

The Crises Affecting Indigenous Peoples in the Western Hemisphere

Dinah Shelton,
Manatt/Ahn Professor of Law
The George Washington University Law School
Member, Inter-American Human Rights Commission
April 29, 2010

There are over 200 million indigenous people in the world. Most of them live in highly vulnerable ecosystems: the Arctic and tundra; tropical and boreal forests, riverine and coastal zones, mountains and semi-arid rangelands. In the past few decades, traditional indigenous lands have come under increased pressure as outsiders have sought and extracted or converted natural resources to supply a growing global demand. Once hardly accessible, the territories used and occupied by indigenous peoples have become a major source of hydroelectric power, minerals, hardwoods and pasture lands. Other indigenous regions are being threatened or lost due to climate change. For those indigenous and tribal peoples who have remained in their traditional territories, the invasion of the outside world has brought with it disease, exploitation, loss of language and culture, and in too many instances, complete annihilation of the group as a distinct entity.

Indigenous peoples are uniquely vulnerable to environmental harm because of their cultural and religious links to their territories. The UN's special

rapporteur on human rights and the environment described the relationship between indigenous peoples and their surroundings:

In nearly all indigenous cultures, the land is revered; "Mother Earth" is the core of their culture. The land is the home of the ancestors, the provider of everyday material needs, and the future held in trust for coming generations. According to the indigenous view, land should not be torn open and exploited--this is a violation of the Earth--nor can it be bought, sold or bartered. Furthermore, indigenous peoples have, over a long period of time, developed successful systems of land use and resource management. These systems, including nomadic pastoralism, shifting cultivation, various forms of agro-forestry, terrace agriculture, hunting, herding and fishing, were for a long time considered inefficient, unproductive and primitive. However, as world opinion grows more conscious of the environment and particularly of the damage being done to fragile habitats, there has been a corresponding interest in indigenous land-use practices. The notion of sustainability is the essence of both indigenous economies and their cultures.

E/CN.4/Sub.2/1990/12, ¶33 and n. 9.¹ The linkages between environmental protection and human rights are perhaps most obvious and critical in the context of indigenous peoples, their lands and resources.

1. The Crises

Throughout the Western Hemisphere indigenous peoples are being deprived of their lands and resources, often targeting for killing and literally decimated by development projects.

In Colombia, American companies engage in large-scale megaprojects, both infrastructural and economic/extractive, in different parts of Colombia, many of which take place in indigenous territories or over indigenous peoples' natural

¹ For other reports of the special rapporteur discussing indigenous peoples and the environment, see: E/CN.4/Sub.2/1991/8; E/CN.4/Sub.2/1992/7; E/CN.4/Sub.2/1992/7/Add.1; E/CN.4/Sub.2/1993/7.

resources; these companies, which are at risk of guerrilla and other criminal violence, obtain support and protection by both the Colombian military and the paramilitary groups; the violence exerted by the Army and by paramilitary groups against the indigenous inhabitants of the territories where the projects are to take place is a cause of death, forced internal displacement, and the like. Their lands are being appropriated by "legal" companies backed by paramilitary violence, in order to develop there their agro-industrial, mining, or infrastructural projects.

The U'wa community of 5,000 in northeast Colombia has been subject to invasions of their lands and violence as a result of Occidental Petroleum activities and militarization of lands to prepare for three mega-projects extraction of natural gas, construction of a highway to Venezuela U'wa legal reserve, and expansion of a national park into sacred areas. In 2009, Colombia's Constitutional Court listed the U'wa amongst a handful of indigenous groups at risk of extinction.

In Brazil, the Raposa Serra do Sol (RSS or Raposa) case concerns indigenous land in the state of Roraima, Brazil. Indigenous groups claim the Government has failed to demarcate and title their ancestral lands. Acts of violence are alleged to have been perpetrated against indigenous peoples in the course of their efforts to reclaim their lands, including an armed raid on several indigenous communities and their institutions resulting in displacement, burning of buildings, significant physical injuries; as well as the shooting and resulting

injury of several indigenous members peacefully building a traditional structure within the demarcated lands).

In Guyana, the Akawaio and Arecuna Amerindian tribes of the Upper Mazaruni river basin have been subjected to systematic and massive deprivations of their lands and resources, including impacts of large scale dam project.

The Brazilian Yanomami have neared decimation by garimperos/rubber tappers and the Pataxuh-he group reported at least 80 women were sterilized by a politician looking for votes from non-indigenous land owners.

In Chile, the Mapuche protests have been criminalized, and indigenous leaders referred to as terrorists for their efforts to combat loss of their lands.

In sum, throughout the hemisphere some of the most marginalized and vulnerable people are losing their lands, their liberty, their identity and too often their lives.

2. There is Clear International Law Protecting Indigenous Peoples²

In recent decades, human rights law, particularly in the Western Hemisphere, has made clear state obligations to respect property rights and access to justice for indigenous peoples. Preservation of ancestral territories enable indigenous peoples to maintain their own social, political, and legal institutions as well as their own vision of integral development.

² This section is derived from the Inter-American Commission report *Captive Communities: Situation of the Guarani Indigenous Peoples and Contemporary Forms of Slavery in the Bolivian Chaco* (2010), paras. 64-80.

ILO Convention 169 on indigenous peoples establishes that the states parties have the duty to respect “the special importance for the cultures and spiritual values of the peoples concerned [i.e. indigenous peoples] of their relationship with the lands or territories ... and in particular the collective aspects of this relationship” – the term “lands” being understood as the concept of “territories” – which “covers the total environment of the areas which the peoples concerned occupy or otherwise use.” (ILO Convention 169, art. 13). Article 14 of that Convention establishes the duty of States to take measures to safeguard the right of indigenous peoples even with respect to lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.

Article 14 also establishes a duty on States in the following terms: “Adequate procedures shall be established within the national legal system to resolve land claims by [indigenous] peoples....” In addition, Convention 169 provides that the indigenous peoples “shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights.” (art. 12)

With respect to access to justice, the United Nations Declaration on the Rights of Indigenous Peoples provides that indigenous peoples have the right to procedures that are “just and fair procedures for the resolution of conflicts and

disputes with States or other parties” that lead to prompt decisions that include effective reparations for the injury to their individual and collective rights, taking due consideration of “customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.” Art. 40

In relation to the issue of reparations, the United Nations Declaration on the Rights of Indigenous Peoples provides at Article 28 that reparations should be made by means of restitution; and in case the restitution of lands is not possible, there should be “fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.” It should be noted that in relation to any legislative, administrative, or other measure that affects indigenous peoples, including measures of reparation, States should engage in consultations and should cooperate in good faith with those peoples so as to secure their free, prior, and informed consent. Art. 19

Indigenous peoples are entitled as well “to the improvement of their economic and social conditions, especially in the areas of education, employment, training, housing, sanitation, health, and social security.” Art. 21(1) The State therefore has the obligation to adopt “effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions.” Art. 21(2)

In addition, the United Nations Declaration establishes that the indigenous peoples have the right to “determine and develop priorities and strategies for exercising their right to development,” which also includes the right of those peoples “to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.”¹ Art. 23.

The above-mentioned provisions of international law with respect to the rights of indigenous peoples are also backed by the case law of the inter-American human rights system in the context of its interpretation of the American Convention.

With respect to the duty of the State to protect the right to life with respect to the indigenous peoples, the Inter-American Court has reiterated that “the States must adopt any measures that may be necessary to create an adequate statutory framework to discourage any threat to the right to life; ... and to protect the right of access to conditions that may guarantee a decent life.”³ In this regard, the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.⁴

³ I/A Court H.R., *Indigenous Community Sawhoyamaya v. Paraguay Case*. Judgment of March 29, 2006. Series C No. 146, para. 153; *Indigenous Community Yakye Axa v. Paraguay Case*. Judgment of June 17, 2005. Series C No. 125, para. 161.

⁴ I/A Court H.R., *Indigenous Community Yakye Axa v. Paraguay Case*. Judgment of June 17, 2005. Series C No. 125, para. 162.

The Inter-American Commission and the Inter-American Court have issued rulings in matters related to the right to communal property, the restitution of ancestral lands, the contradictions that may arise between indigenous communal property and individual private property, the right of access to justice, as well as the obligation of the States to ensure a dignified life for the members of indigenous peoples.

The Inter-American Court of Human Rights has established that Article 21 of the American Convention (right to property) also protects “the rights of members of the indigenous communities within the framework of communal property,” and recognizes that “[a]mong indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community.”⁵ The Inter-American Court recognizes: “For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”⁶

The possession of land under the “customary law” of the indigenous peoples, according to the Inter-American Court, “should suffice for indigenous

⁵ I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua Case*. Judgment of August 31, 2001. Series C No. 79, paras. 148, 149.

⁶ I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua Case*. Judgment of August 31, 2001. Series C No. 79, para. 149.

communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.”⁷ Therefore, the Court has ruled as follows on the right to property of indigenous peoples and the obligation of the States to recognize that right in their domestic legal systems:

... (1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights....⁸

In those cases in which the restitution of ancestral lands of the indigenous peoples is made difficult by the presence of third parties who have acquired title

⁷ I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua Case*. Judgment of August 31, 2001. Series C No. 79, para. 151.

⁸ I/A Court H.R., *Indigenous Community Sawhoyamaxa v. Paraguay Case*. Judgment of March 29, 2006. Series C No. 146, para. 128.

to or possession of those lands, the guidelines under the provisions and case law of the inter-American system dictate that there may be restrictions on the enjoyment of and right to property if these (a) are established by law; (b) are necessary; (c) are proportional; and (d) are put in place for the purpose of achieving a legitimate objective in a democratic society.⁹ The American Convention, at Article 21, provides that a law of a State “may subordinate [the] use and enjoyment [of property] to the interest of society.” The need for such restrictions depends on the imperative public interest sought to be satisfied; and proportionality is “based on the restriction being closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right.”¹⁰ In addition, the restrictions on the right to property “must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right.”¹¹

Therefore, in the context of indigenous peoples, and the contradictions that may arise between the ancestral property claimed and the existence of private property within the area claimed, the Court has established that:

⁹ I/A Court H.R., *Indigenous Community Yakye Axa v. Paraguay Case*. Judgment of June 17, 2005. Series C No. 125, para. 144.

¹⁰ I/A Court H.R., *Indigenous Community Yakye Axa v. Paraguay Case*. Judgment of June 17, 2005. Series C No. 125, para. 145.

¹¹ I/A Court H.R., *Indigenous Community Yakye Axa v. Paraguay Case*. Judgment of June 17, 2005. Series C No. 125, para. 145; *See (mutatis mutandi) Ricardo Canese v. Paraguay Case*. Judgment of August 31, 2004. Series C No. 111, para. 96; *Herrera Ulloa v. Costa Rica Case*. Judgment of July 2, 2004. Series C No. 107, para. 127.

“the States must assess, on a case by case basis, the restrictions that would result from recognizing one right over the other. Thus, for example, the States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations. Property of the land ensures that the members of the indigenous communities preserve their cultural heritage.

... Disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members.

... On the other hand, restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society, in the sense given to this by the American Convention; and it could be proportional, if fair compensation is paid to those affected....¹²

According to the case law of the inter-American system, the State has the duty to ensure the right to collective property of the indigenous peoples, and with respect to the indigenous peoples who are not in possession of their ancestral

¹² I/A Court H.R., *Indigenous Community Yakye Axa v. Paraguay Case*. Judgment of June 17, 2005. Series C No. 125, paras. 146-148.

territory, the State should facilitate the restitution of their lands, which may include the impairment of private rights that currently vest in the lands claimed by those peoples. As follows from the case law cited above, private property may be restricted for the sake of a greater collective interest, so long as there is fair compensation for the owner harmed, if he or she has been an innocent third-party buyer to whom that right has been conveyed.

The Inter-American Court has established that the right of the indigenous peoples to the recovery of their traditional lands that are not in their full possession persists indefinitely to the extent that there continues to be a cultural, spiritual, ceremonial, or material relationship of the indigenous people with their territory. Nonetheless, as the Court explains, “if the members of the indigenous people carry out few or none of such traditional activities within the lands they have lost, because they have been prevented from doing so for reasons beyond their control, which actually hinder them from keeping up such relationship, such as acts of violence or threats against them, restitution rights shall be deemed to survive until said hindrances disappear.”¹³

The case law of the inter-American system has also established that to ensure access to justice for the members of indigenous peoples, the States have the duty to grant effective protection that takes into account their own particularities:

¹³ I/A Court H.R., *Indigenous Community Sawhoyamaya v. Paraguay Case*. Judgment of March 29, 2006. Series C No. 146, para. 132.

As has been established by this Tribunal [on] other occasions and pursuant [to] the principle of non-discrimination enshrined in Article 1(1) of the American Convention, in order to guarantee the members of indigenous communities access to justice, “it is necessary that the States grant an effective protection taking into account their specific features, economic and social characteristics, as well as their special situation of vulnerability, their common law, values, uses and customs.”¹⁴

Moreover, the Court has highlighted that under Articles 8 (right to a fair trial) and 25 (judicial protection), and in light of the duty to adopt provisions of domestic law pursuant to Article 2 of the American Convention, the State is “obliged to provide for appropriate procedures in its national legal system to process the land claim proceedings of the indigenous peoples with an interest thereon. For such purpose, the generic obligation to respect rights established in Article 1(1) of [the Convention] imposes on the States the duty to ensure an accessible and simple procedure and to provide competent authorities with the technical and material conditions necessary to respond timely to the requests filed in the framework of said procedure.”¹⁵

¹⁴ I/A Court H.R., *Indigenous Community Yakye Axa v. Paraguay Case*. Judgment of June 17, 2005. Series C No. 125, para. 63; *Indigenous Community Sawhoyamaya v. Paraguay Case*. Judgment of March 29, 2006. Series C No. 146, para. 83; and *Saramaka People. v. Suriname Case*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007. Series C No. 172, para. 178; *Case of Tiu Tojin*, Judgment of November 28, 2008. Series C No. 190, para. 96.

¹⁵ I/A Court H.R., *Indigenous Community Sawhoyamaya v. Paraguay Case*. Judgment of March 29, 2006. Series C No. 146, para. 109.

OAS member states have an uneven record in regard to respecting and protecting these rights. In some instances, governments have demarcated and titled lands in indigenous peoples. They have cancelled concessions and removed non-indigenous settlers. In other states there is a climate of impunity and violence against indigenous peoples is widespread, while development projects result in their forced removal from their ancestral lands. Compliance with human rights law remains a work in progress.

3. Recommendations

- Encourage the administration to reverse U.S. policy and to support the United Nations Declaration on the Rights of Indigenous Peoples as a framework for protecting their rights, including their lands and resources.
- Call on the administration to support efforts to conclude the Inter-American Declaration on the Rights of Indigenous Peoples
- Find a means for the U.S. government to comply with recommendations of the Inter-American Human Rights Commission in the Dann Case, involving access to grazing lands for members of the Western Shoshone tribe.
- Utilize opportunities arising from bilateral negotiations, such as the projected Colombia-US Free Trade Agreement, to promote compliance with human rights standards and changes on the ground by the Colombian government.
- Consider legislative action on corporate accountability for violations of human rights and environmental laws wherever they occur.