

## Human Rights Brief

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#### Indigenous Peoples' Rights to Land, Territories, and Natural Resources: A Technical Meeting of the OAS Working Group by Osvaldo Kreimer\*

Territorial rights are a central claim for Indigenous Peoples around the world. Those rights are the physical substratum for their ability to survive as peoples, to reproduce their cultures, and to maintain and develop their productive systems. The Permanent Council Working Group (Working Group), in charge of the preparation of the American Declaration on the Rights of Indigenous Peoples of the Organization of American States (OAS), held a major technical meeting from November 7–8, 2002 with the participation of representatives of the OAS member state governments, indigenous lawyers, leaders, and experts. This meeting was in preparation for the more political Special Session that will convene from February 24–28, 2003, under the chairmanship of the Peruvian ambassador to the OAS, Eduardo Ferrero Costa. The specific goal of this meeting was to review the present situation and evolution of national law, jurisprudence, and practice relating to land and territorial rights in the Americas.

The Working Group's meetings in Washington have become a major forum in the discussion and development of international standards on indigenous rights and their relations with nation-states. The meetings are part of a universal effort to review indigenous rights. Key participants in this effort are the United Nations (at the parallel forum at the Commission on Human Rights and the Indigenous Forum), the International Labor Organization, the World Bank, and the Inter-American Development Bank, as well as other technical and political institutions. The goal of these organizations has focused on setting new international standards and establishing legal mechanisms to address such issues as biodiversity, intellectual property, sustainable development, children's rights, health, and others in relation to the rights of Indigenous Peoples.

#### Development of Indigenous Rights in the Americas

As part of a general trend away from dictatorships since the late 80s, and toward a more inclusive political participation, most Latin American countries (15 out of 24) have included in their constitutions provisions recognizing the rights of Indigenous Peoples. Simultaneously, Indigenous Peoples have strengthened their organizations and have developed a more organic struggle to reclaim their rights. Central among these demands are issues related to land, territories, and natural resources. As discussed in a general climate of consensus at the meeting, these rights are not merely real estate issues, and shall not be conceived according to the classical civil law approach to "ownership." Rather, indigenous land rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control of their habitat as a condition necessary for the reproduction of their culture and for their own development, or as indigenous experts prefer, for carrying ahead their "life plans" (*planes de vida*) and their political and social institutions.

One of the expositors at the meeting, C. Gregor Barié, a German scholar who has focused on Latin American constitutional law and indigenous rights, reminded the participants that despite the general backlash during the Republican period since the early 1800s, when all the American governments were trying to extinguish or integrate the Indians within the nascent nation-states, legislation was implemented in different countries, both in the 1800s and the early 1900s, freeing Indians from some of their burdens (such as manumissions, servitudes, and special services like the *mita* and *encomienda*). There were other exceptions, such as the Peruvian Constitution of 1920, which established the protection of the indigenous "race" by the state, recognizing the existence of indigenous communities and declaring the need for special measures for their development and cultural protection. Another exception is the Panamanian recognition in 1925 of the autonomy of the Kuna people.

#### Multiculturalism

Multiculturalism, as a new conception of unity in diversity, has had growing acceptance as a political and constitutional principle in Latin America. With different approaches and content (multiethnic and pluricultural nations; intercultural education and public services), multiculturalism has developed as the dominant paradigm constitutive of states. This development has occurred not only in countries with proportionately large indigenous populations (Ecuador, Bolivia, Guatemala, Mexico), but also in those countries such as Brazil,

Argentina, and Colombia, where indigenous populations make up a minor proportion of the national population. Growing recognition of indigenous territorial rights has been one of the major consequences of the acceptance of multiculturalism in law and doctrine.

Moreover, the newest constitutions in Latin America, such as those of Ecuador (1998) and Venezuela (1999) have expanded concepts of Indigenous Peoples' lands and territories. Ecuador accepted a wider concept of Indigenous Peoples' land and territories, with "environmental" and "gender" components, recognized trade systems (a generalized barter system, or *trueque*), and elements of indigenous Quechua law.

The Venezuelan "Bolivarian" Constitution devotes a full chapter to indigenous rights, stating about Indigenous Peoples that "the State will recognize . . . their habitat and their rights of origin over the lands they ancestrally and traditionally occupy and are necessary to develop and guarantee their lifestyles (*formas de vida*)."<sup>1</sup> A new law issued in Venezuela in December 2000, *Demarcation and Safeguards for the Habitat and Lands of Indigenous Peoples*, prepared with wide participation of indigenous representatives, has already begun to implement those precepts established in the Venezuelan Constitution.

The Brazilian Constitution of 1988 gives renewed strength to ancestral possession as a basis for territorial rights. As presenters Barié and Sergio Leitão, a Brazilian scholar, explained in the meeting, four conditions operating as four concentric circles are established constitutionally to define "indigenous areas" to be demarcated; homologated, or registered; and titled as their "habitat": 1) permanent ancestral possession; 2) areas necessary for their productive activities, including the reproduction of flora and fauna; 3) areas necessary for their cultural reproduction, and for their survival as a collective; and 4) habitat that shall have the physical capacity and shape to allow the full functioning of the mechanisms of authority and self-government of Indigenous Peoples.

### Indigenous Land and Territory

Indigenous and state representatives at the Working Group delved into the analysis of these four elements defining Indigenous Peoples' land and territory. Of particular value was the discussion of the use of the word "territory" in reference to indigenous habitat. The participants explored the concept of "indigenous territory," defined as the habitat necessary for their collective life, activities, self-government, and cultural and social reproduction, without impinging or compromising the territorial integrity of the state. The major trend has been to abandon the classical concept of "territory" connected with national sovereignty when referring to "indigenous territory."

There are differences between the legal definition of the term "territory" in the United States and Canada, and that in Latin America. In Canada, indigenous land is essentially the area where an Indigenous People exercises its right of ownership and jurisdiction, whereas indigenous territories are areas where Indigenous Peoples exercise certain rights (fishing, hunting, use), but do not own land. In U.S. law, "territory" is not a term of art that carries any specific legal meaning or definition, despite having often been used in legal and political contexts to mean lands over which Indigenous Peoples have legal rights. The various forms of property rights held by Indigenous Peoples, however, vary so much that it is rather difficult to connect one term of art with a standard definition of its constituent rights. Therefore, terms such as "Indian country," "Indian lands," and "Indian reservations" are commonly used. This last term is generally used to describe areas of lands and resources that are under broad jurisdiction or authority of Indigenous Peoples. The other two terms can include reservations as well as areas in which Indigenous Peoples can exercise any number of rights, which may or may not include full ownership or jurisdiction over the lands (subsurface and/or surface), but do include other rights such as fishing, hunting, and use.

In Latin America, territories are not owned or controlled by an Indigenous People, but rather are areas where an Indigenous People exercises other rights, such as use, passage, hunting and gathering, and sacred ceremonies. Moreover, as Dr. Tim Vollman, former counsel for the U.S. Department of the Interior and current counsel for various Indian tribes pointed out, the term "territory" is no longer used in U.S. jurisprudence. On the other hand, in Latin America, "Indian territory" is an inclusive concept that considers both lands and other areas where other property rights exist for an Indigenous People.

Colombia, for example, has constitutionally established "indigenous territorial entities" as part of the political subdivision of its national territory. Nationally, indigenous populations make up less than 2 percent of the population, while 12 percent of the national territory is comprised of indigenous territories. This territorial recognition includes elements of the right to self-government, theoretically with the same functions and attributes of other politico-administrative entities, such as municipalities. However, the Colombian Congress has yet to agree upon rules and regulations to apply those political collective rights.

The eminent domain maintained by the Brazilian state over the indigenous lands and territories has been a positive development, a point emphasized by both Sergio Leitão and Brazilian indigenous leader Azelene Inacio-Kaingang. Indigenous lands are considered the “endowment of the Federal Union” (*benefício da União*) because the *União* assumes the responsibility to guarantee those lands to the Indigenous Peoples, to protect them from attacks and usurpation from state agents and third parties, and to provide special measures necessary for indigenous welfare and survival. In fact, recognition of these rights has corresponded with the demographic growth of indigenous populations in Brazil (approximately 0.2% of the national population), reversing a long-term trend despite the existence of other negative socioeconomic conditions. This view of the state’s eminent domain is very close to legal theories in Canada and the United States about permanent domain by the nation-state that has a “trust obligation” to protect and guarantee the safety and permanency of Indian land. As Inacio-Kaingang said, “the right to land [for Indigenous Peoples] implies also the right to decide how to occupy the land, based on [their] values and . . . concepts of occupation and exploration . . . with the possibility to show the planet an alternative construction of the world.” This idea is consistent with Article XXII of the proposed American Declaration, which provides for “the right to define the nature of [Indigenous Peoples’] own development.”

### **Safeguarding Inembargability, Imprescriptibility, and Inalienability**

Another important concept analyzed during the meeting was the “three I’s” that safeguard indigenous lands and territories: inembargability, the principle that land cannot be impounded or auctioned for debts; imprescriptibility, the theory that land rights cannot be subject to any statute of limitations; and inalienability, the concept that land cannot be transferred to third parties outside the Indigenous People or collective. These legal characteristics, generally recognized as part of the concept of the indigenous lands and territories, are taken as necessary in most constitutions and doctrines, with the purpose of keeping indigenous ownership outside the market and free from market forces, guaranteeing intergenerational permanency, and reinforcing indigenous communal forms of use—productive, spiritual, or otherwise.

Two countries, Mexico and Peru, have weakened these safeguards. The traditional collective ownership system in Mexico, *ejido*, has in practice been breached for many decades by different forms of long-term leaseholds to non-Indians. The *ejido* was weakened constitutionally in the early 90s. Similarly, in Peru, the Fujimori administration obtained a constitutional amendment that maintained the theory of imprescriptibility, but allowed for the transfer and mortgaging of individual lots within indigenous areas.

### **Development**

Anne Deruyttere, chief of the Indigenous Peoples and Community Development Unit at the Inter-American Development Bank, called the meeting’s attention to the misconception about poverty in indigenous communities. Acknowledging that classical indicators of poverty (malnutrition, schooling, income) demonstrate the deterioration of living conditions in indigenous communities, Deruyttere emphasized that successful development of Indigenous Peoples must be based upon their riches—the cultural and social capital of Indigenous Peoples, including social mechanisms for production, communal use, and exchange of lands, products, and resources; as well as their agricultural, ecological, and traditional medical knowledge.

Jorge Uquillas, senior sociologist for the World Bank’s Environmentally and Socially Sustainable Development Unit for Latin America and the Caribbean, outlined major sociological questions about the general theme of the meeting. What resources and what rights are at issue? Where do the majority of Indigenous Peoples reside? What is their connection with eco-regions? Which technologies are used in the handling of natural resources in indigenous lands? Uquillas remarked that the majority of the indigenous lands and resources lie in areas of high biodiversity, but the majority of indigenous populations are located elsewhere, namely in the low-sierra chains of the Amazon, in the Central American Atlantic coast, and in the Andes and Mesoamerican highlands. The Indigenous Peoples in these areas, 20 million in Mesoamerica and a similar number in the Andes, live in areas of intense environmental degradation. Uquillas emphasized that protective measures should address not only ecological but also cultural diversity, taking into account that the intensive use of modern agricultural techniques and inputs in those mountainous areas (as opposed to their use in flatlands), have resulted in a high correlation with ecological degradation and lack of sustainability. Additionally, Uquillas presented different experiences of successful agricultural and land and water management practices continuously used by many Indigenous Peoples for centuries.

### **Applicability of the Inter-American System of Protection of Human Rights**

Two major developments in the inter-American system of human rights were also reviewed at

the meeting. The first of these was the groundbreaking decision of the Inter-American Court of Human Rights (Court) in *Awas Tingni v. Nicaragua*. In *Awas Tingni*, the Court recognized the rights of the Mayagna people at Awas Tingni to have their lands demarcated and titled. The Court applied the full protection of the Inter-American Convention on Human Rights in relation to the particular collective forms of property that Indian communities maintain, as opposed to the concept of property in civil law systems. Finally, the Court emphasized the special relationship Indigenous Peoples have with their habitat and the importance of that relationship to their survival.

During the meeting there was also some discussion of the recent decision of the Inter-American Commission on Human Rights, *Dann v. United States*, which involves a complaint by members of the Western Shoshone tribe in the United States regarding the decision by U.S. authorities not to recognize their rights to lands. According to the United States, title to these lands was extinguished by encroachment of non-Indians during the 1800s and by agreement with representatives of the tribe. This position is opposed by the claimants who argue that, *inter alia*, their title was never extinguished by an express act of the U.S. Congress, although such an act is required by the U.S. Constitution. Further, the petitioners argued that the agreement was null and void due to the lack of representation of the Indian participants and counsel.

### Indian Rights in the United States

Tim Vollman provided a history of the development of the concept of Indian property rights from the confusion of colonial years to the belief reflected in the U.S. Constitution that Indian tribes constitute separate nations within the sovereign borders of the United States. Therefore tribal members were not taxed, nor given any of the rights of the citizens of the United States. By the time of the passage of the 1790 Trade and Intercourse Act, the authority to approve all real estate transactions with Indian tribes was reserved to the federal government under the commerce clause of the Constitution. Many states disregarded the Trade and Intercourse Act, while non-Indians competed for the title of lands previously occupied by Indians. As a result, many lawsuits occurred, and the theory of Indian title began to evolve.

In *Fletcher v. Peck*, among other cases, the U.S. Supreme Court held that the underlying title to Indian lands lay with the European sovereign who discovered the land, and this title passed to the 13 original states that formed the United States. Nevertheless, this title, even if later acquired from a state by a non-Indian, was held to be subject to the right of Indian occupancy of the lands, which would first have to be extinguished by the sovereign before a purchaser of the title could occupy and use the land. This Indian right of occupancy was held to be "as sacred as the fee title of the whites" by the Supreme Court in *Mitchell v. United States*, a legal principle reaffirmed by the Supreme Court time after time, to the present day.

Mr. Vollman commented that "extinguishment of Indian title to most of the territory of the United States was accomplished through treaties of cession negotiated between Indian tribes and the United States prior to 1871 . . . usually when they had been defeated . . . or faced the threat of war, . . . and was thus routinely unfair." It was not until 1946 that Congress, recognizing the unfairness of the treaty negotiation process, created the Indian Claims Commission (ICC) "to allow tribes to make claims for monetary compensation, not the lands, based on unconscionable transactions." Continued traditional use of unceded western lands was ignored, and the lands were treated as the public domain of the federal government, or set aside for national forests or military use. Still today, Vollman mentioned, conflicts arise about lands that Indians consider "unceded." Other complex situations have arisen in the southwest regarding lands obtained from Mexico, where the Indians had been recognized as citizens by the Spanish crown. In the Treaty of Guadalupe Hidalgo between Mexico and the United States, a provision was included for the protection of property of Mexican citizens, thereby protecting the rights of Indians in those areas.

Other diverse legal situations that occurred in the southwest still today reflect this variety and complexity. In general, an act of Congress is required in order for Indians to recover land in which title has otherwise been extinguished. Congress has done so on several occasions. However, as the U.S. representative remarked in the meeting, recovering land is not a judiciable right, as the granting of title to land depends upon a political decision by the legislature.

Tim Coulter, director of the Indian Law Resource Center and counsel in *Dann v. United States*, acknowledged several positive aspects of the current state of indigenous rights in the United States: the state protects the rights of Indigenous Peoples against third parties; there is usually no federal or state taxation of Indian lands; there is recognition of aboriginal title (albeit without full legal protection), as well as of Indian ownership of subsurface resources; the U.S. government recognizes certain Indian governments, including much of their jurisdictional powers; and the government respects their hunting and fishing rights. Coulter also mentioned negative aspects of the U.S. legal and political systems: the government's "taking" of Indian lands, justified what he considers the low standard of "public use;" the continuous application of discriminatory procedures; abuses in the system of trusteeship; and the general lack of security and legal predictability.

### **Indian Rights in Canada: Treaties and Negotiations about Land and Resources**

Many lessons were learned at the meeting from the Canadian experience with treaties, and from Canada's elaborate and complex system of negotiation. Most indigenous rights emerge from the numerous treaties made between 1701 and 1923, and from modern-day treaties known as comprehensive land claims settlements, explained Tom Molloy, chief federal negotiator for Canada. In his words, "the government of Canada and the courts understand treaties between the crown and aboriginal people to be solemn agreements that set out promises, obligations, and benefits for both parties." A sense of shared future gives guidance to the understanding of issues and relationships. As the Constitution Act of 1982 recognizes and affirms the existing indigenous rights, but does not define them, the courts shall define these rights in the context of the particular facts and groups involved. The consequent uncertainty has given rise to a systematic search for negotiations and elaborate mechanisms to carry them forward. Nonetheless, as Molloy commented, "treaties take time," as did the negotiation of the treaty recently achieved with the Nisga'a, which exceeded 1500 pages, with "every word and comma . . . negotiated." Issues commonly involved in treaty negotiation include land quantum, location, use of minerals, oil and gas rights, forestry rights, fishing and hunting regulations, land use planning, environmental protection, resource revenue sharing, water use, dispute resolution, expropriation of settlement lands, and issues surrounding the preservation of cultural artifacts, including repatriation, archaeology, and ethnography.

Negotiations are carried out on a "without prejudice" basis so that the parties can speak openly and frankly, with the right to withdraw from the negotiation at any time and pursue other options such as litigation. While time-consuming and costly, Molloy values negotiations: "at the end you don't have a winner and a loser, and that is important to build a new relationship."

### **The Right to a Fair Consultation**

The right to a fair consultation is one of the major components of the future American Declaration on the Rights of Indigenous Peoples, and was therefore a focus of the meeting, echoing history of discussions in other fora. Fairness of consultation is determined by several factors. A consultation must be conducted at an opportune time; all necessary information must be at the disposal of all the parties beforehand; and a consultation must be carried out with full consideration of the customary traditions and decision-making institutions of the peoples affected. In turn, any objections or comments must be taken into consideration when arriving at a decision. Addressing this right involves assessing the ability of the state to use its sovereignty or eminent domain to build infrastructure, the state's exploitation of or licensing the exploitation of natural resources, or any other action or project that may affect indigenous lands and the use of their territory. A major condition of international law in cases involving this right is the previous fair and serious consultation with the affected Indigenous Peoples. Ratification of International Labor Organization Convention 169 by 17 Latin American countries recognizes this right and its general practice in North America.

### **The Right to Natural Resources**

The right to natural resources is probably one of the hardest issues to resolve in the recognition and implementation of indigenous rights. The meeting discussion highlighted issues surrounding surface resources and underground resources. In general, the discussants agreed that the right to land and the recognition of indigenous habitat include the indigenous right to all surface resources necessary for their survival and for a sustainable environment. The application of this principle continues to be controversial, however, especially in Latin America, where concessions of non-renewable resources like old timber and mining are assigned to third parties by the state without full and informed consultation with the Indigenous Peoples occupying those areas.

There is a major difference between the United States and the Latin American legal approaches to rights to subsurface or underground resources. In the United States, underground resources such as oil and coal belong to the owner of the land. On the other hand, in most Latin American countries, the state has reserved for itself the right to those resources. José Aylwin, the Chilean expert who reviewed trends in international law pertaining to natural resources and indigenous rights, underscored the importance of connecting the recognition of territorial, land, and natural resources rights for Indigenous Peoples with the rights to autonomy and self-government. As other presenters asserted, Aylwin emphasized the need to redefine state development policies affecting indigenous lands, as well as the state's monitoring against intrusion, other forms of penetration, and infringement upon indigenous land rights.

Tim Vollman asserted that water rights in the view of many observers could be one of the most critical issues in the 21st century in the United States. While the federal government has subsidized numerous irrigation and other water projects in the west throughout the last 100

years without participation of Indian tribes, the U.S. Supreme Court ruled in *Winters v. United States* that the tribes retained senior rights to enough water to fulfill the purposes of their reservations. As litigation to adjudicate water rights is complex and time-consuming, legislative settlements have secured tribal rights, as evidenced by the passage of 20 acts of Congress in the last 20 years. Congress has also authorized water marketing by tribes, so they may profit from the senior rights.

Azelene Inacio-Kaingang commented that in Brazil, environmental areas preserved by the Indians have proven to be those maintaining the cleanest water streams. This is in contrast to areas surrounding agricultural towns, especially those with mining operations that have severely polluted rivers and streams in the Brazilian northwest.

## Conclusion

In closing, the Working Group's rapporteur focused his conclusions upon topics discussed in the meeting that would help advance the understanding of these issues:

- the general progress in law, practice, and jurisprudence over the last decade in the Americas in relation to indigenous rights to land, territories, and natural resources;
- the acknowledgement of the value of continuous possession as a basis for indigenous rights;
- the acknowledgment of the collective nature and collective value of those rights;
- the understanding of the special meaning of "indigenous territory," different and non-conflicting with its classical meaning connected with national sovereignty;
- the richness of indigenous cultures, practices, and knowledge, and its connection to indigenous territorial rights and development policies and projects;
- the importance of well established and well funded mechanisms for negotiation and agreement between the state and Indigenous Peoples to implement indigenous territorial rights and to give new basis to their relationship;
- the necessity for the states to establish reliable and clear mechanisms for identification, demarcation, and homologation of Indigenous Peoples' lands and territories;
- the differences in national legislation about the rights to underground resources, and the commonly accepted principle of serious and fair consultation with the Indigenous Peoples affected, as well as the sharing of benefits;
- the increasing legal acceptance of the indigenous worldview to interpret the extent of their habitats, including how to organize and manage habitats, as well as how to define development plans;
- the value of the eminent domain by the state over indigenous lands emerging from the state assuming the obligation to promote, preserve, and protect those indigenous rights;
- the value of historical treaties and other agreements for legal and historical sources for the recognition and definition of states and indigenous relations;
- the importance of recognizing indigenous rights when establishing ecologically protected areas; and
- the connection between the definition of territorial rights for Indigenous Peoples and their ability to establish their own self-government, including internal jurisdiction.

The rapporteur finally remarked that the discussion shows that the fear of the birth of atomized states or the atomization of the states present a few decades ago is dissipating. More and more autonomous Indigenous Peoples' lands are being established without detriment to the apparatus and sovereignty of states, and in many cases they reinforce states' territories, enrich the variety and diversity of cultures, and act as zones of peace within areas of conflict.

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