possess territory. In addition, Article 75, paragraph 17, of the Argentine Constitution employs only the term 'lands.'" Observations and Recommendations of the Governments of the Member States on the "Proposed American Declaration on the Rights of Indigenous Peoples," Argentina. (CP/doc.2878/97), OEA/Ser.G/CP/CAJP-1293/98 add.4, 21 January 1998, reissued as: *Observations and Recommendations of Argentina on the "Proposed American Declaration on the Rights of Indigenous Populations."* OEA/Ser.K/XVI/RECIDIN/INF.3/99, 1 February 1999, p. 4.
- 151 Guatemala's preliminary written comments object to the article on autonomy and self-government citing incompatibility with national law. Preliminary Observations of the State of Guatemala on the Draft American Declaration on the Rights of Indigenous Peoples, May 1998, reissued as: *Observations and Recommendations of Guatemala on the Proposed American Declaration on the Rights of Indigenous Populations.* OEA/Ser.K/XVI/RECIDIN/INF.8/99, 2 February 1999, p. 3-4.
- 152 Argentina's written comments on the proposed Declaration stated that references to autonomy and self-government be deleted from the text and limited to "participation by indigenous peoples in managing their own institutions".
- 153 This is a very rough appraisal of the positions of the various states based upon their written and oral statements. This classificatory scheme is overly simplistic and arbitrary to say the least and does not reflect that some states were both supportive and opposed, or uncommitted, etc., to different parts of the proposed Declaration; nonetheless, the intent is to give the reader a general idea of the positions of the various delegations, nothing more.
- 154 The Report of the Chair on the second session was issued as: OEA/Ser.K/XVI GT/DADIN/doc.23/01 rev. 1, 26 July 2001 (available on the OAS web site: www.oas.org).
- 155 In the first session eight states were classified as "opposed" or "mostly opposed" while only three were identified as "mostly supportive".
- 156 *Declaration of Quebec City*, April 22, 2001, adopted by the Third Summit of the Heads of State and Government of the Americas. For the full text, see, <http://www.summit-americas.org/Documents%20for%20Quebec%20City%20Summit/Quebec/PofA-Dec-mainpage22April-Eng.htm>
- 157 *Plan of Action*, adopted by the Third Summit of the Heads of State and Government of the Americas. For full text, see, <http://www.summit-americas.org/Documents%20for%20Quebec%20City%20Summit/Quebec/PofA-Dec-mainpage22April-Eng.htm>
- 158 OEA/Ser.K/XVI GT/DADIN/doc.23/01 add. 2, 9 mayo 2001
- 159 OEA/Ser.P. AG/RES. 1780 (XXXI-O/01), 5 June 2001.
- 160 *Calendar 2001-2002*, Working Group on the Rights of Indigenous Peoples. OEA/Ser.K/XVIGT/DADIN/doc.29/01 rev. 1, 5 November 2001.
- 161 Among others, see, OAS Declaration, art. XVIII(4)(5) based upon ILO 169, art. 15.
- 162 For instance, the American Convention on Human Rights (1969); the American Declaration on the Right and Duties of Man (1948); American

- Convention for the Prevention, Punishment and Eradication of Violence Against Women. Convention of Belem do Para (1994); and, OAS General Assembly: Declaration of Nassau (1992).
- 163 Universal Declaration of Human Rights (1948); International Covenant on Civil and Political Rights (1966) and; the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992).
- 164 See, OAS Declaration, art. XIII(2) taken from Principle 15, draft Principles on Human Rights and the Environment. *Human Rights and the Environment. Final Report prepared by Mrs. Fatima Zohra Ksentini, Special Rapporteur.* UN Doc. E/CN.4/Sub.2/1994/9 (1994)
- 165 Among others, see, OAS Declaration, arts. X(3) and XVIII(7) based upon arts. 13 and 26, respectively of the UN Draft Declaration. See, also, XV(1) an amalgamation of arts. 3 and 31 of the UN instrument.
- 166 The technical staff of the IACHR looked at and incorporated elements from the Constitutions and laws of the following states: Brazil, Colombia, Chile, Paraguay, Guatemala, Venezuela, Costa Rica and Argentina
- 167 UN Draft Declaration, Art. 20.
- 168 UN Draft Declaration, Art. 25, reads: "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard."
- 169 ILO 169, Art. 13(1) reads: "In applying the provisions of this Part of the Convention [PART II. LAND] governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationships with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship."
- 170 Compare with UN Draft Declaration, Art. 26, which in part states: "Indigenous peoples have the right to own, develop, control and use the lands and territories ... and other resources that they have traditionally owned or otherwise occupied or used"
- 171 See, *Brazil Const.*, Art. 231.4; *Colombia Const.*, Art. 63; *Paraguay Const.*, Art. 64; *Argentina Const.*; Art. 67; *Venezuela, Law 426*, Art. 12; *Chile, Law 19.253*, Art. 3 and; *Costa Rica, Dto. 6172, (1977 Indian Law)*, Art. 13.
- 172 *Aloeboetoe et al. Case*, para. 46 (see, above, Section VII.D.2).
- 173 Art. 7(b) reads: "Indigenous Peoples have the collective and individual right not to be subjected to ethnocide or cultural genocide, including prevention of and redress for: ... (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources."
- 174 ILO 169, Art. 16.
- 175 See, UN Draft Declaration, Art. 28.
- 176 *Kitok vs. Sweden, Report of the Human Rights Committee*, 43 UN GAOR Supp. (N0. 40) at 221, 230, para. 9.8, UN Doc. A/43/40 (1988). See, also, *Lovelace vs. Canada, Report of the Human Rights Committee*, 36 GAOR Supp. (N0. 40), at 166, UN Doc. A/36/40 (1981).
- 177 This part of the article is drawn from the American Convention for the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para, 1994).
- 178 Source: *Basic Documents Pertaining to Human Rights in the Inter-American System.* OAS/Ser.L/V/I.4 rev. 8, 22 May 2001.

