

Amici Curiae

Awas Tingni Mayagna (Sumo) Indigenous Community

v.

The Republic of Nicaragua

presented by

The International Human Rights Law Group (IHLRG)

and

The Center for International Environmental Law (CIEL)

Honorable Inter-American Court on Human Rights:

Romina Picolotti, in representation of the International Human Rights Law Group (IHLRG), address at 1200 18th Street, NW, Suite 602, Washington D.C., 20036; and Owen J. Lynch, in representation of the Center for International Environmental Law (CIEL), address at 1361 Connecticut Avenue, NW, Suite 300, Washington D.C., 20036, respectfully present the following amicus brief on the case of Awas Tingni Mayagna (Sumo) Indigenous Community v. The Republic of Nicaragua:

Request to be Considered Amici Curiae

The amicus curiae brief is primarily a common law institution although countries with Romano-Germanic law traditions use it. Professor W. Michael Reisman of Yale Law School has succinctly stated the value of amicus briefs in correspondence with the Registrar of the International Court of Justice.

In common law countries, the amicus curiae brief has been an institution which has provided useful information to courts, permitted private parties who were not litigating to inform the court of their views and the probable effects the outcome might have on them and, overall, has served as a means for integrating and buttressing the authority and conflict-resolving capacities of domestic tribunals.

Consistent with the custom of the Inter-American Court on Human Rights of accepting amicus briefs, we wish to request that the honorable Court admit

this Amici Curiae in support of the international human rights of the Mayagna (Sumo) Indigenous Community of Awas Tingni.

Interests of the Amici Curiae

The IHRLG is a non-profit human rights organization comprised of legal professionals engaged in human rights advocacy, litigation and training around the world. Founded in 1978, the IHRLG has worked in more than 80 countries in 5 continents. Our mission is to support and help empower advocates to expand the scope of human rights protection and to promote broad participation in strengthening human rights standards and procedures at the national, regional, and international levels. Presently, the IHRLG has a civil society-strengthening program in the Atlantic Coast of Nicaragua, with two offices, one in Puerto Cabezas and the other in Bluefields.

CIEL is a public interest environmental law organization founded in 1989 to focus the energy and experience of the United States' public interest environmental law movement on reforming international environmental law and institutions, and on forging stronger and more meaningful connections between the top-down diplomatic approach of international law and the bottom-up participatory approach that has been the hallmark of the public interest environmental law movement. CIEL is part of a growing movement, and an informal network, of civil society institutions from various parts of the world that are committed to promoting public interest law and sustainable development.

As non-governmental organizations dedicated to the promotion and protection of human and environmental rights, we have closely followed the legal proceedings and discussion on the recognition and demarcation of indigenous territorial rights, and have taken a special interest in the Awas Tingni Mayagna (Sumo) case.

The forthcoming decision in this case will be of major importance for the development of the human rights of indigenous peoples as well as international human rights and environmental law. The case is poised to set a precedent on the commitment of the Inter-American human rights system to protect the human rights of indigenous peoples in an effective and adequate manner. It is worth noting that nearly 30 million indigenous people are citizens of Organization of American States (OAS) member states, yet the Inter-American Human Rights Court has rarely had the opportunity to rightfully and emphatically define and defend indigenous peoples rights.

We approach the Court in the status of Amici Curiae, in support of efforts to encourage an enlightened and proactive role by the Inter-American human rights system in the defense of indigenous peoples' rights and to promote

constructive linkages between human rights and environmental laws in defense of the Awas Tingni Mayagna and other indigenous peoples.

Petitum

With the anticipation that this contribution might assist the Court to reach a just decision for the parties involved with the Awas Tingni Mayagna (Sumo) case, we respectfully request that the Honorable Court:

- 1) admit the International Human Rights Law Group (IHR LG) and the Center for International Environmental Law (CIEL) as Amici Curiae for this case;
- 2) attach this amicus to the case file; and,
- 3) adopt the views set forth in this brief.

The Importance of the Awas Tingni Case for the Development of the Inter-American Human Rights System

This case presents an important opportunity for Nicaragua and the Inter-American Human Rights system to promote national and regional interests by fostering an appropriate balance between human rights and environmental and economic interests. Nicaragua's forests represent important long-term national assets with potential benefits for all Nicaraguans. Forests stabilize and invigorate Nicaragua's ecology, provide rich troves of genetic diversity (for pharmaceutical and agricultural products), produce lumber, and provide homes for indigenous peoples. The true value of forestlands to Nicaragua is in jeopardy if the court does not grant an adequate and effective protection to the Awas Tingni community. Multinational corporations or others who will not suffer the effects of deforestation can too easily buy logging concessions. Without means for accounting for the true environmental costs of logging, Nicaragua will find it difficult to capitalize on the value these forests represent.

The Awas Tingni case presents a landmark opportunity for the evolution of the Inter-American Human Rights System. The decision of the Inter-American Court will potentially have great impact on the development of hemispheric indigenous rights and on the promotion and protection of environmental human rights. The Awas Tingni case provides the Inter-American Court on Human Rights with its first opportunity to rule on a case concerning the legal recognition and demarcation of the property rights of indigenous peoples, an issue of major regional and international concern.

The Inter-American Human Rights System requires clarity and the development of existing jurisprudence on indigenous peoples, specifically as concerns:

- Terminology Used to Address Indigenous Peoples;
- Need for Special Legal Protection for Indigenous Peoples;

Summary of the Argument

In analyzing the Awas Tingni case, we have focused on Nicaragua's international obligations. We have anchored our observations on standards and rules applicable to human rights, indigenous peoples, and the environment. These rules and standards are mandated in universal and/or regional international agreements freely entered into by Nicaragua and by general principles in international human rights and environmental law.

The central contention of this brief is that the Inter-American Human Rights System can adequately and effectively protect the rights of indigenous peoples, including the Mayagna (Sumo) people of Awas Tingni. The Inter-American Court, being the highest organ of the Inter-American Human Rights System, has an affirmative duty to interpret the American Convention on Human Rights according to its object and purpose, i.e. the international protection of the basic rights of human beings. The historical, contemporary and severe discrimination faced by indigenous peoples requires the development and enforcement of special legal protection to ensure their enjoyment of basic human rights. In the case of Awas Tingni, the *sole* way of achieving this special protection is by interpreting the American Convention in a way that: a) integrates Nicaragua's international obligations under the American Convention with other international instruments freely entered into by Nicaragua; and, b) includes indigenous concepts.

Further, this brief argues that the intrinsic connections between land, environment, life, religion, identity, and culture, are so deeply rooted, that it is not possible to provide an effective and adequate protection of a single right, such as the right to property, without considering other rights such as the right to life, identity, culture and religion. In the case of indigenous peoples the above mentioned rights are inextricably woven into geo-spatial and cultural dynamics, and cannot be considered as isolated matters without undermining the special nature of indigenous circumstances. Recognition of these unique rights also has important implications for ensuring that indigenous stewardship of Nicaragua forest resources continues and is legally supported in ways that are culturally and economically appropriate.

Structure of the Amicus Curiae

Part I of this brief identifies the terminology used by the Inter-American Human Rights System to address indigenous peoples and recommends that the Inter American Court rely on the definitions developed by the United Nations Working Group on Indigenous Populations and on the Draft Inter-American Declaration on the Rights of Indigenous Peoples. Part II asserts that in the case of indigenous peoples the purpose of the American Convention is served by special protection, and argues that the need for a special protection in the case of indigenous peoples mandates the application of Article 29 of the American Convention. Finally, it describes the content of this special protection in the case of Awas Tingni. Part II (i) sketches the international obligations assumed by Nicaragua beyond the American Convention and provides a list of correlative rights relevant to the Awas Tingni case that should be integrated in the interpretation of the American Convention. Part II (ii) argues that the applicability of Article 29 requires that the Court take into account the contemporary development of indigenous concepts. This necessarily includes the indigenous concept of collective rights in the Awas Tingni case.

Part III conceptualizes collective rights including: i. the right to property, ii. the right to life, iii. the right to a healthy environment including the applicability of environmental economics and the internalization of environmental costs, iv. the right to culture, and v. the right to participate in government. The brief also provides an annex containing a short comparative domestic overview of recent legal developments on the recognition of indigenous community-based property rights in Canada, Australia and the Philippines.

I. Terminology Used to Address Indigenous Peoples

On different occasions, the Inter-American Commission has used a variety of terms to refer to indigenous peoples: minorities, ethnic minorities, ethnic group, peoples, tribes, indigenous cultures, and population. The Commission has not explained why it has preferred a term over the others.

In choosing a terminology to address indigenous peoples, it is important that this Honorable Court select terms that preserve the right of these communities to decide who belongs to them, without external interference. The terminology used by the following definition not only fulfills this requirement, but also reflects the collective characteristic of indigenous peoples' rights. For these reasons, we strongly encourage this Honorable Court to adopt the following definition developed by the leading United Nations study on indigenous populations:

Indigenous **communities, peoples and nations** are those which, having a historical continuity with pre-invasion and pre-colonial

societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.*[emphasis added]*

This definition, which this brief adopt, is the product of many years of discourse in which indigenous peoples from throughout the world have actively participated. It is consistent with the Draft Inter-American Declaration on the Rights of Indigenous Peoples, which defines indigenous peoples as:

... those who embody historical continuity with societies which existed prior to the conquest and settlement of their territories by Europeans. (alternative 1) [, as well as peoples brought involuntarily to the New World who freed themselves and re-established the cultures from which they have been torn] (alternative 2) [, as well as tribal 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 or regulations.]"

II. Need for Special Legal Protection for Indigenous Peoples

Article 31 (1) of the Vienna Convention on the Law of Treaties provides that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and **purpose.**" *[emphasis added]*

What then, is the purpose of the American Convention? The Honorable Court in the Gallardo case concluded that, "The Convention has a purpose -the international protection of the basic rights of human beings...." Thus, in the present case, the purpose of the American Convention is served by providing international protection of the basic rights of indigenous peoples. The continuous and severe discrimination faced by indigenous peoples requires deep reflection on how to ensure that this protection is adequate and effective.

The prevention of discrimination, on the one hand, and the implementation of special protections, on the other, are merely two aspects of the same problem: that of fully ensuring equal rights to all persons.

The term "special protection" contains within it the principle of non-discrimination, the *rationale* being the principle of "juridical equality." This is understood to be a measure of justice that provides for reasonably equal treatment to everyone in the same circumstances. Applying the principle of "juridical equality" requires that factual inequalities be recognized in order for law to address them and achieve justice. In other words, the special circumstances faced by indigenous peoples throughout the Americas and worldwide require special legal treatment in order to render justice.

The IACHR has consistently advocated for special protection of indigenous peoples in reports as well as in its resolutions. Already in 1971, citing Article 2 of the American Declaration, the IACHR found that indigenous peoples were entitled to special legal protection because they suffered severe discrimination. The Commission called upon the OAS member states "to implement the recommendations made by the Inter-American Charter of Social Guarantees which deals with the protection of indigenous peoples." A year later, the IACHR adopted a resolution that stated that "for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states." Subsequently in referring to the Miskitos, Yanomamis, Mapuches, and the indigenous peoples of Ecuador, the IACHR reiterated the need for a special protection.

The indigenous nature of the Awas Tingni case requires that this Honorable Court implement special protection. Without special protection, the essential preconditions for the enjoyment of other rights do not exist and the purpose of the American Convention will not be served.

Even though the best way of achieving special protection is by the development and application of specific law, Article 29 of the American Convention can already support special legal protection for the indigenous peoples of Awas Tingni. In order to do this, the American Convention should be interpreted to:

- i. integrate Nicaragua's international obligations under the American Convention with other international instruments freely entered into by Nicaragua; and,
- ii. take into account the contemporary development of concepts that encompass indigenous values such as the concept of collective rights.

As explained *ut supra*, there is an urgent and unpostponable need for special protection in the case of indigenous peoples to provide minimum legal guarantees for the enjoyment of their basic human rights. The current absence of specific law in the Inter-American system to provide for this special protection requires that Article 29 be applied. In other words, the affirmative duty of the Inter-American Court to interpret the American Convention according to its object and purpose mandate application in this case of Article 29 of the American Convention. The application of Article 29 is **mandatory** in order to protect the indigenous peoples of Awas Tingni in an adequate and effective manner.

i. **Integration of Nicaragua's International Obligations Under the American Convention with Other International Instruments - Applicability of Article 29b. of the American Convention**

The American Convention allows for the integration of different instruments that codify international human rights law. On this matter, this Honorable Court in its consultative opinion number one stated:

A certain tendency to integrate the regional and universal systems for the protection of human rights can be perceived in the Convention. The Preamble recognizes that the principles on which the treaty is based are also proclaimed in the Universal Declaration of Human Rights and that "they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope." Several provisions of the Convention likewise refer to other international treaties or to international law, without speaking of any regional restrictions. (See, e.g., Convention, Arts. 22, 26, 27 and 29.) Special mention should be made in this connection of Article 29, which contains rules governing the interpretation of the Convention, and which clearly indicates an intention not to restrict the protection of human rights to determinations that depend on the source of the obligations...."

It is particularly important to emphasize the special relevance that Article 29b. has to the Awas Tingni case. The indigenous nature of this case requires that the Court consider the utilization of other international human rights instruments in its analysis in order to provide adequate and effective protection to Mayagna (Sumo) people. Since the adoption of the American Convention, specific rights in international law pertaining to indigenous peoples have been developed. Article 29b. allows the Court to integrate other international instruments that Nicaragua has voluntarily signed and ratified, and which bind Nicaragua to their content, to protect indigenous peoples.

In addition to the American Convention, as a United Nations member state Nicaragua is obliged by articles 55 and 56 of the United Nations Charter to respect and promote the principles of equal rights and self-determination of peoples and the observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. These clauses mark the modern foundation of international human rights law, and the International Court of Justice has confirmed their mandatory character.

While these articles do not define "human rights and fundamental freedoms," the 1948 Universal Declaration of Human Rights is today recognized as being declaratory and interpretive of the obligations of United Nations member states under the Charter. Further, by virtue of being a member of the Organizations of American States, Nicaragua is obliged to uphold the basic rights and guarantees proclaimed in the 1948 American Declaration of the Rights and Duties of Man (American Declaration).

In addition to these constitutive instruments and declarations, Nicaragua has ratified the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of all form of Racial Discrimination (CERD); the Convention on the Rights of the Child (CRC). By ratifying these instruments, Nicaragua assumed a solemn duty toward other States Parties and toward its own citizens to respect and ensure the free exercise of rights guaranteed in these treaties.

The international instruments mentioned *supra* enshrine the international obligation of Nicaragua to ensure and respect, among others, the following rights:

- right to life;
- right to equality before the law;
- right to an effective judicial remedy;
- right to residence and movement;
- right to own property alone as well as in association;
- right to religious freedom and worship;
- right to the benefits of culture;
- right to self-determination;
- right to be free from discrimination;
- right to health;
- right to a clean environment;
- right to be free from interference with one's home;
- right of minorities; and,
- right to identity.

These rights are directly implicated in the case of Awas Tingni and should be considered by this Honorable Court when interpreting the American Convention according to Article 29. As discussed below, relationships between indigenous peoples and their land and other natural resources cannot be reduced to a matter of property rights. The Mayagna (Sumo) peoples have repeatedly expressed the importance of their land for their survival, as well as its intrinsic connection to the preservation of their culture, religion and identity. Thus any analysis of the property rights of the Mayagna (Sumo), and any violation thereof, necessarily includes the rights mentioned *ut supra*.

ii. Applicability of Article 29 to Take into Account Contemporary Development of International Laws that Accommodate Indigenous Values

Article 29 of the American Convention wisely articulates a mechanism that allows the American Convention to adapt itself to the evolution of international law, including the adoption of new concepts and trends.

Judge Rodolfo E. Piza Escalante summarizes:

2. In this regard, in my opinion, both the principles of interpretation established in the Vienna Convention on the Law of Treaties, and those stemming from Article 29 of the American Convention, correctly understood above all in the light of the law on human rights, serve as a basis for the application of criteria of interpretation and even of integration that are principles, ends, and established for the greatest protection of the rights established. The Court has utilized these criteria in one way or another. [See for example OC-1/82 (paras. 24-25, 41); OC-2/82 (paras. 27 ff., sp. 27, 29, 30-31); OC-3/83 (paras. 50, 57, 61, 65-66), as well as my separate opinion in the case, Gallardo et al., (par. 21).] **These criteria also point to the need to interpret and integrate each standard of the Convention by utilizing the adjacent, underlying or overlying principles in other international instruments, in the country's own internal regulations and in the trends in effect in the matter of human rights, all of which are to some degree included in the Convention itself by virtue of the aforementioned Article 29,** whose innovating breadth is unmatched in any other international document.

3. With regard to my separate opinion, I invoke as of special importance first of all the principle that human rights are progressive and expansive in addition to being requirable. These features require the consequent interpretative

approach and, therefore, they impose the need to consider in each instance not only the meaning and scope of the very standards interpreted in their literal text, but also their potential for growth, in my judgment put in the form of legislated law by Articles 2 and 26 of the American Convention, among other international instruments on the subject, the first for all rights, and the second in terms of the so-called economic, social and cultural rights... This is why the principles of " progressive development " contained in Article 26 of the Convention, although they refer literally to the economic, social, educational, scientific, and cultural standards contained in the Charter of the Organization of American States, should in my judgment be understood to be applicable to any of the " civil and political " rights established in the American Convention, to the extent and in the ways in which they are not reasonably requirable in themselves, and vice versa, that the standards of the Convention itself may be understood to be applicable to the so-called " economic, social and cultural rights, " to the degree and in the ways in which they are reasonably requirable in themselves (as occurs, e.g., with the right to strike). In my opinion, this flexible and reciprocal interpretation of the Convention's standards with other international standards on the subject, and even with those of national legislation, is consistent with the " standards of interpretation " of Article 29 thereof, applied in accordance with the aforementioned criteria of principles and ends. [*emphasis added*]

Accordingly, Article 29—which, as expressed *ut supra*, is mandatory in this case—requires the adoption of the trends in effect in international law concerning indigenous peoples. The relevant trend in effect concerning the Awas Tingni case is the concept of collective rights.

III. Collective Rights

Collective rights are thought of as *rights that cannot be exercised but in-groups or rights where right holders are collective agents*. Their collective characteristic is what constitutes their value. Therefore the deprivation of its collectiveness will imply the emptiness of the content of the right, and subsequently, its non-existence.

The first "category" of collective rights are rights that can only be exercised in a group, as is the case with the right to freedom of expression. An individual in isolation cannot realize his or her right to freedom of expression; rather an individual must be able to share ideas with others to fully enjoy this right.

The second "category" are rights in which the rights holders are collective agents. These rights are by nature collective. Therefore the right can only be enjoyed if the group as a whole realizes the right. The right to culture and to community-based property provide an example. These rights cannot be understood absent their presence within a group in which these rights have meaning and through which they are exercised and enjoyed.

Collective rights can be found with every known indigenous community rights system, as is the case of the Awas Tingni community. The intrinsic nature of collective rights has forced a change in the language of international law since they could not be adequately addressed as individual rights. International human rights law has recognized collective rights, in both categories. A consensus has developed during the past decade that indigenous peoples have distinctive community-based collective rights. Agreements signed by the States at the Rio Conference explicitly recognized indigenous peoples' collective rights and provide strong evidence of this emerging consensus. Among these distinctive internationally recognized collective rights are the right to land and other natural resources, cultural integrity, environmental security, and control over their own development.

Even though the American Convention does not expressly use the word "collective," some of the rights that its enshrines are indeed collective. The IACHR in its report on Ecuador recognizes:

Certain individual rights guaranteed by the American Convention on Human Rights must be enjoyed in community with others, as is the case with the rights to freedom of expression, religion, association and assembly... The ability of the individual to realize his or her right both contributes to and is contingent upon the ability of individuals to act as a group. For indigenous peoples, the free exercise of such rights is essential to the enjoyment and perpetuation of their culture.

For the sake of brevity we will only focus, in this case, on the collective characteristic of the right to property and its implications concerning: the right to life, the right to a healthy environment, the right to culture and the right to participate in government.

i. The collective perspective of the right to property - Article 21 of the American Convention -

Specifically concerning indigenous peoples, the right to property has a collective perspective. As the U.N Special Rapporteur on human rights of indigenous peoples affirmed:

"...In summary, each of these examples underscores a number of elements that are unique to indigenous peoples: (1) a profound relationship between indigenous peoples and their lands, territories and resources exists; (2) that this relationship has various social, cultural, spiritual, economic, and political dimensions and responsibilities; (3) that the collective dimension of this relationship is significant; and (4) that the inter-generational aspect of such a relationship is also crucial to indigenous peoples identity, survival and cultural viability."

The indigenous right to property is a community-based right that derives from long-term relationships between indigenous peoples and the natural resources that sustain them. In the case of Awas Tingni, the Mayagna Sumo community has a system of communal property in which the land belongs collectively to the community.

Particularly in the case of Nicaragua, it must be noted that the collective right of the Mayagna Sumo peoples, to own on a community basis the rights to land they have traditionally occupied, is expressly recognized in Articles 5 and 89 of the Nicaraguan Constitution.

Article 5 of the Nicaragua Constitution reads:

The State recognizes the existence of indigenous peoples, who enjoy the rights, obligations and guarantees recognized in the Constitution, especially those that maintain and develop their identity and culture...**so as to maintain the communal forms, enjoyment, use and benefit of their lands**, all in conformity with the law... *[emphasis added]*

Article 89 of the Nicaragua Constitution reads:

...**The State recognizes the communal forms of property of the Atlantic Coast Communities' lands**; it also recognizes the enjoyment, use and benefit of the waters and forests of their communal lands...*[emphasis added]*

The definition of communal land is provided by article 36 of the Autonomy Statute of Nicaraguan Atlantic Coast Autonomous Region:

Article 36: Communal property is the land, water and forest that have traditionally pertained to the [indigenous] communities of the Atlantic Coast.

As noted *ut supra*, Nicaragua's internal laws in this case expand the concept of right to property express in Article 21 of the American Convention. Article 29 of the American Convention in this case requires that this Honorable Court integrate Nicaragua's domestic legislation in the interpretation of Article 21. This Honorable Court, therefore, should recognize the collective right to property of the indigenous peoples of Awas Tingni.

A sentence by this Honorable Court mandating the legal demarcation and documentation of indigenous community-based rights in Awas Tingni will not only establish an important legal precedent on the collective rights of indigenous peoples in Nicaragua; it would also provide a legal foundation for fostering goodwill between indigenous communities and governments throughout the Americas. It would provide indigenous communities with state-sanctioned authority to prevent migration and unsustainable commercial activities within their ancestral domains. Technical assistance to improve and develop organizational capacities and support sustainable management would, along with expanded credit programs, complement such a move.

ii. The Collective Perspective of the Right to Life - Article 4 of the American Convention -

Understanding the contextual complexities of indigenous peoples and their relationships to their land and other natural resources is essential for promoting their legal interests and well being. This requires an appreciation of the collective relationship between life and land.

The basis of all substantive legal rights is the right to life. This right is not limited to individual human beings. The United Nations in several resolutions, where it affirmed that not only all individuals but all peoples have an inherent right to life, has recognized the collective dimension of the right to life. Safeguarding this fundamental right is an essential condition for enjoying the entire range of civil and political rights.

Wisely, the President of this Honorable Court affirmed:

"This brings to the fore the safeguard of the right to life of all persons as well as **human collectivities, with special attention**

to the requirement of survival (as a component of the right to life) **of vulnerable groups** (*e.g.*, the dispossessed and deprived, disabled or handicapped persons, children and the elderly, ethnic minorities, **indigenous populations**, migrant workers...)"[*emphasis added*]

Actions taken by indigenous leaders to defend their cultural patrimony and heritage have focused on the need to protect traditional territories. Displacement from ancestral domains and damage to the local environment invariably harms the cultural integrity and well being of indigenous peoples, and often leads to physical harm and the loss of life. Therefore any analysis of Awas Tingni community-based property right pursuant to Article 21 requires consideration of the right to life - Article 4.

In the case of *Bernard Ominayak & The Lubicon Lake Band v. Canada*, the applicants alleged that the government of the province of Alberta had deprived the Lake Lubicon Indians of their means of subsistence and their right to self-determination by selling oil and gas concessions on their lands. The H.R. Committee found that historical inequities and certain more recent developments, including oil and gas exploration, were threatening the way of **life** (*emphasis added*) of the Lake Lubicon Band and were thus violating minority rights, contrary to Article 27 of the ICCPR.

The threat to the right to life in its collective and individual dimension of the Mayagna Sumo peoples is real and concrete. This threat remains permanent, like Damocles' sword, if the State fails to take positive, adequate and effective measures to protect indigenous territories and rights. Experience repeatedly shows that the failure of States to protect indigenous rights, including the authorization of incursions by external forces into indigenous territories, has hastened the extinction of the indigenous peoples and communities. The overwhelming evidence of these hostile state-sanctioned incursions, and the consequent extinction of indigenous peoples, has driven scholars of indigenous communities and other concerned parties to refer to the problem as being genocidal in nature.

As incursions into indigenous territories increase, the symbiotic tie between culture, land and life for the Awas Tingni community becomes more and more self-evident. Consequently a violation of the community-based property rights of Awas Tingni will necessary imply a violation of the right to life consecrated in Article 4 of the American Convention.

i. The Right to a Healthy Environment as Corollary of the Right to Life

The right to life entails negative as well as positive obligations. Thus the right to life implies the negative obligation not to practice any act that will result in the arbitrary deprivation of human life and the positive obligations to take all appropriate measures to protect and preserve human life. The European Commission of Human Rights recognizes that Article 2 of the European Convention of Human Rights imposed on states the positive obligation *de prendre des mesures adéquate pour protéger la vie*. Further, the Human Rights Committee stated regarding Article 6 of the UN Covenant on Civil and Political Rights that states are required "to take positive measures to ensure the right to life, including steps to reduce the infant mortality rate, prevent industrial accidents, and **protect the environment**". [emphasis added]. From this perspective, the right to a healthy environment appears as a corollary to the right to life. In the realm of international law, the right to a healthy environment is found in several environmental agreements as well as in human rights instruments. Hence, the ICESCR includes a right to a clean environment. The term "healthy environment" was also incorporated in the 1988 Additional Protocol to the American Convention on Human Rights. The Hague Declaration of 1989 was one of the most important international statements before the United Nations Conference on Environment and Sustainable Development (UNCED) that connected environmental degradation to human rights issues. It declared that environmental harm threatens "the right to live in dignity in a viable global environment."

Interest in and support for recognizing a right to healthy environment has continued to develop momentum since the UNCED. A major development was publication of the 1994 Final Report on Human Rights and the Environment, of the Commission on Human Rights Sub-commission on Prevention of Discrimination and Protection of Minorities, more generally known as the "Ksentini 1994 Report." That document discussed the legal foundations of a right to a satisfactory environment.

A right to a healthy environment is also included in the United Nations Environment Programme's 1993 Proposal for a Basic Law on Environmental Protection and the Promotion of Sustainable Development. It includes within its "Governing Principles" the "...right of present and future generations to enjoy a healthy environment and decent quality of life..." The Draft Principles on Human Rights and the Environment (which is attached to the 1994 Ksenti Report states that "[a]ll persons

have the right to a safe and healthy working environment." The IUCN draft Covenant on Environment and Development requires that "Parties undertake to achieve progressively the full realization of the right of everyone to an environment and a level of development adequate for their health, well-being and dignity." The IUCN draft also avers that "[a]ll persons have a duty to protect and preserve the environment..." thus recognizing that the right to good environment entails both a right for everyone to benefit from the environment as well as obligation for all to manage it sustainably. It is also noteworthy that a right to environment has been included in many national constitutions around the world.

The distinctive nature of indigenous peoples' relationship to the environment within their ancestral domains is captured in the proposed American Declaration on the Rights of Indigenous Peoples, which in its preamble, recognizes "the respect for the environment accorded by the cultures of indigenous peoples of the Americas." It explicitly acknowledges "the special relationship" between indigenous peoples and the environment, lands, resources and territories on which they live. The preamble also recognizes "that in many indigenous cultures, traditional collective systems for control and use of land and 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 ..." In the same vein, the draft United Nations Declaration on the Rights of Indigenous Peoples, provides in Article 25 that: 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.

As the president of this honorable Court noted,

The right to a healthy environment has individual and a collective dimensions - being at a time an "individual" and a "collective" right - in so far as its **subjects or beneficiaries** are concerned. Its "social" dimension becomes manifest in so far as its **implementation** is concerned (given the complexity of the legal relations involved). And it clearly appears in its "collective" dimension in so far as **object** of protection is concerned (a *bien commun*, the **human environment**).

Despite stylistic variations, each articulation contains an identifiable core: that the human right to a healthy environment concerns affording each person as well as a given human collectivity a right to an environment that supports physical and spiritual well being and development. The type of environment suggested in several of the instruments is one which is ecologically sound, an imprecise term, but which would likely proscribe the degradation of forests and the depletion of biodiversity which would coincide with externally controlled timber extraction activities within the ancestral domain of Mayagna (Sumo) people.

In sum, the right to life, which has a corollary the right to a healthy environment, imposes the positive obligation to Nicaragua, in this case, to take adequate measures to protect the environment of the Awas Tingni community. The degradation of forest and the depletion of bio-diversity, by timber companies with the acquiescence of the Nicaraguan state, is in direct conflict with the international legal obligations of the state.

The Right to a Healthy Environment and the Right to Equal Protection - Article 24 of the American Convention

The right to a healthy environment is intimately connected with the notion of juridical equality that contains within it, the principle of non-discrimination. As Kiss noted,

il contribue à établir une égalité entre citoyens ou, du moins, à atténuer les inégalités dans leurs conditions matérielles. On sait que les inégalités entre humains de conditions sociales différentes sont accentuées par la dégradation de l'environnement: les moyens matériels dont disposent les mieux nantis leur permettent d'échapper à l'air pollués, aux milieux dégradés et de se créer un cadre de vie sain et équilibré, alors que les plus démunis n'ont guère de telles possibilités et doivent accepter de vivre dans des agglomérations devenues inhumaines, voire des bidonvilles, et de supporter les pollutions.

L'exigence d'un environnement sain et équilibré devient ainsi en même temps un moyen de mettre en oeuvre d'autres droits reconnues à la personne humaine.

Mais, par ses objectifs mêmes, le droit à l'environnement apporte aussi une dimension supplémentaire aux droits de l'homme dans leur ensemble.

In the case of indigenous peoples, the concept of environmental discrimination takes on special relevance. While governments approve the activities of industries that conduct oil exploration, mining operations, timber exploitation, in communities that are predominantly indigenous, without regards of their proximity to or impact on areas that are populated exclusively or predominantly by indigenous peoples. Specifically in the case of Awas Tingni, the Nicaraguan government has proven to be resistant to enforcing laws and unwilling to protect indigenous communities from environmental degradation. As explained in this brief the symbiotic tie between life, land, environment and culture, of indigenous peoples, implicates that the degradation of the environment threatens the very survival and culture of indigenous peoples. Indigenous peoples suffer disproportionately the failure of the state to act to protect the environment adversely affected as a result of unregulated or uncontrolled industrial exploitation of indigenous natural resources.

The recognition by this honorable Court, of the obligation of the Nicaraguan state to protect the environment of the Awas Tingni community and its correlative right to a healthy environment, will provide the minimal legal guaranties for the enjoyment of their basic human rights, assuring the applicability or juridical equality.

Applicability of Environmental Economics - Internalizing Environmental Costs

Economic activities that preserve the regenerative capacities of renewable resources contribute to sustainable development. Economists treat environmental costs in two ways. The first, and most widespread, view sees costs flowing from environmental destruction as *external* to short-term economic calculations. Individual natural resource extractors do not face the full negative impacts of that ecological decay when no meaningful regulation or procedure forces them to confront it. Ecological costs are difficult to measure for those who do not have to cope directly with them, and they are typically left out of cost-benefit calculations. The long-term effect of externalizing ecological costs is that commercial transactions do not reflect their true ecological costs, impoverishing natural resource sellers who receive too little benefit to offset the ecological costs.

The opposite approach, *internalization*, incorporates ecological costs into economic decision-making through appropriate social,

economic and regulatory mechanisms. With perfect internalization, economic decisions keep more of the value of ecological resources in the country that enjoys them. The challenge is to find and nurture appropriate social and legal systems that recognize and protect the true value of natural resources. Absent such systems, entrepreneurs have strong incentives to rig economic transactions so that they benefit while society pays in externalized ecological (and later economic) costs.

In analyzing sustainability, four types of capital can be identified: human-made capital (e.g. factories, cash), natural capital (forests, water, air, soil, etc.), human capital (education, skills, etc.), and social capital (churches, schools, NGOs, private business, government agencies, etc.). Without appropriate ways of valuing ecological costs (appropriate uses of social capital), commerce that depletes natural capital will not lead to sustainable development.

Economists have long identified secure property rights as important. Such rights are disrupted when "significant externalities (such as environmental impacts) from resource extraction that have not been internalized through established property rights."

Appropriate property rights protection is an important tool for internalizing environmental costs and promoting sustainable development, providing individuals and groups incentives to manage resources for maximum long-term social and economic benefit. As to the present controversy, this requires the identification and invocation of social and legal rules that help internalize the costs of deforestation before timber concessions are granted.

An essential problem for developing nations is that they are susceptible to short-term economic coercion in the form of pressures to grant concessions to extract and destroy valuable natural resources, like forests. Governments need to build into their natural resource planning systems checks on this vulnerability.

Local forest-dependent people, such as the Mayagna (Sumo) of Awas Tingni, are best positioned to identify the environmental and social costs of deforestation within their ancestral domains. In this light, demarcation and legal recognition of the territorial

rights of the Mayagna (Sumo) of Awas Tingni represents an obligation of the Nicaraguan government and an opportunity. Recognition of ancestral domain rights at Awas Tingni will provide the Mayagna (Sumo) with state-sanctioned incentives for long-term sustainable management and can help Nicaragua capitalize on indigenous peoples' social, cultural and economic attachment to their natural resource base.

Without meaningful cultural and institutional checks on overexploitation, Nicaragua and other nations in the Americas are likely to find their natural resources mined at prices that represent only a fraction of the real long-term costs for sustaining economic, ecological and demographic stability. Without meaningful social structures that encourage responsible commerce (commerce that accounts for environmental costs), commerce will lead to systematic environmental decay and long-term impoverishment. In other words, "humans and a diversity of biological organisms can live together in relative harmony when the appropriate system is used."

What is good for Awas Tingni can be good for Nicaragua, if Nicaragua finds ways to accommodate indigenous values and social structures in government policy on the one hand, and the people of Awas Tingni remain stewards of the forest and other natural resources within their indigenous territory on the other.

Sustainable development requires that economic choices take place within social and legal environments that encourage full environmental cost accounting. These social and legal environments can and should operate at the level of the village or town, the nation, and the international arena (including the Inter-American system of nations). This is consistent with the principle of subsidiarity that promotes a preference for the lowest level of decision-making where a decision can best be managed. Recognizing the territorial rights of the Mayagna (Sumo) people of Awas Tingni will help ensure that economic choices will be made in the context of meaningful and culturally appropriate social structures that more fully value and steward natural resources.

ii. The Collective Perspective and the Right to Culture

The Declaration of the Principles of International Cultural Cooperation provides in Article 1 that:

each culture has a dignity and value which must be respected and preserved... all cultures form part of the common heritage belonging to mankind

The right to culture is protected in a range of international instruments that Nicaragua has signed and ratified. Hence, the American Declaration of the Rights and Duties of Man, the Universal Declaration on Human Rights and the International Covenant on Economic Social, and Cultural Rights, recognize the right of every human being to take part in cultural life. In addition, the International Covenant on Civil and Political Rights recognizes the rights of minorities to enjoy their own culture. The International Convention on the Rights of the Child, expressly recognizes this same right-for children.

The International Labour Organization (ILO) Convention No.169, concerning Indigenous and Tribal Peoples in Independent Countries requires governments to guarantee respect for the integrity of indigenous peoples, including "the full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural identity...." Further Nicaragua has signed the Additional Protocol to the American Convention on Economic, Social and Cultural Rights, which establishes similar guarantees, but has yet to enter into effect.

In addition, the Inter-American Commission on Human Rights Draft Inter-American Declaration on the Rights of Indigenous Peoples ("IADRIP") identifies "property" as an aspect of cultural integrity. Property in this context is understood to include traditional lands, including sacred forests and other sites, which are recognized as vital to the maintenance of cultural integrity, as well as lands required by communities to promote their livelihood and development.

Recognition, respect, and conservation of indigenous territorial rights is essential to the cultural survival of indigenous peoples, including the Awas Tingni. Land, forests and other natural resources provide a geo-spatial habitat where indigenous peoples develop their cultures, their relations with nature, their arts, their beliefs, their histories, and their own perspective of history. Indigenous peoples maintain special ties with the natural resources within their traditional areas, and manifest an intricate dependence upon these resources.

The Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities concludes:

It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic

to their existence as such and to all their beliefs, customs, traditions and culture.

For such peoples, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity that can be acquired, but a material element to be enjoyed freely.

The United Nations Human Rights Committee recognizes that in the context of indigenous communities, "traditional land tenure is an aspect of the enjoyment of culture protected under Article 27 of the ICCPR."

Further the Inter-American Commission in its report on Ecuador reflects:

The principle efforts in the struggles carried forward by the Indigenous Nationalities have concentrated on the recuperation and defense of their territories. Historically defended, we consider that these constitute the material sustenance which makes possible our present and future development, and which is additionally the foundation of our historical evolution and the permanent reference of our wisdom and our system of knowledge.

In its General Comment on minority rights, the United Nations Human Rights Committee observed that "**culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous people...**" [*emphasis added*] In the case of Bernard Ominayak & The Lubicon Lake Band v. Canada, the H.R. Committee found that historical inequities and certain more recent developments, including oil and gas exploration, were threatening the **culture** (*emphasis added*) of the Lake Lubicon Band and were thus violating minority rights, contrary to Article 27 of the ICCPR.

As the foregoing excerpts from various international laws demonstrate, Nicaragua has an affirmative obligation to protect the cultural survival of indigenous peoples. Accordingly, the Awas Tingni community has a right to culture. This Honorable Court in light of Article 29 of the American Convention must recognize this right and its correlative international obligation. The symbiotic relationship between land and culture in the case of indigenous peoples requires that, to guarantee the right to culture of the Awas Tingni community, the State of Nicaragua shall take positive measures to identify, recognize and ensure the enjoyment of the Mayagna Sumo ancestral domains. Failure to do so could imply a violation of the right to culture of the

Awas Tingni and, consequently, that Nicaragua has incurred an international responsibility.

v. The Collective Perspective and the Right to Participate in Government - Article 23 of the American Convention -

Article 23 of the American Convention articulates the right to participate in government. More recent international instruments, including ones focused more on environmental and developmental issues, such as Agenda 21, the Desertification Convention and the Beijing Declaration, make clear that participatory partnerships involving both state and non-state actors, including indigenous communities such as the Awas Tingni, are developing rapidly as a means for facilitating more equitable access and sustainable use of natural resources. One of the first major international documents to make public participation a central developmental objective, including the achievement of equitable socio-economic development, was the 1986 United Nations General Assembly "Declaration on the Right to Development." Its preamble states, *inter alia*:

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits arising therefrom....

Article 1 of the Declaration, which defines the "right to development," recognizes universal public participation as essential for the expression of the right. It asserts that

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

The role of public participation as a necessary means for achieving sustainable development was first clearly identified in 1987 in *Our Common Future*, which is also known as the Brundtland Commission Report. It found that:

In the specific context of the development and environment crisis of the 1980s, which current national and international political and economic institutions have not and perhaps cannot overcome, the pursuit of sustainable development requires: [*inter alia*]...a political system that secures effective citizen participation in decision making.

The Brundtland Commission identified "effective participation" as a *sine qua non* for achieving sustainable development. It refers particularly to the significance of participation in promoting sustainable development by specific groups of the public, including indigenous peoples and NGOs.

Although the UNCED and related instruments do not refer to "participation" as a right, they indicate that it is vital for achieving sustainable development. They also acknowledge that international laws regarding sustainable development have a central role to play in promoting participation on all levels. Principle 27 of the Rio Declaration, for example, provides that:

States and people shall cooperate in good faith in a spirit of partnership in the fulfillment of the Principles embodied in this Declaration and in the further development of international law in the field of sustainable development.

The preamble to the Rio Declaration recognizes a right to participation by establishing a "new and equitable global partnership" which will be realized through new levels of co-operation among states and with non-state actors, namely "...key sectors of societies and people." This new form of co-operation is the right to participation.

In light of the application of Article 29 of the American Convention to this case, the right to participate in government- consecrated in Article 23 - should be integrated with the evolution of international law in this matter. As such the Awas Tingni community has a right to participate in decisions concerning the exploitation of their natural resources. The right to participate, however, was not complied with by the Government of Nicaragua when it granted a timber concession that overlapped with the indigenous territory of Awas Tingni. The timber concession was granted without consulting the indigenous community and without assuring that the local people would be able to continue benefiting from natural resources within their ancestral domain. In light of the failure to comply with international laws on participation, there is an urgent need to ensure that the Government of Nicaragua is officially informed of where the indigenous territory of the Awas Tingni is located and to recognize the community-based property rights of the Awas Tingni. No other remedy will ensure that the mistakes of the recent past will not be perpetrated anew.

Conclusion

The basic human rights of indigenous peoples in the Americas have long been neglected. This case presents an unprecedented opportunity for the Inter-American Court to establish an important legal precedent by which the human rights of indigenous peoples can be recognized and protected.

The Inter-American Human Rights System can adequately and effectively protect indigenous peoples by a meaningful interpretation of the American Convention. In the case at hand, a proper analysis of the American Convention on indigenous peoples rights should consider the "symbiotic tie" between the life-land-culture-environment of the Awas Tingni community. It does not suffice that the Court understand that the non-demarcation of indigenous land by the State constitutes a violation of Article 21 of the Convention. The Court must go further considering among others violations to the right to life, to a healthy environment, to culture, to identity, to participate in government, and to freedom of religion.

Historically, indigenous peoples have demanded the recognition by non-indigenous societies of the spiritual, social, cultural, economic and political significance of their lands, territories and other natural resources. This is necessary for the continued survival and vitality of their societies. Addressing the circumstances of indigenous peoples in a different conceptual framework, due to their deeply rooted relationships to lands, territories and resources is essential. Indigenous peoples have urged the world community to assign a clear positive value to these distinct relationships, and they have long awaited an appropriate and just response.

This Court has a unique opportunity to begin to address indigenous peoples' human and environmental rights, recognizing the special relationship indigenous peoples have with their land and resources, and in so doing protecting and promoting the basic human rights of indigenous peoples in an adequate and effective manner.

This brief has identified an array of international human rights and environmental laws, as well as legal and economic concepts, that support the petition of the Inter-American Commission on behalf of the people of Awas Tingni. The Inter-American Court in its wisdom will use this information in ways that it deems most appropriate. The international human rights and environmental communities trust that the final decision will equitably balance the interests at stake and render a decision that promote the well-being of Nicaragua and all of its citizens, especially those who have long endured discrimination and injustice.

Respectfully,

Romina Picolotti Owen Lynch

International Human Rights Center for International Environmental Law

Law Group

-

-

ANNEX

Contemporary Comparative Insights from Canada, Australia and the Philippines.

Comparative domestic developments over the past decade concerning the legal demarcation and recognition of indigenous rights to land and other natural resources make clear that the relief requested in this case is not an isolated, atypical, unprecedented or far-reaching request. Rather, the complaint by the Inter-American Commission on behalf of the Awas Tingni Mayagna (Sumo) indigenous community is very much in accord with the ongoing development of domestic legal standards for recognizing native title and other indigenous rights. The leading countries in terms of domestic laws and jurisprudence may be Australia, Canada and the Philippines. A brief summary of major laws and jurisprudence in these three countries follows.

Canada

The Canadian Constitution Act of 1982 recognizes "Aboriginal and Treaty Rights" in section 35 and its "Charter of Rights and Freedoms" contains several sections regarding indigenous rights. Even before the Constitution Act of 1982 was promulgated, the Supreme Court of Canada (SCC) issued its famous Calder decision. In Calder, the SCC recognized for the first time the continuous existence of an "aboriginal (Indian) title." The case originated in the province of British Columbia (BC) where no treaties with any First Nations existed. Further SCC decisions in Guerin and Sparrow expanded on Calder's recognition of aboriginal rights.

Since 1973 a Canadian "Comprehensive Land Claims Process" (CLCP) has been in place to address legal issues concerning indigenous territorial rights in traditionally occupied areas that are not covered by treaties. The CLCP has been used to negotiate "comprehensive land claim settlements" that include indigenous land and self-determination rights as well as political reforms, particularly in Canada's northern territories.

Current Canadian comprehensive land claim settlements negotiated between Canadian Federal and Provincial Governments and Indian First Nations, as well as other indigenous (Inuit and Metis) groups, recognize a wide range of

rights to land and other natural resources, self-government, environmental protections, etc. Early versions of land claim settlements, starting with the James Bay and Northern Quebec Agreement of 1975, the Northeastern Quebec Agreement of 1978, and the Inuvialuit Final Agreement of 1984, include environmental protections. This has been broadened in more recent agreements to address the concept of sustainable development, e.g., Yukon Umbrella Final Agreement (1990), Nunavut Final Agreement and Nunavut Self-Governing Territory (1993).

The latest agreement of this kind is the "Nisga'a Settlement" in British Columbia. This long awaited land claims and self-government treaty was signed on August 4, 1998 for an area that until then was NOT covered by any treaty. More than a dozen major 'regional agreements' exist in Canada and many more are under negotiation. Up to 75 % of the entire country may soon be under some form of joint indigenous -government agreement. Canadian regional treaties vary and illustrate the general point that different solutions in this field work for different peoples.

Since 1996 there are also new SCC decisions concerning indigenous land and self-determination rights. These decisions concern the interpretation of aboriginal title and aboriginal rights, the validity of indigenous titles, land selection, indigenous self-administration and environmental management, and the fiduciary duties of the state towards indigenous groups. Indian groups are even commonly referred to in Canada as 'First Nations'.

In 1997 the SCC decided the Delgamuukw case and it could now be considered the leading case in Canada on aboriginal title. The court decided that Aboriginal title conceptually falls in-between the rights associated with an inalienable fee simple and those rights traditionally integral to Aboriginal cultures. Chief Justice Lamer held that "**aboriginal title encompasses the right to exclusive use and occupation of the land** held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs, and traditions which are integral to distinctive aboriginal cultures."*[emphasis added]* The Chief Justice emphasizes that the source of this Aboriginal title manifests from the "common law principle that occupation is proof of possession in law." The Court elaborated some important characteristics associated with this new concept of indigenous title: the exclusive right to use the land is not restricted to activities congruent with traditional Aboriginal practices, the land is held communally and is inalienable, and can only be sold or surrendered to the Crown.

The 1996 five volume Report of the indigenous/non-indigenous "Royal Commission on Aboriginal Peoples" (RCAP) is likely to provide the future basis for interpreting and recognizing indigenous (Indian, Inuit and Metis) rights in Canada (see Report of the Royal Commission on Aboriginal Peoples

(RCAP) Canada Communication Group, Ottawa 1996, vol. I-V). The RCAP calls for a new partnership between the Canadian government and First Nations. It provides that First Nations shall receive an equal status, but at the same time shall be regarded as different groups" (id., vol. II, part 1, 176). The sovereignty of the Canadian State is understood as the territorial power of peoples, in equality and co-existence. Indigenous, Provincial and the Federal governments are required to work at the same level (id., vol. II, part 1, 240). The rights of indigenous people living outside their traditional territories are given special consideration.

Australia

The High Court of Australia (HCA) has held that native title rights are rights '*sui generis*' because of the special cultural and spiritual connection of aboriginal people to their ancestral domains. The primary prerequisite for gaining legal recognition of ancestral-domain rights is proof of traditional and continuous connections to the area.

Australian jurisprudence concerning native title emanates from a decision rendered on June 3, 1992 *Mabo v. Queensland* in which the High Court of Australia (HCA) upheld the claims of indigenous peoples from Murray Island in the Torres Strait. The HCA ruled that Australia was not *terra nullius* ('empty territory belonging to no one') when settled by the British in 1788. Rather, it was occupied by mainland Aboriginal and Torres Strait Islander people who had their own laws and customs and whose 'native title' to land survived the Crown's annexation of Australia. The position of the HCA in *Mabo* (1) was reaffirmed in *Mabo* (2) which held that section 10 of Australia's Federal Racial Discrimination Act of 1975 (No. 52 of 1975) constitutes a Federal 'safety net' against State or Territory legislation that would otherwise extinguish native title rights.

Legally recognized native title rights in Australia are often for hunting, fishing and/or gathering rights, but they can be much more than that. *Mabo* (2) makes clear that traditional aboriginal rights and customs define the content of native title. Thus indigenous rights to land and natural resources are legally acknowledged to vary from region to region.

Australia's Native Title Act (NTA) of 1993 came into effect on 1 January 1994. This legislation is a direct result of the *Mabo* (2) decision and provides the first nationally valid mechanism to clarify native title claims. The NTA established a National Native Title Tribunal (NNTT). It also validated state laws that provided for recognition of native title. Procedures and standards for future native title agreements were introduced. A Land Fund was established for those indigenous people who cannot take advantage of the NTA, e.g., they

have already lost their traditional connection to their ancestral domain because of involuntary removal.

Pursuant to the NTA, a diverse array of negotiated Native Title Agreements and Land Use and Resource Agreements exist in Australia today. This is encouraging for the negotiation of future indigenous/non-indigenous agreements.

State governments in Australia are also providing for legal recognition of native title. In 1996, the Cape York Land Use (Heads of)Agreement (CYA) was signed by the Peninsular Regional Council of the Aboriginal and Torres Strait Islander Commission (ATSIS), the Cape York Land Council, the Cattlemen's Union of Australia as well as the Australian Conservation Foundation of Nature and The Wilderness Society. The parties committed themselves to the development of "a management regime for ecologically, socially and culturally sustainable land use on the Cape York Peninsular." A final agreement could be registered with the NNTT under section 21 of the NTA. One reason why the CYA is so important is that it strives for government participation and legitimization, as it is now common in Canadian "comprehensive land claim settlements." Another reason is that the CYA represents a first step on the way towards comprehensive Australian regional agreements, in which central stakeholders of the resource industry, environmental as well as indigenous groups agree upon different kinds of land use. This way, each party is assured of being benefited from any agreement.

Regional agreements are defined as a concept of equitable and direct negotiations between Indigenous Peoples, governments and other stakeholders in a region to recognize the rights of indigenous peoples and to protect them in a contemporary legal system. A regional agreement is a way to organize policies, politics, administration and/or public services for or by indigenous peoples in a defined territory of land or land and sea.

The Philippines

The Republic of the Philippines has long relied on a fictitious colonial legal concept, known as the Regalian Doctrine, to justify its claim to State ownership over indigenous lands and resources. After Corazon Aquino became president in 1986 following a "peoples' power revolution" the Philippine Department of Environment and Natural Resources (DENR) became more responsive to and supportive of upland communities, including indigenous communities. The DENR began authenticating and demarcating the perimeters of ancestral domain claims in the early 1990s, and a large-scale community-based forest management program was launched. By June 30, 1998, nearly nine percent of the country's total land mass, or over 2.7 million ha, including many mountain areas, was officially covered by Certificates of

Ancestral Domain Claims (CADCs), and even more areas were covered by different types of tenure instruments under various community forestry programs.

Legislative efforts to convert the ancestral claims into ancestral titles received a culmination in October 1997 when the Philippines Congress passed the Indigenous Peoples Rights Act (IPRA). The IPRA establishes a legal presumption that areas inhabited by indigenous peoples are "owned" by them and constitute "not only the physical environment but the total environment including spiritual and cultural bonds." More specifically, ancestral domains are defined to include "lands, forests, pasture ... hunting grounds, burial grounds, worship areas [and] bodies of water." Ancestral-domain rights include rights of ownership, development and priority setting, regulation of entry by outsiders, conflict resolution, transfer and redemption, and "the right to participate fully ... at all levels of decision making in matters which may affect their rights."