
JURIST

PROJECT

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# Indigenous and Tribal Peoples' Rights and Access to Justice in Six Caribbean Countries

**SYNTHESIS REPORT**

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## Executive Summary

While they feature somewhat in intergovernmental standards and policy processes within the CARICOM (e.g., reparations discourse and the Charter of Civil Society), indigenous and tribal peoples ("ITPs") have largely been excluded from the official history of the Caribbean and the (colonial and post-colonial) processes of state-building in the region. They also were largely left out of the process of setting national constitutional and other standards and their rights have not been adequately secured in law or practice across the region. For this reason, the CARICOM Reparations Commission described ITPs as "… the most marginalized social group within the region." Human rights law provides the parameters and a set of transparent norms and legal obligations to begin to repair this situation. This does not rest solely on – and nor should the focus only be – the sins of the past by colonial others, but, instead, provides the means, nationally and regionally, for sustained dialogue between Caribbean states and ITPs and, more importantly, action to address their rights and concerns within the context of contemporary norms and common aspirations.

The Judicial Reform and Institutional Strengthening project seeks to remedy the lack of information about ITPs in the Caribbean, *inter alia*, by collating baseline data on ITPs' rights and priorities in the six above-mentioned countries, all member states of the CARICOM. It commissioned six-in-country studies to start this process, each written by an expert in consultation with ITPs' organizations and communities. Focused on ITPs' rights and access to justice, this 'synthesis paper' seeks to: 1) summarize the relevant international normative framework and its requirements and implications; 2) synthesize the information presented in the six 'in-country baseline studies' commissioned under the project, identifying common or divergent themes and issues; and 3) articulate conclusions and recommend possible ways forward, including as related to ITPs' priorities. The footnotes serve the dual purpose of citation and bibliography.

The normative framework is drawn from both regional or domestic standards and from international and regional human rights law. In these standards, access to justice generically includes the following elements: a normative legal framework; legal awareness; access to appropriate fora; and the effective administration of justice. The jurisprudence of the inter-American human rights system is highlighted in this regard, especially the 2015 judgment of the Inter-American Court of Human Rights in *Kaliña and Lokono Peoples v. Suriname,* as are various provisions of the UN Declaration on the Rights of Indigenous Peoples and various UN and other studies on ITPs and access to justice.[1] At a bare minimum, states are obligated to recognize and secure ITPs' rights in law and the remedies provided should offer "a real possibility … to be able to defend their rights and exercise effective control over their territory." The UN Expert Mechanism on the Rights of Indigenous Peoples adds that ITPs "must have access to justice externally, from States, and internally, through indigenous customary and traditional systems." As with other standards, this is consistent with ITPs right to self-determination, which requires that they can continue to use their legal and juridical systems internally as well as to have equal access to those of the state.

These standards include key reference points, such as basic recognition as ITPs; recognition of collective legal personality and standing; whether rights have been recognized in law, beyond the mere possibility of

[1] Kaliña and Lokono Peoples v. Suriname, Judgment of 25 November 2015. Series C No. 309, para. 250-1 Where Suriname "asked the Court to provide it with guidance in order to resolve the complex issues related to the recognition of the rights of indigenous and tribal peoples in Suriname" and where the Court explains that, "in order to ensure the human rights of the indigenous peoples, the domestic remedies should be interpreted and applied taking the following criteria into account…."

recognition of (inchoate) rights through a judicial process; the existence of colonial era or other doctrines that negate or impair rights; whether remedies are accessible, prompt, appropriate and effective; if human rights law related to ITPs is applied by the judiciary; whether the judiciary adequately upholds ITPs' rights; if ITPs' internal justice systems are recognized; if ITPs-specific land titling and/or other administrative mechanisms or processes exist and are effective; and the extent to which the rights of ITPs women and girls are recognized beyond the general individual rights framework. These are discussed in relation to the situation in each of the six countries under review.

The in-country studies and secondary materials illustrate, albeit to differing degrees, that none of the six countries comply with most, if not almost all, of the relevant standards (see also Table immediately below). For instance, only one country (**Dominica**) recognizes the collective legal personality of ITPs, and this is largely coincidental, whereas the only other to do so (**Guyana**), at least to some extent, has confined recognition to institutions of the state's design and legal personality is unjustifiably restricted only to individual villages. Likewise, **Guyana** and **Dominica** have dedicated laws and institutions, albeit strongly criticized by human rights bodies, whereas **Belize** and **Suriname** are in the process of drafting or enacting legislation that could represent a large step forward if enacted and implemented. **Guyana** and **Belize** also have some form of constitutional protection. **SVG** and **T&T**, while occasionally referring to ITPs, have yet to formally recognize their legal status and rights beyond rare ad hoc and discretionary statements or, more infrequently, limited action.

This synthesis paper concludes with a set of recommendations, listed immediately below as well, mostly generated in specific discussions with ITPs in the six countries. One recommendation not discussed at the country level is that, in the short-term, a baseline study like those synthesized here should be commissioned on the legal status and rights of Maroons in **Jamaica**. In terms of follow up on these recommendations, members of the JURIST project ITPs Steering Committee should be contacted, individual or collectively, to discuss specific in-country or regional initiatives. The recommendations are as follows:

**Capacity building:** Most of the in-country studies prioritize and recommend education and training on ITPs' rights, both for ITPs and their institutions and for public authorities, including police, judicial officers, and lawyers/bar associations. This also includes capacity building measures specifically directed at strengthening ITPs' juridical systems and institutions, including on the role of customary law. While this can be done on an ongoing basis, particularly if attached to a Continuing Legal Education or other certification programme, some can also be done in the short-term, e.g., support for specific trainings organized by ITPs alone or in conjunction with others (e.g., exchanges with ITPs in other countries, developing courses or programmes with university departments (UWI would seem to be a logical partner in this respect)). These can be about general rights issues, issues of relevance locally (e.g., proposed legislative enactments in **Suriname** and **Belize**, agreeing on and proposing legislative amendments in **Guyana** and **Dominica**, seeking strategic advice on issues related to rights recognition, etc.).

**Informational Materials and Documentation:** Related to capacity building, other short-term priorities and initiatives include the development of capacity building and educational materials concerning access to justice for ITPs. This is both user friendly information for ITPs and information to explain critical issues to policy makers and the legal profession. For instance, developing written and visual materials that explain how the right to cultural heritage and way of life in **Guyana's** Constitution should be understood from an indigenous perspective and using

specific examples may greatly assist in upholding this and other rights, both per se and in relation to other areas, such as the land titling process.

- The South Rupununi District Council in **Guyana** has already collected a great deal of relevant information and supporting it to both write up this information and to develop specific visual materials would be the most efficient means of starting such an initiative, one that can be easily scaled up to other regions of Guyana (and beyond given the ongoing development of cultural heritage rights in international law).
- Similarly, in the case of **T&T**, support could be provided to collate anthropological and other materials that substantiate traditional ownership of lands and to frame these in legal terms that may allow for a sustained dialogue with the state aimed at securing an adequate area of land in which indigenous people determine what initiatives may be executed.
- More broadly, specific materials could be developed on the rights and roles of ITPs women in relation to access to justice, both for policy makers and the judiciary and for ITPs internally (e.g., in relation to the issues identified in Dominica set out below). This could include specific explanatory materials on the soon to be finalized CEDAW General Comment on the Rights of Indigenous Women and Girls as well as how to understand women's rights in relation to the UNDRIP and in the light of intersecting forms of discrimination.[2]

**Alternative Dispute Resolution, Paralegals and Legal Aid Centres:** In the mid-term, recommendations identify the need for specific ITPs' alternative dispute resolution mechanisms that support ITPs and whose decisions are respected by state bodies and procedures. There are models, both traditional and statutory, that could assist in developing such mechanisms. Longer-term priorities and recommendations include training of paralegals to support ITPs and the establishment of legal aid centres that are accessible and responsive to ITPs. In the author's experience, paralegal training programmes work best when anchored to ITPs' organizations that have a strong relationship with their constituent communities and that have some degree of long-term, secure funding.

**FPIC Protocols and Legislation:** Several studies highlight the need for the development and implementation of FPIC Protocols. These would be developed by communities, sets of communities or territories as a means of informing external actors about the way consultation, participation and FPIC shall take place for activities that may affect the lands and lives of the people in question. Other than specific activities related to new enactments (**Belize** and **Suriname**) or proposed amendments (**Dominica** and **Guyana**), such as capacity building, support for gatherings, and technical support, initiatives related to legislation are likely longer-term advocacy initiatives (**SVG** and **T&T**), although they need not be if there a specific aperture that may allow for more immediate action (e.g., simply drafting a bill and then seeking political support for the same). In the case of **Suriname**, a series of subsidiary laws will also be drafted to give effect to the Framework Law should be enacted in its current form.

**Traditional Knowledge and Intellectual Property Rights:** Some of the studies highlight the need to develop legislative and other measures to address the lack of protection for ITPs traditional knowledge and intellectual property rights as well as initiatives aimed at correcting perceived violations of associated rights in some instances. This also crosses over to some extent with cultural heritage and other rights. In some of the countries under review some of the issues may also be addressed in by-laws or rules adopted by ITPs or, at least initially, by policy instruments where this is not possible. It makes sense that this could be one area of follow up in the light of Article

[2] *See* for the latest draft https://www.ohchr.org/Documents/HRBodies/CEDAW/Draft-GR-rights-indigenous-women-and-girls/Draft-GR-indigenous-EN.DOCX.

66(c) of the Revised Treaty of Chaguaramas (concerning "the legal protection of the expressions of folklore, other traditional knowledge and national heritage, particularly of indigenous population in the Community") and, while only applicable to **Dominica**, Article 23 of Revised Treaty of Basseterre (2011). The Convention on Biological Diversity is also relevant in context. This provides a regional level opening to develop specific measures within the confines of existing law and procedures as well as to ensure that ITPs are fully engaging any regional process or mechanisms and any resulting national processes. For example, a model law and/or regulations could be developed by ITPs and used to seek national-level action as well as regional actions to the extent necessary or desirable, even more so given that this is part of the economic union of the CARICOM.

**Caribbean Network of Indigenous and Tribal Peoples. Engaging at the Regional Level:** While ITPs all have pressing concerns nationally, sharing and organizing at the regional level is also important. This may mean organizational meetings in the short-term and sustained institutional support in the mid- to longer-term. For instance, supporting a regional voice for ITPs may assist with promoting an ITPs perspective in relation to the CARICOM Reparations Commission and its activities or about regional action on traditional knowledge and intellectual property rights as proposed above or in the next section. The same may also be said in connection with the clarification and operationalization of the meaning, scope, and utility of Charter of Civil Society as it relates to ITPs, including the meaning of 'historical rights' and how the states should be undertaking to respect ITPs rights, both "historical" and in contemporary human rights law. It will also likely facilitate greater exchanges within the region as this at present is ad hoc and patchy. Assistance to ITPs to engage in direct dialogue with e.g., the Conference of Heads of Judiciary of CARICOM and the CCJ could also be important. The same is also the case with the UWI, particularly its law faculties, to promote additional course work, seminars, and support to ITPs.

Beyond the Caribbean region, it is also important for ITPs and Caribbean institutions to engage with the organs of the OAS that are concerned with ITPs issues and human rights more broadly (e.g., but not limited to, the IACHR, IACTHR, Inter-American Institute for Human Rights and the General Secretariat of the OAS via the Office of the Secretary General). This would be mutually beneficial as a greater understanding of issues in the Caribbean, explained by persons from the region, will enable OAS institutions to be more responsive to needs identified in the region (including a better understanding of the relative roles of the CCJ and the IACHR and the IACTHR). Conversely, a greater understanding of OAS jurisprudence in the region and greater collaboration would facilitate increased attention to access to justice issues as they relate to ITPs. Likewise, the extensive experience of many OAS member states, in all regions, provides invaluable background, learning and potential models that may contribute to positive advances for Caribbean states and ITPs.

**Jurisprudence Compilation:** To assist ITPs in the region to engage with human rights bodies and the judiciary on human rights issues, a compilation of UN jurisprudence and recommendations concerning the countries under review would be helpful and an important resource. Such a compilation would not require much work and can be updated as new information comes in and is a short-term initiative beyond supporting the entity that would be responsible for updating and dissemination. This could include ensuring that constituents are informed of important jurisprudential developments from within and outside of the region.

## Table Comparing Selected Points of Baseline Data

| | Belize | Dominica | Guyana | Suriname | SVG | T&T |
|---|---|---|---|---|---|---|
| **Basic Recognition: in law, policy and/or practice, and Institutionally** | Y<br>Y | Y<br>Y | Y<br>Y | Y<br>Y | Unclear<br>N | Ad hoc, informal<br>N |
| **Collective Legal Personality and Standing** | N<br>Y | Y<br>Y | Partial (only villages)<br>Y | N<br>N | N<br>Unclear | N<br>Unclear |
| **Legal Recognition of ITPs' Rights (Const., legislation, or judicially)** | Const. Preamble, 2015 CCJ Consent Order, legislation being drafted | Legislation (inadequate) | Const. (preamble, substantive), legislation (inadequate) | N (Collective Rights Framework Bill pending) | N | N |
| **Continued reliance on colonial legal doctrines re. land that negates or impairs ITPs' rights** | Y, but rejected by judiciary and Consent Order | Y | Y | Y | Y | Y |
| **Remedies are accessible,**<br>**prompt, appropriate and effective** | Y<br>Y<br>remains to be seen | Y<br>unclear<br>unclear | Depends on location<br>N<br>N | N<br>N<br>N | N<br>unclear<br>unclear | Depends on location<br>unclear<br>unclear |
| **Application of human rights law related to indigenous peoples by the judiciary** | Y<br>Const., right to protection of the law, among others | N | N<br>in principle required by Const., Arts 39(2) and 154A, has been applied to non-ITPs | N | N | N |

| | | | | | | |
|---|---|---|---|---|---|---|
| **Judicial decisions adequately uphold ITPs' rights** | Y | N | N | N | N | N |
| **Recognition of internal ITPs' governance and justice systems** | Inadequate | Inadequate | Inadequate | De facto only | N | N |
| **ITP Land Titling Processes** | N being developed | N but KTA allows for discretionary grants of land | Y but often ineffective and divorced from rights | N would be required if Framework Bill is enacted | N | N |
| **Gender (recognition of ITPs women/girls rights beyond general individual rights framework or recognition of intersectionality)** | N but does sometimes feature in policy | N but does sometimes feature in policy | N but general state mechanisms have shown an interest in indigenous women's rights | N but does sometimes feature in policy | N | N |

## I. Introduction

Various accounts and analyses have been written about European and others' interactions with indigenous and tribal peoples' ("ITPs" or, separately, "indigenous" and/or "tribal" peoples) across the Caribbean, mostly historical, anthropological or archaeological.[3] These accounts detail slavery;[4] repeated and devastating epidemics; genocide and ethnocide; theft and duplicity; legal ambiguity, disregard and confusion; neglect, stigmatization and discrimination; and extensive trade,[5] and various cultural, linguistic and other exchanges,[6] all taking place within often complex relationships.[7] Although it could apply equally to the mainland (and is ongoing in some respects),[8]

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[3] *See e.g.*, C. Bayly, *The British and indigenous peoples, 1760—1860: Power, Perception and Identity* in M. Daunton and R. Halpern (eds.), EMPIRE AND OTHERS: BRITISH ENCOUNTERS WITH INDIGENOUS PEOPLES, 1600–1850 (London: Routledge 1999); C. Hoffman, *Indigenous Caribbean Networks in a Globalizing World* in C. DeCorse (ed.), POWER, POLITICAL ECONOMY, AND HISTORICAL LANDSCAPES OF THE MODERN WORLD: INTERDISCIPLINARY PERSPECTIVES (Albany: SUNY Press 2019); M. Forte (ed.), INDIGENOUS RESURGENCE IN THE CONTEMPORARY CARIBBEAN: AMERINDIAN SURVIVAL AND REVIVAL (New York, NY: Peter Lang 2006); M. Forte, *Writing the Caribs Out: The Construction and Demystification of the 'Deserted Island' Thesis for Trinidad*, 5 ISSUES IN CARIBBEAN AMERINDIAN STUDIES 1 (2004-05); and M. van den Bel and G. Collomb, *'Beyond the Falls': Amerindian Stance towards New Encounters along the Wild Coast (AD 1595–1627)* in C. Hofman and F. Keehnen (eds.), MATERIAL ENCOUNTERS AND INDIGENOUS TRANSFORMATIONS IN THE EARLY COLONIAL AMERICAS: ARCHAEOLOGICAL CASE STUDIES (Leiden: Brill 2019).

[4] *See e.g.,* E. Stone, *'Chasing 'Caribs': Defining Zones of Legal Indigenous Enslavement in the Circum-Caribbean, 1493–1542*, in J. Fynn-Paul and D. Pargas (eds.), SLAVING ZONES (Leiden: Brill 2017) (citing studies estimating that 650,000 indigenous people were enslaved in the Caribbean islands in the 16th century). The numbers for the Guianas are likely higher, being part of the broader Amazonian indigenous slave trade, particularly Brazil, as well as the insular Caribbean. *See also,* C. Arena, *Indian Slaves from Caribana: Trade and Labor in the Seventeenth-Century Caribbean* (PhD Diss., Columbia U. 2017); J. Whitaker, *Amerindians in the Eighteenth Century Plantation System of the Guianas*, 14 TIPITÍ: J. SOC. ANTHROP. LOWLAND S. AM. 30 (2016) (explaining that "During the eighteenth century, the Makushi were caught between Luso-Brazilian slaving raids and those carried out by Amerindian proxies (mostly Caribs and Akawaio) of the Dutch. Such raids against the Makushi were frequent during the eighteenth century and continued into the nineteenth century"); J. Hemming, RED GOLD. THE CONQUEST OF THE BRAZILIAN INDIANS, (Cambridge: Harvard U. Press 1978); and A. Bialuschewski, *Slaves of the Buccaneers: Mayas in Captivity in the Second Half of the Seventeenth Century*, 64 ETHNOHISTORY 41 (2017).

[5] *See e.g.,* L.A.H.C. Hulsman, *Nederlands Amazonia: Handel met indianen tussen 1580 en 1680* (PhD diss., U. Amsterdam 2009); T. Murphy, *Kalinago Colonizers: Indigenous People and the Settlement of the Lesser Antilles* in L.H. Roper (ed.), THE TORRID ZONE: CARIBBEAN COLONIZATION AND CULTURAL INTERACTION IN THE LONG SEVENTEENTH CENTURY (Columbia: U. South Carolina Press 2018); and M. Meuwese, BROTHERS IN ARMS, PARTNERS IN TRADE: DUTCH-INDIGENOUS ALLIANCES IN THE ATLANTIC WORLD, 1595-1674 (Leiden: Brill 2011).

[6] *See e.g.*, J. Roitman, *Portuguese Jews, Amerindians, and the frontiers of encounter in colonial Suriname*, 88 NEW WEST INDIAN GUIDE 18 (2014), p. 21-2 ("The relationship between Jews and Amerindians was hardly clear-cut. Although there was certainly oppression and exclusion, there was also cooperation, alliance, and cultural brokerage. These are the themes common in any frontier zone where cultures come into contact, collide, and connect"); L. Newson, ABORIGINAL AND SPANISH COLONIAL TRINIDAD: A STUDY IN CULTURE CONTACT (London and New York: Academic Press, 1976); and N. Whitehead (ed.), WOLVES FROM THE SEA. READINGS IN THE ANTHROPOLOGY OF THE NATIVE CARIBBEAN (Leiden: KITLV 1995).

[7] *See e.g.*, K. Douglass and J. Cooper, *Archaeology, environmental justice, and climate change on islands of the Caribbean and southwestern Indian Ocean*, 117 PROC. NAT'L ACADEMY OF SCIENCES 8254 (2020) (explaining that "The landscapes and material records of Caribbean islands reveal the 16th century genocide of millions of indigenous peoples (*sic*) with a corresponding loss of thousands of years of traditional ecological knowledge; the 17th and 18th century translocation of European and African lifeways (including plants and animals) transforming island ecologies; and the 19th century industrialization of landscape modification and biodiversity loss before a 20th century revolution in political and economic models for cultural development and sovereign determination"); L.H. Roper (ed.), THE TORRID ZONE: CARIBBEAN COLONIZATION AND CULTURAL INTERACTION IN THE LONG SEVENTEENTH CENTURY (Columbia: U. South Carolina Press 2018); and N. Whitehead, LORDS OF THE TIGER SPIRIT: A HISTORY OF THE CARIBS IN COLONIAL VENEZUELA AND GUYANA, 1498-1820 (Dordrecht: Foris Publications 1988).

[8] *See e.g.*, L. Notess et al, *Community land formalization and company land acquisition procedures: A review of 33 procedures in 15 countries*, 110 LAND USE POLICY 1 (2021) (while it only reviews one of the countries (Guyana), the findings can be applied to the rest to the extent that they have any procedures. For example, regulatory and policy frameworks favor investors over communities; community procedures are inaccessible and inflexible whereas procedures for companies land acquisition processes are more flexible, with a wider range of options; community procedures generally take years to decades to complete, while land acquisition procedures for companies typically range from one month to five years; all community procedures require a screening for third-party rights,

one commentator observes in relation to the Caribbean islands that "Europeans used land dispossession, the imposition of forced labour, slavery and rape as key instruments for the control and eradication of Caribbean indigenous populations."[9] Moreover, many of these lands were handed over to private hands or companies as part of a plantation economy. "That is, colonization in the Caribbean and the extermination of the indigenous populations were possible, thanks to a corporate structure and a network of public–private relations that privileged the interests of British political-economic elites and settler-colonialists…. Hence, land dispossession was a key form of colonial domination and extermination."[10]

This history was recognized by the CARICOM Reparations Commission, which has reparations for "Native Genocide" as one of its three main pillars.[11] Its *Ten Point Action Plan* states that "Genocide and land appropriation went hand in hand" and recommends that a "[d]evelopment Plan is required to rehabilitate this community."[12] Discussing this, the Prime Minister of Saint Vincent and the Grenadines ("SVG"), Ralph Gonsalves explained that "the quest for reparations … is for us in the Caribbean a defining issue in the 21st century for justice, reconciliation, and the righting of historic wrongs."[13] Leaving aside the word 'rehabilitate' or the appropriateness of a 'development plan' in context, one commentator correctly notes that, apart from drastically undercounting the contemporary ITPs population, this call for reparations is "problematic … due to the ongoing violation of [ITPs'] rights internally … by the same states who are representing them in the Caribbean Reparations Commission."[14] The representative from Guyana on this Commission, for instance, is notorious for publicly deriding the rights and even the indigenous status of three of the nine indigenous peoples in that country, unnecessarily using them as a prop in his argument that Afro-Guyanese should be granted 'ancestral lands' as reparations.[15] This has been described as part of "a long-standing politics of belonging" that emphasizes the experiences of Afro- and Indo-Guyanese at the expense of indigenous experiences, including assertions that some indigenous peoples are not even fully Guyanese.[16] Thus, "the people brought to Guyana are laying claim to what they portray to be no one's land prior to and after colonization."[17]

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whereas only 6 of the 14 corporate land acquisition procedures surveyed required any form of community consultation, and only 3 contained provisions protecting communities' rights to FPIC).

9 J. Atiles-Osoria, *Colonial State Crimes and the CARICOM Mobilization for Reparation and Justice*, 7 STATE CRIME J. 349, 355-56 (2018).

10 *Id*.

11 *See* https://caricomreparations.org/.

12 *See* https://caricomreparations.org/caricom/caricoms-10-point-reparation-plan/ (stating that "A community of over 3,000,000 in 1700 has been reduced to less than 30,000 in 2000," when the indigenous population of Guyana alone is almost three times that number and the Maroon population in Suriname exceeds it four times over).

13 'OAS Heard Claim for Native Genocide and African Slave Trade', *OAS Press Release*, 6 November 2015, (also stating that "The OAS Secretary General, Luis Almagro, expressed his support to the claim of the Caribbean states. 'We are aware that the official history of the Americas has been written at the expense of minority groups, especially Afro-descendants and indigenous peoples'"), https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-334/15.

14 A. Strecker, *Indigenous Land Rights and Caribbean Reparations Discourse*, 30 LEIDEN J. INT'L L. 629 (2017), 629. *See also* M. McKeown, *Backward-looking reparations and structural injustice*, 20 CONTEMP. POL. THEORY 771, 774 (2021) ("Several CARICOM states fail to recognise indigenous land rights and socioeconomic discrimination against these groups is prevalent, raising concerns that their needs will not be addressed").

15 *See e.g.*, 'Amerindians were not the first people on the continent', Eric Philips, Letter to the Editor, *Stabroek News*, 25 March 2016 (asserting, *inter alia*, that "History has recorded that enslaved Africans arrived in Guyana in the mid-17th century and were in Guyana for 100 to 200 years before the Wai Wai and Wapishana nations"); and 'Reparatory justice for Guyanese for crimes against humanity', Eric Phillips, Letter to the Editor, *Kaieteur News*, 19 September 2017, (asserting that "Three Amerindian groups received lands as reparatory justice even though they came here 100 to 200 years after Africans. None of the three were here before the 1763 Cuffy rebellion"), https://www.kaieteurnewsonline.com/2017/09/19/reparatory-justice-for-guyanese-for-crimes-against-humanity/.

16 S. Jackson, CREOLE INDIGENEITY: BETWEEN MYTH AND NATION IN THE CARIBBEAN (Minneapolis: U. Minnesota Press 2012).

17 *Id*. *See also* J. Mullenite, *Engineering Colonialism: Race, Class, and the Social History of Flood Control in Guyana* (PhD Diss., Florida Int'l U. 2018), 60 (verifying this and relaying that such notions are part of the primary school curriculum in Guyana today).

While historical injustices continue to have real effects today,[18] many ITPs would highlight the need to secure their extant rights, rather than exclusively discuss reparations in the way postulated.[19] They also stress the need to halt current and often debilitating violations by those same states, who, it seems, would rather deflect to the past and discuss the blame that may be ascribed to foreign others.[20] ITPs and others further point out that "dispossession of Indigenous land can be seen as a structure that has not yet ended;"[21] it is ongoing[22] – sometimes by less than subtle means – in the name of the economic development of the majority, from which ITPs rarely benefit, and even for purported nature conservation based on disproven notions that nature should be protected from ITPs.[23] To this may be added the increasingly delayed gestation of the "Development Plan;" the absence of any serious discussions with ITPs about the same or even what reparations may look like from ITPs' perspectives; the seeming confusion of extant and permanent rights with amorphous and retrospective calls for reparations by others; and the lack of any meaningful and coordinated follow up to Article XI of the CARICOM Charter of Civil Society (1997), let alone other relevant standards. The latter provides that: "[t]he States recognise the contribution of the indigenous peoples to the development process and undertake to continue to protect their historical rights and respect the culture and way of life of these peoples." It is unclear what it is meant by "historical rights" or how exactly the states may be undertaking to "continue" to protect the same, nor can any explanation be located for this terminology or why the existent and internationally guaranteed rights of ITPs should not be the primary focus of attention. Irrespective, this provision could provide the basis for regional action should it be interpreted consistently with other human rights standards.

This ongoing neglect is even more glaring in the light of the Reparations Commission's conclusion that the ITPs as "Survivors remain traumatized, landless, and are the most marginalized social group within the region."[24] This finding alone should prompt dedicated consultations and coordinated, urgent and special measures,

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18 *See e.g., R. v. Ipeelee* [2012] SCC 13, para. 60 (where the Canadian Supreme Court refers to "the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples").

19 *See e.g.,* C. Verdon, *Improving the Present to Repair the Past: A Proposal to Redefine the Guiding Principle of Reparation for Gross Violations of Human Rights*, 53 NYU J. INT'L L. & POL. 587 (2020), p. 611 et seq (discussing reparations in relation to gross violations of ITPs' rights).

20 *See e.g.,* W. Bradford, 'Beyond Reparations: An American Indian Theory of Justice', Aboriginal Policy Research Consortium International (APRCi), 217, p. 3-4 (observing that "For the indigenous peoples who have inhabited, since time immemorial, the lands within the external borders of the U.S., remediation of historical injustice is a pressing issue. Despite this, reparations would fail to advance, and might even frustrate, important Indian objectives, primarily the reacquisition of the capacity to self-determine as autonomous political communities on ancestral lands"), https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1227&context=aprci.

21 T. Waligore, *Redress for Colonial Injustice: Structural Injustice and the Relevance of History*, 11 GLOBAL JUSTICE, SPECIAL ISSUE: JUSTICE AND RECONCILIATION IN WORLD POLITICS 15 (2019), p. 16 (also opining that "all agents have a forward-looking responsibility to reform unjust structures to which they are socially connected. … Historically connected agents who fail to fulfill their different forward-looking responsibilities could owe greater and different kinds of compensation and reparations than other agents do").

22 *See e.g.*, A. van Stipriaan, *Suriname Maroons: A History of Intrusions in the Territory* in A. Iye, N. Scmidt, P. Lovejoy (eds.), SLAVERY, RESISTANCE AND ABOLITIONS. A PLURALIST PERSPECTIVE (Paris: UNESCO 2020), p. 215 ("Maroonage has been an important aspect of the history of slavery in Suriname. Maroons liberated themselves and conquered a more or less autonomous place beyond the borders of colonial society. … When it turned out that their territories held enormously rich natural resources, a process of intrusion was started by colonial society to appropriate these riches. This has not stopped in postcolonial times").

23 *See e.g.*, C. Sobrevila, *The Role of Indigenous Peoples in Biodiversity Conservation: the natural but often forgotten partners*, (Washington DC: World Bank 2008), p. 5 (explaining that research consistently "reveals a strong correlation between indigenous presence and the protection of natural ecosystems"); and A. Nelson & K. Chomitz, *Effectiveness of Strict vs. Multiple Use Protected Areas in Reducing Tropical Forest Fires: A Global Analysis Using Matching Methods,* 6 PLoS ONE 8 (2011) (concluding that community-managed forests are much more effective in reducing deforestation than strict protected areas).

24 *See* https://caricomreparations.org/caricom/caricoms-10-point-reparation-plan/.

nationally and regionally,[25] a view endorsed by the Heads of State of the Americas in 2000.[26] As illustrated herein, the same is also the case concerning recognition of and respect for ITPs' rights more generally.[27] Discussing this in the context of development, the former UN Special Rapporteur on the Rights of Indigenous Peoples ("UNSRIP") observes that special measures should "not only address the socio-economic gaps between the indigenous and non-indigenous sectors of society but also remove discriminatory barriers to the exercise of their right to self-determined development and cultural integrity,"[28] and that includes the resolution of outstanding land and connected rights issues.[29] The Inter-American Commission on Human Rights ("IACHR") has concluded in this regard that "traditional collective systems for the control and use of territory are … essential to the individual and collective well-being, and indeed the survival of, [ITPs]."[30] Moreover, as the UN Expert Mechanism on the Rights of Indigenous Peoples ("EMRIP") explains: "Injustices of the past that remain unremedied constitute a continuing affront to the dignity of the group. This contributes to continued mistrust towards the perpetrators, especially when it is the State that claims authority over indigenous peoples as a result of that same historical wrong."[31]

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[25] *See e.g., General Recommendation No. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination*, CERD/C/GC/32 (2009), para. 11 (explaining that "The concept of special measures is based on the principle that laws, policies and practices adopted and implemented in order to fulfil obligations under the Convention require supplementing, when circumstances warrant, by the adoption of temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms"); and para. 15 ("Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as … the rights of indigenous peoples, including rights to lands traditionally occupied by them…. Such rights are permanent rights, recognized as such in human rights instruments…"). *See also* CERD/C/63/CO/10 (10 December 2003), para. 10 (recommending that SVG report on "affirmative action measures adopted… to ensure the adequate development and protection of minority groups, in particular the Caribs…").

[26] *Declaration of the Regional Conference of the Americas* (Preparatory meeting for the Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance), Santiago, Chile (2000) (as explained by the OAS Press Dept., *supra*, note 11, stating, *inter alia*, that colonial depredations have caused "indigenous people considerable and lasting economic, political, and cultural harm and that justice requires now that important national and international efforts be made for the reparation of such harm. The reparation should be made through policies, programs and measures taken by the states that materially benefited from these practices and must aim at correcting the economic, cultural, and political harm inflicted to these communities and peoples").

[27] *See e.g., Maya Leaders Alliance v. A.G. Belize* [2015] CCJ 15 (AJ) (hereinafter "Maya Leaders 2015"), para. 57 (stating that "… the delay of the Government of Belize in resolving the issues of indigenous title cannot go unchecked"); and para. 59 ("the fact such rights nonetheless remain invisible in the general laws of the country, suggest the obligation to put in place special measures to give recognition and effect to these rights so that the protection of the law can be enjoyed").

[28] *Rights of indigenous peoples, including their economic, social and cultural rights in the post-2015 development framework*, A/69/267 (2015), para. 29. (further explaining that "Given that non-discrimination in the context of indigenous peoples has both an individual and a collective dimension, and that non-discrimination and self-determination are complementary and intertwined principles that permeate economic, cultural and social rights as they apply to indigenous peoples…").

[29] *See e.g.*, IACHR Indigenous Lands, para. 110 (observing that ITPs "have the right to possession and control of their territory without any type of external interference, given that territorial control by [ITPs] is a necessary condition for the maintenance of their culture"), and para. 165 (stating that the IACHR has also acknowledged that for ITPs there "is a direct relation between self-determination and land and resource rights"); *Río Negro Massacres v. Guatemala,* Ser. C No. 250, para. 160 (citing the right to self-determination and explaining that indigenous peoples' cultural identity or integrity "is a fundamental and collective right of the indigenous communities that must be respected in a multicultural, pluralist, and democratic society…"); *Kichwa Indigenous People of Sarayaku v. Ecuador*, 27 June 2012. Ser. C No. 245, para. 159 (citing the right to self-determination of indigenous peoples and noting that it protects, *inter alia*, the right "to freely pursue economic, social and cultural development"); and, para. 146 (explaining that "the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their lifestyle").

[30] *Mary and Carrie Dann*, Merits, Case 11.140 (United States) (2002), OEA/Ser.L/V/II.116, Doc. 46, para. 128.

[31] *Access to justice in the promotion and protection of the rights of indigenous peoples,* A/HRC/24/50 (2013), para. 6-7 (observing that "A particular dimension of access to justice relates to overcoming long-standing historical injustices and discrimination, including in relation to colonization and dispossession of indigenous peoples' lands, territories and resources"). *See also* K. Roach, *Remedies for Violations of Indigenous Rights* in K. Roach, REMEDIES FOR HUMAN RIGHTS VIOLATIONS: A TWO-TRACK APPROACH TO SUPRA-NATIONAL AND NATIONAL LAW (Cambridge: CUP 2021) (explaining that "remedies involve the challenges of responding to the harms of colonialism and avoiding new neo-colonial harm"); and P. Macklem, THE SOVEREIGNTY OF HUMAN RIGHTS (Oxford: OUP 2015), p. 136 (concluding that indigenous rights in international law "recognize differences, partly denied and partly produced by the international distribution

There are positive examples of this *process* of redress and reconciliation that may assist in drawing lessons for the Caribbean region.[32]

Caribbean legal studies often look at the mixed or hybrid legal systems in the region, other colonial legacies, or the contours of and interconnections among the various national legal systems (particularly those employing the common law tradition).[33] Most lack more than a few pages dedicated to ITPs and track standard Caribbean history books that typically teach that ITPs became extinct in the mists of time.[34] Aptly stated: "indigenous Caribbean communities still live within a historical backdrop in which native peoples were methodically removed or otherwise excluded from the historiography of the region and this history specifically remains relevant to the issue of reparations."[35] Yet, and while there are some country-focused studies of varying quality, very little has been written about the legal rights and status of ITPs in and across the contemporary Caribbean.[36] Even fewer actually identify, explain or seek to address indigenous perspectives and priorities. Indeed, various authors have identified that, while ITPs are iconized to some extent (e.g., on national coats of arms and currency, as part of national mythology, and for tourism purposes), the "conventional claim that Caribbean indigenous peoples were extinguished was used to deny their existence and avoid the responsibilities consequent upon acknowledging their presence…," and they have been on "the periphery of post-colonial Caribbean Constitutions."[37] This is not new; as early as 1838, the British House of Commons asserted that: "Of the Caribs, the native inhabitants of the West Indies, we need not speak, as of them little more remains than the tradition that they once existed."[38] Similar comments were made about then-British Guiana some 60 years later and in relation to the Maya of southern Belize into the late 20th century:[39]

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of territorial sovereignty initiated by colonization. … The morally suspect foundations of the sovereign power that a State exercises over indigenous peoples residing on its territory are why indigenous rights merit recognition in the international legal register").

32 *See e.g.*, 'Long fight for justice ends as New Zealand treaty recognises Moriori people', *The Guardian*, 26 November 2021, (explaining that "the New Zealand government enshrined in law a treaty between Moriori and the Crown, which includes an NZ$18m (£9.3m) settlement, the return of land, and an apology acknowledging the wrongs Moriori have suffered since the arrival of Māori and Europeans to their shores. … [T]he settlement includes an agreed account of the Moriori history, a necessary step in correcting the myths and narratives the Crown disseminated over many generations"), https://www.theguardian.com/world/2021/nov/26/long-fight-for-justice-ends-as-new-zealand-treaty-recognises-moriori-people. *See also Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation*, A/HRC/EMRIP/2019/3/Rev.1 (2 September 2019).

33 *See e.g.,* C. Toppin-Allahar, *Guyana: 'Mosaic or Melting-Pot?'* in S. Farran et al (eds.), A STUDY OF MIXED LEGAL SYSTEMS: ENDANGERED, ENTRENCHED OR BLENDED (Farnham: Ashgate 2014) (containing an extended discussion on indigenous rights); and D. López-Medina, *The Latin American and Caribbean Legal Traditions: Repositioning Latin America and the Caribbean on the Contemporary Maps of Comparative Law* in M. Bussani and U. Mattei (eds.), THE CAMBRIDGE COMPANION TO COMPARATIVE LAW (Cambridge: CUP 2012).

34 *See e.g.,* J. Shannon, *The Professionalization of Indigeneity in the Carib Territory of Dominica*, 38 AM. INDIAN CULTURE & RES. J. 29 (2014), p. 29 (explaining that "Local textbooks only present Caribs to Kalinago children as part of 'Amerindian' prehistory or cannibals whom Columbus met in 1493"). An exception is R-M. Antoine, COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS, 2nd ed., (London: Routledge-Cavendish 2003).

35 J. B. Torres, *'Reparational' Genetics: Genomic Data and the Case for Reparations in the Caribbean,* 2 GENEALOGY 7 (2018), p. 14.

36 *See e.g.*, A. Bulkan, *The Land Rights of Guyana's Indigenous Peoples* (PhD Diss., U. Toronto 2008); E-R. Kambel and F. MacKay, THE RIGHTS OF INDIGENOUS PEOPLES AND MAROONS IN SURINAME (Copenhagen: IWGIA 1999); and A. Gough, *Indigenous identity in a contested land: A study of the Garifuna of Belize's Toledo district* (PhD Diss., Lancaster U. 2019).

37 *See e.g.,* A. Bulkan, T. Robinson & A. Saunders (eds.), FUNDAMENTALS OF CARIBBEAN CONSTITUTIONAL LAW (London: Sweet and Maxwell 2015), p. 55.

38 *Report from the Select Committee on Aborigines (British Settlements): with the minutes of evidence, appendix and index,* London: Parliamentary papers/House of Commons (1837), p. 10.

39 *See e.g.*, E. Rowland, *The census of British Guiana*, 6 TIMEHRI 40, 44 (1891) (stating that "This race is of little or no social value and their early extinction must be looked upon as inevitable in spite of the sentimental regret of Missionaries").

> Until recently, Belizean historiography suggested that all of the Maya people living in … southern Belize were killed before the British arrived—and that the land remained essentially empty until the 1880s. This justified primitive accumulation, the separation of the living Maya from their forests, on the grounds that there were no indigenous people around at the time of colonization, hence no land rights. This political position, never coherently elaborated in post-Independence Belize … has been rigorously undone by the work of numerous scholars….[40]

More profoundly, a Garifuna scholar observes that: "What makes the condition of the indigenous people in the English-speaking Caribbean particularly caustic is that it brings home to the observer that there are some unresolved questions built into their newly enshrined constitutions that have to be answered."[41] Although written in 1992, these questions continue to pertain today; none have been satisfactorily answered and, in some cases, they are treated as irritants or, worse, justification for threats against or condemnation of those who raise them.[42] In the same vein, and echoing the former chair of the UN Working Group on Indigenous Populations,[43] a Guyanese scholar has called for settling "the obligations due to the Caribbean's ITPs as part of the process of building a social contract that is a pre-requisite of nation-building."[44] This process of "belated State-building" must involve serious and collaborative consideration of the many unresolved questions about ITPs' rights, role and status within contemporary Caribbean states as well as their role in the history of these states.[45] It thus involves those states "reconstructing their laws and constitutions to accommodate and respect the values, laws and beliefs of the [ITPs] who were essentially left out when these nations were established."[46] The former Chief Justice of the British Columbia Court of Appeal has emphasized in this regard that: "… we must conceive of reconciliation, in the legal context as well as in social and political terms, as a two-way street: just as the pre-existence of aboriginal societies

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[40] J. Wainwright, *The Colonization of the Maya of Southern Belize*, 2016, p. 2, https://cpb-us-w2.wpmucdn.com/u.osu.edu/dist/4/45440/files/2017/04/Wainwright-2016-Colonization-of-the-Maya-of-Southern-Belize-1gijtc7.pdf. *See also* J. Wainwright, *The Colonial Origins of the State in Southern Belize*, 46 AN. ESTS. CENTROAMERICANOS 99 (2020).

[41] J. Palacio, *The Sojourn Toward Self Discovery Among Caribbean Indigenous Peoples*, 38 CARIBBEAN Q. 55 (1992), p. 55.

[42] *See e.g.,* 'Activist for life Tony James working to save the indigenous way of life', *Stabroek News*, 5 September 2021, https://www.stabroeknews.com/2021/09/05/sunday/activist-for-life-tony-james-working-to-save-the-indigenous-way-of-life/; 'Kalinago people contemplate legal action in Venezuela aid matter', *Dominica News Online*, 25 June 2019, https://dominicanewsonline.com/news/homepage/news/kalinago-people-contemplate-legal-action-in-venezuela-aid-matter/; *Saramaka People (Request for Provisional Measures and Monitoring Compliance), Orders* (2013), Having Seen, para. 7 and Considering, para. 16 (reminding the State, for the second time, not to "exert pressure" on the alleged victims and their representatives "on account of statements, opinions, or legal defenses presented to the Court").

[43] *Explanatory note concerning the draft declaration on the rights of Indigenous peoples, by Erica-Irene Daes, Chairperson of the Working Group on Indigenous Populations*, E/CN.4/Sub.2/1993/26/Add.1 (1993), para. 26 (ITPs' right to self-determination, according to Prof. Daes "should ordinarily be interpreted as their right to negotiate freely their status and representation in the State in which they live. This might be best described as a kind of "belated State-building", through which Indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed and just terms, after many years of isolation and exclusion. This does not mean [the] assimilation of indigenous individuals as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms").

[44] 'Remarks of J. Bulkan' in *IMPACT Justice Indigenous Peoples' Conference Report and Presentations,* July 2016, p. 10, http://caribbeanimpact.org/website/wp-content/uploads/2020/10/Indigenous-Peoples-Conference-Report-and-Presentations-Final.pdf.

[45] Explanatory note concerning the draft declaration on the rights of Indigenous peoples, *supra*, para. 26. *See also* E-I. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1993), p. 9 (stating that "With few exceptions, [ITPs] were never a part of State-building. They did not have an opportunity to participate in designing the modern constitution of the States in which they live, or to share, in any meaningful way, in national decision-making .... Whatever the reason, [ITPs] in most have never been, and are not now, full partners in the political process, and lack others' ability to use democratic means to defend their fundamental rights").

[46] R. Epstein, *The Role of Extinguishment in the Cosmology of Dispossession* in G. Alfredsson and M. Stavropoulou, JUSTICE PENDING: INDIGENOUS PEOPLES AND OTHER GOOD CAUSES (Leiden: Brill-Nijhoff 2002), p. 56.

must be reconciled with the sovereignty of the Crown, so must the Crown, in its assertion of sovereignty, equally be reconciled with the pre-existence of aboriginal societies."[47] This includes respect for ITPs' internationally guaranteed right to self-determination, which includes the right to own and control traditionally-owned lands, territories and resources, and a range of other issues that are germane to access to justice.[48]

The judiciary also has a role to play in this process. This includes ensuring that the law is interpreted and fully informed by the state's human rights commitments and obligations as they pertain to ITPs. For instance, judicial decisions in some countries have prompted considerable changes in state policy and practice which have resulted in positive change for ITPs,[49] and, in some cases, transformed "almost overnight the political leverage of the tribes."[50] The Caribbean Court of Justice's ("CCJ") judgment in *Maya Leaders Alliance* is one such decision, even if its potential impact has yet to be fully realized, both in Belize and beyond,[51] and bearing in mind the critical distinguishing features identified therein.[52] As stated by Barrow CCJJ, "challenges to existing legislation, which seek to achieve reform that is properly the business of the legislature, are not challenges created or initiated by

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47 L. Finch, 'The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice', CLEBC Indigenous Legal Orders and the Common Law Conference (15 November 2012), p. 19.

48 Various treaty bodies, the Inter-American Commission and the three United Nations mechanisms mandated to monitor indigenous and tribal peoples' rights have determined that "the most important right for indigenous peoples is that of self- determination, 'as without the enjoyment of that right, they could not enjoy the other fundamental human rights'"). *See e.g., Indigenous Peoples, Afro-Descendent Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OAS Doc. 47/15, para. 237 (explaining that an "essential element of the right to self-determination is constituted by the relations [indigenous and tribal peoples] have with their lands, territories and natural resources"); *Saramaka People v. Suriname*, Judgment of 28 November 2007. Ser C No. 172, para. 93 (hereinafter "Saramaka People"); *Kaliña and Lokono Peoples v. Suriname*, Judgment of 25 November 2015, Ser. C No. 309, para. 124 (hereinafter "Kaliña and Lokono") (stating that "in this case, the right to property protected by Article 21 of the [American Convention] and interpreted in light of the rights recognized in Article 1 common to the two Covenants … which cannot be restricted when interpreting the American Convention"); and *African Commission on Human and Peoples' Rights v. Republic of Kenya*, (006/2012) [2017] AFCHPR 28; (26 MAY 2017)

49 *See e.g., Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, at para. 10 (where the Supreme Court of Canada explains that "In 1973, the Supreme Court of Canada ushered in the modern era of Aboriginal land law by ruling that Aboriginal land rights survived European settlement and remain valid to the present unless extinguished by treaty or otherwise. … [I]ts affirmation of Aboriginal rights to land led the Government of Canada to begin treaty negotiations with First Nations without treaties … resuming a policy that had been abandoned in the 1920s").

50 *See e.g.*, P. McHugh, ABORIGINAL TITLE: THE MODERN JURISPRUDENCE OF TRIBAL LAND RIGHTS (Oxford: OUP 2011), p. 2 (opining that common law aboriginal title "became a legal phenomenon of profound national importance, transforming almost overnight the political leverage of the tribes. The tremors arising from this radical change in legal direction were immense…. Tribes were now treated with seriousness unmatched in over a century of neglect, marginalization, and humble petitions to Great White Mothers, Fathers, and others on high").

51 *See e.g.,* R-M. Antoine, *Assessing 10 Years of the Caribbean Court of Justice in its Appellate Jurisdiction: Encouraging signs of a Mature, Relevant Jurisprudence*, 4 CARIBBEAN J. INT'L RELATIONS AND DIPLOMACY 69 (2016); S. Caserta, *The Contribution of the Caribbean Court of Justice to the Development of Human and Fundamental Rights*, 18 HUMAN RIGHTS L.R. 170 (2018); D. Barrow, *Developments in the CCJ in the Application of International Law to Domestic Law Cases*, 4 CARIBBEAN J. INT'L RELATIONS AND DIPLOMACY 63 (2016). L. Medina, The production of indigenous land rights: Judicial decisions across national, regional, and global scales, 39 POLAR: POLITICAL AND LEGAL ANTHROPOLOGY REV. 139 (2016); S. Wheatle and Y. Campbell, *Constitutional faith and identity in the Caribbean: tradition, politics and the creolisation of Caribbean constitutional law*, 58 CWTH & COMP. POLITICS 344 (2020); and L. Gahman, A. Greenidge & A. Mohamed, *Plunder via Violation of FPIC: Land Grabbing, State Negligence, and Pathways to Peace in Central America and the Caribbean,* 15 J. PEACEBUILDING & DEVELOPMENT 372 (2020).

52 Maya Leaders (2015), para. 59 ("The critical distinguishing features of this case include its history of litigation, the formal agreements between the Government and the Maya leadership, and the decisions of the courts of Belize. We place particular emphasis on the Findings and Recommendations of the IACHR in the Maya Communities case which created legal obligations for Belize at the international level and legitimate expectations for the Maya people in the domestic sphere. … The nature of traditional or customary rights in land, the history of litigation, the informal as well as formal acknowledgements by the State, and the fact such rights nonetheless remain invisible in the general laws of the country, suggest the obligation to put in place special measures to give recognition and effect to these rights so that the protection of the law can be enjoyed").

the judiciary; they are challenges that the Constitution gives aggrieved persons the right to make and they are challenges that the courts must (not may) hear and determine, once satisfied that they are justiciable."[53]

The Judicial Reform and Institutional Strengthening ("JURIST") project seeks to remedy the above-noted deficit of information, *inter alia*, by collating baseline data on ITPs' rights and priorities in six Caribbean countries: Belize, Dominica, Guyana, Suriname, SVG and Trinidad and Tobago ("T&T"), all member states of the CARICOM. It does not include the situation of the Maroons of Jamaica,[54] where Queen Nanny, a Maroon leader, graces its $500 bill, an omission that could be corrected in the future.[55] Belize, Dominica and Guyana have accepted the appellate jurisdiction of the CCJ, whereas SVG and T&T have retained the Judicial Committee of the Privy Council ("JCPC") as their apex court.[56] Suriname has accepted the jurisdiction of the Inter-American Court of Human Rights ("the IACTHR") and Guyana, SVG and Suriname are parties to Optional Protocol I to the International Covenant on Civil and Political Rights ("ICCPR"), which allows for the filing of formal complaints before the UN Human Rights Committee.

Focused on ITPs' rights and access to justice, this 'synthesis paper' seeks to: 1) summarize the relevant international normative framework and its requirements and implications; 2) synthesize the information presented in the six 'in-country baseline studies' commissioned under the project, identifying common or divergent themes and issues; and 3) articulate conclusions and recommend possible ways forward, including as related to ITPs' priorities within the region and actions for possible, additional Global Canada or other donor support in the future.

## II. International Norms and Jurisprudence

> Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due

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53 *McEwan and Ors v. A.G. Guyana*, [2018] CCJ 30 (AJ), para. 143 (per Barrow JCCJ).

54 *See e.g.,* A. Bulkan, T. Robinson & A. Saunders (eds.), FUNDAMENTALS OF CARIBBEAN CONSTITUTIONAL LAW (London: Sweet and Maxwell 2015), p. 56 (stating that "The Constitutional Commission of Jamaica in 1994 fell into this trap [the notion that recognition of ITPs' rights places them somehow above other citizens] in relation to Maroons when it concluded that the constitutional protection of equality before the law 'leans against specific provisions in relation to particular interest groups'").

55 *See e.g.,* 'Maroon Chief defends "using modern means" to defend his people, *Jamaica Observer*, 12 August 2021 (where the chief of the Accompong Maroons refers to a dispute with the police and states that "We will never stop honouring the ways of our ancestors and the sacrifices that they made to ensure that we had a place to call home. This is not land we begged for and this is not land King George II gave to us but rather land that we have possessed…." The response of the authorities was summed up by National Security Minister, Dr Horace Chang, who stated that there is "no such thing as maroon land"), https://www.jamaicaobserver.com/latestnews/Maroon_Chief_defends_%26%238216;using_modern_means%26%238217;_to_defend_his_people. *See also R v. Mann O' Rowe* [1956] 7 J.L.R. 45, 49 (where the Chief Justice of Jamaica denied that Maroons have any autonomy under Jamaican law. Despite acknowledging the treaties signed with the Maroons, the CJ opined that "there is today no difference or distinction whatever in the rights and obligations as defined by the law of this island between persons residing in former Maroon settlements and those of any other British subject in Jamaica").

56 *See generally* A. Bulkan and T. Robinson, *Constitutional Comparisons by a Supranational Court in Flux: The Privy Council and Caribbean Bills of Rights,* 80 THE MOD. L. REV. 379 (2017); and D. O'Brien, *The Interpretation of Commonwealth Caribbean Constitutions: Does Text Matter?* in R. Albert, D. O'Brien & S. Wheatle (eds.), THE OXFORD HANDBOOK OF CARIBBEAN CONSTITUTIONS (Oxford: OUP 2020) (comparing the approaches of the JCPC and the CCJ towards the interpretation of the independence Constitutions of the Commonwealth Caribbean).

> consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.[57]

Over the past 40 years, ITPs' rights have assumed a prominent place in international human rights law and a discrete body of law confirming and protecting their individual and collective rights has emerged and crystallized.[58] This body of law is still expanding and developing through indigenous advocacy; decisions of international human rights bodies; codification of indigenous rights in international instruments adopted by the UN and Organization of American States ("OAS"), including conservation, environmental and development-related instruments and policies; and through domestic legal reforms and judicial decisions.[59] OAS attention dates to the 1948 Inter-American Charter of Social Guarantees[60] and includes a 1972 resolution entitled *Special Protection for Indigenous Populations, Action to Combat Racism and Racial Discrimination*. This resolution called upon member states "to act with the greatest zeal in defense of the human rights of indigenous persons, who should not be the object of discrimination of any kind."[61] It further stated that "for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states."[62] This "sacred commitment" is today expressed through detailed and justiciable norms and corresponding state obligations, and a rich jurisprudence on an increasing range of issues, all, in principle, applicable to the six states under review herein.[63]

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57 *United Nations Declaration on the Rights of Indigenous People*, A/RES/61/295 (2007) (hereinafter "UNDRIP"), Art. 40. *See also* UNDRIP arts. 8(2), 11(2), 12(2), 13(2), 15(2), 20(2), 27, 28, 31(2), and 32(3) (all referring to specific remedial measures); and *American Declaration on the Rights of Indigenous Peoples*, Art. XXXIV (providing that "In the event of conflicts or disputes with indigenous peoples, States shall provide, with the full and effective participation of those peoples, just, equitable and effective mechanisms and procedures for their prompt resolution. For that purpose, due consideration and recognition shall be accorded to the customs, traditions, norms and legal systems of the indigenous peoples concerned"). *See also* K. Roach, *Remedies for Violations of Indigenous Rights* in K. Roach, REMEDIES FOR HUMAN RIGHTS VIOLATIONS: A TWO-TRACK APPROACH TO SUPRA-NATIONAL AND NATIONAL LAW (Cambridge: CUP 2021) (explaining that in "Article 40 of the [UNDRIP], the overall balance stage should be applied bi-jurally to respect both rights and Indigenous law"); F. Lenzerini, REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES (Oxford: OUP 2008); and T. Antkowiak, *Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court*, 35 U. PA. J. INT'L L. 113 (2014).

58 *See e.g.,* S.J. ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (Oxford & New York: OUP, 2nd Ed., 2004); and P. Thornberry, Indigenous Peoples and Human Rights (Manchester: Manchester U. Press 2002).

59 United Nations treaty body jurisprudence concerning indigenous peoples for the years 1993-2019 is compiled in F. MacKay (ed.), *Indigenous Peoples and United Nations Treaty Bodies: A Compilation of UN Treaty Body Jurisprudence, Special Procedures of the Human Rights Council, and the Advice of the Expert Mechanism on the Rights of Indigenous Peoples*, Vols. I-VIII (Moreton in Marsh; Forest Peoples Programme), https://www.forestpeoples.org/en/UN-jurisprudence-report-volume-viii.

60 *Inter-American Charter of Social Guarantees* (1948), Art. 39, providing that: "In those countries in which the problem of the native population exists, the necessary measures shall be taken to provide the Indian protection and assistance, protecting his life, liberty, and property, and defending him from extermination, and safeguarding him from oppression and exploitation, protecting him from poverty, and providing adequate education. … Institutions or services should be created to protect the Indians, and in particular to ensure respect for their lands, to legalize their possession by them, and to prevent the invasion of such lands by outsiders."

61 *Annual Report of the IACHR 1973-74*, OEA/Ser.P.AG/doc. 305/ 72, rev. 1, (14 March 1973), p. 90-1.

62 *See also* J. Bens, THE INDIGENOUS PARADOX. RIGHTS, SOVEREIGNTY, AND CULTURE IN THE AMERICAS (Philadelphia: U. Penn. Press 2020), Ch. 6, "De Facto Legal Pluralism" and the Problem of Not Being "Different Enough": *Aloeboetoe v. Suriname.*

63 *See e.g., Jurisprudencia sobre Derechos de los Pueblos Indígenas en el Sistema Interamericano de Derechos Humanos*, OEA/Ser.L/V/II.120, Doc. 43 (9 September 2004); *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources,* OEA/Ser.L/V/II. Doc. 56/09 (30 December 2009); and *Indigenous Peoples, Afro- Descendent Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OAS Doc. 47/15 (31 December 2015). *See also* F. MacKay, *From 'Sacred Commitment' to Justiciable Norms. Indigenous Peoples' Rights and the Inter-American Human Rights System* in M. Salomon et al (eds.), CASTING THE NET WIDER – HUMAN RIGHTS AND DEVELOPMENT IN THE 21ST CENTURY (Antwerp: Intersentia 2007).

In its 2015 judgment in *Kaliña and Lokono Peoples v. Suriname*, the IACTHR explained that states' obligations to provide judicial remedies entail, first, to "legislate and ensure the due application by the competent authorities of effective remedies that protect all persons against acts that violate their fundamental rights or that lead to the determination of their rights and obligations;" and, second, "to guarantee the means to execute the respective decisions and final judgments issued by those competent authorities so that the rights that have been declared or recognized are truly protected."[64] In the case of ITPs,[65] states are additionally obligated to recognize and secure their collective rights in law and the remedies provided should offer "a real possibility … to be able to defend their rights and exercise effective control over their territory."[66] In 2020, illustrating again the interdependent nature of ITPs' rights,[67] the IACTHR observed that "the adequate guarantee of communal property does not entail merely its nominal recognition but includes observance and respect for the autonomy and self-determination of the indigenous communities over their territory."[68] (This linkage between property/territory and self-determination has deep historical roots).[69] Also, in *Maya Leaders Alliance*, the CCJ accepted the IACTHR's "basic premise" that "the mere possibility of relief under the common law is no answer to a claim for conventional, and we would add, constitutional, redress."[70] The IACTHR had stated in this regard that "the mere possibility of recognition of rights through a certain judicial process is no substitute for the actual recognition of such rights."[71]

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64 *Kaliña and Lokono*, para. 239. *See also* A. Tomaselli and F. Cittadino, *Land, Consultation and Participation Rights of Indigenous Peoples in the Jurisprudence of the Inter-American Court of Human Rights. The Cases of Kichwa Indigenous People of Sarayaku v. Ecuador and Kaliña and Lokono Peoples v. Suriname* in B. de Villiers et al (eds.), LITIGATING THE RIGHTS OF MINORITIES AND INDIGENOUS PEOPLES IN DOMESTIC AND INTERNATIONAL COURTS (Leiden/Boston: Brill 2021).

65 "Tribal peoples" are defined in International Labour Organization Convention No. 169, Art. 1(1) as "peoples in independent countries 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." There is thus no need for Jamaica Maroons to assert, as some do, that they are 'indigenous' or have rights based on being 'mixed with Taino'; they may assert the same rights as 'tribal peoples' in the same way that Maroons in Suriname have done so and in line with the national legal recognition of Maroons (*Cimmarones*, *Quilobola*) in Colombia, Ecuador and Brazil.

66 Kaliña and Lokono, para. 240.

67 *See e.g.,* H. Quane, *A Further Dimension to the Interdependence and Indivisibility of Human Rights: Recent Developments Concerning the Rights of Indigenous Peoples*, 25 HARVARD HUMAN RIGHTS J. 49, 51 (2012) (analysing United Nations' treaty body practice "concerning the rights of indigenous peoples, which suggest[s] a further dimension to the interdependence and indivisibility of human rights. These developments suggest that human rights are interdependent and indivisible not only in terms of mutual reinforcement and equal importance, but also in terms of the actual content of these rights" (footnote omitted)).

68 *Indigenous Communities of the Lhaka Honhat Association v. Argentina,* Ser. C, No. 400, 6 February 2020, para. 153. *See also* Case 12.354, *Kuna Indigenous Peoples of Madungandi and Embera Indigenous People of Bayano (Panama)*, IACHR, Report 125/12 (2012), para. 259 (attributing positive value to the establishment of a legal mechanism for recognition of collective property rights and stating that "it understands that the mechanism cannot exclude rights of indigenous peoples that are associated mainly with the right to self-government according to their traditional uses and customs…"); *Tiina Sanila-Aikio vs. Finland*, CCPR/C/124/D/2668/2015 (20 March 2019); and *Klemetti Käkkäläjärvi et al. v. Finland*, CCPR/C/124/D/2950/2017 (18 December 2019 (where the Human Rights Committee affirms indigenous peoples' right to self-determination and its interrelationship with other rights).

69 *See e.g.,* R. Merino, *The Land of Nations: Indigenous Struggles for Property and Territory in International Law* 115 AM. J. INTL L. UNBOUND 129, 131 (explaining that "Both Spanish and British colonizations recognized some degree of Indigenous sovereignty, combining ideas of collective property with self-government"); D. Shelton, *The Rights of Indigenous Peoples: Everything Old Is New Again* in A. von Arnauld et al (eds.), THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC (Cambridge: Cambridge Univ. Press 2020); and H. Berman, *Perspectives on American Indian Sovereignty and International Law, 1600 to 1776* , in O. Lyons (ed.), EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS AND THE U.S. CONSTITUTION (Santa Fe: Clear Light Publishers 1992).

70 Maya Leaders (2015), para. 49.

71 Saramaka People v. Suriname, para. 101 (explaining further that "The judicial process mentioned by the State is thus to be understood as a means by which said rights might be given domestic legal effect at some point in the future, but that has not yet effectively recognized the rights in question").

Responding to Suriname's request for "guidance,"[72] the IACTHR explained further that, "to ensure the human rights of the indigenous peoples, the domestic remedies should be interpreted and applied taking the following criteria into account:

1. The recognition of collective legal personality as [ITPs], as well as individual legal personality as members of such peoples;
2. The recognition of legal standing to file administrative, judicial or any other type of action collectively, through their representatives, or individually, taking into account their customs and cultural characteristics;
3. The guarantee of access to justice for the victims – as members of an [ITPs] – without discrimination, and in keeping with the rules of due process; hence, the available remedy must be:
   a) Accessible, simple and within a reasonable time. This means, among other matters, establishing special measures to ensure effective access and the elimination of obstacles to access to justice. In other words:
      i) Ensure that the members of the community can understand and be understood during the legal proceedings undertaken, providing them with interpreters or other means that are effective in this regard;
      ii) Give the [ITPs] access to technical and legal assistance in relation to their right to collective property, if they are in a situation of vulnerability that would prevent them from obtaining this, and
      iii) Facilitate physical access to the administrative or judicial institutions, or to the bodies responsible for ensuring the right to collective property of the [ITPs], and also facilitate their participation in judicial, administrative or any other proceedings, without this entailing exaggerated or excessive efforts, due either to the distances or to the channels for accessing such institutions, or to the elevated cost of the proceedings.
   b) Appropriate and effective to protect, ensure and promote the rights over their indigenous lands, by means of which they can implement the processes of recognition, delimitation, demarcation, and titling and, if appropriate, secure the use and enjoyment of their traditional territories;
4. The granting of effective protection that takes into account the inherent particularities that differentiate them from the general population and that accord with their cultural identity, their economic and social characteristics, their possible situation of vulnerability, their customary law, values, uses and customs, as well as their special relationship to the land, and
5. Respect for the internal mechanisms for deciding disputes on indigenous issues, which are in harmony with human rights."[73]

Various UN treaty bodies, the IACHR and the three UN mechanisms mandated to monitor ITPs' rights have determined that "the most important right for indigenous peoples is that of self- determination, 'as without the enjoyment of that right, they could not enjoy the other fundamental human rights'."[74] An indigenous scholar likewise explains that "… the starting point for access to justice at every level is directly related to, dependent upon, and connected to the right to self-determination," and the only variable would be how ITPs choose to

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[72] Kaliña and Lokono, para. 250.

[73] *Id*. para 251 (footnotes admitted).

[74] *See e.g., Indigenous Peoples, Afro- Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OAS Doc. 47/ 15 (31 December 2015), para. 237.

exercise the same within the various states.[75] That self-determination is interconnected with and interdependent on other rights has been affirmed and clearly articulated by various international authorities, including in standards pertaining to access to justice and the corresponding substantive and procedural guarantees. The EMRIP, for instance, recalls that pursuant to the right to self-determination, ITPs "must have access to justice externally, from States, and internally, through indigenous customary and traditional systems."[76]

These bodies have all stressed that the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP")[77] is a key reference point – or more – for interpreting and understanding the rights of ITPs,[78] including as guaranteed under general human rights treaties and other instruments.[79] In the case of **Suriname**, for example, a treaty body has recommended that the state adopts a framework law on the rights of ITPs and "that this framework law comply with the provisions of the [UNDRIP]."[80] The consistency between the text of the UNDRIP and official interpretations of various human rights treaties strongly indicates that the UNDRIP should be viewed as much more than a mere aspirational instrument.[81] The IACTHR, for instance, has even directly read provisions of the

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75 D. Sambo Dorough, *Indigenous People's Right to Self-Determination and other Rights related to Access to Justice* in W. Littlechild and E. Stamatopoulou (eds.), INDIGENOUS PEOPLES' ACCESS TO JUSTICE, INCLUDING TRUTH AND RECONCILIATION PROCESSES (New York, NY: Colombia U., Inst. Study of Human Rights 2014), p. 4, https://academiccommons.columbia.edu/doi/10.7916/D8GT5M1F.

76 *Access to justice in the promotion and protection of the rights of indigenous peoples*, A/HRC/24/50 (2013), para. 5 (also stating, para. 19, that, with respect to "access to justice, self-determination affirms their right to maintain and strengthen indigenous legal institutions, and to apply their own customs and laws").

77 *See e.g.,* J. Hohmann and M. Weller (eds.), THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY, Oxford Commentaries on International Law (Oxford: OUP 2019); S. Allen and A. Xanthaki (eds.), REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (London: Bloomsbury 2011); C. Charters and R. Stavenhagen (eds.), MAKING THE DECLARATION WORK. THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Copenhagen: IWGIA 2009); E. Pulitano (ed.), INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION (Cambridge: CUP 2012); and C. Doyle and J. Eichler (eds.), THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES. A COMMENTARY (Baden Baden: Nomos Verlagsgesellschaft, fthcming).

78 *See e.g., Access to justice in the promotion and protection of the rights of indigenous peoples*, A/HRC/24/50 (2013), para. 11 (explaining that "The provisions of the Declaration should guide the interpretation of international human rights treaties in relation to access to justice for indigenous peoples. Elements of access to justice include the right to an effective remedy, procedural fairness and the need for States to take positive measures to enable access to justice").

79 *See e.g., Tiina Sanila-Aikio vs. Finland*, CCPR/C/124/D/2668/2015 (2019), para. 6.8 (reading ICCPR, Article 27 together with the UNDRIP and ICCPR, Article 1), and 6.9 (reading ICCPR, Article 25, the UNDRIP and ICCPR, Article 1 together, and finding that Articles 25 and 27, read in light of Article 1 and the corresponding right of indigenous peoples to internal self-determination, have a collective dimension that transcends the individual rights guaranteed by those articles); *Kaliña and Lokono*, para. 139 (citing and quoting UNDRIP, Art. 26); 180 (quoting Arts. 18, 25 and 29 and citing Art. 23); 202 (quoting Arts. 18, and 32(2)); 221 (citing Art. 32(3)); 231 (citing Art. 12); 251(3) (citing the fifth preambular paragraph and Art. 2); 251(5) (citing Arts. 27 and 33(2)); 296 citing UNDRIP, Art. 29); *Partially Dissenting Opinion of Judge Alberto Pérez Pérez* (citing Arts. 18 and 32); and *Joint Concurring Opinion of Judges Humberto Antonio Sierra Porto and Eduardo Ferrer MacGregor Poisot* (citing Arts. 18, 29 and 32); E/C.12/UGA/CO/1 (2015), para. 13 (recommending that Uganda includes "recognition of indigenous peoples in the Constitution in line with the [UNDRIP]"); CRC/C/GAB/CO/2 (2016), para. 61(a) (calling on Gabon to "[a]dopt a law for the protection of indigenous people based on the [UNDRIP]"); and CEDAW/C/BOL/CO/5-6 (2015), para. 25(c) (recommending that Bolivia "[e]nsure that indigenous women have access to education in compliance with the criteria enshrined in the [UNDRIP]"); and CERD/C/USA/CO/6 (2008), para. 29 (recommending that the USA employs the UNDRIP "as a guide to interpret [its'] … obligations … relating to indigenous peoples'); and Committee on the Rights of the Child, General Recommendation No. 11, Indigenous Children and their Rights under the Convention (2009), para. 82.

80 CERD/C/SUR/CO/13-15 (2015), para. 24.

81 *See e.g.,* M. Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, 58 INT'L COMP L.Q. 957, 966 (2009) (explaining that "the strong relationship between the content of the Declaration and existing law should be recognized. The fact that the Declaration contains provisions that refer to rights and principles already recognized, or emerging, in the realm of international human rights, and, more specifically, within the indigenous rights regime, represents a first important indication of the legal significance of the instrument"); and F. MacKay, *The Case of the Kaliña and Lokono Peoples v. Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence and Mutual Reinforcement*, 11 ERASMUS L.R. 31 (2018).

UNDRIP into its interpretation of the American Convention on Human Rights.[82] National courts have also employed the UNDRIP,[83] in the case of **Belize** holding that "as a member state of the United Nations which voted in favor of the [UNDRIP] … [the state] is clearly bound to uphold the general principles of international law contained therein."[84] This is not a coincidence given that the UNDRIP largely codifies existing standards, restating binding norms of international law and, conversely, contributing to their progressive development as these norms interact with and are interpreted conjunctively with other standards.[85] The EMRIP reviewed implementation of the UNDRIP over a 10 year period, confirming that "many of the rights contained in the Declaration are already guaranteed by major international human rights instruments and have been given significant normative strength, including through the work of the treaty bodies, regional and national courts."[86] The UNDRIP is additionally relevant as the rights therein are declared to "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world" (Art. 43).[87] For these and other reasons, the EMRIP concludes that "implementation of the [UNDRIP] should be seen as a framework for reconciliation and as a means of implementing indigenous peoples' access to justice."[88]

The International Court of Justice has ruled that "great weight" should be accorded to interpretations adopted by the bodies that supervise human rights treaties, including regional mechanisms such as those of the inter-American human rights system to which all of the states under review belong.[89] This includes the four states that have not ratified the American Convention on Human Rights (**Belize**, **Dominica**, **Guyana** and **SVG**), but which are nonetheless bound by the American Declaration on the Rights and Duties of Man (1948).[90] The latter has been

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82 Kaliña and Lokono, para. 203 (where the Court read Article 18 of the UNDRIP into its interpretation of Article 23 of the American Convention, and ruled that the state must establish mechanisms for effective participation: "[t]his is not only a matter of public interest, but also forms part of the exercise of [indigenous peoples'] right to take part in any decision-making on matters that affect their interests, in accordance with their own procedures and institutions…." UNDRIP, Art. 18 provides that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."

83 *See e.g.*, *New Zealand Māori Council et al. v. A.G. and Ors*, [2013] NZSC 6 (where the New Zealand Supreme Court relied on the UNDRIP in construing the scope of Māori rights to freshwater and geothermal resources); *Tres Islas indigenous community Case*, Judgment of the Const. Ct. Peru, Exp. No. 01126-2011-HC/TC, 11 September 2012, para. 23 (reaffirming the rights of ITPs to their lands and territories); and *Cal et al. v. AG of Belize et al. and Coy et al. v. AG of Belize et al.*, Consolidated Claims No. 171 & 172 of 2007 (Supreme Court of Belize), 18 October 2007 (C.J. Conteh), para. 131 (observing that "where these resolutions or Declarations contain principles of general international law, states are not expected to disregard them," and the UNDRIP reflects "the growing consensus and the general principles of international law on indigenous peoples and their lands and resources." Endorsed by Morrison JA in *A. G. Belize v Maya Leaders Alliance et al,* Civil Appeal No. 27 of 2010, para. 276-7).

84 *SATIIM et al v. A. G. et al*, Claim 394 of 2013 (Supreme Court of Belize), 3 April 2014, p. 33; and *id*.

85 *See e.g.*, M. Barelli, SEEKING JUSTICE IN INTERNATIONAL LAW: THE SIGNIFICANCE AND IMPLICATIONS OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (London and New York: Routledge 2018).

86 *Ten years of the implementation of the United Nations Declaration on the Rights of Indigenous Peoples: good practices and lessons learned – 2007-2017*, A/HRC/36/56, 7 August 2017, para. 10.

87 *See e.g.*, J. Hohmann, *The UNDRIP and the Rights of Indigenous Peoples to Existence, Cultural Integrity and Identity, and Non-Assimilation: Articles 7(2), 8, and 43* in J. Hohmann and M. Weller (eds.), THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY, Oxford Commentaries on International Law (Oxford: OUP 2019)

88 *Expert Mechanism advice No. 5: Access to justice in the promotion and protection of the rights of indigenous Peoples* (2013), para. 1. *See also United Nations Declaration on the Rights of Indigenous Peoples Act* (S.C. 2021, c. 14) (sec. 4, "The purposes of this Act are to (a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and (b) provide a framework for the Government of Canada's implementation of the Declaration"), https://laws-lois.justice.gc.ca/eng/acts/U-2.2/page-1.html#h-1301574; and Bolivia, *Law 3760 of 2007* (which "recognizes the 46 Articles of the [UNDRIP] as national Law of the Republic").

89 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits*, ICJ REP. 2010, p. 663-64 (this includes their general comments and concluding observations regarding individual state parties).

90 *See e.g., Report Nº 81/07, Case 12.504, Daniel and Kornel Vaux (Guyana),* 15 October 2007, para. 24 (holding that the alleged victims "are persons whose rights are protected under the American Declaration, the provisions of which the State is bound to respect in

ruled to be an authoritative interpretation of the Charter of the OAS, the organization's constitutional treaty.[91] The American Declaration on Rights of Indigenous Peoples (2016) ("ADRIP") is also relevant to understanding and interpreting ITPs' rights, including as this relates to access to justice.[92] For this and other reasons, a compilation of UN treaty body and other mechanisms' observations and recommendations about ITPs in the countries under review would be a useful reference tool. This would be an important resource for states, courts, and ITPs alike because the recommendations adopted by the various bodies provide strong evidence of ITPs' rights and corresponding states' obligations, including, as discussed below, via the lens of the fundamental rights sections of the various Constitutions.

## III. Application to Countries under Review

The EMRIP has called on states "to meaningfully establish new relationships with indigenous peoples, based on the recognition of their rights and on freedom from discrimination and wrongdoing."[93] It considers this to be integral to guaranteeing and respecting their rights as well as to redress and reparation for past and (often) ongoing injustices.[94] This echoes statements by the UN and others dating back to the 1980s or even earlier in some cases, and this 'new relationship' is a guiding principle that inspires the UNDRIP and other international actions on ITPs' rights.[95] These issues are all addressed in the in-country studies synthesized below. The in-country studies

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conformity with the OAS Charter, Article 20 of the Commission's Statute and Article 49 of the Commission's Rules of Procedure. … The Commission notes that the American Declaration became the source of legal norms for application by the Commission upon Guyana becoming a member State of the Organization of American States in 1991"); and *Report Nº 61/08, Case 12.435, Grand Chief Michael Mitchell* (Canada), 25 July 2008, at para. 64 (observing that "the organs of the inter-American system have previously held that developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may be drawn from the provisions of other prevailing international and regional human rights instruments. This includes the American Convention on Human Rights which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration").

91 *See e.g.*, IACHR, *Report No. 40/04, Maya Indigenous Communities of the Toledo District*, *Case 12.053 (Belize*), 12 October 2004, para. 85 (stating that "the American Declaration constitutes a source of international legal obligation for all member states of the Organization of American States…"); and para. 132, note 135 (recalling that "[a]lthough phrased in somewhat different terms, the right to property affirmed in Article XXIII of the American Declaration is essentially the same human right as that provided for in Article 21 of the American Convention. The value of coherence and consistency within the Inter-American system for the protection of human rights mitigates in favor of extending a similar interpretation to both instruments").

92 *See e.g.,* Art. XXIV(2) providing that "When disputes in relation to such treaties, agreements and other constructive arrangements cannot be resolved between the parties, they shall be submitted to competent bodies, including regional and international bodies, by the states or indigenous peoples concerned." This mostly concerns treaties concluded between tribal peoples in Suriname and Jamaica, and perhaps with indigenous peoples in SVG, as the text of the treaties with indigenous peoples in Guyana and Suriname, which mostly date from the 17th and 18th centuries, is no longer available or known. The Maroon treaties raise complicated questions involving *jus cogens* norms (as they also concern the capture and return of slaves) as well as the separability of the offending clauses and whether this would irredeemably defeat the purposes of the treaties themselves. *See e.g., Aloeboetoe et al v. Suriname, Reparations*. Judgment of 10 September 1993. Ser C No. 15, para. 56-7 (acknowledging that the IACHR's brief affirmed that the Saamaka "enjoyed internal autonomy by virtue of [the]…treaty" and that the Saamaka "'acquired their rights on the basis of a treaty entered into with the Netherlands, which recognizes, among other things, the local authority of the Saramaka over their own territory';" and, declaring that the 1762 treaty "would be null and void because it contradicts the norms of *jus cogens superveniens*" given that it provides for the capture, detention, return, purchase and sale of slaves. The Court therefore declared that "[n]o treaty of that nature may be invoked before an international court of human rights"). On separability, *see Vienna Convention on the Law of Treaties* (1969), Arts. 44 and 63.

93 *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation*, A/HRC/EMRIP/2019/3/Rev.1, para. 3.

94 *Id*.

95 *See e.g.*, E-I. Daes, *An overview of the history of indigenous peoples: self-determination and the United Nations*, 21 Cambridge Rev. Int'l Aff. 7 (2008).

and secondary materials illustrate, albeit to differing degrees, that none of the six countries comply with most, if not almost all, of the above-listed standards.

### A. Basic Recognition

The EMRIP explains that "Recognition as indigenous peoples is the most basic, critical form of recognition, from which other types of recognition flow."[96] In common with various human rights mechanisms, the ADRIP provides that self-identification as ITPs is "a fundamental criterion," and that states shall respect this principle, "whether individually or collectively, in keeping with [ITPs'] practices and institutions…."[97] With the possible exception of SVG, where it is somewhat ambiguous, the states surveyed do provide some degree of *basic, nominal* recognition of the existence of ITPs.[98] However, as one indigenous scholar notes, ITPs "are no strangers to the age old ploy of denying status in order to deny rights,"[99] or, better stated in current context, nominally recognizing that ITPs exist in some contexts, but not formally recognizing at least some of the legal rights that attach to that status.[100]

The latter is the case in **Belize**, **Suriname**, **SVG**, and **T&T** to the extent that there is now no real, legal connection in national law between nominal recognition and even some of the corpus of rights that are inherent to ITPs (noting that Belize and Suriname are in the process of drafting or enacting new laws, while Belize also mentions the Maya in the preamble to its *Constitution Act* and affirmed in 2015, via a Consent Order, that Maya have constitutionally protected property rights). The EMRIP is clear however: "[f]ailure to legally recognize indigenous peoples obviates" the right to self-determination and other rights.[101] While its political parties continue to argue over the use of 'indigenous' versus 'Amerindian' – on specious grounds and which mostly affects the name of one Ministry: the Ministry of Amerindian Affairs (1992-2015, 2020-) and the Ministry of Indigenous Peoples' Affairs (2015–2020)[102] – **Guyana** has both laws and constitutional guarantees, even if the definition of

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96 *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation*, A/HRC/EMRIP/2019/3/Rev.1, para. 74.

97 *American Declaration on the Rights of Indigenous Peoples*, AG/RES. 2888 (XLVI-O/16), Art. I(2), https://www.oas.org/en/sare/documents/DecAmIND.pdf. See also *Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon Region*, OAS/Ser.L/V/II. Doc. 176, 29 September 2019, para. 21 ("The IACHR regards the criterion of self-identification as the principal one for the recognition of a human group as an indigenous people in both an individual and a collective sense. That position is also adopted by the I/A Court H.R. in it[s] case-law, according to which, the collective identification of a people or community, from its name to its membership, is a social and historical fact that is part of its autonomy. Therefore, "the Court and the State must restrict themselves to respecting the corresponding decision made by the Community; in other words, the way in which it identifies itself") (citations omitted), http://www.oas.org/en/iachr/reports/pdfs/Panamazonia2019-en.pdf.

98 *See e.g.,* A. Strecker, *Revival, Recognition, Restitution: Indigenous Rights in the Eastern Caribbean*, (reviewing "the various degrees to which communities have gained state recognition and illustrat[ing] that while progress has been made in relation to recognition and cultural rights for communities in the islands, issues remain in relation to land security").

99 D. Sambo Dorough, *Indigenous People's Right to Self-Determination and other Rights related to Access to Justice* in W. Littlechild and E. Stamatopoulou (eds.), INDIGENOUS PEOPLES' ACCESS TO JUSTICE, INCLUDING TRUTH AND RECONCILIATION PROCESSES (New York, NY: Colombia U., Institute for the Study of Human Rights 2014), p. 4, https://academiccommons.columbia.edu/doi/10.7916/D8GT5M1F.

100 *Cf.* K. Hossain, *Recognition of the Ainu as an Indigenous People in Japan: Legal Implications for their Right to Traditional Salmon Fishing*, 28 INT'L J. MINORITY & GROUP RIGHTS 757 (2021) (observing that, while the Japanese government legally recognized the Ainu as an indigenous people in 2019 and the legislation is a step forward, "it does not provide the Ainu with concrete rights applicable to Indigenous Peoples as those rights are set out in international legal standards").

101 *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination*. Report of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/48/75 (2020), para. 35.

102 *See e.g., Comments of the Government of Guyana on the concluding observations of the Committee on the Elimination of Racial Discrimination*, CERD/C/GUY/CO/14/Add.1 (2008), p. 3 et seq (strangely arguing that the state must use the term 'Amerindian' to refer to indigenous peoples to protect a supposed right of all Guyanese to call themselves indigenous, and specifically that Afro-Guyanese

'Amerindian' in legislation is problematic and the laws have been deemed substantially inadequate by various human rights bodies.[103] **Dominica**, likewise, has a legislative framework, albeit deficient, that connects nominal recognition to some form of legal rights,[104] both in terms of statutory law and via its accession to ILO Convention No. 169 in 2002 (an international convention on ITPs rights, which has not been incorporated into national law).[105]

On another level, recognition may also relate to the existence of formal institutions that are responsible for ITPs issues within the national government. The utility thereof may ultimately come down to the actual mandate of such institutions, including whether it confers any authority to uphold rights or just concerns basic administration, and the extent to which they may be adequately resourced (financial, personnel and otherwise); their relative status among other ministries and agencies, particularly those responsible for natural resources and nature conservation; and whether partisan politics override bureaucratic or even statutory mandates. **Guyana's** Ministry of Amerindian Affairs is the best resourced and it has a clear mandate, staff and a set of programmes and projects.[106] It can hardly be described as immune to partisan politics however, and it is very much a second-class citizen in relation to other ministries and agencies (who often have competing agendas that routinely supersede those concerning ITPs, and this is a major problem in the land titling process).[107] Land titling decisions that are reserved for the Minister by the *Amerindian Act* 2006 are also subject to another level of political control as government *policy* requires an additional approval by Cabinet, even though the statute vests that authority in the Minister (and Cabinet does sometimes intervene). Equally problematically, governments have sometimes described the Ministry as *the representative* of indigenous peoples, supplanting ITPs' institutions, particularly for external purposes, and generally the Ministry (and others, the regional/local government system included) acts as if ITPs' authorities are subordinates.

The *Amerindian Act* 2006 also provides for a National Toshaos Council (unilaterally annexed the existing Council is a better description), which has a specific role and mandate, as a collective voice for ITPs.[108] It is still

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are not denied the right to pursue their "ancestral rights" because they would not be able to define themselves as 'indigenous'), http://www2.ohchr.org/english/bodies/cerd/docs/followup/CERD.C.GUY.CO.14.Add1.pdf.

[103] *See e.g.,* E/C.12/GUY/CO/2-4 (2015), paras. 15-6.

[104] *See e.g., National Report submitted in accordance with Paragraph 15(A) of the Annex to Human Rights Council Res. 5/1: Dominica*, A/HRC/WG.6/6/DMA/1, para. 70. (explaining that "The rights of Dominica's indigenous people, the Kalinago, are enshrined in the Constitution, and the Carib Reserve Act of 1978. The Kalinago people live in the 3800 acre Carib Territory which is characterised by a communal land tenure system, and governed by the Carib Chief and the Carib Council").

[105] *See e.g.,* ILO Committee of Experts on the Application of Conventions and Recommendations, *Direct Request: Dominica*, Indigenous and Tribal Peoples Convention, 1989 (No. 169), adopted 2020, published 109th ILC session (2021) (stating that "The Committee notes the Government's indication that the Convention applies to the Kalinago (Carib) people, comprising approximately 2,000 persons who live in the Carib Reserve…"), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4061269,103311,Dominica,2020.

[106] *See e.g., Government of Guyana Response to the United Nations Expert Mechanism on the Rights of Indigenous Peoples*, 24 February 2012 (describing some of the projects and programmes), https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Declaration/Guyana.doc.

[107] *See e.g.*, 'The main issue is the Marudi Agreement was signed without effective Indigenous participation', Chief Tony James, Letter to the Editor, *Stabroek News*, 4 December 2021, (explaining that pending title applications have simply been ignored in favour of mining interests: "the main issue is that this agreement, which authorizes activities on our traditional lands and will have direct impacts on our Indigenous Communities, was signed without our effective participation and inclusion in decision-making. Marudi is a sacred mountain and is in our Traditional Lands, in an area where we have a pending extension application, and we have formally claimed it as such since the 1967 Amerindian Lands Commission Report"), https://www.stabroeknews.com/2021/12/04/opinion/letters/the-main-issue-is-the-marudi-agreement-was-signed-without-effective-indigenous-participation/. *See also An Application by the Guyana Gold and Diamond Miners Association*, 30-CM-2012, High Court, Unreported, 5 October 2012.

[108] *Amerindian Act* 2006, secs. 38 – 43.

struggling to secure an adequate budget, staff and other resources to fulfil its mandate, with very little support from the state, and its independence from government has been less than debatable at times.[109] One of its functions is "to nominate in accordance with Article 212S(2) of the Constitution persons to the Indigenous Peoples Commission…."[110] As discussed in the Guyana in-country study, authored by an inaugural and extant member, the Indigenous Peoples Commission, despite its impressive mandate and potential, is barely functional almost two decades after it was formally established, and it is generally overlooked by ITPs and government alike.[111] In 2016, for instance, one Member of Parliament observed that "government has allocated a sum of money to the IPC that is the same for the capital expenditure for the Prime Minister's vehicle."[112]

Turning to the other countries, **Suriname** now has a Directorate Sustainable Development of the Indigenous (DDOI), a division of the Ministry of Regional Development, and a similar body for tribal peoples. It received 0.02% of the annual budget in 2020, almost all of which is salaries and operational expenses. These 'functions' were previously subsumed within the overall mandate of the Ministry of Regional Development. In 2020, **Belize** established a ministerial-level portfolio for indigenous peoples within the newly renamed Ministry of Human Development, Families and Indigenous Peoples' Affairs. This superseded the Toledo Maya Land Rights Commission, the body established in 2016 to implement the Consent Order endorsed by the CCJ in *Maya Leaders*. In **Dominica**, while touted as a ministry on equal level to others, responsibility for Kalinago affairs is vested in what has been described as little more than a "constituency office;" a constituency that is not even exclusively dedicated to the Kalinago no less. There are no specific bodies or agencies in **SVG** and **T&T**, and, as noted in the in-country studies, the few decisions and actions taken tend to be *ad hoc* and discretionary.

### B. Collective Legal Personality and Standing

The first issue identified by the IACTHR above - the collective juridical or legal personality as ITPs[113] – is related to the preceding point.[114] The right to juridical personality has been described as 'the right to have rights'.[115] It is

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[109] *See e.g.*, https://dpi.gov.gy/national-toshaos-council-highest-representative-body-for-indigenous-peoples-in-guyana/ (strangely describing the NTC as "semi-autonomous"); and J. Bulkan, *The Struggle for Recognition of the Indigenous Voice: Amerindians in Guyanese Politics*, 102 THE ROUND TABLE: THE COMMONWEALTH J. INT'L AFFAIRS 367 (2013) (explaining that "After losing its parliamentary majority in 2011, the coastlander-based party in power has been working to disrupt cohesion among Amerindian community leaders. The government uses a variety of funds to reward community leaders who will sign pre-prepared resolutions at the statutory National Toshaos Council meetings, and denies funds to leaders and communities that protest at government neglect and mismanagement of the traditional areas claimed by the indigenous peoples").

[110] *Amerindian Act* 2006, sec. 41(a).

[111] *See e.g.,* 'House Speaker handed Indigenous Peoples' Commission reports for 2013-2016', DPI GUYANA, 8 November 2019, https://dpi.gov.gy/house-speaker-handed-indigenous-peoples-commission-reports-for-2013-2016/.

[112] 'Budget cuts for Indigenous Peoples and Child Rights Commissions', *Demerara Waves*, 7 January 2016, https://demerarawaves.com/2016/01/07/budget-cuts-for-indigenous-peoples-and-child-rights-commissions/.

[113] *See e.g., Access to justice in the promotion and protection of the rights of indigenous peoples*, A/HRC/24/50, para. 23 (explaining that "To address instances of non-recognition, reference should be made to jurisprudence at all levels where there has been recognition of the collective legal personality of indigenous peoples and their communities").

[114] *See e.g.*, M. Åhrén, INDIGENOUS PEOPLES' STATUS IN THE INTERNATIONAL LEGAL SYSTEM (Oxford: OUP 2016); I. Watson (ed.), INDIGENOUS PEOPLE AS SUBJECTS OF INTERNATIONAL LAW (Abingdon and New York: Routledge 2018); L. Lixinski, *Case of the Kaliña and Lokono Peoples v. Suriname*, 111 Am. J. Int'l L. 147 (2017); C. Thornhill et al, *Legal pluralism? Indigenous rights as legal constructs*, 68 U. TORONTO L.J. 440, 491 (2018) ("The idea that indigenous communities possess a distinctive legal personality, to which distinctive rights are attached, is becoming widespread, in practice and in theory. This is clearly established in rulings of the IACtHR, where it has been argued that indigenous communities possess a unique collective legal personality, in which the 'collective rights of the community' are separate from the single, individuated rights of its members").

[115] *See e.g.*, Working Group on Enforced or Involuntary Disappearances, *General Comment on the right to recognition as a person before the law in the context of enforced disappearances*, A/HRC/19/58/REV.1 (2012) (explaining that "This right is central to the conception

specifically designated to be non-derogable in Article 4(2) of the ICCPR. The ADRIP provides in Article IX that "States shall recognize fully the juridical personality of indigenous peoples, respecting indigenous forms of organization and promoting the full exercise of the[ir] rights…."

In *Saramaka People*, the IACTHR explains that recognition of collective legal personality, as *peoples*, "is a natural consequence of the recognition of the right of members of indigenous and tribal groups to enjoy certain rights in a communal manner."[116] It is also related to their status as self-determining peoples and, as the EMRIP observes, echoing the IACTHR's second point above, "the right to self-determination requires recognition of the legal standing of indigenous peoples as collectives, and of their representative institutions, to seek redress in appropriate forums. Moreover, in these cases, remedies must be collective."[117] The IACTHR has subsequently reaffirmed that ITPs' rights are the "rights of peoples" and that ITPs are "collective subjects of international law."[118] It is incumbent on states to consult with ITPs to determine how they would choose to exercise their collective personality, including for the purposes of vesting and enforcing rights and, on an ongoing basis, their exercise and enjoyment.[119] In short, ITPs have a right to determine for themselves how to exercise their collective legal personality, including through designating their own representatives.[120] At first glance, this may seem to be mostly a theoretical or an academic concern (albeit mostly ignored in academia), however, lack of adherence to this right underlies many of the violations suffered by ITPs around the world today, including in the countries now under study.

By way of illustration, albeit an extreme one, a study conducted by the UN Food and Agriculture Organization explains that "Since the [**Suriname**] legal system currently has no way of recognizing traditional tribal groups and institutions as legal entities, they are effectively invisible to the legal system and incapable of holding rights."[121] Suriname has not contested this and related findings. Instead, it has argued that recognition of ITPs'

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of human rights, as it expresses the right and the capacity of each human being to be the holder of rights and obligations under the law. It has often been described as the "right to have rights" and as a direct consequence of the right to respect for human dignity").

116 Saramaka People, para. 172 (explaining, at para. 167, that "the question is whether the lack of recognition of the Saramaka people as a juridical personality makes them ineligible under domestic law to receive communal title to land as a tribal community and to have equal access to judicial protection of their property rights"). *See also Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System*, Advisory Opinion OC- 22/ 16, 26 February 2016, Ser A No. 22, para. 72 (explaining that "international standards concerning indigenous and tribal peoples and communities recognize the rights of peoples as collective subjects of international law, not only its members").

117 *Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples*, A/HRC/24/50, para. 20.

118 *See e.g., Kichwa Indigenous People of Sarayaku v. Ecuador*, 27 June 2012. Ser. C No. 245, para. 231.

119 *See e.g.,* Saramaka People, para. 174 (ruling that "the State must establish, in consultation with the Saramaka people and fully respecting their traditions and customs, the judicial and administrative conditions necessary to ensure the recognition of their juridical personality, with the aim of guaranteeing them the use and enjoyment of their territory in accordance with their communal property system, as well as the rights to access to justice and equality before the law"). *See also* J. Bens, THE INDIGENOUS PARADOX. RIGHTS, SOVEREIGNTY, AND CULTURE IN THE AMERICAS (Philadelphia: U. Penn. Press 2020), Ch. 8, *Expansions and Limits of the Culture Approach: Saramaka v. Suriname*.

120 *See e.g., Saramaka People, Interpretation of the Judgment*, 8 August 2008. Ser C No. 185, para. 18 (it is ITPs, "not the State, who must decide which person or group of persons will represent the[m] … in each consultation process…"). *See also Chitay Nech v. Guatemala*, Judgment of 25 May 2010. Ser C No. 212, para. 115 (ITPs' leaders "exercise their charge by mandate or designation and in representation of a community. This duality is both the right of the individual to exercise the mandate or designation (direct participation) as well as the right of the community to be represented. In this sense, the violation of the first reverberates in the damage of the other right"); and UNDRIP, Article 18 (providing that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures…").

121 *Strengthening National Capacity for Sustainable Development of Forests on Public Lands. Report of the Legal Consultant, Cormac Cullinan*, FAO Project TCP/SUR/4551 (1996), at sec. 4.6.2.

collective personality is precluded by extant national law, citing, *inter alia*, provisions of its Civil Code.[122] Suriname's *Framework Bill on the Collective Rights of Indigenous and Tribal Peoples* (June 2021) proposes to remedy this in its' Article 2(1), which provides simply that ITPs are "legal persons and they have collective rights as stipulated in this act." Article 2(2) provides that ITPs shall exercise "their collective legal personality by means of representatives appointed by themselves on the basis of procedures established by them in accordance with their culture, customs, traditions and traditional governance systems," while Article 2(3) states that collective personality and rights are without prejudice to the individual rights held by their members.

While it would not seem to bar access to the judiciary, as has been the case in Suriname, **Belize**, **SVG** and **T&T** also have not formally recognized that ITPs are collective legal persons. Nor has **Dominica**, at least to the extent that it established a corporate body to hold and exercise rights over the Kalinago territory and it did so seemingly without any attempt to seek the views of the people themselves or to consider their inherent rights.[123] That said, the law and related matters do concern the Kalinago as a people, even if this is more a *de facto* outcome than a reasoned choice, noting also that some may describe this complaint as one of form over substance.[124] Belize and Guyana present two different aspects of this issue.

**Guyana's** Constitution recognizes that "indigenous peoples" have certain rights in Article 149G – by its plain meaning, rights that are vested in 'indigenous peoples' *per se* –and its Preamble adds that Guyana values "the special place in our nation of the Indigenous Peoples and recognize[s] their right as citizens to land and security and to the promulgation of policies for their communities." The judiciary has heard at least one case involving Article 149G, submitted by a specific Akawaio village, even though it was not submitted by or argued on behalf of the Akawaio indigenous people collectively or as a distinct juridical person.[125] However, the *Amerindian Act* 2006, with one exception (a hangover from its 1951 predecessor),[126] only recognizes individual villages for the purposes of vesting title to lands and exercising other rights – and then creates/maintains Village Councils as corporate bodies for this purpose – rather than allowing for the joint titling of more than one village or an entire indigenous territory.[127] This is not a concern for some indigenous communities, but for others it is deemed to be substantial deviation from their interlinked collective territorial and self-government rights.[128] The Wapichan and

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122 *Response of the State of Suriname*, Kaliña and Lokono Peoples, 16 April 2014, p. 8-9.

123 *Kalinago Territory Act* 1978 (as amended by the *Kalinago Territory (Amendment) Act* of 2015, http://extwprlegs1.fao.org/docs/pdf/dmi150799.pdf), Cap. 25:90, *AN ACT to provide for the establishment of a body corporate for the Carib Reserve, to make provision for the administration of the Reserve and for matters connected therewith*, sec. 14(1) (providing that "There shall be in and for the Reserve a body corporate for the government of the Reserve. It shall be a local government body, and in addition to the powers given in this Act shall have the powers of a Council under the Village Councils Ordinance").

124 *See e.g.*, E. Mullaney, *Carib Territory: Indigenous Access to Land in the Commonwealth of Dominica*, 8 J. LATIN AM. GEOGRAPHY 71 (2009).

125 *Thomas and Arau Village Council v. A.G. Guyana* and Ors., No. 166-M/2007, HC of Guyana, unreported case, 30 April 2009.

126 *Amerindian Act* 2006, sec. 37: Special Provisions for Karasabai, stating that "(1) All lands whose title is held by the Karasabai District Council are recognised as Village lands. (2) The Karasabai District Council may exercise the functions of a Village Council over its Village lands subject to the approval of the Karasabai Village as expressed through the councils established by the Village").

127 The Act, in sec. 35, does however provide that "The Minister may by order establish a District Council if (a) at least three Village Councils make such a request in writing to the Minister; (b) the Village Councils making the request are in the same geographic area; (c) none of the Village Councils is a member of another District Council." Holding title to land is not one of the functions of a District Council, however (sec. 36), and only one has been formally established to date.

128 *See e.g., Report of the Special Rapporteur on the rights of indigenous peoples. Implementing the right of indigenous peoples to self-determination through autonomy and self-government*, A/74/149 (17 July 2019), para. 20, 23 (observing that the "imposition of State frameworks in the implementation of arrangements for autonomy or self-government has often resulted in what could be termed 'fragmented autonomies'," and a "comprehensive approach is needed that includes the indigenous conceptions of territory, control, power and relations." It adds that effective guarantees for this right "cannot be achieved without the adequate implementation of their

Akawaio peoples, for instance, have long-called for recognition of and protection for their collective territorial rights and they have denounced the fragmentation of their territories and collective personality due the state's (recent) insistence on solely titling individual villages.[129] To make matters worse, the Act renders some indigenous communities ineligible to even apply for title[130] and these are also mostly denied the Act's purported protections.[131] Guyana, for instance, has admitted before a UN treaty body that "while communities without legal title have traditional rights as specified in the *Amerindian Act*, they do not have the level of rights as the titled communities."[132]

The Maya peoples of southern **Belize** have been able to access the judicial system to seek protection for their collective rights and, contrary to Guyana so far, they have had considerable success. That said, while they have some degree of (representative) standing, they are not recognized as collective legal persons otherwise in the laws of Belize. The Maya peoples, however, have stressed that they wish to exercise their collective personality via their individual villages, which are autonomous entities, even if they are tied together culturally, politically, and otherwise. They propose that legislation recognize their preexisting and inherent collective legal personality as well as their right to choose how it is exercised. The current government, however, is presently delaying the adoption of a protocol on free, prior and informed consent ("FPIC") because it does not agree with the Maya, and refuses to accept, that the Toledo Alcaldes Association is their representative organization at the supra-village level. Notably, these are some of the issues that gave rise to the IACTHR rulings on the right to collective legal personality, i.e., Suriname's insistence that it would disregard the persons identified as representatives by the Saamaka because, in its view, it would only deal with the *Gaama* or paramount leader, even though the Saamaka collectively, including the *Gaama*, explained that the representatives of the land-owning clans must be addressed about land tenure issues.

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rights to the lands and territories, and measures that result in territorial fragmentation and limited jurisdiction hinder the exercise of autonomy or self-government").

129 *See e.g.,* B. David, et al, *Wa Wiizi - Wa Kaduzu. Our territory - Our Custom. Customary Use of Biological Resources and Related Traditional Practices within Wapichan Territory in Guyana*, (SCPDA/FPP, 3 April, 2006), http://www.forestpeoples.org/topics/community-based-resource-management/publication/2010/wa-wiizi-wa-kaduzu-our-territory-our-cus; and *Baokopa'o wa di'itinpan wadauniinao ati'O Nii. Kaimanamana'o, wa zaamatapan, wa di'itapan na'apamnii wa sha'apatan Wapichan wiizi Guyana'ao raza* (Thinking together for those coming behind us. An outline plan for the care of Wapichan territory in Guyana) (South Central and South Rupununi Districts Toshaos Councils, 2012), http://www.forestpeoples.org/sites/fpp/files/publication/2012/05/wapichan-mp-22may12lowresnomarks.pdf. *See also* L. Hennessy, *Re-Placing Indigenous Territory: Villagization and the Transformation of Amerindian Environments Under 'Cooperative Socialism' in Guyana*, 103 ANNALS ASSOC. AM. GEOGRAPHERS 1242 (2013) (explaining that "The legacy of diffuse village—state relations is compromising cultural and territorial integrity as distinct peoples under transitions to neoliberalism in the post-socialist era").

130 *Amerindian Act* 2006, sec. 60, providing that "An Amerindian Community [meaning one that lacks a land title] may apply in writing to the Minister for a grant of State lands provided – (a) it has been in existence for at least twenty-five years; (b) at the time of the application and for the immediately preceding five years, it comprised at least one hundred and fifty persons."

131 In the *Amerindian Act*, protections pertaining to mining (Sec. 48-53), logging (Sec. 54-6) and protected areas (Sec. 58) only apply to titled communities. Other examples include Section 5(1) which provides that persons wishing to conduct research among indigenous peoples must obtain permission and provide information on the results of their research. However, this only applies to 'village lands', meaning those titled by the State (see Sec. 2). The same is also the case in Section 78(1), which only protects titled communities from non-consensual removal of indigenous artefacts. Similarly, Section 85 denies legal personality to indigenous communities that have not established (undefined) 'councils' prior to 31 December 2003. Even if a 'Community Council' is recognized by the Minister under Section 85, Section 86 expressly denies the council the same jurisdiction over its lands as applies to titled villages and none of the protections pertaining to titled lands apply to the village's traditional lands and resources).

132 *See Comments of the Government of Guyana on the concluding observations of the Committee on the Elimination of Racial Discrimination*, CERD/C/GUY/CO/14/Add.1 (2008), p. 6 (where Guyana explicitly rejected the Committee's recommendation, stating that it is "impossible to remove the distinction between the titled and untitled communities. It is very clear that one has title (ownership) to the land they occupy and use and the other does not."

### C. Positive, Legal Recognition of ITPs' Rights

As noted above, states are obligated to affirmatively recognize and guarantee ITPs' collective rights in legislation, ideally in their constitutions as well, and the remedies provided should offer a real possibility that ITPs can defend their rights and effectively control their territories.[133] This is the case irrespective of whether constitutional rights have been judicially articulated and upheld in the absence of legislation. As the CCJ states, notwithstanding a Consent Order that affirmatively recognizes that the Maya have constitutionally protected property rights, the nature and extent of Maya rights will "remain inchoate and uncertain until authoritatively identified and codified by the laws of Belize."[134] This does not mean that these laws need to be the same across all countries. Clearly, national circumstances across the countries under review vary, even if there are common elements: e.g., compare **Guyana** (or **Suriname**, ca. 55) with 130+ indigenous communities, spread over much of the country and comprising a significant percentage of the national population, with **T&T** (or **SVG**), where only a few communities exist and where demands are considerably different in scope. That said, these laws do need to acknowledge that ITPs, "because of their preexistence to contemporary States, and because of their cultural and historical continuity, have a special situation, an inherent condition that is juridically a source of rights."[135] In other words, legislation must recognize that ITPs rights are inherent and are not merely "entitlements that accrue by way of the benevolent discretion" of the State (e.g., this precludes leasing state lands to ITPs where they are the traditional owners of the same (**Belize**, **Suriname**, **SVG**, and **T&T**)).[136]

None of the states adequately and affirmatively recognize and guarantee ITPs' collective rights in legislation, at least as currently drafted. **Suriname** has explicitly admitted that its laws "do not yet comply with international standards," and it is now in the process of drafting a Framework Law, which, in turn, requires drafting and enacting several implementing laws (e.g., on FPIC and demarcation/titling).[137] Suriname's *Environmental Framework Act* (No. 97 of 2020), its' first, comprehensive environmental legislation, is an exception, even if it also does not comply with international standards.[138] This law purports to require ITPs' FPIC where the direct interests of ITPs in the residential areas of their villages are impacted and where permits and/or concessions are given to persons or decisions are made about the use of the residential area (Arts. 1 and 3, read together). This is an improvement to be sure as previously there was no legal requirement to consult with or even notify ITPs. However, this only applies to the residential areas of their villages, a small part of their traditional lands, and it does not apply at all to government projects that are included in any policy instrument approved by the legislature (even generally, e.g., approval of a policy to expand mining would exempt any permit or concessions issued pursuant thereto). When that is the case, ITPs are to be consulted prior to grants of rights to third parties (Arts. 1 and 3,

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133 *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation*, A/HRC/EMRIP/2019/3/Rev.1, para. 76 ("Constitutional recognition of indigenous peoples should be encouraged, although, where this is not possible, recognition through other means, including national laws, could be pursued. In this regard, constitutional language should be construed broadly in favour of recognizing indigenous rights, including as a basis for reconciliation").

134 Maya Leaders (2015), para. 12 (and, para. 35, explaining that "In these circumstances it would be somewhat incongruous for this Court to award damages against the Government for breaching rights which the Maya accept are still to be identified").

135 O. Kreimer, *The Future Inter-American Declaration on the Rights of Indigenous Peoples: A Challenge for the Americas,* in C. Price Cohen (ed.), HUMAN RIGHTS OF INDIGENOUS PEOPLES (Transnat'l Pubs., 1998), p. 69-70.

136 R-M. Antoine, *Trinidad and Tobago: Canada/CCJ Study on Indigenous Peoples Access to Justice,* November 2021, p. 1.

137 Kaliña and Lokono, para. 250.

138 https://leap.unep.org/countries/sr/national-legislation/environmental-framework-act-no-97-2020 (*inter alia*, converting the National Institute for Environment and Development in Suriname into the National Environmental Protection Agency, and also establishing the legal basis for Strategic Environmental and Social Assessments as well as Social and Environmental Impact Assessments).

read together). FPIC protocols are being developed by ITPs and these should be given effect by proposed subsidiary legislation, although how remains to be seen.[139] This is substantially incompatible with the state's international obligations, for instance, as explicated in the *Saramaka People* judgment,[140] and it is unlikely to mitigate, let alone remedy, the massive violations of ITPs' rights in the extractive sector in Suriname.[141]

The other laws are all firmly in the tradition of British paternalism, protectionism and a predilection for indirect rule as typified by the 1837 report of the British House of Commons' Select Committee on Aborigines (British Settlements).[142] **Guyana's** *Amerindian Act*, for instance, is a direct descendant of protectionist laws developed in Australia[143] and elsewhere in the mid-19th century[144] and brought to then-British Guiana and elsewhere by colonial administrators[145] (e.g., the 1902 *Aboriginal Indians Protection Ordinance*).[146] These policies and the laws they prompted were "not just to safeguard [ITPs'] rights as newly clarified British subjects but also to bring the corrective influences of law and good government to the furthest peripheries of the British Empire."[147]

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139 E/C.12/ARG/CO/4, 1 November 2018, para. 21 (recommending that "for the implementation of the right to be consulted and to free, prior and informed consent, the State party use the protocols drawn up and agreed upon with indigenous peoples, in order to ensure that factors specific to each people and each case are taken into account"). *See also* C Doyle, A Whitmore & H Tugendhat (eds), *Free Prior Informed Consent Protocols as Instruments of Autonomy: Laying Foundations for Rights based Engagement*, Infoe and ENIP (2019), https://enip.eu/FPIC/FPIC.pdf.

140 *Saramaka People*, para. 129-34. *See also B. Oliveira Pereira and L. Guillermo Sosa Benega and the Indigenous Community of Campo Agua'ẽ, of the Ava Guaraní People v. Paraguay*, CCPR/C/132/D/2552/2015 (12 October 2021), para. 8.7 ("the Committee recalls that measures are required to ensure the effective participation of indigenous peoples in decisions that affect them.49 [citing UNDRIP 32] In particular, "it is of fundamental importance that measures that compromise or interfere with the economic activities of cultural value of an indigenous community have been subjected to the free, prior and informed consent of the members of the community, they must also respect the principle of proportionality, so that they do not endanger the very subsistence of the community").

141 On rights violations *see e.g.*, J. Anaya, J. Evans and D. Kemp, *Free, prior and informed consent (FPIC) within a human rights framework: Lessons from a Suriname case study*, Washington DC: Resolve FPIC Solutions Dialogue (2017), https://www.colorado.edu/law/sites/default/files/attached-files/merian-expert-advisory-panel_final-report1.pdf;

142 *See e.g.*, S. Furphy and A. Nettelbeck, ABORIGINAL PROTECTION AND ITS INTERMEDIARIES IN BRITAIN'S ANTIPODEAN COLONIES (London: Routledge 2019); A. Lester and F. Dussart, COLONIZATION AND THE ORIGINS OF HUMANITARIAN GOVERNANCE: PROTECTING ABORIGINES ACROSS THE NINETEENTH-CENTURY BRITISH EMPIRE (Cambridge: CUP 2014); M. F. Lindley, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW (London: Longmans, Green & Co., 1926); K. Roberts- Wray, COMMONWEALTH AND COLONIAL LAW (London : Stevens , 1966 ); and, for an especially cogent examination of these issues, R. A. Williams, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (New York, NY: OUP 1990).

143 *See e.g.*, M. Shahabuddeen, THE LEGAL SYSTEM OF GUYANA (Georgetown: Guyana Printers 1973), p. 226 (explaining with regard to Australia that "… Her Majesty's sovereignty was asserted over the whole of the territory and that therefore the Aborigines were to be considered 'as within the allegiance of the Queen and as entitled to her protection'. This was essentially the basis on which jurisdiction was asserted in British Guiana"); and p. 230 (noting 19th century exchanges between Australia and British Guiana).

144 *See e.g.*, A. Nettelbeck, INDIGENOUS RIGHTS AND COLONIAL SUBJECTHOOD. PROTECTION AND REFORM IN THE NINETEENTH CENTURY BRITISH EMPIRE (Cambridge: CUP 2019), p. 3-4 (explaining that, while its origins lie in the abolitionist movement and the 1837 report of the Select Committee, "the legal implications of the protection policy as it was applied to indigenous peoples have most often been associated with the later statutory acts and government departments that oversaw the centralized management of indigenous lives in the British Commonwealth during the late-nineteenth and twentieth centuries").

145 *See e.g.,* C.A. Bulkan and J. Bulkan, *'Protector of Indians': assessing Walter Roth's legacy in policy towards Amerindians in Guyana* in R. McDougall (ed.), THE ROTH FAMILY, ANTHROPOLOGY, AND COLONIAL ADMINISTRATION (Walnut Creek, CA: Left Coast Press 2008). *See also* D. Sanders, *Indigenous Peoples in Guyana* (World Bank: Washington D.C., 1995), p. 6 (observing that the 1951 legislation was "an old-style statute, setting out a colonial structure of indirect rule").

146 *See e.g.,* D. Omrow, *Abyssal Ideology and the Amerindians of Guyana: an eco-crimes analysis of power, discourse and cognitive injustice* (PhD Diss., York U. 2017), Ch. 5; and A. Bulkan, *The Land Rights of Guyana's Indigenous Peoples* (PhD Diss., York U. 2008) (both reviewing the development of legislation about and affecting indigenous peoples in what is now Guyana from the 1800s to 2006). *See also* M. N. Menezes, BRITISH POLICY TOWARDS THE AMERINDIANS IN BRITISH GUIANA, 1803 -1873. (Oxford: Clarendon Press 1979) and M.N. Menezes, THE AMERINDIANS IN GUYANA 1803-1873: A DOCUMENTARY HISTORY (London: Frank Cass 1979).

147 A. Nettelbeck, INDIGENOUS RIGHTS AND COLONIAL SUBJECTHOOD. PROTECTION AND REFORM IN THE NINETEENTH CENTURY BRITISH EMPIRE (Cambridge: CUP 2019), p. 5.

Note in this regard also then-British Guiana's heavy reliance on relations with indigenous peoples to establish effective occupation in the border arbitration proceedings with both Venezuela (1899) and Brazil (1904).[148]

One colonial official explained that "the whole object of protection is to keep the protected group away from temptation and outside bad influences and from exploitation until the Authorities are satisfied that sufficient advancement has been made to warrant protection unnecessary."[149] Compare this with sections 5(3) and 6(2) of the 2006 *Amerindian Act*,[150] which require, respectively, that persons, even if invited and/or commissioned by the Village, must obtain the permission of the Minister to enter Village lands and conduct various kinds of research, and they must share the results with the state, irrespective of whether this research is for the sole use of the village or perhaps if even for use in proceedings against the state at some point.[151] While the stated rationale is to protect indigenous peoples from exploitation (it can often look like control, however), there are far less intrusive means of achieving this should it be required, and, in the absence of case-by-case and compelling evidence to the contrary, protection is not rationally required where it is indigenous peoples themselves who have commissioned the research.[152]

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[148] In 1899, following arbitration, the international border between Venezuela and British Guiana was fixed by treaty. In 1904, following arbitration, a treaty was also concluded with Brazil, and in 1906 a tri-boundary marker was placed on Mt. Roraima, locating the boundary between the colony and its neighbours. According to Butt-Colson, this: ". . . drew a line right through the heart of the circum-Roraima territory and its indigenous nations. Not only two ethnic unities, Kapon and Pemon, were divided from each other, but even their internal regional groupings. Thus, a small group of Akawaio at the head of the Cotinga River was assigned to Brazil, becoming detached politically from close relatives on the Kukui River, assigned to British Guiana. Mixed Akawaio-Arekuna Pemon were left on either side of the frontier north of Roraima. Even members of the same family now fell under different national sovereignty, different laws, different linguistic, cultural and social systems stemming from European traditions and their creole mixtures. From the point of view of the indigenous occupants of these territories, the treaties represent an international carve-up, in that national sovereignty was assigned in different capitals of the world, principally in other continents, and boundaries were created without reference to the traditional rights of the occupants. These superimpositions could make no sense in terms of local structures, for they cut across and divided geographical, ecological, social and cultural unities, placing in separate political areas populations which conceived themselves to have been in possession of the land 'from the beginning of time' (*pia'tai*), and as being far more closely interrelated amongst themselves than the peoples and cultures of the nation-states which were engulfing them. These assignments divided, Roraima, the centre of the indigenous cosmological system, into three!" A. Butt-Colson, *National Development and the Upper Mazaruni Akawaio and Pemon*, Unpublished Ms., (1983), p. 5.

[149] P.S. Perberdy, *Report of a Survey on Amerindian Affairs in the Remote Interior: With additional notes on coastland population groups of Amerindian origin* (Georgetown: Government of British Guiana 1948), p. 38.

[150] Compare also with sec. 113(1) of the 1989 *Mining Act*, providing that "113. (1) Where any Amerindian who is not the holder of a mining licence, claim licence or special mining permit under this Act obtains and desires to sell any valuable mineral or precious stone, it shall be sold by the Commission on his behalf and the proceeds shall be paid to such Amerindian").

[151] Sec. 5(3) provides that "A person, other than a person referred to in section 8, who wishes to conduct any scientific, anthropological or archaeological research or any other research or study which relates to biological diversity, the environment or natural resources or to any use or knowledge thereof within Village lands shall apply for and obtain in advance¬ (a) the permission of the Village Council; (b) all permits required under any other written law; and (c) the permission of the Minister." Sec. 6(2) requires that "A person who wishes to make use of any material derived from research or study under this section shall¬ (a) apply for and obtain the permission of the Village Council, the Minister, the Minister with responsibility for culture …."

[152] *See e.g., McEwan and Ors v. A.G. Guyana*, [2018] CCJ 30 (AJ), para. 62 (per Saunders, PCCJ), (explaining that "Any such limitation should be demonstrably justified in a democratic society. In other words, the infringing law must pursue some pressing objective and be rationally connected to that objective. The infringing law should impair only such of the right as is necessary to be impaired. And there must be proportionality of effects between the deleterious and salutary effects of the infringing law in question"). *See also Report of the Special Rapporteur in the field of cultural rights*, A/70/279 (2015), para. 44 (referring to UNDRIP, art. 46(2) – containing the grounds for limitations on rights – and concluding that such limitations "can be problematic, however, if they are justified by reference to the interest of a mainstream society that otherwise does not recognize indigenous interests. In such cases, limitations can be misused to the detriment of indigenous communities").

Protectionist laws, which often were impossible to enforce and rarely observed, intruded on many areas of life. For example, bans on alcohol sales to indigenous persons in **Guyana** were formally enacted in 1908 and this remained in the law until 2006.[153] More importantly, protectionism also led to the establishment of a system of land reservations in **Belize** – although not created until later, provisions were in the Crown Lands Ordinances of 1872, 1877, and 1886[154] – and then Guyana (starting in 1902), and may have prompted the issuance of title to Kalinago in **Dominica** in 1903.[155] While some disagreed,[156] colonial officials were quick to point out that reservation land was not considered to be the property of ITPs,[157] and, in Guyana at least, the boundaries thereof were amended without compunction when minerals or other exploitable resources were located (as discussed below, a practice that continues today in a modified form).[158] In sum, the various iterations of protectionist laws across the colonies (in settled, ceded or conquered territories alike) "help to illuminate how and why later expressions of Aboriginal protection became recast as a set of legally empowered institutions for indigenous management, in which the rhetoric of civil rights had all but disappeared," an approach that is fundamentally at odds with the contemporary recognition of ITPs as self-determining peoples and bearers of specific rights.[159] The long titles of Guyana (2006) and Dominica's (1978) extant legislation are illustrative.

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153 *Aboriginal Indians (Intoxicating Liquors) Ordinance* (1908) (repeated in Part VIII, secs. 36-38 of the 1951 *Amerindian Act,* as amended in 1976 and 1990.

154 *See e.g.,* G. De Vries et al, ENHANCING COLLABORATION FOR CONSERVATION AND DEVELOPMENT IN SOUTHERN BELIZE (Ann Arbor: U. Michigan 2003), Ch. 3, The Struggle for Land Tenure and Resource Control in Southern Belize, p. 44 (explaining that "By the mid-1900s, the British colonial government established ten Maya Indian Reservations in the Toledo District in order to make land available for residential, farming and subsistence needs"), https://seas.umich.edu/ecomgt/pubs/belize/chapter3.pdf.

155 The 1902 Ordinance provided for the establishment of ten reservations in various parts of British Guiana and for the appointment of a Protector of Indians to act as a guardian. Four additional reservations were established by order under the 1902 Ordinance in 1904. The 1902 Ordinance was repealed in 1910 by the enactment of the *Aboriginal Indians Ordinance* 1910. A number of districts, and reservations therein, were later established under this Ordinance. The 1910 Ordinance was repealed by the *Amerindian Ordinance* 1951, which was more comprehensive and introduced a very limited form of local government. It provided that the Governor could establish District or Area Councils and the District Commissioner could establish Village Councils (the first was established in 1959). District and Area Councils consisted of various government officials and the indigenous Captains (Village Chiefs) of that District or Area. Village Councils consisted of the village Captain and other persons appointed by the Commissioner, who was required to give due consideration to the wishes of the community when making appointments

156 M.N. Menezes, *Amerindians and the Land*. Paper Prepared for the Conference of Amerindian Peoples, n.d., 22-5 (arguing that regulations issued pursuant to the 1902 Ordinance in 1903 and 1905 both recognized that lands occupied by Amerindians were legally theirs, but excluded rights to subsurface minerals).

157 *Interim Report by the Aboriginal Indian Committee* (Georgetown, British Guiana 1945), p. 24.

158 For example, the 1904 Mazaruni Reservation was established by order under the 1902 Ordinance and amount to almost 20,000 square miles. This was modified by the 1911 Mazaruni Amerindian District and later by the 1945 Mazaruni Indian Reservation. The latter was approximately 6,000 square miles and was specifically delimited to exclude former areas in which gold and diamonds had been found and where numerous indigenous villages continued to be located. Likewise, the 1959 Upper Mazaruni Amerindian District covered some 3,000 square miles and was established after gold was discovered in parts of the 1945 reservation, all of which were simply dereserved after the area had been flooded by miners. Today, the Arecuna and Akawaio of the former Upper Mazaruni District hold title to around 1,500 square miles, despite their long-standing demands for full title to their territory. Some of the Akawaio of the middle Mazaruni, the area deserved in 1945, didn't obtain title until 2007/09, 2012 and 2020, one of which, Isseneru, is the subject of a pending petition before the IACHR. One of its primary complaints is that it received title to less than one-quarter of the area over which it had provided compelling evidence of various attachments to land as required by the *Amerindian Act*. Moreover, Isseneru contains the remnants of the populations of numerous (mostly abandoned) middle and lower Mazaruni villages that were decimated by mining, which continues to be a serious problem for this village today as around 15 percent of its title is burden by extant mining concessions and operations that were all saved in the title deed itself. Those on the middle Marazuni are almost entirely burdened by hundreds of pre-existing mining permits and concessions.

159 A. Nettelbeck, INDIGENOUS RIGHTS AND COLONIAL SUBJECTHOOD. PROTECTION AND REFORM IN THE NINETEENTH CENTURY BRITISH EMPIRE (Cambridge: CUP 2019), p. 5. *See also* S. Cordis, *Push Ya' Body: Imaginaries of the 'Bush' and the Amerindian Body in the Guyanese State* in A. Bulkan and D. A. Trotz (eds.), UNMASKING THE STATE: POLITICS, SOCIETY, AND ECONOMY IN GUYANA, 1992-2015 (Kingston: Ian Randle 2019), p. 441 ("Similar to its colonial predecessors, post-independence governments merely extended this logic of protectionism and intervention which limit the rights and property of Amerindians through its uncritical reinscription of inherited

**Guyana's** states that it is an Act "to provide for the recognition and protection of the collective rights of Amerindian Villages and Communities, the granting of land to Amerindian Villages and Communities and the promotion of good governance within Amerindian Villages and Communities." Note that the "collective rights" purportedly recognized and protected are neatly distinguished from "the granting of lands"[160] (whereas, in fact, most of the former depend on the latter), and, rather than upholding rights to self-government, the law's focus is on promoting good governance (at least the state's idea of what it should be).[161] Consistent with the view that they are adjuncts of the administration, Village Chiefs are also made Rural Constables and Justices of the Peace (although most receive no training or equipment). In fact, the Minister is provided powers and undue discretion to interfere in numerous aspects of indigenous village government, holding a variety of vetoes over democratically determined decisions, in a manner that would be familiar to a colonial administrator. The Minister, for instance, may annually audit Village finances, provided that two weeks' notice is given (sec. 33(1)), and may veto, without any stated grounds: proposed research, even if commissioned by the village itself (sec 5(3)), and the results must also be provided to the Minister (sec. 6);[162] by-laws (Rules) enacted by the Village Council (14(2); taxes levied by the Village Council (18(3)); and removal of artefacts, even if freely decided by the village (sec. 78(1)). The Minister may also override the village's objections to large scale mining and determine royalties that may be due to the village (sec. 50(1)) and may interfere in the minutiae of village elections in numerous ways (Part VII).

In the case of **Dominica**, the Act is "to provide for the establishment of a body corporate for the Kalinago Reserve, to make provision for the administration of the Reserve and for matters connected therewith." It established a local government body, at the lowest tier – as Guyana's Village Councils were until 2006 - to administer the territory (a land title first "granted" in 1903 and regularized after 1978), subject to various oversights and interferences by the national government. Described as a semi-autonomous regime, the Act nevertheless provides that "the overall responsibility for development and planning in the Territory is retained by the Government" (sec. 48), and the Minister has the power to review by-laws developed by the Council, which must be also approved by Cabinet (sec. 29(2)). To put this into perspective, the law requires that a Minister reviews, and Cabinet approves, democratically adopted by-laws on matters such as "keeping of animals, birds and bees" and "parks and playing fields" (sec. 29(1)(f) and (w), respectively). A Minister may also decide to revoke these by-laws if they are "of the opinion that it is causing or likely to cause hardship…" (sec. 29(2)). This goes beyond discretion and is well into the realm of being illegitimately vague, among other things (e.g., surely the Minister and Cabinet have more pressing concerns than nosing around in by-laws on bee keeping).

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colonial policies and ideologies about the hinterland and its communities. This ongoing grinding away of indigenous lands and sovereignty constitute indigenous dispossession; that is, legal and spatial techniques of power, such as contested demarcation and titling processes that obscure local knowledges, collective memory, and sense of place; the separation of indigenous territories into 'titled' and 'untitled' lands; increased vulnerability to the environmental and social impacts of mining and logging activities – all of which enable the shift of lands into state control for neoliberal development").

160 *See e.g.*, J. Bulkan, *Original Lords of the Soil? The Erosion of Amerindian Territorial Rights in Guyana*, 22 ENVIRONMENT AND HISTORY (2015); M.N. Menezes, BRITISH POLICY TOWARDS AMERINDIANS IN BRITISH GUIANA, 1803-1873 (Oxford: OUP 1977); and A. Sanders, *British Colonial Policy and the Role of Amerindians in the Politics of the Nationalist Period in British Guiana, 1945-68*, 36 SOC. & ECON. STUDIES 77 (1987).

161 *See also Amerindian Act* 2006, sec. 37(5), providing that "The Minister may at the request of the Karasabai Village and its councils accept a transfer of title back to the State on condition that the Minister establishes Village Councils among whom the Village lands are divided by the grant of separate titles."

162 Referring to "scientific, anthropological or archaeological research or any other research or study which relates to biological diversity, the environment or natural resources or to any use or knowledge thereof within Village lands [meaning titled lands]."

While there is no legislation involved, **Suriname's** administrative practice as it relates to ITPs' traditional authorities is similar, treating them as minor civil servants to be appointed by the state and who are subservient to various levels of central government (even setting out a dress code).[163] This is mostly a view that hardened post-World War II as the Dutch colonial regime was both ambivalent and somewhat confused as to the status of the traditional authorities, and, with a few exceptions, normally where the State or a third party had encroached on traditional lands, these authorities were largely left to their own devices into the late 20th century.[164] A proposed draft Law on Traditional Authorities (2015) sought to continue to treat the authorities as minor civil servants and was emphatically rejected by ITPs as incompatible with their rights and cultures.[165] The Framework Bill (2021) defines 'traditional authority' as the "governing authority of the [ITPs] legitimized by customs and traditions of that people;" and the 'traditional governance system' as the "coherent functional system of governing bodies, authorities, mechanisms and structures that the [ITPs] have and use partially or wholly for their governance processes."[166] While requiring the enactment of a subsidiary law on this subject, it now (draft art. 5) recognizes their authority over the territory/village and its population in accordance with customary norms. In **Belize**, the law established that Alcaldes are magistrates with limited jurisdiction, and subjects them to appointment and removal by the Attorney General.[167] It has also established a rival local government system that operates in parallel, and at times at odds with, the Maya's Alcalde system.[168] For instance, the law vests decisions about land in the Village Councils, not the Alcaldes, even if the latter continue to informally deal with disputes about the same at the intra- and inter-village levels.[169]

Of the countries under review, only two have some form of constitutional norms or language specific to ITPs (**Guyana** and **Belize**), and one of these is only preambular text (Belize). **Suriname** has discussed including a provision in its Constitution, but this has yet to move beyond the realm of talk. Only two (**Dominica** and **Guyana**) have specific legislative frameworks and these have been strongly criticized by ITPs and human rights bodies alike. Apex judicial bodies have both ruled that **Belize** and **Suriname** do not have adequate or effective laws, and in the

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163 M. Hoever-Venoaks and L. Damen, SURINAAMS BESTUURSRECHT (Paramaribo/Amsterdam 1996).

164 For the Dutch, the status of the Maroons was not a straightforward matter. As late as the first quarter of the 20th century, Maroons were referred to as a "state within a state;" as a "friendly nation" by a member of the Colonial States, and in 1924, a member of the Dutch First Legislative Chamber wondered whether they should be perceived "as Dutch citizens or as allies." *See* B. Scholtens, *Bosnegers en Overheid in Suriname. De ontwikkeling van de politieke verhouding 1651-1992* (PhD Diss., Nijmegen; Afdeling Cultuurstudies/Minov, Paramaribo, 1994), p. 83-7. *See also* M. Schalkwijk, *Colonial State Formation in Caribbean Plantation Societies. Structural Analysis and Changing Elite Networks in Suriname, 1650-1920* (PhD Diss., Cornell U. 1994; 2nd ed., Paramaribo: Vaco, 1998), p. 151-54.

165 *See also* CERD/C/SUR/CO/13-15 (2015), para. 23 ("noting the drafting of a law acknowledging the traditional authorities of [ITPs], the Committee is concerned that the current draft does not adequately reflect [ITPs] customs"); and para. 24 (recommending enactment of a framework law, and that this law "comply with the provisions of the [UNDRIP] ... [and] the planned law on traditional authorities reflect [ITPs'] right to determine the structures and to select the membership of their institutions in accordance with their own procedures").

166 *Framework Bill*, 15 June 2021, Art. 1 (also defining 'self-government' as "The traditional administration that the [ITPs] have and use for their own internal and autonomous governance processes").

167 *Inferior Courts Act*, Cap. 94, Part VII (on "Alcalde Jurisdiction"). *See also* T. Mesh, *Alcaldes of Toledo, Belize. Their Genealogy, Contestation, and Aspirations* (PhD Diss., U. Florida 2017); and M. Moberg, *Continuity under Colonial Rule: The Alcalde System and the Garifuna in Belize*, 1858-1969, 39 ETHNOHISTORY 1 (1992).

168 *See e.g.* CERD/ C/ CRI/ CO/ 19– 22 (2015), para. 25 (expressing concern that local government bodies in Costa Rica "have supplanted indigenous peoples' own institutions in their relations with the State" and recommending "that indigenous peoples' authorities and representative institutions be recognized in a manner consistent with their right to self-determination in matters relating to their internal and local affairs").

169 *Inferior Courts Act*, sec. 69, provides for the establishment in each district declared to be an "alcalde jurisdiction district", of an "Alcalde Jurisdiction Court," exercising civil and criminal jurisdiction in minor matters.

case of Suriname, several laws are manifestly hostile to or even negate ITPs' rights.[170] For instance, similar to the findings about Suriname quoted above, the CCJ observed that Maya property rights "remain invisible in the general laws of the country,"[171] and it arrived at "the unavoidable conclusion that the existing property regime fails to adequately protect" the Maya and their rights.[172]

This absence of adequate and effective legal guarantees also may be racially discriminatory, aggravating state responsibility, simply because it denies and/or impairs ITPs' internationally guaranteed rights, rights that are vested solely in ITPs.[173] In a recent decision adopted under its petitions-based jurisdiction, the UN Committee on the Elimination of Racial Discrimination ("UNCERD"), for instance:

> recalls that to ignore the inherent right of indigenous peoples to use and enjoy land rights and to refrain from taking appropriate measures to ensure respect in practice for their right to offer free, prior and informed consent whenever their rights may be affected by projects carried out in their traditional territories constitutes a form of discrimination as it results in nullifying or impairing the recognition, enjoyment or exercise by indigenous peoples, on an equal footing, of their rights to their ancestral territories, natural resources and, as a result, their identity.[174]

This should be of grave and abiding concern in the multiethnic societies of most of the contemporary Caribbean.[175] It is also barred, in theory, by their Constitutions, all of which prohibit racial discrimination, which is generally understood to include discrimination based on race and/or ethnicity and, if international standards are followed, ITPs' status and identity.[176]

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[170] Saramaka People, para. 176 *et seq* (reviewing Suriname's legal system with respect to ITPs' rights).

[171] Maya Leaders (2015), para. 59.

[172] *Id*. para. 60 (also observing that "the statutory regimes in the General Registry Act CAP 327 and the Registered Land Act CAP 194 fail to provide a mechanism for identifying, documenting and titling Maya customary property, as indeed it does for non-Maya customary land tenure. There has undoubtedly been a failure to recognize and protect Maya land rights and this is one of the implied concessions in the Consent Order"). *See also Cal and others v. A.G.*; *Coy and others v. A.G*. (2007) 135 ILR 77, para. 22 (stating that "neither British colonial nor Belizean statutory law has provided a way to demonstrate Maya customary land rights with official papers…").

[173] *See e.g*., Human Rights Committee, *General Comment 23, The Right of Minorities* (1994), para. 1 (explaining that Article 27 of the ICCPR "establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant"). The same principle applies in relation to the corpus of ITPs' rights (sometimes referred to as "citizenship plus" in Canada).

[174] *Lars-Anders Ågren et al. vs. Sweden*, CERD/C/102/D/54/2013 (2020), para. 6.7. *See also Report No. 09/06 (Merits), Twelve Saramaka Clans, Report No. 09/06, Case 12.338 (Suriname)*, IACHR, Merits (2 March 2006), para. 236 (where the Commission acknowledged that ITPs "have endured racial discrimination, and that one major manifestation of such discrimination has been the failure of state authorities to recognize customary indigenous forms of land possession and use"); and, para. 117 ("respect for and protection of the private property of indigenous peoples on their territories is equivalent in importance to non-indigenous property, and … is mandated by the fundamental principle of non-discrimination enshrined in Article II of the American Declaration").

[175] *See e.g.,* 'Address on behalf of the Right Honourable Sir Dennis Byron, President of the Caribbean Court of Justice, delivered by Honourable Justice Adrian Saunders, Judge of the Caribbean Court of Justice' in *IMPACT Justice Indigenous Peoples' Conference Report and Presentations* (2016), p. 65 (explaining that "In countries like Belize, Suriname, Dominica, or Guyana, 'the affected Population', comprised as it is of the descendants of slaves, indentured servants and native peoples, may actually constitute, not a minority, but the vast majority of the people. It's a thought worth contemplating").

[176] *See e.g*., UNCERD, *General recommendation XXIII on the rights of indigenous peoples* (1997), para. 1 ("… the Committee has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination;") and UNCERD, *General Recommendation XXIV concerning article 1 of the Convention* (1999).

### D. "The common experience of the New World … is colonialism"[177]

The colonial legacy is most pronounced in relation to lands and resources and this is presently the case in all the countries under review. As Anaya observes, the massive loss of lands that accompanied colonization (and which is still ongoing in some respects) was "typically facilitated by colonial and state policies and laws that accorded diminished or no value to the presence of indigenous peoples and their pre-existing land tenure. The legacies of such policies and laws continue today in state legal systems and administrative practices…."[178] While it is generally accepted today that doctrines such as *terra nullius* and discovery[179] "are racist, scientifically false, legally invalid, morally condemnable and socially unjust,"[180] the states under review all (except Belize since 2015)[181] rely on the (mostly judicially untested at the local level) notion that any preexisting rights vested in ITPs were somehow extinguished by virtue of discovery and effective occupation and/or by assertions and cessions of sovereignty by and among various European powers.[182] Williams rightly observes that "this blatantly racist European colonial-era legal doctrine continues to be used by courts and policy makers … to deny indigenous peoples their basic human rights guaranteed under principles of modern international law."[183]

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[177] D. Walcott, THE MUSE OF HISTORY (1974), p. 36.

[178] S.J. Anaya, *Reparations for Neglect of Indigenous Land Rights at the Intersection of Domestic and International Law-The Maya Cases in the Supreme Court of Belize* in F. Lenzerini, REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES (Oxford: OUP 2008), p. 567.

[179] *See e.g.*, R. Miller, J. Ruru, L. Behrendt & T. Lindberg, DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES (Oxford/New York: OUP 2012)

[180] UNDRIP, Preambular Para. 4. *See also Western Sahara Case*, (ICJ Rep. 1975), 31 ("the presence of nomadic tribes with a degree of political and social organization precluded the territory from being regarded as *terra nullius.*" Judge Ammoun added, at 78, that, "the concept of *terra nullius*, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned. It is well known that in the sixteenth century, Francisco de Vitoria protested against application to the American Indians in order to deprive them of their lands, of the concept of *res nullius*").

[181] *See e.g.*, *Estevan Caal and Jalacte Village and Ors v. Ag Belize and Ors*, Claim No. 190 of 2016 (Supreme Ct. Belize), 16 June 2021, para. 31 (explaining that "customary title is not derived from any grant or lease of national lands from the central government; it arises out of Maya customary land tenure system, a system that has been operating in what is now southern Belize since before Belize became a British colony").

[182] *See e.g.*, F.W. Ramsahoye, THE DEVELOPMENT OF LAND LAW IN BRITISH GUIANA (Dobbs Ferry, NY: Oceana Publications 1966), p. 25 (opining that "The ownership of all land in British Guiana can be traced to the prerogative by virtue of which ownership of land vested in the crown at cession, or to grants from the Dutch West India Company and later from the Crown in favour of the Colonial Government, private individuals and in some cases, corporations"); and A.J.A Quintus Bosz, GREPEN UIT DE SURINAAMSE RECHTSHISTORIE. VERZAMELDE WERKEN VAN PROF. MR. A.J.A. QUINTUS BOSZ (Paramaribo: Vaco N.V. 1993), p. 329 (asserting that 'For centuries government authority in Suriname has been exercised as a right which emanates from the supreme ownership of the land, in relation to which the Government currently still regards itself as private owner of the domain"); and, p. 337 (since 'domain' is understood to be the private ownership of the State, in Quintus Bosz's opinion, only those with titles issued by the government have 'ownership rights.' Accordingly, ITPs, who do not possess such titles, are believed not to have ownership rights but, as Quintus Bosz put it, mere 'entitlements or interests'").

[183] R. Williams Jr., SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION (New York: Palgrave Macmillan 2012), p. 228. Another commentator validly opines that "Those who today apply archaic Christian European standards to Indigenous nations and peoples ought to be called upon to identify any contemporary basis upon which originally free and independent nations and peoples may legitimately continue to be considered subject to such standards without their permission." UNPFII, *Conference Room Paper on the Doctrine of Discovery*, 11th Session of the UN Permanent Forum on Indigenous Issues, E/C.19/2012/CRP.2 (2012), para. 37. *See also* UNPFII, *A Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress, with reference to the Declaration, and particularly to articles 26-28, 32 and 40. Note by the secretariat*, E/C.19/2014/3, para. 3 (explaining that "The doctrine of discovery is invalidly based on the presumption of racial superiority of Christian Europeans. … In all its manifestations, 'discovery' has been used as a justification framework to dehumanize, exploit, enslave and subjugate indigenous peoples and dispossess them of their most basic rights, laws, spirituality, worldviews and governance and their lands and resources. Ultimately it was the very foundation of genocide").

This continues to be a major obstacle to full recognition of ITPs rights, underlies the predominance of *ex gratia* and discretionary grants or leases of land from the store of state lands (**Dominica**, **Guyana**, **SVG** and **T&T**, and **Suriname**, albeit to a much lesser extent and historically only),[184] all divorced from any notion of inherent rights, and this has also led to a serious misconstruction or complete denial of ITPs' rights in some cases.[185] This is not to suggest that the doctrine of common law aboriginal title is some panacea:[186] similar and likely clearer results could be achieved by reference to international human rights law and/or by interpreting constitutional rights consistently therewith (and without much of the baggage), by incorporation in modern statutes or, at least initially, politically insofar as any of the states could recognize, in myriad ways, that ITPs have inherent rights and that those rights, at least absent clear evidence to the contrary, were not willingly surrendered or extinguished by colonization.[187] By itself, this would remove one of the major, structural problems in each of the countries as well as demonstrate a commitment to begin to repair the proclaimed 'trauma, landlessness, and marginalization' identified by the CARICOM Reparations Commission and others. More so as the UN Permanent Forum on Indigenous Issues has concluded that: "… there are compelling reasons to go beyond repudiation. It is essential to replace the colonial doctrine of discovery [and related doctrines] with contemporary international human rights standards and engage in just and collaborative processes of redress."[188]

On the basis of contemporary human rights standards, UN treaty bodies and others have rejected non-consensual 'extinguishment' of ITPs' rights as "incompatible" with the right to self-determination[189] and the complex of rights that coalesces around ITPs' multiple relations with their traditional lands, territories and

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[184] *Dorpsgemeente Besluit* (Village Community Resolution), GB 1938, 66) and Resolution of 29 September 1937 (GB 1937, 110), which established 75 year-long collective leasehold titles in favour of the indigenous villages of Bigi Poika, Powaka, Redi Doti and Casipora. These titles differed in important respects from leasehold under both the Civil Code and the *Agrarian Ordinance* as they could be neither alienated nor mortgaged. Further, a village leader, appointed by the governor, was installed who could issue use rights to members of the community within the titled area. In 1981, the enabling law was repealed, and the leasehold titles were automatically terminated. No compensation was provided and there is no evidence that the four communities were even informed that their titles had been terminated.

[185] *See e.g., Comments of the Government of Guyana on the concluding observations of the Committee on the Elimination of Racial Discrimination*, CERD/C/GUY/CO/14/Add.1 (2008), para. 2 (contending that "The Amerindian Act creates a regime of additional or special rights for Amerindians in addition to the rights that they already have under national law. The rights set out in the Amerindian Act apply only to Amerindians. The entire Act is a special measure discriminating in favour of Amerindians, in compliance with article 1, paragraph 4, of the Convention").

[186] *See e.g.*, J. Gilbert, *Historical Indigenous Peoples' Land Claims. A Comparative and International Approach to the Common Law Doctrine on Indigenous Title*, 56 INT'L & COMP. L. Q. 583 (2007).

[187] *See e.g.*, G. Pentassuglia, *Towards a Jurisprudential Articulation of Indigenous Land Rights*, 22 EURO. J. INT'L L. 165 (2011).

[188] *A Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress, with reference to the Declaration, and particularly to articles 26-28, 32 and 40*, E/C.19/2014/3, para. 4. *See also* R. Miller, *The Doctrine of Discovery: The International Law of Colonialism*, 5 INDIGENOUS PEOPLES' J. LAW, CULTURE & RESISTANCE 35 (2019) (on the past, present, and future of the doctrine of discovery, including measures that would allow for its repeal).

[189] CCPR/C/79/Add.105 (7 April 1999), para. 8 (recommending that "the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant"). *See also Decision 1(66), New Zealand*, CERD/C/DEC/NZL/1 (27 April 2005), para. 6 (observing that "the legislation appears to the Committee, on balance, to contain discriminatory aspects against the Maori, in particular in its extinguishment of the possibility of establishing Maori customary titles over the foreshore and seabed…"); *Decision 2(54), Australia,* A/54/18 (18 March 1999), para. 21(2), at para. 6-7; E/C.12/1/Add.31 (10 December 1998), para. 18 (endorsing "the recommendations of Royal Commission on Aboriginal Peoples that policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party"); and CCPR/C/CAN/CO/5 (20 April 2006), para. 8 and 9 (explaining that it remains concerned about practices that "amount to extinguishment of aboriginal rights (arts. 1 and 27);" and recommending that Canada "re-examine its policy and practices to ensure they do not result in extinguishment of inherent aboriginal rights").

resources.[190] The IACHR, also citing IACTHR judgements, unambiguously states that "the American Convention is violated when indigenous lands are considered to be state lands because the communities lack a formal title of ownership or are not registered under such title. A legal system which subjects the exercise and defense of the property rights of [ITPs'] members to the existence of a title of private, personal or real ownership over ancestral territories, is inadequate to make such rights effective."[191] This stands in stark contrast however to the actual situation, e.g., in **Guyana**, where the *Amerindian Act* merely permits an indigenous "village" or "community" [192] to "apply in writing to the Minister for a grant of State lands…."[193] Or **Dominica**, where a Minister has the discretionary power to "grant" additional lands to the Kalinago people.[194] As discussed further below, this is actually an improvement over the other countries under review, which do not have such procedures at all (nor did Guyana prior to 2006, when it was entirely discretionary and occurred in even more of a legal vacuum as far as indigenous peoples' rights were concerned), even if two of the countries appear to be now in the process of drafting or enacting the same.

One of the architects of **Guyana's** *Amerindian Act* explains that the "orthodox view" in Guyana is that there is "no recognition of aboriginal systems of tenure and all land in Guyana is treated as having become the property of the State irrespective of whether it was occupied and used by Amerindians. This position is entrenched in a number of statutes and is the current legal position until the courts of Guyana pronounce otherwise."[195] The case filed by the Akawaio and Arecuna peoples that seeks such a pronouncement otherwise has been inexplicably languishing before Guyana's High Court (a trial court) since October 1998 and for almost five years since the state's final arguments were submitted in April 2017 (at any rate, arguing that any rights that Akawaio may have held were extinguished in 1803).[196] In another case, decided in 2009, the Guyana's Chief Justice (Ag.), determined that

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[190] *See e.g., Report Nº 75/02, Mary and Carrie Dann*, Case Nº 11.140 (United States), OEA/Ser.L/V/II.116, Doc. 46 (2002), para. 144-45 (rejecting the state's argument that indigenous title had been "extinguished by encroachment").

[191] *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources,* OEA/Ser.L/V/II. Doc. 56/09 (30 December 2009) (hereinafter "IACHR Indigenous Lands"), at para. 69 (hereinafter "IACHR Indigenous Lands") (also stating that "Official recognition "should be seen as a process of 'production of evidence establishing the prior ownership of the communities'" and not as a grant of new rights. Territorial titling and demarcation are thus complex acts that do not constitute rights, but merely recognize and guarantee rights that appertain to indigenous peoples on account of their customary use").

[192] *See e.g., Amerindian Act* 2006, Sec. 2 (providing that "'Community or Amerindian Community' means a group of Amerindians organised as a traditional community with a common culture and occupying or using the State lands which they have traditionally occupied or used" and; "'Village or Amerindian Village' means a group of Amerindians occupying or using Village lands;" and "'Village lands' means lands owned communally by a Village under title granted to a Village Council to hold for the benefit of the Village"). *See also* CERD/C/GUY/CO/14 (2006), paras. 15-6 (finding such distinctions between ITPs based on whether they have title or not to be discriminatory).

[193] *Id*. Secs. 59 and 60.

[194] *Kalinago Territory Act*, sec. 44(1), providing that "The Minister may from time to time by State grant vest other lands in the Council to form part of the Reserve."

[195] M. Janki, *Customary Water Laws and Practices: Guyana*. A Paper for the UN FAO (19 August 2005), p. 10, http://www.fao.org/fileadmin/templates/legal/docs/CaseStudy_Guyana.pdf.

[196] *Mendason et al v AG Guyana*, *Final Written Arguments of the Defendants*, HC Guyana, 8 March 2017, para. 9 (asserting that the indigenous plaintiffs have no rights beyond usufruct privileges at the will of the State due the ownership of their lands by the State, the latter being achieved by the operation of colonial laws and provisions of colonial and independence statutes); and para. 21 (asserting that "it is clear that the State is in charge of the land. Any use of State lands by Amerindians is the exercise of limited usufructuary privileges"). *Cf.* A. Butt-Colson, LAND: THE CASE OF THE AKAWAIO AND AREKUNA OF THE UPPER MAZARUNI DISTRICT, GUYANA (Panborough: Last Refuge 2009) (containing an exhaustive study of the Akawaio of the Mazaruni basin, based on over 40 years of research, which shows in minute detail how the Akawaio have occupied and used the entire Mazaruni river basin (and also a much wider area) for thousands of years before the time of European colonization to the present day).

insufficient evidence had been led that could allow a ruling on this point, although he did not discount it entirely.[197] As discussed further in the in-country study and below, with one qualified exception, the rest of the judgment recalls Reisman's reflection that a 1992 decision of the International Court of Justice amounted to a disengagement of judicial responsibility, from past tragedies as well as the present and often dire situations of ITPs, "caused by the inertial, and apparently unthinking, application of anachronistic law."[198] A similar point was made by Morrison JA in the Belize Court of Appeal's decision in the *Maya Leaders* case.[199]

To some extent, it would be better to say the 'misinterpretation of anachronistic law' as there is considerable evidence that colonial administrators either ignored or misunderstood the state of the law, a view that is supported by the preponderance of commonwealth and other jurisprudence on aboriginal/native/Indian

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[197] *Thomas and Arau Village Council v. A.G. Guyana* and Ors., No. 166-M/2007, HC of Guyana, unreported case, 30 April 2009, para. 22 (where the Chief Justice (ag.) observes that, following the introduction of the common law to Guyana in 1917, "[i[n so far as English law gives recognition to native rights and interests in or over land, the courts must view such rights as de jure rights and not de facto"). *See also* A. Richard, *A discussion on the implications of the decision in Thomas & Arau Village Council v AG of Guyana & Guyana Geology & Mines Commission,* n.d., p. 6 (explaining that "lack of conceptual clarity in examining the common law doctrine of indigenous title … as well as the incoherent linking of sovereignty to proprietary rights leads to failure to protect the property rights of indigenous peoples, which has brought both academic and institutional criticism to Guyana"), https://www.academia.edu/39745612/Implications_of_the_decision_in_Thomas_and_Arau_Village_Council_v_AG_of_Guyana_and_GGMC.

[198] M. Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT'L L. 350, 357 (1995) (referring to the ICJs decision in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)).*

[199] *A. G. Belize v Maya Leaders Alliance et al,* Civil Appeal No. 27 of 2010, para. 278 (observing that "The real significance of Brennan J's path-breaking judgment in *Mabo*, in my view, was that it helped to liberate the jurisprudence in this area of the law from the mindless paternalism that had characterised it in a previous age").

title or related rights.[200] This includes mixed jurisdictions like South Africa[201] and Canada (Quebec).[202] In accord with judgments of the JCPC dating back to the turn of the 20th century,[203] this jurisprudence is founded on the principle that a "mere change in sovereignty shall not be presumed to disturb rights of private owners;"[204] and, as stated by the Australian High Court, it "is the fact of the presence of indigenous inhabitants on acquired land which precludes proprietary title in the Crown and which excites the need for protection or rights."[205] The rules in question have been described as "part of a body of fundamental constitutional law that was logically prior to the

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[200] *See e.g.*, *Roberts v. Canada* [1989] 1 S.C.R. 322, at 340 (holding that aboriginal rights and title arise "by operation of law, and do not depend on a grant from the Crown"); *Wik Peoples v. Queensland & Ors*, [1997] 187 CLR 1, at 84 (per Brennan CJ, explaining that "native title does not require any conduct on the part of any person to complete it, nor does it depend for its existence on any legislative, executive or judicial declaration"); *Te Weehi v. Regional Fisheries Officer* [1986] 1 NZLR 682, at 687 (per Williamson J., observing that the "treatment of its indigenous peoples under English common law had confirmed that the local laws and property rights of such peoples in ceded or settled colonies were not set aside by the establishment of British sovereignty"); *Johnson v. MacIntosh* 21 US (8 Wheat.) 543, 574 (1823) per Marshall C.J., stating that acquisition of sovereignty "could not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase.... [The original inhabitants] were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion") and; *Nor Anak Nyawai et al (*12 May 2001), Suit No. 22-28-99-I, High Court for Sabah and Sarawak, at para. 57 (explaining that "[native/aboriginal title] is therefore not dependent for its existence on any legislation, executive or judicial declaration … though they can be extinguished by those acts. Therefore, I am unable to agree … that native customary rights owe their existence to statutes. They exist long before any legislation and the legislation is only relevant to determine how much of those native customary rights had been extinguished"); and *Maya Village of Conejo v. A.G et al*, Supreme Court of Belize, Claim No. 172 (2007), at para. 77 (per Conteh CJ, stating that "I am, however, convinced and fortified by authorities that the acquisition of sovereignty over Belize, first by the Crown and later, by independent governments, did not displace, discharge or extinguish pre-existing interests in and rights to land. The mere acquisition or change of sovereignty did not in and of itself extinguish pre-existing title to or interests in the land").

[201] *See e.g., Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) (where the South African Constitutional Court held that indigenous or customary law is a valid source of property rights and that the community had a right to communal ownership over the indigenous land which included ownership over the minerals and precious stones therein. It also held that the indigenous rights to private property in a conquered territory were recognised and protected after the acquisition of sovereignty – interestingly by the same instrument by which the Crown also acquired what became Guyana – and concluded that the rights of the Richtersveld Community survived annexation). *See also* G. Pienaar, *The Inclusivity of Common Land tenure: A Redefinition of Ownership in Canada and South Africa*, 19 STELLENBOSCH L. R. 259 (2008); and F. Osman, *The Ascertainment of Living Customary law: An analysis of the South African Constitutional Court's Jurisprudence*, 51 J. LEGAL PLURALISM AND UNOFFICIAL L. 98 (2019).

[202] *R. v. Cote* [1996] 3 S.C.R. 139, 173 (where the Supreme Court of Canada found that "the common law recognizing aboriginal title was arguably a necessary incident of British sovereignty which displaced the pre-existing colonial law governing New France").

[203] *Nireaha Tamaki v. Baker* (1901), NZPCC 371; *Te Teira Te Paea v. Te Roera Tareha* (1902), A.C. 56; *Manu Kapua v. Para Haimona* (1913), A.C. 56. In *Nireaha Tamaki,* p. 384, the JCPC expressly approved the statement of the Supreme Court of New Zealand in *R. v. Symonds* (1847) NZPCC 387 (SC(NZ), p. 390, that "Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of the country, whatever may be their present clearer and still growing conception of their dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers." *R. v. Symonds* was reaffirmed by the New Zealand Court of Appeal in *Te Weehi v. Regional Fisheries Officer* [1986] 1 NZLR 682.

[204] *See e.g., Amodu Tijani v. Secretary, Southern Nigeria* [1921], 2 A.C. 399, per Viscount Haldane, at 407; and *in accord*, *Nireaha Tamaki v. Baker*, (1901), NZPCC 371; *Re Southern Rhodesia* [1919] A.C. 211; and, *Adeyinka Oyekan v. Mussendiku Adele* [1957], 1 WLR 876, per Lord Denning, at 880 (holding that, as a "guiding principle," "The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected").

[205] *Mabo v. Queensland (No.2)* (1992) 175 CLR 1, 188 (per Toohey, J). *See also* M. Lindley, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW (London: Longmans, Green & Co., 1926), p. 337 (observing that the accepted rule is that "privately owned property within a region which has been acquired by Conquest or Cession remains unaffected by the transfer of sovereignty unless and until the new sovereign brings about some alteration in its condition by means of his municipal law"); and D.P. O' Connell, THE LAW OF STATE SUCCESSION (Cambridge: CUP 1956), p. 77-101, and; I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (OXFORD: OUP 1990), p. 656-57.

introduction of English common law and governed its application in the colony," and thus was not dependent on formal acts of importation or reception of the common law.[206]

The same is also the case with a considerable body of judicial opinion.[207] As McNeil explains, "looking back at earlier Indigenous rights [judicial] decisions, it is apparent that they were not based on facts, but on prejudicial and erroneous assumptions about Indigenous peoples."[208] Elaborating further, he explains that these "Erroneous factual assumptions resulted in legal precedents that led to the denial of Indigenous rights for around a century. Nor is the impact of these precedents entirely spent. Even today, false arguments are made that there was no basis in nineteenth-century common law for Indigenous land rights."[209] This situation also applies in **Suriname**, the only fully civil law jurisdiction examined here, including in what are considered to be authoritative treatises on land law and regarding basic factual issues that should underlie robust legal analysis and decisions (e.g., prejudicial notions that only indigenous peoples in southern Suriname are 'real' indigenous persons, which are based on nothing more than facile stereotypes).[210]

While similar comments could be made about others,[211] **Guyana** again amply illustrates this point. Ramsahoye's treatise, *The Development of Land Law in British Guiana*, continues to be a standard reference work and in large part underpins continued assertions that indigenous peoples' rights were somehow extinguished by colonisation. In one of its few remarks on indigenous peoples (as usual, a momentary reflection on the dawn of

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206 B. Slattery, *Understanding Aboriginal Rights*, 66 CANADIAN BAR REV. 727, 737 (1987). *See also* P. McHugh, THE MAORI MAGNA CARTA. NEW ZEALAND LAW AND THE TREATY OF WAITANGI (Auckland: OUP 1991), p. 97 ("The Crown's acquisition of sovereignty over New Zealand did not bring with it any legal confiscation of pre-existing tribal property rights. It acquired the *imperium* (right to govern) without displacing the tribes' private rights of land ownership (*dominium*). This state of affairs was recognized by the Treaty of Waitangi, but in making such provision and securing the Crown's so-called 'pre-emptive right', the Treaty did no more than declare what would have been the legal position anyway. This position arises from what is known as the common law doctrine of aboriginal title. This doctrine rests upon the simple premise that a change in sovereignty does not legally displace pre-existing property rights"); and K. McNeil, COMMON LAW ABORIGINAL TITLE (Oxford: OUP 1989).

207 *See e.g.*, M. Shahabuddeen, THE LEGAL SYSTEM OF GUYANA (Georgetown: Guyana Printers 1973), p. 225-31 (discussing 'Jurisdiction over Amerindians', including (demonstrably false) factual assumptions about indigenous peoples, and the 1831 case of *R. v. Billy William*, a Lokono prosecuted for and convicted of murder. His sentence was commuted by Governor Wodehouse in 1856, who commented that "Although dwelling among us … they are still essentially a distinct people, governed by their own customs and petty chiefs, and altogether ignorant of our laws." Shahabuddeen then discusses two other similar cases, the first in 1903, and comments: "[t]hat the process of assimilation is still not complete is suggested by a 1955 case in which tribal laws of self-defence were successfully pleaded on behalf of a young Amerindian charged with the murder of an old man who had threatened to kill his family by tribal curse").

208 K. McNeil, 'The Factual Basis for Indigenous Land Rights', *Articles & Book Chapters, 2833* (2021), p. 1 https://digitalcommons.osgoode.yorku.ca/scholarly_works/2833.

209 *Id*. (also stating that "what was missing in the 1880s was not law supporting Indigenous land rights, but rather evidence that should have led to the application of existing law").

210 A.J.A. Quintus Bosz, DRIE EEUWEN GRONDPOLITIEK IN SURINAME: EEN HISTORISCHE STUDIE VAN DE ACHTERGROND EN DE ONTWIKKELING VAN DE SURINAAMSE RECHTEN OP DE GROND (Paramaribo: U. Suriname 1980), p. 331 (denying that 17th century treaties with indigenous peoples protected territorial rights and opining that "Considering their nomadic existence the Indians would probably not have insisted on an own territory." In the attendant footnote he explains that "their relations with the land appear to be very weak," and he refers to "bushland teachers," "Indian experts," and an early Carib ethnography as support). *Cf*. K. McNeil, COMMON LAW ABORIGINAL TITLE (Oxford: OUP 1989), p. 202-03 (explaining that "modern anthropological research has revealed that few hunting and gathering groups are indiscriminate wanderers. On the contrary, they tend to be attached to definite areas, where they often have spiritual ties, are familiar with the resources available and are able to keep conflict with potentially rival groups to a minimum. Boundaries may or may not be clearly defined, and there may be peripheral strips of shared or no man's land, but generally a group's territorial range will be known both to its members and to neighbouring groups").

211 *Id*. re. Suriname's domain principle.

history), he cites *Williams v. A.G. New South Wales* (1913).[212] However, the Australian High Court directly addressed *Williams* in its 1992 landmark decision in *Mabo v. Queensland* (No. 2), where it affirmed that upon the assertion of sovereignty, radical title indeed vested in the Crown but such radical title was entirely consistent with the maintenance of native or aboriginal title to land. Regarding the ruling in *Williams* – that full beneficial ownership vested in the Crown – which is the sole authority that Ramsahoye relies on, the High Court emphasized that "that proposition is wholly unsupported" and noted the comment in Roberts-Wray's authoritative treatise on British colonial law that this view was "startling and, indeed, incredible."[213] The High Court also rejected another key tenet of Ramsahoye's argument: the notion that the Crown could acquire beneficial ownership of lands on the basis of its prerogative.[214] Yet, even today, the state and others successfully argue that indigenous peoples have no ownership rights to their lands unless affirmatively granted by the state, which is the owner of the same by virtue of colonial intervention, a notion again deemed "wholly unsupported," "startling" and "incredible" in the preponderance of commonwealth jurisprudence and authoritative commentary.

When questioned on the preceding, Guyana has vehemently contended that even if indigenous peoples do not have ownership rights or title without affirmative acts by the state, they nevertheless have "traditional rights."[215] It refers to the savings clause that has been contained in legislation dating back to the early 19th century or in colonial land grants issued prior to that under the Dutch (which were also found in **Suriname**),[216] and which is now in a modified form in section 56 of the *Amerindian Act* 2006.[217] Section 2 of the Act defines a 'traditional right' as "any subsistence right or privilege, in existence at the date of the commencement of this Act, which is owned legally or by custom by an Amerindian Village or Amerindian Community and which is exercised sustainably in accordance with the spiritual relationship which the Amerindian Village or Amerindian Community has with the land, but it does not include a traditional mining privilege." Bulkan rightly explains that

> this provision is a classic example of the disregard for Amerindians running through the law. To have confined recognition specifically to rights or privileges 'heretofore legally possessed' was an artful

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212 F.W. Ramsahoye, THE DEVELOPMENT OF LAND LAW IN BRITISH GUIANA. (Dobbs Ferry, New York: Oceana Publications 1966), p. 25 (also stating that: "[T]he aboriginal Indians … were nomadic tribes whose customary law, if indeed there was any, has not been the subject of academic treatment and may well be left to the anthropologists and historians of the future. The ownership of all land in British Guiana can be traced to the prerogative by virtue of which ownership of land vested in the crown at cession, or to grants from the Dutch West India Company and later from the Crown in favour of the Colonial Government, private individuals and in some cases, corporations").

213 *Mabo v. Queensland (No. 2),* [1992] 175 C.L.R. 1, per Brennan J., at 22, (citing K. Roberts-Wray, COMMONWEALTH AND COLONIAL LAW (1966), at 631).

214 *Mabo v. Queensland (No. 2)* [1992] 175 C.L.R. 1, at 140-41. *See also* K. McNeil, ABORIGINAL TITLE (Oxford: OUP 1989), p. 163-64.

215 *Comments of the Government of Guyana on the concluding observations of the Committee on the Elimination of Racial Discrimination*, CERD/C/GUY/CO/14/Add.1, para. 46 (explaining that it would not remove the "distinction between titled and untitled land" because doing so "is basically saying that wherever Amerindians live is considered their land." This (hopefully facetious) statement was partly made in relation to the State's observation that indigenous people "are free to live in any part of the country…").

216 The Dutch recognized and required respect for Indigenous occupation of land when issuing land to settlers. In accordance with applicable norms, this was normally done through the inclusion of specific guarantee clauses in land warrants (*landbriefen*). Used in both (now) Guyana and Suriname, these guarantee clauses stated that nothing could be done "to injure the Indians dwelling there" or "to molest, prevent or ill-treat in any manner the Free Indians …." *See Report of the Titles to Land Commissioners on Claims to Land in the County of Demerara* (Georgetown: Baldwin and Co., 1892), Appendix, p. 4; M.N. Menezes, *The Amerindians of Guyana: original lords of the soil*, 48 AMÉRICA INDÍGENA 353 (1988), p. 354; and E-R. Kambel and F. Mackay, THE RIGHTS OF INDIGENOUS PEOPLES AND MAROONS IN SURINAME (Copenhagen: IWGIA 1999), p. 36, 91-4.

217 *Amerindian Act 2006*, sec. 57, providing that "Nothing in this Act shall, except where expressly stated, be construed to prejudice or alter any traditional right over State lands and State forests save that where leases have been granted rights shall be exercised subject to the rights of private leaseholders existing at the date of commencement of this Act."

> device. Since Amerindian rights have been systematically contracted from the beginning of European occupation, such a formulation could well ensure the exclusion of any claims not solidly grounded in the prevailing legal framework not to mention denying recognition to any expanding interpretations as a result of developments in international law.[218]

Even a cursory review of the 1910 *State Lands (Amerindian) Regulations* illustrates just how drastically so-called traditional rights have been heretofore curtailed.[219] To make matter worse, the 2006 Act also added a new and discriminatory condition insofar as no other person or group's rights in Guyana is subject to the same, nor is there a reasonable purpose that it should only apply to indigenous peoples. This condition requires that these 'traditional rights' must be exercised "sustainably in accordance with the spiritual relationship" of the people, where 'sustainable' is not defined and, in practice, often means whatever those who use it would like it to mean, irrespective of whether there is a rational, factual basis for the assertion. In sum, and as Bulkan observes,[220] these 'rights' have been contracted to "a point that they are almost meaningless," a point seemingly affirmed by Guyana's Chief Justice (Ag.) in the 2009 judgment noted above and discussed in more detail in the Guyana in-country report and below.[221]

It is important to recall in the light of the general theme of this section that the 1837 report of the British House of Common's Select Committee on Aborigines stated the following, some 23 years after the assertion of British sovereignty over what is now Guyana:

> A debt is due to the aboriginal inhabitants of British Guiana of a very different kind from that which inhabitants of Christendom may, in a very certain sense, be said to owe in general to other barbarous tribes. The whole territory which has been occupied by Europeans, on the Northern shores of the South American Continent, has been acquired by no other right that that of superior power; and I fear that the natives whom we have dispossessed, have to this day received no compensation for the loss of lands on which they formerly subsisted. However urgent is the duty of economy in every branch of public service, it is impossible to withhold from the natives of the country the inestimable benefit which they would derive from appropriating to their religious and moral instruction some part of that income which results from the culture of the soil to which they or their fathers had an indisputable title.[222]

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[218] A. Bulkan, *Amerindian Land Rights: Is the Struggle for Equality Really Over?* 3 GUYANA L.R. 30, 32-3 (2002) (discussing an analogous provision in Section 41 of the State Lands Act (now repealed by the Amerindian Act 2006): "Nothing in this Act shall be construed to prejudice, alter, or affect any right or privilege heretofore legally possessed, exercised, or enjoyed by any Amerindian in Guyana…").

[219] The 1910 *State Lands (Amerindians) Regulations*, adopted pursuant to Section 41, substantially limited Amerindian 'rights and privileges'. For instance, Regulation 5 states that any Amerindian may occupy ungranted or unlicensed State lands for the purpose of residence only and may not clear the forest or cultivate ungranted State lands. Regulation 9(1) provided that any Amerindian who wants to cut timber or dig, remove or carry away any item from State lands will have to apply for permission, which can be denied.

[220] *See* A. Bulkan, *Amerindian Land Rights: Is the Struggle for Equality Really Over?* 3 GUYANA L.R. 30, 2002, at 32-3 (explaining that "this provision is a classic example of the disregard for Amerindians running through the law. To have confined recognition specifically to rights or privileges 'heretofore legally possessed' was an artful device. Since Amerindian rights have been systematically contracted from the beginning of European occupation, such a formulation could well ensure the exclusion of any claims not solidly grounded in the prevailing legal framework not to mention denying recognition to any expanding interpretations as a result of developments in international law").

[221] *See also* D. James, *The Amerindian Act 2006 and the Rights of Indigenous Peoples to Lands, Territories and Resources: A Critique*, 2 *New Guyana Bar Review* 106 (2008); A. Bulkan, *From Instrument of Empire to Vehicle for Change: The Potential of Emerging International Standards for Indigenous Peoples of the Commonwealth Caribbean*, Faculty Workshop Series, Faculty of Law. University of the West Indies, 17 March 2010, p. 24-5, http://www.cavehill.uwi.edu/news/articles/2010/March/Bulkan_Instrument_to_Vehicle.pdf.

[222] *Report of the Select Committee on Aborigines (British Settlements): with the minutes of evidence, appendix and index* (London: Parliamentary papers/House of Commons, 1837), p. 10.

This bears repeating: assertions of state ownership of the lands within now-Guyana and to which "they or their fathers had an indisputable title" are based on "no other right that that of superior power," and "the natives whom we have dispossessed, have to this day received no compensation for the loss of lands…." Guyana would argue that it has made considerable progress in titling indigenous lands and that the *Amerindian Act* requires that a percentage of mining royalties paid to the government and derived from titled indigenous lands are deposited in a Fund.[223] The details of the former are discussed below and, at least in relation to the other countries under review, there is no question that Guyana stands above in this regard. That said, its titling process is substantially at odds with international standards – as is the legislation that sets out the process more broadly – and the use of mining royalties is opaque at best and has been described as a 'slush fund' that has been misused for electioneering purposes, and the fund was essentially shut down by the Auditor General in 2015.[224] Moreover, the impetus for the titling process was a condition of Guyana's independence from the United Kingdom[225] and, pursuant thereto, an Amerindian Lands Commission was established to make recommendations for title in 1966.[226] Its 1969 report recommended that indigenous peoples receive title to 24,000 square miles out of the

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[223] *Amerindian Act* 2006, sec. 51(3), providing that "(3) The Guyana Geology and Mines Commission shall transfer twenty per cent of the royalties from the mining activities to a fund designated by the Minister for the benefit of Amerindian Villages." *See also Report of the Auditor General on the Public Accounts of Guyana and on the Accounts of Ministries/Departments/Regions for the Fiscal Year ended 31 December 2015*, Vol. I (Georgetown: Government of Guyana, September 2016), para. 253 (explaining that "According to the bank statements for the year 2015, the [Amerindian Purposes Fund] had a balance of $838.679M as at 1 January 2015. … The closing balance as at 31 December 2015, was $20.360M [or around 99,000 US$).

[224] '$818 M unaccounted for from Amerindian Purposes Fund - Auditor General's report', *Stabroek News*, 26 October 2016, https://www.stabroeknews.com/2016/10/20/news/guyana/818-m-unaccounted-amerindian-purposes-fund/; and 'Amerindian Purposes Fund mired in financial impropriety – AG's report', *Stabroek News*, 8 November 2015, (reporting that "Numerous financial improprieties continue to dog the Amerindian Purposes Fund (APF), according to the Auditor-General's report for 2014 which also questioned the legality of the fund"), https://www.stabroeknews.com/2015/11/08/news/guyana/amerindian-purposes-fund-mired-in-financial-impropriety-ags-report/. More recently, it has come to light that "the Governments of Guyana, under the PPP and APNU/AFC administrations, cannot account for the over 2 billion [Guyana] dollars missing from the Amerindian Fund…." *See* 'I wish to remind the Prime Minister of commitments made that are yet to yield results', Letter to the Editor, Lenox Schuman MP, *Stabroek News*, 9 December 2021 (stating further, and referring to use of the fund for electioneering, that "One can only guess as to where it ended up. Successive administrations have continued to transpose 1492 to the 21st century where beads are replaced by bicycles, boats, tractors et al in exchange for our silence as our rights get trampled upon"), https://www.stabroeknews.com/2021/12/09/opinion/letters/i-wish-to-remind-the-prime-minister-of-commitments-made-that-are-yet-to-yield-results/.

[225] At the 1960 British Guiana Constitutional Conference, British Guiana obtained full internal self-government and its eventual independence from Great Britain was agreed upon. At the 1960 Conference it was agreed that the following would be incorporated into the 1961 Constitution: "The Amerindian minority in British Guiana would be safeguarded in two ways: (i) as individuals, by provisions of the Bill of Rights; (ii) by provision in the August, 1961, Constitution that responsibility for Amerindian Affairs should be a specific part of a Ministerial portfolio" (Report of the British Guiana Constitutional Conference 1960, p. 12). The British Guiana Independence Conference was opened in 1962 and concluded in 1965 with the submission of its report. Annex C of the Report dealt directly with indigenous land rights and was repeated verbatim in the Amerindian Lands Commission Act, Sections 2 and 3 of which were entrenched in Section 17 of the *Guyana Independence Order* 1966 and in Section 20 of the 1980 Guyana Constitution. The measures specified in Annex C were a legal condition of Guyana's independence; paragraph 1 of Annex C reads: "The Government of British Guyana has decided that the Amerindians should be granted legal ownership or rights of occupancy over areas and reservations or parts thereof where any tribe or community of Amerindians is now ordinarily resident or settled and other legal rights, such as rights of passage, in respect of any other lands where they now by tradition or custom de facto enjoy freedoms and permissions corresponding to rights of that nature. In this context it is intended that legal ownership shall comprise all rights normally attaching to such ownership."

[226] *Amerindian Lands Commission Ordinance* 1966 (re-enacted as *The Amerindian Lands Commission Act* (Cap. 59:03). Section 20 of the 1980 Guyana Constitution reads: "Notwithstanding anything contained in this Constitution, Sections 2 and 3 of the Amerindian Lands Commission Act as in force immediately before the appointed day may be amended by Parliament only in the same manner as the provisions specified in Article 164(2)(6) of the Constitution." Article 164(2)(6) requires a two-thirds majority of Parliament and submission of the proposed amendment to a vote by the electorate, prior to signature by the President.

43,000 square miles over which indigenous peoples had asserted rights (Guyana is 83,000 square miles).[227] It wryly noted that "here and there the view was expressed that the land on which Amerindians lived was already theirs and that it was odd for Government at this stage to talk of giving them what they already possess."[228] To-date, title has been "granted" to around 14,000 square miles and the (flawed) process is ongoing.

That the rights of indigenous peoples in **Guyana** – rights to own, control and peacefully enjoy and benefit from traditional lands and resources especially – continue to be routinely subordinated to the economic development priorities of others was confirmed in a November 2021 editorial in the *Stabroek News*, Guyana's main daily newspaper. Opining that the government "cannot continue to treat the Indigenous people with such scant regard, imposing decisions on them relating to the areas where they live," (in this instance a slew of mining concessions in traditional Wapichan lands), the editorial team explains that "[f]or all its promotion of a green approach, the government has never managed to reconcile this with its drive for what it regards as economic development. When there is a conflict, the latter always wins."[229] Others have documented that the same is the case where there is a conflict with indigenous peoples' rights, and this is normally the case in all the countries under review, irrespective of the evidence of the substantial harm it has caused and continues to cause ITPs. This is the subject of the next section, which again focuses mostly on Guyana and, to a lesser extent, Suriname and Belize.

Finally, it is sometimes claimed that **Suriname's** civil law tradition and, to a lesser extent, **Guyana's** retention of some Roman-Dutch law pertaining to property renders them so different that conclusions or solutions that may be drawn from elsewhere cannot apply. However, this view is misplaced for the following reasons. First, neither uniformly applied Roman-Dutch law as it was known in Europe as both employed a *sui generis* form of colonial law that over time incorporated aspects of some Roman-Dutch law.[230] They did so well into the late 19th and even 20th centuries, a situation that was not helped by the legal profession which often sought (not always successfully) to rationalize the same with what they had learnt in various European law schools.[231] For instance,

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[227] The Commission recommended that 128 Amerindian communities in Guyana receive some form of land title, in almost all cases communal freehold title. (ALC Report, p. 22-9). One community was recommended for a conditional title grant and two others for reservation status on the basis that they were 'too primitive' to comprehend a land title. Many requests were rejected by the Commission, stating that the area requested was "excessive and beyond the ability of the residents to develop and administer." (ALC Report, p. 77). The Commission also did not visit all areas of Guyana and therefore did not account for a number of communities in its report.

[228] *Report of the Amerindian Lands Commission* (Georgetown: Government of Guyana 1969), p. 4. *See also* A. Sanders, *British Colonial Policy and the Role of Amerindians in the Politics of the Nationalist Period in British Guiana, 1945-68,* 36 SOCIAL AND ECONOMIC STUDIES 77 (1987); J. Bulkan, *Original Lords of the Soil? The Erosion of Amerindian Territorial Rights in Guyana*, 22 ENVIRONMENT AND HISTORY 1 (2015); and J. Bulkan and A. Bulkan, *"These Forests Have Always Been Ours": Official and Amerindian Discourses on Guyana's Forest Estate* in M. Forte (ed.), INDIGENOUS RESURGENCE IN THE CONTEMPORARY CARIBBEAN: AMERINDIAN SURVIVAL AND REVIVAL (New York: Peter Lang 2006).

[229] 'Marudi mining', Editorial, *Stabroek News*, 26 November 2021, https://www.stabroeknews.com/2021/11/26/opinion/editorial/marudi-mining/.

[230] *See e.g.,* C. Weiske, LAWFUL CONQUEST? EUROPEAN COLONIAL LAW AND APPROPRIATION PRACTICES IN NORTHEASTERN SOUTH AMERICA, TRINIDAD, AND TOBAGO, 1498–1817 (Berlin and Boston: De Gruyter 2021) (reviewing the lawfulness of colonization by the Spanish and Dutch on the northeast corner of South America between 1492 and 1817, including Suriname and Guyana, and proposing redress via the restitution of indigenous territories within the UNDRIP and CARICOM Reparations frameworks).

[231] *See e.g.*, M. Shahabuddeen, THE LEGAL SYSTEM OF GUYANA (Georgetown: Guyana Printers 1973), p. 198-9 and 206-8 (explaining e.g., p. 206-7, that the Attorney General of BG had said in 1881 that "'[t]he real difficulty the judges in British Guiana have to contend with is that they are called on to administer a law with which they have no previous acquaintance and which is only to be learnt by studying the old writers on the subject whose works are wither in medieval Latin or Dutch. … {T]he difficulty is increased by the fact that on most points writers of authority are to be found taking divergent views, their views being influenced by the legislation or judicial decisions of

most of the land titles issued in Suriname until the 1930s were unknown to the Dutch legal system. *Allodiale eigendom en erfelijk bezit* is the oldest land title issued by the Dutch in Suriname. Its nature and content continue to puzzle legal practitioners today, although there seems to be consensus that the title developed out of land warrants first issued by the English between 1650 and 1667.[232] Suriname's much discussed 'domain principle' (that the state owns all land except that for which title can be shown) was imported – and inverted in terms of the burden of proof[233] – by a colonial official from Indonesia, and much of contemporary thought on the same is based on his 1954 dissertation.[234] Both employed a hybrid legal system, comprised of colonial law, and various elements of imported English and Dutch law (actually law from certain Dutch provinces e.g., Zeeland and North Holland), at least until the Dutch Civil Code was imported to Suriname in 1869 and the common law was formally introduced by statute to British Guiana in 1916, and even then not fully in both cases.[235] Both also developed institutions that were unique to local circumstances more so than copies and transplants of Dutch institutions.[236] As one scholar notes, "the Dutch Atlantic was politically fragmented. Different institutional arrangements existed in the various colonies, adapted to a wide range of local specificities and a variety of legal statuses."[237]

Second, and somewhat ironically given the preceding, the first constitutional instrument that applied to both Suriname and now-Guyana, the 1629 *Ordre van Regieringe soo in Policie als Justitie in de Plaetsen verovert ende te veroveren in West-Indiën* (the "Order of Government, Police and Justice in Locations Conquered or to be Conquered in the West Indies")[238] explicitly guaranteed the rights of indigenous peoples.[239] The *Ordre*, drawn up

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the particular state of Holland with which they happen to be best acquainted.' … The problems of inaccessibility were compounded when English lawyers arrived in the post-conquest period").

232 *See e.g.*, M.A. Blecourt, *Allodiaal eigendom en erfelijk bezit in Suriname*, 4 NEW WEST INDIAN GUIDE 129 (1923); A.J.A. Quintus Bosz, *Het Recht van Allodiale Eigendom en Erfelijk Bezit in Suriname*, 1 VOX GUYANAE 79 (1954); and A.C. Ramautar, BOEDELPROBLEMATIEK IN SURINAME. OVER VEREFFENING VAN TOT EEN ONVERDEELDE OF ONBEHEERDE BOEDEL BEHORENDE RECHTEN OP (PLANTAGE)GRONDEN IN SURINAME (Zutphen: Uitgeverij Paris 2015). On the English period in Suriname, *see e.g.,* M. Parker, WILLOUGHBYLAND: ENGLAND'S LOST COLONY (New York, NY: Thomas Dunne Books 2017); K. Fatah-Black, WHITE LIES AND BLACK MARKETS. EVADING METROPOLITAN AUTHORITY IN COLONIAL SURINAME, 1650-1800 (Leiden: Brill 2015) and C. Arena, *Aphra Behn's Oroonoko, Indian Slavery, and the Anglo-Dutch Wars* in L.H. Roper (ed.), THE TORRID ZONE: CARIBBEAN COLONIZATION AND CULTURAL INTERACTION IN THE LONG SEVENTEENTH CENTURY (Columbia: U. South Carolina Press 2018).

233 *See e.g.*, E. H. 'sJacob, *Landsdomein en adatrecht* (PhD diss. Utrecht U., 1945), p. 229-30. Professor 's Jacob's (coincidentally Quintus Bosz's academic supervisor) authoritative work explained that the domain declaration could not be used by the Government to force natives to prove that they owned the land. This would be contrary to the intent of the Indonesian domain declaration, which specifically provided that lands used by the natives were their property. If the State wanted to dispose of land to which native property rights were attached, it would have to prove indisputably that the land was indeed free.

234 *See e.g.*, E-R Kambel and F. MacKay, *The Rights of Indigenous Peoples and Maroons in Suriname* (Copenhagen: IWGIA 1999) (deconstructing and contesting some of his arguments); and G.W. van der Meiden, BETWIST BESTUUR. EEN EEUW STRIJD OM DE MACHT IN SURINAME, 1651–1753 (Amsterdam: De Bataafsche Leeuw 1987).

235 *Civil Law of British Guiana Ordinance* (1916); now the *Civil Law of Guyana Act*, Cap. 6:01. *See also* J. Ledlie, *Roman-Dutch Law in British Guiana and a West Indian Court of Appeal*, 17 J. SOC. COMP. LEGISLATION 210 (1917).

236 *See e.g.*, K. Fatah-Black, *The usurpation of legal roles by Suriname's Governing Council, 1669–1816,* 5 COMP. LEGAL HISTORY 243 (2017), p. 243-4 ("a Governing Council (*Raad van Politie en Criminele Justitie)* functioned simultaneously as political council to the governor, as a criminal court and also elected the Civil Court. Members of the Governing Council were nominated from the Protestant plantocracy…. Over time, the Governing Council in Suriname was able to usurp practically all other forums for adjudication of both civil and criminal cases. The one exception was the indigenous population, who from the onset remained outside the purview of the Governing Council. They 'remained recognised as their own masters', as governor Jan Nepveu stated in 1765").

237 *Id*. p. 246.

238 J. Schiltkamp, *Legislation, Government, Jurisprudence, and Law in the Dutch West Indian Colonies: The Order of Government of 1629*, 5 PRO MEMORIE. BIJDRAGEN TOT DE RECHTSGESCHIEDENIS DER NEDERLANDEN 320 (2003).

239 *See e.g.*, M. Shahabuddeen, THE LEGAL SYSTEM OF GUYANA (Georgetown: Guyana Printers 1973), p. 178 *et seq*. *See also* R.W. Lee, AN INTRODUCTION TO ROMAN-DUTCH LAW, 5th ed. (Oxford: Clarendon Press 1953), p. 8.

by the Dutch West India Company and enacted by the States General,[240] sets out what laws would apply to certain issues.[241] It was wholly applicable to Guyana and Suriname until the resolutions of the States General of 4 October 1774[242] modified some of its provisions (noting that Berbice[243] was often subject to different laws than those in effect in Demerara and Essequibo).[244] But even then the relevant provision was largely untouched until the 1930s in Suriname[245] and possibly until 1917 in Guyana (and the general principle of saving some prior rights remained intact even thereafter).[246] Property rights were essentially based on "local feudal regulations," and the "indigenous population was allowed to continue to adhere to their own laws without interference by the colonists."[247] This was consistent with the *Ordre*, which explicitly provided in Article 14 that "… the Spaniards, Portuguese and Naturals [Natives] of the land who subject themselves to the government and obedience of the lords States-General will keep their *ingenios*, lands, houses and other goods and will remain and protected in the free possession and use thereof."[248]

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[240] A. Renton & G. Phillimore (eds.), BURGE'S COMMENTARIES ON COLONIAL AND FOREIGN LAWS GENERALLY AND IN THEIR CONFLICT WITH THE LAW OF ENGLAND, Vol.1, (London: Sweet & Maxwell 1907), p. 119.

[241] *See e.g.*, M. Shahabuddeen, THE LEGAL SYSTEM OF GUYANA (Georgetown: Guyana Printers 1973), p. 178-82 (e.g., Article 59 provides that the "Political Ordinance issued by the States of Holland in the year 1582" shall apply to marriage, wills and intestate succession, whereas Article 61 provides that the ordinary written laws shall apply to contracts and transactions and Article 60 provides that "all conveyances, as well as bonds and mortgage deeds" shall fall under the law that are "customary in the United Provinces").

[242] *Extract from the Register of the Resolutions of Their High Mightinesses the States-General of the United Netherlands,* 4 Oct. 1774 (*Laws of Demerara and Essequibo*) in T.C. Rayner (ed.), THE LAWS OF BRITISH GUIANA. A NEW AND REVISED EDITION PREPARED UNDER THE AUTHORITY OF THE STATUTE LAWS (Rev. Ed.), Vol. I, (London: Waterlow & Sons 1905), providing that "It shall be further enacted, as it is by these presents enacted accordingly, that all the laws of Holland in general and more particularly all Law, Statutes, Resolutions and Ordinances of Their High Mightinesses, or of the Committee of Ten with the approbation of Their High Mightinesses, heretofore transmitted, or hereafter to be transmitted … shall be the rule of their judgments").

[243] *See e.g.,* M. van den Bel, L. Hulsman & L. Wagenaar, THE VOYAGES OF ADRIAAN VAN BERKEL TO GUIANA. AMERINDIAN-DUTCH RELATIONSHIPS IN 17TH-CENTURY GUYANA (Leiden: Sidestone Press 2014) (concerning the colonization of Berbice and its relationship to the other Dutch colonies of Suriname, Demerara and Essequibo).

[244] F. Ramsahoye, The Development of Land Law in British Guiana, *supra*, p. 2-3; R. Lee, An Introduction to Roman-Dutch Law, *supra*, p. 8.

[245] The 1865 Government Regulation, a kind of constitution, provided that regulations for granting ownership or leasehold titles must be prescribed by law or, in absence thereof, by Colonial Ordinance. Although a Surinamese Civil Code, almost an exact copy of the Dutch Civil Code, was introduced in 1869, the regulations required by the Government Regulation did not appear until 1937 when the *Agrarian Ordinance* was enacted. The *Agrarian Ordinance* stipulated in article 1(1) that: "The allocation of domainland … shall be carried out with respect of the legal rights and entitlements of third parties, including the rights of Bushnegroes and Indians on their villages, settlements and forest plots."

[246] On 13 August 1814, Demerara, Essequibo and Berbice were formally ceded to Great Britain by the Treaty of London concluded between the British Crown and the Netherlands. A further Convention was made "relative to the Colonies of Demerara, Essequibo and Berbice" on 12 August 1815, providing in Article XII, that: "All questions of a private nature relating to such property as comes within the operation of this Convention shall be decided by the competent Judicial Authority, according to the laws in force in said colonies." The *Ordre van Regeringe* was thus saved (as it was by the Articles of Capitulation and the instrument of cession and by the operation of British colonial law). Moreover, in international law, the accepted rule is that "privately owned property within a region which has been acquired by Conquest or Cession remains unaffected by the transfer of sovereignty unless and until the new sovereign brings about some alteration in its condition by means of his municipal law." D.P. O' Connell, THE LAW OF STATE SUCCESSION (Cambridge: CUP 1956), p. 77-101. *See also* T. O. Elias, *BRITISH COLONIAL LAW. A COMPARATIVE STUDY OF THE INTERACTION BETWEEN ENGLISH AND LOCAL LAWS IN BRITISH DEPENDENCIES* (London: Stevens & Sons 1962), p. 101-18; and C. Clark, A SUMMARY OF COLONIAL LAW, THE PRACTICE OF THE COURT OF APPEALS FROM THE PLANTATIONS, AND OF THE LAWS AND THEIR ADMINISTRATION IN ALL THE COLONIES (London: Sweet 1834), p. 4.

[247] K. Fatah-Black, *The usurpation of legal roles by Suriname's Governing Council, 1669–1816,* 5 COMP. LEGAL HISTORY 243 (2017), p. 247. *See also* AJA. Quintus Bosz, *De weg tot de invoering van de nieuwe wetgeving in 1869 en de overgang van het oude naar het nieuwe burgerlijk recht* in EEN EEUW SURINAAMSE CODIFICATIE. GEDENKBOEK 1869–1969 (Paramaribo: Surinaamse Juristen Vereniging, 1969).

[248] Article 14 further instructed the Councils to maintain public order, peace and unity between all those dwelling 'under' her territory and to "take special care that the Spaniards, Portuguese and Naturals of the land who enter in their cities, fortresses, on land, on sea or in ships and resort under the territory and the protection of the Lords States General, will not be violated, hindered or done injustice to their persons, wives, children, family, houses, money, trade and all goods none exempted, but will adequately protected, having all those acting to the contrary vigorously punished…."

Recognition of indigenous ownership of land was part of Dutch policy and law in the majority of its colonial holdings, even if the local administration acted inconsistently therewith.[249] Dutch legal scholars as far back as Grotius rejected the view that the Dutch sovereign had any property rights to land, anywhere, beyond title to territory in international law (i.e., among states *inter se*) unless it could produce a private law title just like anyone else.[250] This was also the case where it asserted sovereignty on the basis of the operations of the West India Company,[251] whose Charter also contained protections for indigenous peoples.[252] Dutch scholars explicitly rejected the proposition that the sovereign held *dominium directum* (either in the form of underlying title or private property rights), stating that the powers of the sovereign were confined to *imperium* (governing jurisdiction, including the right to regulate, compulsorily acquire and dispose of lands).[253] They relied on classical Roman jurists to reach this conclusion. Cornelius van Bynkershoek, the most eminent Dutch legal scholar of the 18th century, wrote in his *Questions of Public Law* that "when Seneca spoke of this right he employed the word *potestas* [power], saying 'Kings have *potestas* over all things, *proprietas* [ownership] applies to individuals."[254] To further illustrate the point, in 1913, the Dutch government appointed a Commission to look at the need for a specific legal provision in Suriname that would vest ownership over ungranted lands in the state. Discussing the *Ordre van Regeringe*, this Commission found that "with the exception of the rights, which have been left to the … Amerindian population and the Bushnegroes [Maroons], one may assume the entire soil which can be cultivated, to be … domain."[255] The Commission also found that a declaration of state ownership over domain/state lands

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[249] *See e.g.*, G.J. van Grol, *De Grondpolitiek in het West-Indische Domein der Generaliteit* [Land Policy in the West-Indian General Domain], Part II, 1942, p. 155 (van Grol, former governor of the Dutch Caribbean Island of St. Eustatius, wrote a study on land law in the Dutch West Indies at the request of the Dutch government in 1931. He records that Dutch law required that sovereign and property rights held by ITPs had to be respected and acquired "in a friendly manner" and "fair compensation had to be rendered for interferences with or deprivations thereof"). *See also* H. Berman, *Perspectives on American Indian Sovereignty and International Law, 1600 to 1776* in O. Lyons & J. Mohawk (eds.), DEMOCRACY, INDIAN NATIONS AND THE U.S. CONSTITUTION (Santa Fe: Clear Light 1992), p. 136; and, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (Charlottesville: The Michie Co., 1982 ed.), p. 53.

[250] J. Brown Scott (ed.), THE FREEDOM OF THE SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE, A DISSERTATION BY HUGO GROTIUS [1609] (New York: OUP 1916), p 13 ("Discovery confers no rights unless the area was uninhabited. Indeed, the Indians, when first discovered by the Spanish … were idol worshippers and wrapped in serious error. Nonetheless, they had full sovereignty, both over public and private property which was their natural right which could not be taken away. Thus it is heretical to believe that those outside the faith do not have full sovereignty over their possessions, for this reason: plunder is not excused by the fact that the plunderer is a Christian").

[251] Through its Charter of 1621, the States-General granted the WIC a trade monopoly over the Americas and the west coast of Africa, empowering it to establish settlements and make treaties with the Indigenous peoples it encountered. The Charter provided only a trade monopoly without a grant of territory or title to land. *See e.g.*, F. Jennings, THE INVASION OF AMERICA: INDIANS, COLONIALISM AND THE CANT OF CONQUEST (New York & London: W.M. Norton & Co., 1976), p. 131; A. Trelease, INDIAN AFFAIRS IN COLONIAL NEW YORK: THE SEVENTEENTH CENTURY, (Lincoln: University of Nebraska 1997), p. 40.

[252] In 1629, the WIC issued a *Charter of Privileges and Exemptions* to encourage colonial enterprises by its members. According to Clementi, this "provided that any member of the Company might obtain an area of unoccupied land" in certain areas, "or 'so far into the country as the situation of the occupiers will permit,' by purchasing such area from the Indians and planting upon it a colony of fifty persons…"). C. Clementi, CONSTITUTIONAL HISTORY OF BRITISH GUIANA (London: Macmillan and Co., 1937), p. 8. In 1664, the States-General published an official interpretation of the Charter in which it "declared their meaning to have been expressly, and still to be, that the Company was empowered, and still is empowered, to establish Colonies and Settlements of people on lands which are not occupied by others…." *Counter-Case presented on the part of the Government of Her Britannic Majesty to the Tribunal of Arbitration between Her Britannic Majesty and the United States of Venezuela (Venezuela No. 2 1899*) (London: HMSO 1899), p. 49 & 56.

[253] C. van Bynkershoek, QUAESTIONES JURIS PUBLICI, 3.15 (T. Frank, trans.; Oxford: Clarendon Press 1930); and Grotius, *De Jure Belli ac Pacis* ([1625]; Trsl. ed. 2 vols. 1925), p. 218-19.

[254] *Id*. p. 218 (ref. Seneca, *De Beneficiis*, 7.4.2).

[255] *Commissie-Radier, Rapport van de Commissie benoemd bij de Resolutie van Z.E. den Minister van Koloniën d.d. 19 maart 1913, afd. B, no. 13, om te dienen van advies omtrent de door de Suriname-Commissie bepleite herziening van de Surinaamsche wetgeving betreffende het beheer der domeinen en de uitgifte van gronden en om c.q. de vereischte voorstellen in verband daarmede in te dienen*

was not needed as the state could achieve all of its purposes through the exercise of its jurisdiction over those lands.

Last, and perhaps most importantly, the states reviewed herein have ratified various human rights instruments that guarantee ITPs' rights. This provides the basis, irrespective of the nature of their legal systems, to recognize and secure those rights and to do so within their own legal traditions and national circumstances. The treaties themselves require that the states give effect to their provisions in domestic law and provide effective remedies by which the guaranteed rights may be enforced.[256] This avoids any need to root around in the historical archives or Roman or medieval Dutch texts to seek justification for recognizing and securing ITPs' rights. Instead, this is a matter of contemporary and international legal contractual obligation and, in part, customary international law. As discussed below, many of these human rights instruments have constitutional status, either directly or via authoritative jurisprudence, in the national law of the countries under review.

### E. Judicial Treatment of ITPs' Rights: The Example of Extractive Industries

> Where our people walk softly in the great forest land dredges come. The mighty trees fall, huge pits are dug by water jets…. [T]hey leave what was once beautiful now untidy and useless, their mud choking the creeks and blocking the river channels. They say "why bother? No one will live here again." It is time our people, here so long, are given justice. We hear of huge concessions given to overseas companies, but what "concessions" to the landless people whose love for the land and skill in conserving it go back maybe two thousand years? The future of people in the years ahead looks dark with storm and destruction unless our voices are heard.[257]

In practice, remedies for violations of ITPs rights are often limited precisely because domestic law is absent, contrary to, or fails to adequately recognize the corresponding rights, or contains a variety of in-built mechanisms that compromise or even nullify those rights.[258] This is especially pronounced in relation to resource exploitation, agro-business, conservation (e.g., protected areas) and, more recently, a growing number of climate change mitigation and adaptation initiatives. In **Surinamese** law, for instance, ITPs' rights – 'privileges at will' is the most accurate description[259] – are subordinated *ab initio* in favour of anything the State classifies as being in the (non-justiciable) public interest or an approved development project, and they are "trumped" by third party interests to the extent that the state has granted some form of permission, concession or title.[260] As found by the IACHR, the "effect is to remove [ITPs'] land issues from the domain of judicial protection."[261]

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[Report of the Commission appointed by the Minister of Colonies to provide advice on the reform of Surinamese legislation regarding the management of the domain and the allocation of land] ('s Gravenhage 1914), p. 1.

256 *See e.g.*, ICCPR, arts. 2 and 14; ICERD, arts. 2 and 6; American Convention on Human Rights, arts 1, 2, 8 and 25; and American Declaration on Rights and Duties of Man, arts. Xx and xx.

257 *Middle Mazaruni Conference Statement*, Conference of Middle Mazaruni Akawaio Communities, October 16-18, 1993, p. 1.

258 *See e.g.*, B. Gunn, *Remedies for Violations of Indigenous Peoples' Rights*, 69 U. TORONTO L.J. 150 (2019) (discussing Canadian law and remedies and comparing these with human rights law).

259 *Twelve Saramaka Clans (Suriname), Report No. 09/06,* IACHR, Merits (2 March 2006), para. 235 (explaining that Suriname's law merely accords ITPs an unenforceable "privilege or permission to use and occupy their lands at the discretion of the State").

260 *Id*. para. 241-42 (observing that the public interest doctrine in Suriname "substantially limit[s] the fundamental rights of the indigenous and Maroon peoples to their land *ab initio*, in favor of an eventual interest of the State that might compete with those rights. What is more, according to Suriname's laws, mining, forestry, and other activities classified as being in the general interest are exempted from the requirement to respect customary rights. In practice, the classification of an activity as being in the "general interest" is not actionable and constitutes a political issue that cannot be challenged in the Courts").

261 *Id*. para. 242.

**Suriname** considers that ITPs' territories form part of the 'free domain', meaning lands "which the State can dispose of freely," and this is the case precisely because Suriname has unreasonably failed to recognize their rights and issue titles.[262] It also interprets Article 41 of its Constitution to mean that the State owns all lands and natural resources and to vest an over-riding and all-consuming power in the state to use and exploit the same at any time. On this basis, it granted a massive gold mining concession that affects 33 Saamaka communities to a Canadian multinational mining company, IAMGOLD, notwithstanding an express prohibition in the 2007 judgment of the IACTHR.[263] When pressed by the IACTHR, Suriname argued that it intended to consult the Saamaka people *after* the concession agreement had been concluded and that it will comply with the order of the IACTHR that FPIC be obtained in relation to the Mineral Agreement, "provided that the final decision is reserved to the national government."[264] Additional concessions have been granted in Saamaka territory, covering at least 100,000 hectares, all of which is illegal pursuant to the IACTHR's judgment. In one of these, the Saamaka of Balingsoela village publicly protested the mining operations (this village was one of those forcibly displaced by a hydroelectric dam in the mid-1960s).[265] The miner sued the state, arguing that the state was obligated to protect his mining operation from the community. The Cantonal Court agreed, ordering that the state intervene and, if necessary, that it deploy police and military units.[266] To add insult to injury, it cited the miner's rights under Article 8 of the Constitution (prohibiting discrimination and requiring equal protection of the law) as the basis for its decision and entirely disregarded how such principles may apply to the Saamaka.[267] Balingsoela is now being threatened again with forcible relocation by high-ranking officials of the state, and it is not unique in this regard.[268]

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[262] CERD/C/SUR/12, p. 29.

[263] *Saramaka People (Monitoring Compliance),* Orders of the IACtHR, 26 September 2018, para. 31 ("given that the titling of Saramaka lands has not yet been carried out […], the Court considers that the granting of any new concessions in those territories after December 19, 2007, the date on which the Judgment was served, without the consent of the Saramaka and without prior environmental and social impact assessments, would constitute a direct contravention of the Court's decision and, accordingly, of the State's international treaty obligations"). The IACHR decided that the extension of mining rights in Saramaka territory "appear[s] to threaten the rights of the Saramaka people and therefore contravene [Suriname's] obligation to comply with the judgment." *Communication of the Inter-American Commission on Human Rights,* 12 March 2013, p. 2.

[264] *Report of the State to the Inter-American Court*, Saramaka People, 22 March 2013, p. 4-5.

[265] *See e.g.*, 'Regering zoekt vreedzame oplossing geschil Balingsoela en Boss Enterprises', *De Ware Tijd*, 12 January 2021, http://dwtonline.com/mobiel/?node=510395; 'Goudconcessionaris daagt staat voor Gerecht', *De Ware Tijd*, 14 September 2020 (stating that "Bissumbar … showed documents showing that he had … an exploitation license in 2012 that expires in 2022. He has already filed a request for an extension. … He notices that there is another concession running between his concession and the village…"), http://dwtonline.com/laatste-nieuws/2020/09/14/goudconcessionaris-daagt-staat-voor-gerecht/.

[266] *Boss Enterprise NV v. State of Suriname (Ministries of Natural Resources, Justice and Police and Finance)*, First Cantonal Court, Case No. AR-20-3040 (decided 20 November 2020), 07 April 2021, https://rechtspraak.sr/sru-k1-2020-60/.

[267] *Id*. 4.3 (where the "Court states first and foremost that, pursuant to Article 8 paragraph 2 of the Constitution of the Republic of Suriname (GW), all who are on the territory of Suriname have an equal right to protection of person and property. It follows from this that the State has the constitutional duty to offer every citizen in this country protection against unlawful and/or criminal behavior of others in order to guarantee the safety of goods or of the citizen. If the State fails to comply with this constitutional obligation and citizens should suffer damage as a result of this failure, then the State is liable for the resulting damage').

[268] *See e.g.*, *Natural Resources, Foreign Concessions and Land Rights: A Report on the Village of Nieuw Koffiekamp* (Unit for Promotion of Democracy, General Secretariat, Organization of American States, 1997) (inter alia, discussing threats to forcibly relocate a N'djuka Maroon community for gold mining); V. Weitzner, *Shifting Ground. Indigenous Peoples and Mining in West Suriname* (North South Institute/VIDS 2008), http://www.nsi-ins.ca/wp-content/uploads/2013/03/Shifting-Grounds-Indigenous-Peoples-and-Mining-in-West-Suriname.pdf; and R. Goodland (ed.), *Suriname's Bakhuis Bauxite Mine: An Independent Review of SRK's Impact Assessment* (Vereniging van Inheemse Dorpshoofden in Suriname, September 2009), http://www.nsi-ins.ca/wp-content/uploads/2013/03/Surinames-Bakhuis-Bauxite-Mine-An-Independent-Review-of-SRKs-Impact-Assessment.pdf; and, more generally, F. MacKay, *Indigenous and Tribal Peoples in Suriname: A Human Rights Perspective* in M. Forte (ed.), INDIGENOUS RESURGENCE IN THE CONTEMPORARY CARIBBEAN: AMERINDIAN SURVIVAL AND REVIVAL (New York: Peter Lang 2006).

One of the primary judicial cases in **Guyana** is *Thomas and Arau Village Council*.[269] Arau, a remote Akawaio village on the border with Venezuela, has a land title of 23.8 square miles, granted in 1991. This title bears little relationship to the lands traditionally owned by the village – e.g., the residential area of the village itself is not inside the title and never was – and it has been seeking to correct this, without success, ever since. Almost the entire area around this title is covered with mining permits. Arau sought judicial protection in 2007 from the severe impact of mining as well as for its traditionally owned lands, citing various provisions of the common law, Guyana's Constitution, and human rights law. It sought declarations, *inter alia*, that the land outside the title was traditionally owned and its property and that the GGMC had no authority to issue mining permits over the same, and relief from the impacts of the mining operations. The Court began by mistakenly asserting that the Dutch did not recognize that indigenous peoples held any "proprietary or occupational rights."[270] Following a long and unconvincing review of authorities, including Ramsahoye's treatise citing *Williams v. AG New South Wales*, the CJ (Ag.) then argued that the British also failed to recognize any rights beyond *de facto* occupational rights, and thus all ungranted lands are owned beneficially by Guyana as successor.[271] It then dismissed connections between the constitutional protection for indigenous peoples' way(s) of life in Article 149G and their relationships to lands – a contention that disregards many decades of anthropological, legal and other findings, not to mention ITPs' perspectives – even disapproving the knowledge of the Chief of the village about burial grounds because, despite being an Akawaio from a nearby community, he was not born in the village.[272]

The Court did however find that Arau would have certain usufructuary rights that could be protected by the Constitution's assurance for property rights, and which could only be extinguished in accordance with certain guarantees.[273] Turning to the mining operations, the CJ (Ag.) distinguished between extinguishment of usufructuary rights and the impairment thereof, strangely finding that there was no extinguishment because the Arau community had chosen not to move elsewhere due to the mining operations, which also "belie[s] their claim that their way of life … has been destroyed by the said mining activities."[274] This distinction also supported his view that there had been no "extinguishment" and thus no violation of the right to property in Article 142 of the

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[269] *Thomas and Arau Village Council v. A.G. Guyana* and Ors., No. 166-M/2007, HC of Guyana, unreported case, 30 April 2009. *See also* Maya Leaders (2015), para. 34 (where the CCJ explained that "In Thomas Chang CJ (Ag) agreed that state issuance of permits, licences and concessions could so interfere with customary usufructuary rights as to amount to deprivation of property in contravention of Article 142 of the Guyana Constitution. However, the Acting Chief Justice decided that the facts presented did not permit a finding of deprivation, albeit he did go on to grant constitutional relief to the applicants on the basis that Article 149G of the Constitution placed a positive duty on the State to protect and preserve the way of life of the Arau people as an indigenous people and that this duty had been breached").

[270] *Id*. para. 12

[271] *Id*. p. 12-31, 35-8. To the extent that there is a conclusion, it may be distilled as: 1) while English law of real property was not imported to British Guiana in 1916 (and thus neither was the doctrine of tenures, the fiction of a feudal paramount lordship vested in the Crown and that underlaid the various feudal estates known under English law; *see e.g.,* E.M. Duke, A TREATISE ON THE LAW OF IMMOVABLE PROPERTY IN BRITISH GUIANA (Georgetown: Argosy Co., 1923)), instead the English law of personal property was imported to apply to immovable property (p. 21-2; *cf*. *Halsbury's Laws of England*, Vol. 8, paras. 1519 and 1520, explaining that under the rules of English personal property law, occupation is an original root of ownership or title), the CJ (Ag.) explains "so far as the English common law gives recognition to native rights or interests in or over land, the courts must view such rights as *de jure* not *de facto* (p.23); and 2) an applicant would have to prove that they have a system of customary law, that on the basis of this law, they have an unextinguished right to certain lands, and, if mining permits have extinguished or adversely affected their rights thereover, they would be entitled to some form of relief (p. 31). *See also* R. Lee, AN INTRODUCTION TO ROMAN-DUTCH LAW, 5th Ed., (Oxford: Clarendon Press 1953), p. 130 (occupation as an original root of title); and W. Buckland and A. McNair, ROMAN LAW & COMMON LAW. A COMPARATIVE OUTLINE (Cambridge: CUP 1936), p, 56 (acquisition of land by occupation and possession).

[272] *Id*. 31-2.

[273] *Id*. p. 38.

[274] *Id*. p. 39.

Constitution.[275] Article 149G does require, he says, that, when exercising its statutory discretionary power, the GGMC "must take into consideration the potential effect of such grants or concessions on the way of life of the occupying indigenous peoples,"[276] and 149G does protect against impairment (provided the indigenous people in question is not contributing to the destruction of its own way of life by not moving away from the mining).[277] Janette Bulkan correctly explains that Guyana's "failure to remove the encumbrances on the communal titled land … are not procedural, but systemic," and that State agencies "either ignore the protections of Indigenous rights in colonial-era legislation or have rolled back those protections in revised legislation."[278] She further explains that "There is no published explanation of the procedure by which the GGMC will determine if the impact of mining will or will not be harmful [as required by the Amerindian Act 2006, s. 53], nor is there any record of the GGMC actually carrying out such impact assessment."[279]

The CJ (Ag.) made no mention at all of human rights standards, incorporated into national law or otherwise.[280] The IACHR however has stated unambiguously that "in light of the way international human rights legislation has evolved with respect to the rights of indigenous peoples … the indigenous people's consent to natural resource exploitation activities on their traditional territories is always required by law."[281] Arif Bulkan critiqued *Thomas and Arau Village Council* and concluded that the "result was not only to set the law back by more than 100 years, but also to render completely worthless the slew of constitutional reforms enacted in 2001, by which an enhanced regime of equality rights and strengthened respect for indigenous peoples were incorporated in the Guyana constitution."[282] He adds that, "[e]qually disquieting is the Chief Justice's rejection of

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[275] *Id*. 38-42.

[276] *Id*. p. 44.

[277] *Id*. p. 39.

[278] *Expert Report of Professor Janette Bulkan*, IACHR, Case 13.083, Akawaio Indigenous Community of Isseneru and the Amerindian Peoples Association (Guyana), 5 December 2017, p. 10 (and also, p. 8 (on "Non-application of provisions in the Environmental Protection Act 1996"); p. 10 (listing negligence and lack of due diligence in relation to Isseneru by a series of State agencies); and p. 13 (on "Setting aside of Amerindian privileges as gold mining increases," and observing that "the [GGMC] and the judiciary almost wholly ignore section 111 in the Mining Act 1989 on 'quiet enjoyment'").

[279] *Id*. 6 (also explaining, p. 9, that "There is no record that the GGMC has enforced [general environmental impact assessment or environmental permit] requirements for small- or medium-scale mining [as prima facie required by Guyana Environmental Protection Act]. All 15,000 small-scale mining claim licences, 1,100 medium-scale mining permits and 12,000 river dredges registered in 2011 were out of compliance (Conservation International Guyana, Projekt Consult, and WWF 2013)"). The IACTHR has determined in this regard that the impact assessment requirement "interrelates with [the State's] duty to ensure the effective participation of the indigenous people," and this includes "effective participation in the environmental impact assessment" process itself. See e.g., Kaliña and Lokono, para. 203 and 216 (finding that the impact assessment requirement had not been adhered to, in part because "the first assessment was made in 2005, eight years after the startup of exploitation, and the Kaliña and Lokono peoples did not participate in it before it was accepted…").

[280] *Cf*. IACHR Indigenous Lands, para. 75 (explaining unambiguously that "Distinctive modalities of relationship to the ancestral territory generate, in turn, customary systems of land tenure that must be recognized and protected by the State, as the very foundation of indigenous and tribal peoples' territorial rights. Recognition of indigenous customary law by the authorities, and particularly by the courts, is necessary for indigenous and tribal peoples to be able to claim and obtain respect for their rights over their territory and natural resources").

[281] *Twelve Saramaka Clans*, *Report No. 09/06*, IACHR, Merits, Case 12.338 (Suriname) (2 March 2006), para. 214; *Kaliña and Lokono Peoples*, *Report No. 79/13*, IACHR, Merits, Case 12.639 (Suriname) (18 July 2013), para. 155 (concluding that the bauxite mining in this case "is precisely the type of activity that the Inter-American Court has stated should be subject to consultations and consent of the affected indigenous peoples…"); and *Maya Indigenous Communities of the Toledo District (Belize)*, para. 142 (stating that the obligation to obtain indigenous peoples' consent is "applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories").

[282] A. Bulkan, *From Instrument of Empire to Vehicle for Change: The Potential of Emerging International Standards for Indigenous Peoples of the Commonwealth Caribbean*, Faculty Workshop Series, Faculty of Law. University of the West Indies, 17 March 2010, at p. 24-5, http://www.cavehill.uwi.edu/news/articles/2010/March/Bulkan_Instrument_to_Vehicle.pdf.

international law, despite the legitimacy of recourse thereto when interpreting the fundamental rights provisions."[283]

In November 2015, Guyana's then-Minister of Indigenous Peoples' Affairs referred to a string of defeats for indigenous peoples in the courts in cases involving mining on indigenous lands, titled and otherwise. Stating that he would move to amend the *Amerindian Act* 2006 (which has yet to occur), the Minister explained that: "We can't continue like this. It is not right to be treating the indigenous peoples in this way…."[284] He also referred to a letter, dated 30 October 2015, that he received from the Guyana Geology and Mines Commission ("GGMC"), which states that:

> There is no legal obstacle in the Mining Act or the Amerindian Act to the grant of permits or licences in areas applied for by the Amerindians under the Amerindian Act either as new titles or as extensions to existing titles except that by virtue of Section 53 of the Amerindian Act, GGMC is required to notify the village and satisfy itself that the impact of mining will not be harmful if it intends to issue a permit, concession or lease over or in any part of village lands, any lands contiguous with village lands or any rivers, creeks or waterways which pass through village lands or any lands contiguous with villages lands….[285]

GGMC's above-quoted views echo a 2012 High Court judgment.[286] The appeal against this ruling submitted by the GGMC has yet to be heard, almost 10 years later. To make matters worse, this continues a trend of simply

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[283] *Id*. p. 24-5.

[284] 'Urgent reform planned to strengthen land rights under Amerindian Act', *Stabroek News*, 11 August 2015, https://www.stabroeknews.com/2015/news/stories/11/08/urgent-reform-planned-to-strengthen-land-rights-under-amerindian-act-allicock/. Also stating that "'This is not doing justice to the people because as long as it satisfies Geology and Mines, they go ahead and issue these things without the satisfaction of the people,' Allicock said. He declared that there should be proper discussion and agreements in the best interest of the people because they live there all the time, while miners only go to extract gold and leave behind a damaged environment."

[285] *Id*. (highlighting also "the case of Tasserene and Kangaruma, Stabroek News reported on the plight of the Region Seven indigenous communities in September. The two communities had expressed fear of eviction after finding out that mining blocks had been given out over their land and the GGMC was continuing to give out lands for mining. The communities had received land titles before which covered these areas but they were taken back"). *See also* 'Tasserene, Kangaruma fear eviction for mining after land title fiasco – certificate handed over by Ramotar was taken back the same day', *Stabroek News*, 25 September 2015, https://www.stabroeknews.com/2015/news/stories/09/27/tasserene-kangaruma-fear-eviction-for-mining-after-land-title-fiasco/; 'Region Seven's Toshaos blast treatment at Amerindian conference', *Kaieteur News*, 15 August 2012, (recording a statement by Akawaio Toshaos that "we are also incensed by the continued granting of [mining] licences in areas which are part of the Upper Mazaruni lawsuit which is currently before the courts. It is our belief that the areas under contention should not be leased until the resolution of the suit"), https://www.kaieteurnewsonline.com/2012/08/15/region-sevens-toshaos-blasts-treatment-at-amerindian-conference/; 'Kurutuku being devastated by mining pollution, Toshao warns -village seeking urgent demarcation', *Stabroek News*, 18 August 2012 (stating, inter alia, that "94 mining concession blocks are within the village" and "the permission of the village was never sought nor was it informed;" and that the "Toshao of the Region Seven community of Kurutuku, Solomon Lewis says that an increase in mining since last year has created problems for the remote community and is appealing for demarcation of land to be done quickly, since the damage could cause the death of the village…"), https://www.stabroeknews.com/2012/news/stories/08/18/kurutuku-being-devastated-by-mining-pollution-toshao-warns/; and 'Micobie residents call for action against illegal mining', Guyana Chronicle, 12 April 2017 ("For years, miners and village councils in indigenous communities have clashed over mining on village lands. Last January during an outreach by a team led by Minister of Natural Resources, Raphael Trotman, Andre had highlighted the issue . He lamented that most of his community's titled lands have been issued to miners. The minister informed Toshao Andre that the law states that no mining could take place on their land without the Toshao and the Village Council's permission"), https://guyanachronicle.com/2017/04/12/micobie-residents-call-for-action-against-illegal-mining/.

[286] *An Application by the Guyana Gold and Diamond Miner Association*, No. 30 CM, High Court of Guyana, 5 October 2012, p. 5 (listing conflicts between existing mining/prospecting permits and applications for title or extension of title submitted by 13 indigenous communities).

subordinating indigenous peoples' rights when they conflict with mining and all branches of government are equally culpable. The situation of Isseneru Village is instructive and the subject of a pending petition before the IACHR.[287] This village first applied for title in 1987 and 1994 yet received no response at all. It applied again in December 2005 and was later asked to provide the documentation specified in sec. 61 of the *Amerindian Act* 2006. It did so shortly thereafter, but its associated application was rejected by the Minister because she deemed that the area was "too big" and "bigger than Barbados" (66 square miles).[288] The *Toshao* at that time explains that "the villagers were not pleased to hear that their application was not accepted in its original form and reluctantly agreed to reduce the size of area of land applied for, mainly because they needed urgent protection for their traditional lands against miners."[289] In January 2007, Isseneru received a letter from the Minister stating that the MAA recognized "the difficulties faced by residents of Isseneru due to mining activities" and, therefore, it "was desirous of accelerating the [titling] process."[290] The second application was approximately one half of the area of its original request. The Minister then unilaterally reduced this area by half again when she approved the title application in 2007. The community was not even aware of this until surveyors showed up a year later to demarcate the area and it excluded large parts of its subsistence resources and sacred sites. To make matters worse, the title deed itself also excludes rivers and creeks and their banks (66 feet inland) and saved and excepted "all lands legally held." The latter encompasses approximately 85 per cent of the titled area, which had been previously granted to miners without even notifying the village, directly contravening at least one recommendation adopted by the UNCERD in 2006.[291]

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[287] *Akawaio Indigenous Community of Isseneru and the Amerindian Peoples Association*, Case 13.083 (Guyana), Petition 1424-13, submitted on 8 August 2013.

[288] *Affidavit of Lewis Larson*, Case 13.083, 5 December 2017, para. 10-1. See also 'AFC calls for improvements in hinterland areas', *Stabroek News*, 12 September 2007 (where the Minister responds to criticism that the title granted to Isseneru lacked any objective basis); and 'Consultations were held and agreements reached with every Amerindian community which received an Absolute Land Grant', *Stabroek News*, 14 September 2007 (explaining that "Guyana has a total land mass of 83,000 square miles and there are over 125 Amerindian communities which comprise about 9.2% of the population. If 1000 square miles is granted to each community it is clear what the math will be"); and 'What criteria are used to determine the size of Amerindian grants?', *Stabroek News*, 5 October 2007 (responding to criticism of "her government's modus operandi of issuing land titles to Amerindian communities," the Minister contrasts the request made by the Micobie indigenous community, which had "submitted a request to the Minister which was reasonable," with Isseneru).

[289] *Affidavit of Lewis Larson*, Case 13.083, 5 December 2017, para. 7. *See e.g.,* 'ENVIRONMENT-GUYANA: Influx of Gold Miners Worries Scientists', *Inter Press Service*, 26 June 2001 (stating that "Isseneru used to be a quiet village in western Guyana's Mazaruni District. Today, it is at the centre of growing concern about environmental and health problems stemming from gold mining. Most of the few hundred people who live in the village are indigenous Amerindians who eke out a living mostly from subsistence farming. In recent years, however, small-time gold miners from the coastland and prospectors from neighbouring Brazil, working legally and illegally, have moved into the area in response to a 'gold shout', or promising find. The miners have arrived not only with food, camping and work equipment, but also large quantities of mercury, which they use to extract gold from the tons of ore they rummage through each day. That's where the problem lies, say environmentalists: A recent survey shows higher than usual concentrations of mercury in the bodies of the villagers. 'We are concerned about it,' says David Singh, head of technical services at Guyana's Institute of Applied Science and Technology. 'The human contamination is definitely associated with gold mining'"), http://ipsnews2.wpengine.com/2001/06/environment-guyana-influx-of-gold-miners-worries-scientists/.

[290] *Letter of the Minister of Amerindian Affairs*, 30 January 2007, p. 1. The negative impact of mining was made painfully clear in Isseneru's request for title. For example, when reciting the reasons that title was needed, the community highlighted suffering "as a result of mining activities," which is causing "environmental, social and health problems;" "[o]ur lands are destroyed by dredges, leaving barren lands behind…" and; "[c]oncessions are given out without our consent, and most of these concessions are within the vicinity of our village where we hunt, fish, farm and carry out other traditional activities. These miners show no respect to us, they destroy some of our sacred sites, old settlements and farm edges…."

[291] CERD/C/GUY/CO/14 (2006), para. 16 (expressing deep concern about "the lack of legal recognition of the rights of ownership and possession of indigenous communities over the lands which they traditionally occupy and about the State party's practice of granting land titles excluding bodies of waters and subsoil resources to indigenous communities on the basis of numerical and other criteria not necessarily in accordance with the traditions of indigenous communities concerned, thereby depriving untitled and ineligible communities of rights to lands they traditionally occupy. (Art. 5(d)(v))").

The prior iteration of the *Amerindian Act* (1951 as amended in 1976) included a provision that would allow for the restitution of lands to indigenous villages as part of the titling process[292] (albeit with scant regard for the due process rights of third parties), and various titles and concessions were terminated and lands were returned across the country (not all however).[293] This is sanctioned by Article 142(2)(b)(i) of the Constitution, which provides as an exception to the right to property that this shall not apply to the extent that a prior law makes provision for "the acquisition or taking possession of the property of the Amerindians of Guyana for the purpose of its care, protection or management or any right, title or interest held by any person in or over any lands situate in an Amerindian District, Area or Village established under the Amerindian Act for the purpose of effecting the termination or transfer thereof for the benefit of an Amerindian Community."[294] Note that the first part of that provision overly discriminates against indigenous peoples. Guyana was quick to point out to the IACHR that, in its view, there is no longer an enabling law that corresponds to this provision and the referenced *Amerindian Act* was repealed in 2006 (this discounts the fact that titles over the same areas have been previously issued under the *State Lands Act* and the *Land Registry Act*).[295] Instead, the *Amerindian Act* 2006 confirms that third party interests will take precedence,[296] and it is indeed Guyana's practice to *ab initio* privilege third parties' interests over those of indigenous peoples.[297] Moreover, the 'save and except' clause was originally intended only for title to land, not mining permits and concessions, the latter being a judicial innovation in cases decided against Isseneru and other

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[292] *See e.g.*, IACHR Indigenous Lands, para. 123 (footnotes omitted) (explaining that "Indigenous or tribal peoples who lose total or partial possession of their territories preserve their property rights over such territories, and have a preferential right to recover them, even when they are in hands of third parties. The IACHR has highlighted the need for States to adopt measures aimed at restoring the rights of indigenous peoples over their ancestral territories, and it has pointed out that restitution of lands is an essential right for cultural survival and to maintain community integrity"); *Xucuru Indigenous People v. Brazil*, Judgment of February 5, 2017. Ser. C No. 346; *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano v. Panama*, Judgment of 14 October 2014. Ser. C No. 284; UNCERD, General Recommendation XXIII on indigenous peoples (1997), para. 5 (recommending that state parties "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories"); and CCPR/CO/69/AUS, para. 10-11 (28 July 2000) (where the Human Rights Committee explains that Article 27 of the ICCPR requires that "necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands …").

[293] *See Amerindian Act* 1951 (as amended in 1976), Cap 29:01, Section 20A(3) (giving the Minister authority to expropriate and transfer lands held under title or otherwise by third parties situated within areas titled to indigenous peoples to the affected communities).

[294] Takings of indigenous lands "for the purpose of its care, protection or management" is a discriminatory condition that applies to no other ethnic group in Guyana and the UNCERD explicitly recommended that Guyana amend this provision in 2006. CERD/C/GUY/CO/14 (2006), para. 17 (recommending that Guyana "afford non-discriminatory protection to indigenous property, in particular to the rights of ownership and possession of indigenous communities over the lands which they traditionally occupy. It also recommends that the State party confine the taking of indigenous property to cases where this is strictly necessary … and to provide these communities with adequate compensation where property is compulsorily acquired by the State, as well as with an effective remedy to challenge any decision relating to the compulsory taking of their property").

[295] *See e.g.,* the *Acquisition of Lands for Public Purposes Act* (the IACTHR, for instance, has specifically ruled that respect for ITPs' right is a public purpose and one that must be weighed against others).

[296] The Government of Guyana submission of Additional Information, Akawaio Indigenous Community of Isseneru, MC-283-13, 5 June 2014, p. 69 (asserting that "The [IACHR] is also asked to note that the chapeau to Art 142(2)(b)(i) requires enabling legislation to be passed which would provide or allow for such an intervention as described in the said sub-section (2)(b)(i). No such legislation has been enacted and therefore Art 142 (2)(b)(i) is inoperable").

[297] *See e.g.,* IACHR Indigenous Lands, para. 119 (citing the jurisprudence of the IACTHR and explaining that ITPs' "right to property and restitution subsists even though the claimed lands are in private hands, and it is not acceptable for indigenous territorial claims to be denied automatically due to that fact – in each case, a balancing must be carried out in order to establish limitations on one or the other property rights in conflict, in light of the standards of legality, necessity, proportionality and a legitimate purpose in a democratic society, taking into account the specificities of the respective indigenous people. The will of the current owners of ancestral lands cannot, per se, prevent effective enjoyment of the right to territorial restitution"). *See also* Saramaka People and Kaliña and Lokono (both requiring that prior concessions in ITPs' lands be reviewed and, where incompatible with human rights guarantees, terminated).

indigenous villages (e.g., Chinese Landing discussed below[298]).[299] The massive scale of these mining concessions and their overlap with titled and traditional indigenous lands is well illustrated on maps included in the Amerindian Peoples Association's 2021 publication, *Participatory Assessment of the Land Tenure Situation of Indigenous Peoples in Guyana.*[300]

Returning to Isseneru, one miner holds 17 medium-scale mining permits, first issued in 2000 and 2001, which encompass 15 per cent of its titled lands.[301] After obtaining title, Isseneru sought to enter into an agreement with him pursuant to the *Amerindian Act 2006* and then to stop his operations when he refused to do so. He sought and was granted an injunction against the community in December 2007, which was made interlocutory by the High Court in August 2008. The court ruled that the community has no authority over mining concessions issued prior to obtaining title and which are explicitly exempted from its title.[302] The community lodged an appeal against this decision on 27 August 2008 and it was scheduled to be heard by the Court of Appeal on 3 April 2009. However, at that time, it became apparent that the presiding High Court judge had not submitted his 'memorandum of reasons' explaining his ruling and the hearing was postponed indefinitely.[303] Despite numerous requests by Isseneru, submitted over the subsequent years, this appeal has yet to be heard today and the miner continued to his operations with impunity in Isseneru's lands well into 2019. Rather than compensating the miner by issuing new concessions elsewhere as part of the titling process, instead Guyana chose to simply burden the indigenous title, indefinitely should the miner choose to extend his permits. In some cases, this renders the titles, actual or extended, worthless insofar as some are or would be entirely burdened by these concessions (e.g., Tasserne and Kangaruma villages).[304]

In another situation, again involving mining in the Isseneru's limited farming lands, the community again sought to stop a mining operation. In that case, Insanally J explained that "It is rather unfortunate that the [GGMC] had granted the Far eye claim licenses before the second respondent [Isseneru] was awarded their title. It is obvious that the drafters of the State Grant took this into consideration when they included the words 'save and except all lands legally held.' It may appear to be manifestly unfair to the Isseneru Villagers but the Constitution

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298 *In the matter of an application by WAYNE VIEIRA for Writs/Orders of Certiorari and Mandamus*, No. 2 M, High Court of Guyana, 17 May 2013, www.guyaneselawyer.com/case-ic-vieira-ggmc-2013.docx.

299 *See also Jawalla Village Council v. Timna Mining Inc. and James Krakowski et al, No. 2015-HC-DEM—CIV-Apl-72* (*inter alia*, mangling the definition of 'contiguous' to deny relief).

300 *See Our Land, Our Life: A Participatory Assessment of the Land Tenure Situation of Indigenous Peoples in Guyana Report for Regions 1, 2, 7, 8 & 9* (Amerindian Peoples Association, Forest Peoples Programme and Rainforest Foundation US 2021), p. 13, https://rainforestfoundation.org/wp-content/uploads/APA-LTA-2021-FINAL-FOR-WEB.pdf.

301 *See id.* p. 16 (showing Isseneru's titled lands and the mining concessions superimposed thereon and around it, covering its traditional lands that were excluded from the title).

302 *An Application by Daniel Dazell*, No. 158 M, High Court of Guyana, 13 August 2008 (ruling that "the lands would not be part of the Isseneru Amerindian Village since they would have been excepted under the words "save and except all lands legally held" in the State grant of lands to the Isseneru Amerindian Village. Such words in such grants clearly indicate the State's respect for private occupational rights and its intention not to derogate from them outside of any factual condition or legal requirement which may attend them. Indeed, any such derogation would invite constitutional challenge for breach of Article 142 which protects property rights").

303 *Isseneru Amerindian Village Council v. Lalta Narine*, 2008-HC-DEM-CIV-Apl-3963, 27 August 2008.

304 In *Dazell*, citing consistent jurisprudence, the judge ruled that "This court is unable to perceive the grant of a prospecting permit to locate mining claims as conferring 'property' rights within the context of Article 142 of the Constitution. After all, the granting of a permit is the granting of a mere privilege and not the conferment of a right." An Application by Daniel Dazell, No. 158 M, High Court of Guyana, 13 August 2008, p. 6 and (see also p. 9, stating that "Even though the law may have been amended to provide for different scales of prospecting permits, a prospecting permit still does not entail a right or interest in the lands covered by the permits"). Nonetheless, GGMC and the state more generally continue to treat prospecting licenses as 'property' to be protected from indigenous peoples.

of Guyana, by virtue of Article 142 has guaranteed all persons the right to property lawfully held."[305] 'Manifestly unfair' would seem to be a major understatement, more so as the judge made no attempt to contemplate what rights Isseneru may have, nor to weigh these against the proclaimed constitutionally protected property rights of the miner. It is a "well-known principle that courts should, as far as possible, avoid an interpretation of domestic law that places a State in breach of its international obligations," yet that is precisely what occurred in this and other cases.[306]

The rulings in the two above quoted cases were reaffirmed, and perhaps even expanded insofar as no reference was made to the 'save and except' clause, in a case decided in 2011 in relation to medium-scale mining permits within the titled lands of Chinese Landing Village. In his decision, the Chief Justice explained that "since the applicant was granted his mining permits in 1998 and 2001 long before the advent and operation of the Amerindian Act 2006 under which grants of communal land was made to Amerindian Villages, the lands covered by such permits could not form part of the area of any Amerindian Village lands;" and "no grant of title under that Act could lawfully embrace lands which were already the subject of grants of mining permits under the Mining Act."[307] This is a curious decision however because it is not based on the extant facts. Chinese Landing obtained title in 1976 under the amended 1951 Act, rather than the 2006 Act.[308] It was then issued a second title deed covering the same lands pursuant to Section 3 of the *State Lands Act* in 1991 ("absolutely and forever"). Neither deed includes the 'save and except' clause, which may explain why it was not referenced in the decision. The title held by Chinese Landing was thus granted "long before the advent and operation" of the 2006 Act and the mining permits in question, which all state that miners may not exercise their rights on any 'lands held under title', rendering their operations illegal under the Mining Regulations in force at the time and today.[309]

The Chinese Landing case eventually landed before the CCJ and thereafter was also the subject of further litigation (with the Village Council as a party to the proceedings for the first time).[310] Predictably, the Village

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[305] *Joan Chang v. Isseneru and Ors*, p. 18-9.

[306] *McEwan and Ors v. A.G. Guyana*, [2018] CCJ 30 (AJ), para. 44 (per Saunders, PCCJ).

[307] *In the matter of an application by WAYNE VIEIRA,* p. 27-8 (citing Section 2 of the *Amerindian Act* 2006 and stating that "since the applicant was granted his mining permits in 1998 and 2001 long before the advent and operation of the Amerindian Act 2006 under which grants of communal land was made to Amerindian Villages, the lands covered by such permits could not form part of the area of any Amerindian Village lands;" and "no grant of title under that Act could lawfully embrace lands which were already the subject of grants of mining permits under the Mining Act").

[308] Section 20A(1) of the 1951 Act (as amended in 1976) provides that, "'All the rights, titles and interests of the State in and over the lands situate within the boundaries of any . . . Village shall without further assurance be deemed to be transferred to and vested in the respective Council for and on behalf of the Amerindian Community … and the Commissioner of the Geological Surveys and Mines shall take due notice of all transactions under this Act affecting lands…."

[309] Form 5B of the *Mining Regulations,* containing the actual permits issued in all three cases above, prohibits medium-scale mining on "lands held under title." Illustrating the extent of discrimination against indigenous peoples and the denial of equal protection of the law in practice, this provision is not interpreted by the State to extend to indigenous lands traditionally owned (or apparently, in the case of Chinese Landing, to state-issued titled lands either). Note in this respect that the IACHR and IACTHR have both consistently held that "traditional indigenous land ownership is equivalent to full title granted by the State" and must be equally protected by law. *See e.g.*, *Sawhoyamaxa Indigenous Community v. Paraguay,* 29 M arch 2006, Ser C No. 146, para 128.

[310] *See e.g.,* 'Chinese Landing calls on Govt to cancel Vieira's mining licence', *Guyana Times*, 10 May 2019 (calling "on the Government to cancel mining licences that were issued to Wayne Vieira, who is using same to give mining rights to a large-scale mining company, Vangold Mining. The Council has said it received title for those lands in 1976, while Wayne Vieira received mining licence almost 20 years later. Fernandes noted that claims are being made that the Council has no title for the land, which he said is a total mistruth. "We want the Government to respect the fact that we are traditional owners of these lands and resources, also acknowledge that we have title to show our ownership of the lands; and we call on them to honour our right to free, prior and informed consent before they issue mining concessions on our traditional lands," Nikita Miller, a councillor from the village, said"), https://guyanatimesgy.com/chinese-landing-calls-on-govt-to-cancel-vieiras-mining-licence/.

Council lost in the High Court, with the GGMC fully supporting the miner, as this seems to be the outcome whenever indigenous people seek protection from mining.[311] The CCJ judgment was largely confined to the narrow question of whether a mines officer within the GGMC or the Minister responsible for mining could enforce provisions of the *Amerindian Act* via a Cease Work Order issued under the Mining Regulations, ruling that the GGMC was not authorized under the relied on regulation as that power was vested in – even if not acted on – the then-Minister of Indigenous Peoples' Affairs.[312] The judgment observes that "The third issue arises from Vieira's submission that the Chinese Landing Village Council had no authority to enforce the relevant provisions of the Amerindian Act, because it would have had to have title to the lands where his mines were located and it did not have this."[313] As noted above, it most certainly did have title and this had vested since 1976 and was reissued in 1991 (and again later when it was issued a Certificate of Title under the *Land Registry Act* in 2018). While opposing counsel "argued that Vieira should not be permitted to take this point for the first time on the present appeal," the CCJ notes that Vieira contended that the GGMC was obliged "to produce evidence, which they failed to do, that Vieira's mines were on lands for which the Chinese Landing Village Council of Tassawini held title."[314] A startling omission!

In September 2021, the High Court again weighed in on the Chinese Landing situation, this time taking cognizance of the fact that the village did have valid title that predated the mining permits issued to the miner. The High Court (per Young J) concluded, first, because the State by law owns all minerals – not strictly true (see Mining Act, sec. 8, which should also apply to indigenous peoples if non-discrimination norms are applied)[315] – and the GGMC has the authority to issue mining permits, therefore, a "trial on this issue … would be a complete waste of judicial time and resources," and the corresponding parts of the Statement of Claim do "not disclose any grounds for bringing the claim."[316] Whether the miner required permission from the Chinese Landing Village Council, however, "required closer consideration."[317] After reviewing the relevant case law, primarily that referred

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311 *Chinese Landing Village Council v. Viera and GGMC,* 2021-DEM-CIV-SOC-80, 28 September 2021, para. 8 (recording that the GGMC had stated that the claimant's claims had no merit and should be dismissed with costs and referencing Arts 6 and 7 of the *Mining Act* 1989 to support the view that the ownership of all minerals is vested in the state). Bulkan and Palmer provide important insights into the reasons that mining seems to be routinely priviledged in Guyana. J. Bulkan and J. Palmer, *Rentier nation: Landlordism, patronage and power in Guyana's gold mining sector,* 3 EXTRACTIVE INDUSTRIES AND SOCIETY 676 (2016), https://www.sciencedirect.com/science/article/pii/S2214790X16300776.

312 *Viera v. GGMC* [2017] CCJ 20 (AJ) (CCJ Appeal No. GYCV2017/009; GY Civil Appeal No. 56 of 2011), para. 25 (explaining further that "There was nothing in regulation 98 which authorized the exercise of any power to enforce the provisions of the Amerindian Act and there could not have been, because that would have been beyond the power of the Minister to make regulations for carrying out the purposes of the Mining Act. This limitation, however, does not prevent a dispute arising under the Amerindian Act in a proper case from also being presented to the Commission as a dispute falling under regulation 81 of the Mining Regulations. This was not such a case").

313 *Id*. para. 20.

314 *Id*. (*cf.* para. 27, stating that "we would expand briefly on our advertence to the requirement that the power can be used only when it appears absolutely necessary, to which, again surprisingly, no one paid any attention until counsel responded to this court's inquiry"). The CCJ concluded, para. 31, by stating that "It is unnecessary to engage with the question of the retrospectivity of the Amerindian Act since, even if that Act had been in force at the time the CWO was wrongfully issued…."

315 *Mining Act,* sec. 8(1), providing that "The owner of any private lands, granted before the passing of the Mining Ordinance, 1903, shall hold and enjoy all metals other than gold and silver therein or thereon, and may after obtaining a licence or permit under this Act search or mine for them in accordance with this Act and the licence and, when found, take and appropriate them to his own use." If this is possible for non-indigenous persons, it is discriminatory to deny the same to indigenous peoples, whose title to lands dates back well before 1903, without a valid reason. Note that title deeds issued to indigenous communities all state that they have been in occupation thereof "from time immemorial." The states failure – ongoing in many cases – to recognize their rights and issue title deeds is not a valid reason to treat indigenous title in an inferior way to those held by non-indigenous persons. Removing discrimination was the UNCERD's basis for recommending that indigenous title include "subsoil resources" in 2006. CERD/C/GUY/CO/14 (2006), para. 16.

316 *Chinese Landing Village Council v. Viera and GGMC,* 2021-DEM-CIV-SOC-80, 28 September 2021, para. 17-8.

317 *Id*. para. 19.

to above, the High Court simply affirmed those decisions – noting that, in its view, the only change was the existence of a Certificate of Title issued in 2018, which "changes nothing" – and stated that "the stance taken by the Claimant would render the principle of *stare decisis* absurd."[318] The judge then simply struck out the Statement of Claim, declaring it, *inter alia*, an abuse of process and awarded costs to the state and the miner. While reference to certain provisions of the *Amerindian Act* 2006 was made, the judge failed to account for any rights vested in indigenous peoples, nor the constitutional mandate to, at a minimum (see below), take human rights norms into account,[319] nor even other sections of the *Mining Act* which could be construed in the same manner as the *Amerindian Act.*[320]

Janette Bulkan explains that "the miscarriage of justice experienced by Amerindian petitioners in the Guyana court system is systemic…."[321] Indeed, the judgements summarized above all recall George J's (as she was then) statement that the failure to uphold basic human rights "would make the Court, the judicial branch of the State, complicit in a violation of … human rights as enshrined" in the Constitution, and "would amount to a failure by the State to live up to its international obligations, moreso where they have been expressly incorporated into the domestic law."[322] Substantial damages were awarded in that judgment, *inter alia*, "so that the State and the other parties, are made aware of the importance of upholding the fundamental rights provisions…."[323] Contrast the above-described situations in Suriname and Guyana with that of **Belize**, where the judiciary has been receptive to indigenous peoples' rights and has provided effective remedies.

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[318] *Id*. para. 27.

[319] *See* Guyana Const., Article 39(2) discussed below. *See also* Guyana Const., Article 142(3)(i), providing, as an exception to the right to property cited by the judge in *Joan Chang*, that: "Nothing in this article shall be construed as affecting the making or operation of any law … so far as it provides for the reasonable restriction of the use of any property in the interests of safeguarding the interests of others or the protection of tenants, licensees or others having rights in or over such property." An indigenous village would qualify as "others" as in "safeguarding the interests of others," and Chinese Landing certainly has rights over the property.

[320] *See e.g.*, *Mining Act* 1989, sec. 80 (subsection (1), providing that "A licensee shall not exercise any of his rights under this Act or his licence— (a) except with the written consent of the Minister, in respect of— … (iii) any land dedicated as a place of burial or which is a place of religious significance; … (v) any land within, or within two hundred metres (or such greater distance as may be prescribed) of the boundaries of, any village, or of any land set apart for a new village or a village extension; (b) except with the written consent of the lawful occupier thereof, in respect of— (i) any land which is the site of, or which is within two hundred metres (or such greater distance as may be prescribed) of, any inhabited, occupied or temporarily unoccupied house or building; (ii) any land within fifty metres (or such greater distance as may be prescribed) of any land which has been cleared or ploughed or otherwise bona fide prepared for the growing of, or upon which there are growing, agricultural crops; or (iii) any land from which during the year immediately preceding, agricultural crops have been reaped (2) Any consent under subsection (1)(a) may be given unconditionally or subject to such conditions as are specified in the instrument of consent; and before giving any consent under subsection (1)(a)(iv) or (v) where there is a local government authority responsible for the government of the relevant township or village, the Minister shall consult that authority").

[321] *Expert Report of Professor Janette Bulkan*, IACHR, Case 13.083, Akawaio Indigenous Community of Isseneru and the Amerindian Peoples Association (Guyana), 5 December 2017, p. 2. The Inter-American Development Bank observes that "there are a bevy of studies that highlight some of the adverse consequence of ASM mining in Guyana, especially in indigenous communities." *Toward the Greening of the Gold Mining Sector of Guyana: Transition Issues and Challenges.* Technical Note 1290 (Washington DC: IADB 2017), p. 18, https://publications.iadb.org/bitstream/handle/11319/8432/Toward-the-Greening-of-the-Gold-Mining-Sector-of-Guyana-Transition-Issues-and-Challenges.PDF?sequence=1&isAllowed=y.

[322] *In the matter of an application by Twyon Thomas, a minor suing by his mother and next friend Shirley Thomas, for Constitutional redress*, 2010-No. 12-M-HC-Demerara, 17 June 2011, p. 15.

[323] *Id*. p. 26 (further observing, p. 35, that "that this global or total award reflects that there is a need for the realization and understanding that respect for the fundamental rights provisions of the Constitution and respect for the human rights of persons requires vigilance and carries with it a tremendous responsibility").

In *SATIIM and Ors v. AG Belize and Ors*, decided by the Supreme Court in 2014 (and not appealed by the state),[324] for instance, the Court determined that one of the issues to be resolved was: "Was the permission granted by the Government of Belize to the 2nd Defendant to conduct road construction and commercial oil drilling within the Sarstoon Temash National Park unlawful, having been granted without the free, prior and informed consent of the indigenous Maya communities named in this Claim?"[325] Citing various international standards, including the 2004 decision of the IACHR in *Maya Indigenous Communities of Toledo*,[326] and domestic judgments,[327] which "recognized that the Maya have rights to lands in Southern Belize based on the Maya People's traditional use and occupation of those lands," the Court agreed "that it is incumbent on the Government of Belize to put in place the legal mechanisms necessary to recognize and to give effect to those rights belonging to the Maya" which have already been recognized by the domestic and international authorities.[328] Finding that Belize is "clearly bound to uphold the general principles of international law contained" in the UNDRIP, including FPIC, Arana J, explained that "specifically to the consultation conducted by the Defendants … while (as argued by the Defence) it might conform with the strict statutory provisions as set out in the Act, in my view that purported consultation fell far short of the Government's international human rights obligation to seek the free, prior and informed consent of those people who would be most affected by the project."[329] Not only; the Court also found that "in deciding to issue the permissions and licences to permit the construction of a road and the drilling for oil (without first seeking the free, prior and informed consent of the Claimants)," the state acted irrationally and

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[324] *SATIIM et al v. AG Belize and Ors*, Claim 394 of 2013 (Supreme Ct. Belize), 3 April 2014 (concerning road construction and commercial oil drilling).

[325] *Id*. para. 10.

[326] *Id*. para. 13 (recalling that "the IACHR has already found in Maya Indigenous Community of the Toledo District v. Belize, Case 12.053, Report No. 40/04, Inter-Am. C. H. R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004) that the Government of Belize had violated the rights of the Maya by granting a permit without first obtaining the free, prior and informed consent of Maya when dealing with land that could fall within those claimed by them as traditional Maya Lands").

[327] *Id*. para. 11 (recalling that "that the Court of Appeal of Belize in The Attorney General of Belize v. The Maya Leaders Alliance and The Toledo Alcaldes Association on behalf of the Maya Villages of the Toledo District, Civil Appeal No. 27 of 2010 has affirmed the approach adopted by the Chief Justice in relying on Belize's international obligations and general principles of international law in determining property rights of the Maya People").

[328] *Id*. para. 13.

[329] *Id*. (stating also that "I cannot put any clearer the reason why the Maya should have been afforded by the Government of Belize the opportunity to give their free, prior and informed consent to this project. In addition to the material fact that their rights to ancestral lands in Southern Belize have been articulated in the Maya Land cases at the Supreme Court and Court of Appeal level, it is also because these are the members of Belizean populace/citizenry whose daily lives will be directly impacted, for better or for worse, by this particular development. … I find that the failure of the Government of Belize to obtain the free, prior and informed consent of the Maya people prior to granting the concessions and permissions for the construction of a road and drilling for oil within the National Park was unlawful.").

unreasonably,[330] violating various administrative law norms as well.[331] This decision was affirmed, albeit in somewhat different circumstances, by the Supreme Court in 2021.[332]

To conclude this section, human rights bodies and tribunals have ruled that the absence of legal protection for the rights of ITPs, *inter alia*, to their traditionally owned lands "reflects unequal treatment in the law" and a failure to provide the necessary protection for the full exercise of the right to property "on an equal footing with the other citizens."[333] They have also established elevated strict scrutiny standards for cases involving distinctions made on the basis of race, ethnicity and other grounds, mandating states to advance compelling reasons to justify differential treatment.[334] They have also specifically criticized Guyana's laws and treatment of indigenous peoples in this regard.[335] Isseneru's Chief explains this somewhat differently, stating that: "We feel that when the High Court tells us that we have no rights to decide and control what takes place on our land, then the land is not ours. Just Friday, when inquiring at the office of the GGMC, we learnt that our whole land is covered with mining concessions. Yet, the government has not informed us about this."[336] By failing to treat ITPs' customary title equally with state-issued titles – equally, not necessarily the same as, considering the other rights that are intertwined with ITPs' land rights - when granting or renewing mining licenses and permits, Guyana is violating basic norms of human rights law.[337] This further substantiates the UN Human Rights Committee's view that

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330 *Id*. para. 14 (citing *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 at 410-411 (per Lord Diplock, re. *Wednesbury* unreasonableness) and explaining that "The decision is irrational for the reasons stated by the Claimants that: (1) the Defendants knew that the Supreme Court and the Court of Appeal of Belize had recognized and declared the communal property rights of the 1st to 5th Claimants; (2) the Defendants knew that the concessions, permissions and licenses fell within, or were likely to fall within the Claimants' communal property; (3) the Defendants proceeded to grant the permissions and licenses or continued the concessions despite this knowledge. I would add to this the fact that the Government failed to obtain the free, prior and informed consent of the Claimants as discussed above, despite being aware of the judgments of the Supreme Court and the Court of Appeal and in so doing I find that the Government of Belize acted irrationally, especially in light of Belize's obligations to its indigenous peoples under the American Declaration of Human Rights and United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)").

331 *Id*. para. 15 (finding that there was a "legitimate expectation that the Government would have sought the free, prior and informed consent of the Mayas before granting the permissions and licences for this project").

332 *Estevan Caal and Maya village of Jalacte and Ors v. AG Belize and Ors*, Claim No. 190 of 2016, (Supreme Ct. Belize), 21 June 2021 (concerning a claim for damages and other relief as compensation for the acquisition and use of Jalacte's lands without obtaining the village's FPIC).

333 Twelve Saramaka Clans, para. 236-7. The IACHR observed in the same case, at para. 117, "that respect for and protection of the private property of indigenous peoples on their territories is equivalent in importance to non-indigenous property, and … is mandated by the fundamental principle of non-discrimination enshrined in Article II of the American Declaration."

334 *See e.g., Report 04/04 (Merits), María Eugenia Morales de Sierra* (Guatemala), IACHR, 19 January 2001, para. 36; and *Atala Riffo and Daughters v. Chile,* Judgment of 24 February 2012. Ser. C No. 239, para. 131.

335 *See e.g.*, E/C.12/GUY/CO/2-4, para. 14 (expressing concern about the limitation of the Amerindian Act, 2006, particularly: "(a) The lack of recognition and protection of indigenous peoples' customary systems of land tenure or customary laws pertaining to land and resource ownership and the lack of recognition of collective territories that are held jointly by several communities; … (d) The lack of protection of the land rights of indigenous peoples who still lack a legal land title or are in the process of obtaining one; (e) The broad range of exceptions that allow mining and logging activities by external investors without the free, prior and informed consent of the affected indigenous peoples; (f) The absence of effective legal remedies by which indigenous peoples may seek and obtain restitution of their lands that are held by third parties (art. 1)").

336 'Miners win ruling over indigenous groups in Guyana', *Mongabay*, 29 January 2013, http://news.mongabay.com/2013/0129-hance-mining-guyana.html.

337 *See e.g., Lars-Anders Ågren et al. vs. Sweden*, CERD/C/102/D/54/2013 (2020), para.6.6 ("… as the raison d'être of these principles, the close ties of indigenous peoples to the land must be recognized and understood as the fundamental basis of their cultures, spiritual life, integrity and economic survival"); *General Comment on the Right to Life*, CCPR/C/GC/36, para. 26 (explaining that "… States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include … deprivation of indigenous peoples' land, territories and resources…").

"members of the indigenous Amerindian minority do not enjoy fully the right to equality before the law."[338] It is expected that the IACHR will decide the pending case submitted by Isseneru in accordance with these norms, finding Guyana in violation of its obligations.[339] The following section is very much related to this.

### F. The Right to Protection of the law

> Difference is as natural as breathing. Infinite varieties exist of everything under the sun. Civilised society has a duty to accommodate suitably differences among human beings. Only in this manner can we give due respect to everyone's humanity. No one should have his or her dignity trampled upon, or human rights denied, merely on account of a difference….[340]

While this eloquent statement was made in a very different context to the situations now under review there are similarities insofar as ITPs' rights and differences are often denied or derided, and, at times, they are the basis for discrimination and other forms of ill-treatment, including violence. These differences are also critically important in relation to a series of fundamental rights and guarantees vested in ITPs and which are often disregarded on the mistaken basis that equality requires standardized treatment for all[341] (this is an all-too-common refrain, even among senior members of the government and judiciary, e.g., T&T's misplaced objection that that "one ethnic group could not be placed above another in what is a multi-ethnic country").[342] In such situations, the Honourable Judge quoted above opines that, "It is for courts to afford the protection of the law to those who experience the

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338 *Concluding observations of the Human Rights Committee: Guyana,* CCPR/C/79/Add.121 (2000), at para. 21. *See also List of issues prior to submission of the third report of Guyana*, CCPR/C/GUY/QPR/3 (31 August 2020), para 25 ("With reference to the previous concluding observations (para. 21), please indicate the measures adopted to ensure the promotion and protection of the rights of indigenous peoples and the participation of the Amerindian communities in decisions that affect them…. Please update the Committee on efforts to amend the Amerindian Act of 2006 and to ensure adequate consultations with members of the Amerindian communities in this respect. Please respond to concerns that: … (b) inadequately regulated mining activities in the areas that Amerindians inhabit have adversely affected the demarcation of their traditional lands and caused environmental degradation and serious threats to their health").

339 *See e.g. Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006 (2009), para. 7.6 (ruling that "the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community").

340 *McEwan and Ors v. A.G. Guyana*, [2018] CCJ 30 (AJ), para. 1 (per Saunders PCCJ).

341 *See e.g., id*. para. 61 (per Saunders PCCJ) (explaining that "Ensuring substantive equality might require equal treatment for those equally circumstanced, different treatment for those who are differently situated, and special treatment for those who merit special treatment. Paying regard to mere formal equality could lead to grave injustice and defeat the spirit of the equality provisions. Critical to the adoption of a substantive approach is the need to examine the impact or effect of a challenged measure. The judge at first instance was in error when he took the view that there was no discrimination here because, among other things, section 153(1)(xlvii) is "directed against the conduct of both male and female persons"). The UNCERD adheres to the principle that discrimination is evident and illegitimate where states treat persons differently in analogous situations without an objective and reasonable justification and where they, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different. *See e.g.*, *General Recommendation XIV, Definition of discrimination (Art. 1, par.1),* 22/03/93, at para. 2 (stating that "a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin").

342 R-M. Antoine, *Baseline Study of Indigenous People Rights and Access to Justice in Trinidad and Tobago*, p. 10-1 (explaining that, in the context of constitutional reform and recognition that "has been resistance to this idea [of recognition of IPTs in the Constitution] on the erroneous ground that that one ethnic group could not be placed above another in what is a multi-ethnic country. The First Peoples continue to insist that there should be a "Pre-eminence" of the First Peoples, who should be regarded as being in a special, unique position given that they were here prior to the Columbus era").

brunt of such behaviour."[343] Protection of the law also provides procedural fairness and ensures to "every person adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power."[344] As the CCJ and Guyana's High Court have observed, in **Guyana**, due to its Constitution, "there is an even greater onus on courts … to place the law in compliance with the country's international law obligations."[345]

Section 3(a) of **Belize's** Constitution guarantees rights to "life, liberty, security of the person, and the protection of the law." Almost identical or similar language is found in the constitutions of **Dominica** (Sec. 8),[346] **Guyana** (Art. 149D),[347] **Suriname** (Art. 8),[348] **SVG** (Sec. 8),[349] and **T&T** (Art. 4(b)).[350] In *Maya Leaders*, the CCJ rejected the Belize Court of Appeal's narrow interpretation that the right to protection of the law concerns only the "…the availability of processes for the vindication of rights rather than to substantive rights themselves."[351] Instead, it ruled that the right to protection of the law is "founded on the concept of the rule of law, which itself imports an obligation to adhere to international law commitments…."[352] Importantly, it also explained that "the right to protection of the law encompasses the international obligations of the State to recognize and protect the rights of indigenous people."[353] It continued that: "The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property, … [and] may, in appropriate cases, require the relevant organs of the State to take positive action in order to secure and ensure the enjoyment of basic constitutional rights."[354] Recall in this regard the above-quoted judicial view that what had occurred in Isseneru was "manifestly unfair."

While not a substitute for explicit recognition of ITPs' rights in the Constitution or legislation, these provisions appear to provide constitutional sanction and the basis for positive action to secure ITPs' rights, including in relation to various international standards. This would likely increase the possibility for the enactment and entrenchment of up-to-date legal regimes, developed with ITPs' effective participation and grounded in human rights law, that are both responsive to ITPs' rights and legitimate expectations and to the varied national and constitutional realities across the six countries. The judiciary has an important role in the process, both as

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343 *McEwan and Ors v. A.G. Guyana*, [2018] CCJ 30 (AJ), para. 1 (per Saunders PCCJ), para. 3.

344 *Nervais v The Queen and Severin v The Queen*, [2018] CCJ 19 (AJ), para. 45.

345 *McEwan and Ors v. A.G. Guyana*, [2018] CCJ 30 (AJ), para. 55.

346 While entitled "Provisions to secure protection of law," the language of this section is mostly focused on access to justice and mostly refers to criminal law.

347 Providing (1) The State shall not deny to any person equality before the law or equal protection and benefit of the law; … [and] (3) Equality includes the full and equal enjoyment of all rights and freedoms guaranteed by or under this Constitution or any other law."

348 "1. All who are within the territory of Suriname shall have an equal claim to protection of person and property."

349 While entitled "Provisions to secure protection of law," the language of this section is mostly focused on access to justice. *See also* Guyana Const. Art. 144 (having the same title and basic content).

350 Providing that "4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely: … (b) the right of the individual to equality before the law and the protection of the law; …").

351 Maya Leaders 2015, para. 40 (and, para. 44, stating that "This Court in *Attorney-General v Joseph and Boyce*, per de la Bastide P and Saunders JCCJ said 'the right to the protection of the law is so broad and pervasive that it would be well-nigh impossible to encapsulate in a section of a Constitution all the ways in which it may be invoked or can be infringed'").

352 *Id* para. 58.

353 *Id*. para. 52 (also stating that "A recognized sub-set of the rule of law is the obligation of the State to honour its international commitments").

354 *Id*. para. 47 (also stating that "It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However the concept goes beyond such questions of access and includes the right of the citizen to be afforded, 'adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power'").

interpreter and guarantor of rights and as a check on abuses of power and discretion. Discussing international decisions, Macklem has correctly observed that the more specific the descriptions of what "changes are needed in domestic law, the more the intervention translates relatively abstract international human and indigenous rights into concrete legal entitlements cognizable to the domestic legal order in question in a programmatic way…."[355] Likewise, judicial pronouncements should also employ accessible language to enable broad understanding.

The 2014 judgment of the Supreme Court of Belize discussed in the preceding section illustrates how international human rights should inform interpretations of the law, including where statutory norms, if viewed in a vacuum, may lead elsewhere. In **Guyana**, this is explicitly required by the Constitution, both as it relates to acts/omissions of "the executive, legislature, judiciary and all organs and agencies of Government and, where applicable to them, by all natural and legal persons"[356] and in judicial interpretation of the fundamental rights provisions.[357] As the CCJ recalled in 2017, the Guyana High Court has held that these provisions "placed courts under a duty 'to incorporate international human rights law into the domestic law of Guyana when interpreting the rights provisions of the Constitution.'"[358] In that case, the High Court explained that there is "a substantial framework for the application of human rights norms in the Constitution of Guyana," and "the incorporated international human rights provisions in Guyana are not merely persuasive…. This specific mandate gives the court jurisdiction and makes it an obligation of the court to incorporate international human rights law into the domestic law of Guyana when interpreting the rights provisions of the Constitution. It is a mandate and jurisdiction which must be taken seriously and actively applied where relevant."[359] In concluding, and to explain the award of "exemplary damages," the High Court further explicated that:

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355 'Paper by Professor Patrick Macklem' in *Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples*, A/HRC/24/50 (2013), p. 18, ftnt. 19.

356 Guyana Const., Art. 154A(1), providing that "Subject to paragraphs (3) and (6) every person, as contemplated by the respective international treaties set out in the Fourth Schedule to which Guyana has acceded is entitled to the human rights enshrined in the said international treaties, and such rights shall be respected and upheld by the executive, legislature, judiciary and all organs and agencies of Government and, where applicable to them, by all natural and legal persons and shall be enforceable in the manner hereinafter prescribed." *See* however, A. Bulkan, *Democracy in Disguise: Assessing the Reforms to the Fundamental Rights Provisions in Guyana*, 32 GA. J. INT'L & COMP. L. 613 (2004), p. 626 (opining that "article 154A is a masterpiece of legal obfuscation, and an analysis of its provisions in their entirety will reveal how minimal its impact is likely to be;" and "as enacted [it] is unlikely to enhance the domestic enforcement of human rights").

357 Guyana Const., Art. 39(2), providing that "In the interpretation of the fundamental rights provisions in this Constitution a court shall pay due regard to international law, international conventions, covenants and charters bearing on human rights." See also *State v. Dwayne Jordon*, No. I72/2010, High Court of Guyana, 17 December 2012, at p. 7 ("the thrust" of Articles 39(2) and 154A requires that the judiciary "pay due regard to international law … bearing on human rights" when making decisions on relevant issues").

358 *McEwan and Ors v. A.G. Guyana*, [2018] CCJ 30 (AJ), para. 55 (per Saunders PCCJ) (explaining that "Article 39(2) of the Guyana Constitution expressly mandates the courts to "pay due regard to international law, international conventions, covenants and charters bearing on human rights" when interpreting any of the fundamental rights provisions of the Constitution. In Thomas v AG, one of the first cases to examine Article 39(2), George J (as she then was) held [at [12]] that the provision placed courts under a duty 'to incorporate international human rights law into the domestic law of Guyana when interpreting the rights provisions of the Constitution.' George J expressly distinguished the situation in Guyana from other Caricom States in which international law is said merely to have persuasive application").

359 *In the matter of an application by Twyon Thomas, a minor suing by his mother and next friend Shirley Thomas, for Constitutional redress*, 2010-No. 12-M-HC-Demerara, 17 June 2011, p. 12 (further explaining that "Article 39(2) does not limit the court's enquiry to the human rights treaties listed in the Fourth Schedule, nor to those to which Guyana is a signatory, and coupled with art 154A, the Constitution now provides the framework for the Court to explore a wide spectrum of human rights learning. The Court can therefore consider not only treaty law, but also the views or recommendations of treaty bodies and decisions of regional human rights bodies such as the Inter-American Court of Human Rights and the European Court of Human Rights as well as those of national jurisdictions").

> in the context of Guyana, a high premium has been placed on respect for human rights as outlined in arts 39(2) and 154A of the Constitution. These provisions are not to be viewed lightly as mere surplusage. They in effect enjoin the State through its various arms, sectors, actors, officers and employees to ensure that there is respect for and protection of human rights. They reflect a modern mores that seeks to embed respect for human rights in all aspects of life, more particularly by those who are public officers and public servants in the widest sense of these terms.[360]

In **Suriname**, the Constitution also requires that international law is given effect in the domestic legal order[361] and may be used to invalidate laws and government acts/omissions that contravene human rights norms.[362] Indeed, international law is considered hierarchically superior to domestic law, including the Constitution, even if this principle is not applied in practice.[363] This may change with the recent establishment and functioning of the Constitutional Court, which has forthrightly dealt with human rights concerns in at least one highly politically-charged matter.[364] At present, considering the lack of remedies in national law, ITPs essentially seek recourse through international human rights mechanisms, such as UN treaty bodies and the inter-American system, and they have done so with some success. This success has been mostly confined to developing important jurisprudence rather than real changes in national law and practice to date because the state has largely ignored the primary orders in these judgments and decisions.[365] If the Framework Bill on Collective Rights of Indigenous and Tribal Peoples is enacted as drafted, and it is implemented, including via the subsidiary laws it requires, this would represent a first meaningful and long overdue step in the right direction. Enforcing the same presents some challenges however, and it remains to be seen how the judiciary – to this point, routinely hostile to ITPs – will address disputes between ITPs and third parties and, especially, the state.

### G. Accessible, Prompt, Appropriate and Effective

This section addresses the third point identified by the IACTHR in *Kaliña and Lokono Peoples* (see p. 11 above). It does not get into issues of administration of justice or the functioning of judicial systems *per se*. These general points are well canvassed in a 2020 UNDP publication, *Caribbean Justice: a needs assessment of the judicial system*

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360 *Id*. p. 35.

361 Suriname Const., Arts. 103, 105 and 106.

362 Suriname Const. Art. 144.

363 *See e.g.,* CCPR/C/SUR/CO/3 (2015), para. 5 ("While taking note of the State party's explanations concerning article 106 of the Constitution, which provides that international agreements take preference over national laws, the Committee regrets that no concrete examples have been presented of specific cases in which the provisions of the Covenant were invoked or applied by courts in Suriname. The Committee is further concerned that the draft bill on the establishment of a Constitutional Court, which the Constitution envisages, with the power to verify, inter alia, the purport of Acts against international human rights treaties (art. 144.2.a), has been pending before the National Assembly for a significant period of time").

364 'Constitutional Court of Suriname: no amnesty for December murders', *World Today News*, 22 July 2021 ("The Constitutional Court in Suriname has determined that the so-called December murders from 1982 are definitively ineligible for amnesty. Suspects of the murders of prominent critics of the then military regime cannot therefore go unpunished. Former president Desi Bouterse was sentenced to 20 years in prison [by a military court martial that began in 2007] at the end of 2019"), https://www.world-today-news.com/constitutional-court-of-suriname-no-amnesty-for-december-murders/. *See also* 'Suriname must respect judicial independence over president's trial, UN expert urges' *UNOHCHR News*, 15 August 2017 (reporting that a UN expert had "condemned the threats to judicial independence and the repeated delays which have dogged the case against President Desiré Delano Bouterse. … 'I am concerned that there have been repeated attempts to interfere with or delay the trial,' said Mr. García-Sayán, whose specialist mandate deals with judicial independence"), https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21974&LangID=E; and *Baboeram et al. v. Suriname*, CCPR/C/21/D/146/l983 (10 April 1984) (concerning the December Murders).

365 *See e.g.*, IACTHR Monitoring Compliance orders in *Moiwana Village* and *Saramaka People*, noting also that the state has failed to even report in relation to the *Kaliña and Lokono Peoples* case.

*in nine countries*, which concerns four of the countries under review (not Suriname and SVG). It observes, *inter alia*, that "the region generally displays high levels of inequality, limited access to services to vulnerable populations and high levels of criminality and low levels of confidence in public institutions, which is also reflected in inequitable access to justice."[366] While references to ITPs are sparse, it reports that "various groups have particular needs from the justice system that are not being adequately met," including ITPs, and a "lack of accessibility to Courts both in terms of infrastructure and distance disproportionally affect … [ITPs]."[367] As discussed in the in-country studies, these same issues also affect ITPs in Suriname and SVG. The report does refer to indigenous peoples in **T&T**, stating that they "are an underrepresented group on the judicial apparatus. Their access to justice is also impaired by their location away from judicial centres."[368] It then proposes that a "partnership be developed with the indigenous community," and that this "needs to acknowledge the reality of uniqueness of indigenous communities. In this regard, there needs to be an understanding that the indigenous groups have their own systems of justice which will play a key role in terms of how they interact with the formal justice system."[369]

This section will not deal with the full range of issues that could be discussed beyond noting that they are all relevant in each of the six countries in one way or another and to varying degrees. Treatment of ITPs in the criminal justice system is especially egregious. For example, ITPs' members are often prosecuted without any mandatory translation services.[370] The author has personal knowledge of indigenous persons in Guyana who are serving prison sentences or were awaiting trial and who had no knowledge of why they were arrested or what the charges might be, and who were unable to communicate with the magistrate during their trial or understand the proceedings that they sat through without counsel, and this is not uncommon. Maroons especially appear to suffer to the same treatment in Suriname. Legal aid is scarce at best and normally overworked and unfamiliar with ITPs'

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366 *Caribbean Justice: a needs assessment of the judicial system in nine countries*, United Nations Development Programme for Latin America and the Caribbean (2020), https://www.bb.undp.org/content/barbados/en/home/library/undp_publications/caribbean-justice--a-needs-assessment-of-the-judicial-system-in-.html.

367 *Id*. p. 18-9 (also stating, p. 34, that "The geographical distribution of Courts, particularly in Guyana and Belize can disadvantage individuals/groups, more specifically: indigenous populations accessing justice as these populations would often have to travel far distances as there are little to no courts in remote areas;" and, Fig. 4, p. 35, entitled "Distribution of courts in the Republic of Guyana illustrate how access to justice is made more difficult for indigenous populations, among others").

368 *Id*. p. 76.

369 *Id*. p. 76-7 (recommending also that "an Indigenous Community Integration Plan should be developed" and include various measures, such as conducting research "to understand the indigenous systems of justice…; [and] sensitization for indigenous communities … about the formal justice administration system." It further proposes support for "persons from these communities to enter the law profession … [and] to become ADR leaders. … The Justice on Wheels project should include frequent visits to indigenous communities to encourage the uptake of services and to build trust in the justice system").

370 *See e.g., L.N.P v. Argentina*, CCPR/C/102/D/1610/2007 (16 August 2011), para. 13.4 ("… the proceedings involving an indigenous woman were held entirely in Spanish, without interpretation, despite the fact that both she and other witnesses had difficulty communicating in that language. … [T]he Committee finds that the author's right to enjoy access to the courts in conditions of equality, as recognized in article 14, paragraph 1, was violated"). See also CERD/C/GTM/CO/11 (2006), para. 15 (expressing concern "at the problems experienced by indigenous peoples in gaining access to the justice system, particularly because the indigenous legal system is not recognized and applied and because of the lack of interpreters and bilingual counsel available for court proceedings").

rights, issues, and cultures.[371] This also applies to minors.[372] In common with other regions, there is also some evidence that ITPs' members are incarcerated more and often experience disproportionately higher sentences in relation to others for the same offenses.[373] Likewise, even notorious crimes against ITPs often go unpunished (e.g., repeated rapes of indigenous women and girls in Baramita, the Upper Mazaruni and elsewhere in Guyana, which are known to the authorities, yet impunity prevails).

In a statement that could also apply to Suriname and others (Belize is an exception), Arif Bulkan aptly describes the judicial process in **Guyana** as operating with "Dickensian laboriousness" and "often amounting to a battle of attrition."[374] Delays in the administration of justice and especially judicial proceedings appear to also affect indigenous peoples disproportionately in Guyana. Compare the relative alacrity of decisions in favour of miners (in the previous section) with those filed by indigenous peoples' seeking protection for their land rights and from mining, and that is not counting the extreme delays in the Upper Mazaruni case, now pending before the High Court for more than 23 years (two of the original plaintiffs have died in that time). This same dynamic has been observed in Guyana's land titling system. Janette Bulkan,[375] for instance, concludes that the state is extremely inefficient in processing indigenous title applications and, "[w]hile this sloth continues, the GGMC continues to issue mining concessions over the Amerindian customary lands. This … would be a denial of justice in almost any country."[376] Discussing the mining permits affecting Isseneru and other indigenous villages' titled and other lands, she states that "one effect of these bureaucratic delays has been to allow the cheaply-acquired mining concessions to pre-empt lands between Amerindian communities and thus prevent the ecologically

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[371] *See e.g., Report Nº 81/07, Daniel and Kornel Vaux (Guyana),* IACHR, Admissibility, para. 65 (where the "Commission notes that all international human rights systems, including the Inter-American system, stress the importance of 'equality of arms' before a tribunal" and; quoting the IACTHR's Advisory Opinion, OC-16/99, stating that "the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages").

[372] *See e.g.,* 'Baramita Youth freed after 7 years wait for trial', *Guyana Newsroom*, 3 May 2018 ("Eon Henry was only 13-years-old when he was incarcerated on a murder charge. A few days ago, the charge against him was finally dismissed after seven years of waiting for the case to go to trial while he remained confined at the Sophia Holding Center, without legal representation. … For years, the teenager remained in the lock ups without any legal representation until 2015 when the Rights of the Child Commission in collaboration with UNICEF and the Guyana Legal Aid Clinic offered support. Following close to three years of persistent representation, the Office of the Director of Public Prosecutions finally dropped the charge. … Last year, the Rights of the Child Commission reported that 90% of juvenile delinquents are denied their right to legal representation"), https://newsroom.gy/2018/05/03/baramita-youth-freed-after-7-years-wait-for-trial/.

[373] *See e.g.*, 'Sentences by Lethem Magistrate', Letter to the editor, *Stabroek News*, 6 December 2021 (explaining that "Over the years people have been appalled by the draconian sentences handed down to mostly Indigenous people for offences that carry lesser penalties in other jurisdictions. Just last week a Lethem youth was sentenced to three years in prison for possession of 16 grams of cannabis which carries a street value of $8,000 while at the same time at the Weldaad Magistrate's court a man was ordered to pay a fine of $40,000 for possession of 156 grams of the same drug and at the Georgetown Magistrate's Court a man was given community service for possession of $31,500 of cannabis. There are many Indigenous people languishing in prison for offences that carry non-custodial penalties elsewhere in the country…. … We are also calling on the relevant authority to make legal representation available for persons who cannot afford same who are mostly Indigenous so justice can be served and our human rights respected"), https://www.stabroeknews.com/2021/12/06/opinion/letters/sentences-by-lethem-magistrate/.

[374] A. Bulkan, Traditional Lands, *supra*, p. 87.

[375] *Expert Report of Professor Janette Bulkan*, IACHR, Case 13.083, Akawaio Indigenous Community of Isseneru and the Amerindian Peoples Association (Guyana), 5 December 2017, p. 5.

[376] *Id*. p. 6.

rational formation of Amerindian Districts within which villages could shift location to allow land fallowing … as well as denying the titling of the whole extent of customary land."[377] This is discussed further in the next section.

Recalling the decision in *Thomas and Arau Village Council* and the High Court's repeated claim to have lacked evidence or that the evidence presented was not sufficient (including testimony from the Village Chief), it is extremely important that the courts are flexible in receiving information from ITPs and that they do not impose unwarranted burdens in this regard. It is grossly unfair to disregard testimony from community members without substantial justification,[378] to reject their (authoritative) characterization of customary tenure and laws, or to require authenticated documentary evidence of historical events,[379] no matter how far back in time.[380] As an indigenous scholar observes, an "Aboriginal perspective is legal evidence of a *sui generis* Aboriginal legal system…. They have been transmitted across the generations of a particular Aboriginal nation to the present-day."[381] In this vein, courts throughout the Commonwealth now often accept oral history as evidence in aboriginal title litigation and have managed to accommodate hearsay and other rules in this regard.[382] Australia, for instance, amended its

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[377] *Id*.

[378] *See e.g.,* N. Higgins, *Songlines and Land Claims; Space and Place*, 34 INT'L J. SEMIOTICS OF LAW 723 (2021) (explaining the central significance of songlines in claims concerning title to land, under the *Aboriginal Land Rights (Northern Territory) Act* and the *Native Title Act* (Cth), and discussing their status in Australia as evidence of title to land); D. Milward, *Doubting What the Elders Have to Say: A Critical Examination of Canadian Judicial Treatment of Aboriginal Oral History Evidence*, 14 INTL J EVIDENCE & PROOF 287 (2010); and Karen Drake, *Indigenous Oral Traditions in Court: Hearsay or Foreign Law?"* in K. Drake and B. Gunn (eds.), RENEWING RELATIONSHIPS: INDIGENOUS PEOPLES AND CANADA (Saskatoon: Wiyasi-wewin Mikiwahp Native Law Centre, University of Saskatchewan, 2019).

[379] *See e.g*., J. Stauffer, *You People Talk from Paper: Indigenous Law, Western Legalism, and the Cultural Variability of Law's Materials*, 23 LAW TEXT CULTURE 40 (2019).

[380] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 ("A court should approach the rules of evidence, and interpret the evidence that exists, conscious of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions and customs engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards applied in other contexts"). *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, 01/11/2002, A/57/18, para. 315-343, 330 (expressing concern about "the difficulties which may be encountered by Aboriginal peoples before the courts in establishing Aboriginal title over land," and recommending that Canada "examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts"). *Cf. Yorta Yorta v. Victoria*, 194 ALR 538 (2002) (an Australian case giving preference to the written accounts of white settlers over the oral history of aboriginal peoples in denying the existence of native title rights); R. Williams Jr., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (Minneapolis: U. Minnesota Press 2005); and H. Babcock, *[This] I know from my grandfather: the battle for admissibility of Indigenous oral history as proof of tribal land claims*, 37 AM. INDIAN L. REV. 19 (2012): 19..

[381] J. Youngblood Henderson, *Proving a Constitutional Right to Land for Aboriginal Peoples in Canada* (FNGI 2020), p. 61 (further stating that "In determining constitutional sui generis rights of Aboriginal peoples, the Supreme Court of Canada has established special rules of evidence and procedures. The constitutional interpretative principles demand that equal weight be given to the perspective of Aboriginal nations and peoples"); and p. 63 (Learning, understanding, affirming and enhancing Aboriginal perspectives and their cognitive diversity in the Canadian legal system and displacing the colonial biases and racial prejudices are difficult and pressing issues for trial courts. In Aboriginal claims to title and rights, reviewing courts must give due weight and equal footing to Aboriginal traditions and perspectives"), https://fngovernance.org/wp-content/uploads/2020/09/proof.pdf.

[382] *See e.g*., *Delgamuukw v. British Columbia,* [1997] 3 SCR 1010*,* para. 82, 84 (explaining that "aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples," and this entails "adapt[ing] the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts"); M. Islam, *Compare the approaches to recognition, proof, and content of aboriginal title in Australia and Canada and to what extent have the Malaysian court decisions reflected either one or both of these approaches?*, 5 INT'L J. LAW 167 (2019). For a comprehensive treatment *see* B.G. Miller, ORAL HISTORIES ON TRIAL. RECOGNIZING ABORIGINAL NARRATIVES IN THE COURTS (Vancouver: UBC Press 2011); A. Mills, EAGLE DOWN IS OUR LAW: WITSUWIT'EN LAW, FEASTS, AND LAND CLAIMS (Vancouver: UBC Press 1994); and D. Eades, COURTROOM TALK AND NEOCOLONIAL CONTROL (Berlin: De Gruyter Mouton 2008).

rules of evidence in 2008 to create new exceptions to hearsay and opinion rules to address the use of oral history by the courts, and incorporated these into its *Native Title Act* in 2009.[383]

Finally, with respect to the requirements that remedies are "appropriate and effective,"[384] which includes evidence of compliance with decisions, and that grant effective protection which "takes into account the inherent particularities that differentiate [ITPs] from the general population," while **Belize** is progressing in some respects, the others have far to go. The defects in both **Surinamese** and **Guyanese** jurisprudence are discussed above and speak for themselves, as perhaps does the absence of any jurisprudence in **Dominica**, **SVG** and **T&T**. To this should be added the abject failure to comply with judgments of the IACTHR in the case of **Suriname** and the ever growing delay, one that is beginning to approach unreasonable, in complying with the Consent Order endorsed by the CCJ in *Maya Leaders* in the case of the **Belize** (as well as the specific recommendations of the IACHR in its 2004 report).[385] With the exception of Belize, the judiciary has routinely failed to take into account ITPs' rights, differences and the other criteria identified by the IACTHR. Guyana's judiciary has been especially remiss in this regard. As discussed below, these problems recur in the administrative land titling procedure established under the *Amerindian Act* 2006, even if Guyana is the only country under review to have such a procedure to-date (Belize and Suriname say they are in the process of developing a procedure).

## H. Land Titling and other Administrative Processes

> We Amerindians were the original people of this country, and as such we feel that, we the Wapisianas of these villages, should have rights to own the land on which we build our houses, to own the land on which we farm, to own the land on which we rear cattle, to own the land on which we hunt; to own the land on which we cut timber for our houses, to own the mineral rights on our lands, to own the water rights for fishing, drinking and swimming, and to claim these rights for our children for all time.[386]
>
> [T]o the extent title has been granted to indigenous groups, this has been done unilaterally by the State party, rather than within the framework of a procedure respecting the inherent rights of the indigenous groups to such areas.[387]

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383 *Evidence Amendment Act (Cth) 2008* and *Native Title Amendment Act (Cth) 2009.* See also Z. Akhtar, *Aboriginal oral testimony, hearsay rule and the reception theory of admissibility,* 42 C'WLTH LAW BULLETIN 396 (2016); and A. Potamianos, *The Challenges of Indigenous Oral History Since Mitchell v. Minister of National Revenue*, 26 APPEAL 3 (2021).

384 Kaliña and Lokono Peoples, para. 251 ("Appropriate and effective to protect, ensure and promote the rights over their indigenous lands, by means of which they can implement the processes of recognition, delimitation, demarcation, and titling and, if appropriate, secure the use and enjoyment of their traditional territories…"); and *Tribunal Constitucional v. Perú,* Judgment of 31 January 2001. Ser. C No. 71, para. 90 ("effectiveness means that, in addition to their formal existence, the remedies must produce results or responses to violations of recognized rights, whether those rights are recognized by the Convention, the Constitution, or domestic law").

385 On performance of obligations in a Consent Order *see e.g.*, FOSKETT ON COMPROMISE (London: Sweet & Maxwell/Thomson Reuters, 2015), para 5-45 ("If the antecedent agreement failed to contain an express term as to the time for performance of the obligation to be set out in the consent order, the court would imply an obligation to perform the obligation within a reasonable time and alter the order accordingly on application"); and the long list of authorities cited in CHITTY ON CONTRACTS Vol. 1 (London: Sweet & Maxwell, 31st Ed.), para 21-021 (e.g., *Postlethwaite v Freeland* (1880) 5 App Cas. 599, 608 (per Lord Sellbourne L.C.: "There is no doubt that the duty of providing and making proper use of sufficient means for the discharge of cargo, when a ship which has been chartered arrives at its destination and is ready to discharge, lies (generally) on the charterer. If by the terms of the charter party he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement … If on the other hand there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time …").

386 *Report of the Amerindian Lands Commission* (Georgetown: Government of Guyana 1969), p. 161 (repeating a 1967 statement by Wapichan leaders).

387 *Communication of the UNCERD (Guyana),* Follow Up Procedure, 24 August 2007, p. 2, https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GUY/INT_CERD_FUL_GUY_11965_E.pdf.

In *Kaliña and Lokono Peoples*, the IACTHR explained that "States have the obligation to establish appropriate proceedings under their domestic laws to process the land claims of the indigenous peoples…."[388] The IACHR explains that the "right to legal certainty of territorial property requires the existence of special, prompt and effective mechanisms to resolve existing legal conflicts over the ownership of indigenous lands,"[389] (including re. third parties and state-designated competing land uses, e.g., protected areas).[390] Part of "legal certainty … consists in having their territorial claims receive a final solution. … [O]nce the claims procedures over their ancestral territories have been initiated, be it before administrative authorities or before the Courts, their claim should be given a final solution within a reasonable time, without unjustified delays."[391] Failure to do so is not only a violation of substantive and other rights, it is also the basis for excuse from the international requirement to exhaust domestic remedies as these would be either unavailable, ineffective or subject to undue delay.[392] Applicable international norms also require that states carry out a "substantial independent review of the historical or other evidence" in order to decide on indigenous peoples' "territorial claims over their ancestral lands in a substantive manner, through an effective and fair procedure."[393] The IACHR has held that "Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied

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388 Kaliña and Lokono Peoples, para. 240. *See also* UNDRIP, Arts. 26(3) ("3. States shall give legal recognition and protection to these lands, territories and resources [in 26(1) and (2)]. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned"); 27 ("States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process"); and 28 ("1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, 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. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress").

389 IACHR Indigenous Lands, para. 86.

390 *Xucuru Indigenous People*, Report No. 44/15, Merits, IACHR, Case 12.728 (Brazil) (2015), para. 97 ("the Commission considers that the ineffectiveness of the administrative process is also evident in that, as noted above, it did not lead to effective removal of non-indigenous settlers from the titled areas, thus preventing the peaceful possession of the land by the Xucuru indigenous people and its members"). *See also Xákmok Kásek vs. Paraguay,* Judgment of 24 August 2010. Ser C No. (concerning restitution of lands held by third parties and a privately owned protected area); Kaliña and Lokono Peoples (concerning third-party land titles, various logging and mining concessions and two state-established national parks/nature reserves)

391 *Id*.

392 S*ee e.g., Hul'qumi'num Treaty Group* (*Canada*)*, Report No. 105/09,* IACHR, Admissibility, Petition 592-07, 30 October 2009, para. 37 (stating that "Since 15 years have passed and the central claims of the HTG have yet to be resolved, the IACHR notes that the third exception to the requirement of exhaustion of domestic remedies applies due to the unwarranted delay on the part of the State to find a solution to the claim. Likewise, the IACHR notes that by failing to resolve the HTG claims with regard to their ancestral lands, the BCTC process has demonstrated that it is not an effective mechanism to protect the right alleged by the alleged victims. Therefore, the first exception to the requirement of exhaustion of domestic remedies applies because there is no due process of law to protect the property rights of the HTG to its ancestral lands"); and *Xucuru Indgenous People (Brazil)*, *Report No. 98/09,* IACHR, Admissibility, 29 October 2009, at para. 35 (concluding that there was an unjustified delay and stating that "In short, FUNAI and the Ministry of Justice began the administrative measures specified in domestic legislation for restoration of the Xucuru indigenous people's traditional habitat in 1989, and to date --20 years later-- the matter has still not been finally settled").

393 IACHR Indigenous Lands, at 346 (footnotes omitted) (further observing that "This requirement is disregarded along with the rights to property and due process, when the administrative decisions are not based on an independent review of the available evidence in order to establish whether the territorial claim is founded, but on other grounds such as arbitrary stipulations or negotiations").

and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole."[394]

As discussed above and further below, **Guyana's** titling system does not meet these international standards, although it should be noted that a large part of the defect is the overly broad discretion accorded to the Minister, who, in principle, *could* comply with the applicable standards within the confines of the law but is certainly not required to do so. J. Bulkan calculates that indigenous "communal titled lands [up to] 2015[395] represented about 30 per cent of their customary claimed land as recorded in the Report of the Amerindian Lands Commission."[396] Additionally, studies conducted by the Amerindian Peoples Association in most of Guyana's administrative regions amply illustrate the problems with the land titling process (which commenced in 1976, was regulated with actual procedures and criteria in 2006 and again in 2017, and is ongoing today, some 45 years later).[397]

Its first report documents the land rights situation of 35 indigenous communities in Region 1 and seven in Region 2.[398] After extensive field work and community meetings, it found that: almost one third of the communities have no legally secured land rights; out of the 29 titled Amerindian Villages visited, only one community considers its existing land title to be adequate for its residents; two-thirds of titled villages highlight that their settlements and homesteads are left outside their title; and weak land governance and flawed boundary survey practices along with discriminatory national laws on land and resource ownership often prevent satisfactory and fair land titling for indigenous communities. The situation in Region 8, primarily Patamona lands, is equally bad. For instance, the titles of all 15 titled villages do not cover the full customary areas occupied and used; 14 titled villages report that they depend on land outside the title for hunting, fishing, gathering and farming; and nine titled villages report that they have homesteads and small settlements outside their title boundaries.[399]

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394 *Mary and Carrie Dann*, Merits, Case 11.140 (United States) (2002), OEA/Ser.L/V/II.116, Doc. 46, at 140 (further explaining that "This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives").

395 Bulkan explained in 2013 that "Some 104 Amerindian Villages have been awarded communal tenure under the *ex gratia* terms of the Amerindian Acts of 1951 and 2006, covering about 2.9 Mha or 13.8% of Guyana. There is some confusion in MoAA as to whether 120 or 138 communities are eligible for title. In addition, 41 Amerindian Villages have outstanding claims for extension of titled lands. … This area should be contrasted with the 11.1 Mha (53% of Guyana) claimed by Amerindian communities during the survey by the Amerindian Lands Commission (ALC) during 1967 – 1969. In other words, although the Amerindian population has doubled since 1969, their land claims have reduced by 20%." J. Bulkan, The Struggle for Recognition of the Indigenous Voice: Amerindians in Guyanese Politics, 4 *Commonwealth J. Int'l. Affairs* 1, at p. 6 (citations omitted), https://www.academia.edu/4702552/The_Struggle_for_Recognition_of_the_Indigenous_Voice_Amerindians_in_Guyanese_Politics.

396 *Expert Report of Professor Janette Bulkan*, IACHR, Case 13.083, Akawaio Indigenous Community of Isseneru and the Amerindian Peoples Association (Guyana), 5 December 2017, p. 5.

397 *See Guideline for Amerindian Land Titling in Guyana* (approved by the ALT Project Board and endorsed by the GoG and UNDP, April 2017, https://www.gy.undp.org/content/dam/guyana/docs/GOVPOV/Guideline-for-Amerindian-Land-Titling-in-Guyana.pdf. See also C. Camacho-Nassar, *Mid-Term Evaluation of the Amerindian Land Titling project in Guyana* (UNDP, December 2016), https://erc.undp.org/evaluation/documents/download/10060.

398 *Our Land, Our Life: A Participatory Assessment of the Land Tenure Situation of Indigenous Peoples in Guyana. Report for Region 1 and Region 2* (Amerindian Peoples Association of Guyana and Forest Peoples Programme 2016), http://www.forestpeoples.org/sites/default/files/publication/2016/12/fppguyanaltainternet.pdf.

399 *Our Land, Our Life: A participatory assessment of the land tenure situation of indigenous peoples in Guyana. Report for Region 8* (Amerindian Peoples Association, Forest Peoples Programme and Rainforest Foundation US, May 2018), p. 9-10 (also finding that "The land tenure security of the Villages that hold a legal title is limited in some Villages by a 'save and except' clause in titles allowing exclusion of third party private property or land lease interests within the title area; 8 Joint requests for collective land title in the past have been dismissed e.g. by the Amerindian Lands Commission in the 1960s; … [and] Fourteen of the 15 titled Villages say they were

Also, twelve of the 14 demarcated villages report flaws in their boundary demarcations, which is also the cause of recent disputes between several villages, and almost all report conflicts with external parties on their titled and other lands (e.g., mining and logging and the Kaieteur and Iwokrama protected areas).[400] The situations in Regions 7 (Arecuna and Akawaio) and Region 9 (Waiwai, Wapichan and Macushi) are replete with the same defects and problems.[401]

Why? There are various reasons, some institutional, some legal, and some derived from societal prejudices towards indigenous peoples.[402] This includes, first, that the titling process is entirely divorced from any rights that indigenous peoples may have internationally or even domestically. The Act is, as the title and text attest, about the discretionary[403] distribution of state lands.[404] The objective of the law is therefore not to regularize indigenous peoples' rights, even if there may be an overlap in practice. Indigenous peoples and their communities are in a profoundly different position where the law recognizes that they have inherent and enforceable rights to which correspond obligations on the part of the State to regularize, respect and protect the lands to which those rights pertain.[405] This also means that the Minister's discretion is primarily constrained by administrative law standards, rather than the articulated rights of indigenous peoples, and it is doubtful if administrative law standards (e.g., even an expansive notion of an irrationality test) would allow a court to examine the details of land titling decisions, and they would only apply in the most egregious situations. There is no evidence at all that the Minister even considers human rights standards, entrenched in the Constitution or otherwise. The *Amerindian Act* is the primary legislation that concerns the procedures for "granting" lands to indigenous communities and it is the logical place to affirmatively recognize and specify indigenous property rights

not consulted, and did not give their free, prior and informed consent to the area granted as title"), https://www.forestpeoples.org/sites/default/files/documents/Our%20Land%2C%20Our%20Life.pdf.

400 *Id*. p. 9-10.

401 *See Our Land, Our Life: A Participatory Assessment of the Land Tenure Situation of Indigenous Peoples in Guyana Report for Regions 1, 2, 7, 8 & 9* (Amerindian Peoples Association, Forest Peoples Programme and Rainforest Foundation US 2021), p. 6 ("77 out of 85 titled villages reporting that their titles do not secure their customary lands"), https://rainforestfoundation.org/wp-content/uploads/APA-LTA-2021-FINAL-FOR-WEB.pdf.

402 *See e.g.,* S. Cordis, *Push Ya' Body: Imaginaries of the 'Bush' and the Amerindian Body in the Guyanese State* in A. Bulkan and D. A. Trotz (eds.), UNMASKING THE STATE: POLITICS, SOCIETY, AND ECONOMY IN GUYANA, 1992-2015 (Kingston: Ian Randle 2019), p. 440-1 (observing that "… Though seemingly more progressive than other commonwealth/CARICOM countries such as Belize and Suriname, statutory recognition of indigenous land titles in Guyana paradoxically, reproduces a condition of coloniality, facilitating the erosion of indigenous control over their lands and territories and marginalising indigenous interests, knowledges, and voices. The state arbitrates indigenous relations to the land, qualifying the extent of actual recognition, codification, and realisation of indigenous land rights, even as it prioritizes economic ventures that undermine indigenous self-determination").

403 The Minister is under no obligation to issue title at all under the Act and this is clear from the conditional language employed in Section 63(1): "If an application is approved title shall be granted under the State Lands Act."

404 IACHR Indigenous Lands, para. 69 (explaining that "Official recognition should be seen as a process of 'production of evidence establishing the prior ownership of the communities' and not as a grant of new rights. Territorial titling and demarcation are thus complex acts that do not constitute rights, but merely recognize and guarantee rights that appertain to indigenous peoples on account of their customary use").

405 *See e.g.,* 'The two words that scare the World Bank' (Opinion by Philip Alston, UN Special Rapporteur on Extreme Poverty and Human Rights), *Washington Post*, 7 November 2014 (responding to the question "[o]fficials at the [World Bank] ask why it matters whether they use human rights language, as long as they are pushing for gender equality, access to water and so on;" and explaining that "[t]he answer is that rights language provides a context and a framework, invokes states' legal obligations, underscores that certain values are nonnegotiable, brings a degree of normative certainty, and makes use of the agreed interpretations of rights that have emerged from decades of reflection, discussion and adjudication. Most important, rights language recognizes the dignity and agency of all individuals and is intentionally empowering"), http://www.washingtonpost.com/opinions/philip-alston-the-world-bank-treats-human-rights-as-unmentionable/2014/11/07/9091dafa-65da-11e4-9fdc-d43b053ecb4d_story.html.

in accordance with international human rights standards and to set out the corresponding obligations of the State (the primary duty being to delimit, demarcate and title the lands to which those rights correspond).[406]

To be sure, the IACHR and the IACtHR have unambiguously held that the purpose of delimitation, demarcation and titling procedures is to regularize and secure the lands and territories that "belong to indigenous peoples,"[407] "with due respect for indigenous peoples' forms of internal organization with regard to land tenure,"[408] and which "recognizes such rights in practice."[409] Further, the IACHR has held that the State's "obligation to recognize and guarantee the exercise of the right to communal property by indigenous peoples 'necessarily requires the State to effectively delimit and demarcate the territory to which the people's property right extends …'."[410] It further explains that states are obligated to delimit, demarcate and title "the precise territory encompassed by indigenous and tribal peoples' property rights…."[411] The UNCERD made precisely this point in 2006, recommending that Guyana "*recognize* and protect the rights of all indigenous communities to own, develop and control the lands which they traditionally occupy… [and] demarcate or otherwise identify the lands which they traditionally occupy or use."[412] Complying with these obligations would preclude responses from the state that the area requested is "too big" or "bigger than Barbados," or that the population is too small for the requested area, at least without further justification, and would have to be based on whether the applicant has demonstrated traditional ownership or not.[413]

Under the *Amerindian Act*, when the Minister's takes a decision on applications for title (s. 60) or extension of title (s. 59), Section 62(2) requires that "In making a decision the Minister shall take into account all information obtained in the investigation and consider the extent to which the Amerindian Village or Community has demonstrated a physical, traditional, cultural association with or spiritual attachment to the land requested." The key words expressing duties in this provision are "shall take into account" (the information obtained) and "consider" (the extent of various attachments to the requested land). The eligibility criteria are a demonstrable "physical, traditional, cultural association with or spiritual attachment to the land." In other words, the Minister is obligated to take into account information and consider the extent to which that information demonstrates various attachments to the requested land. If the Act had enumerated the rights of indigenous peoples to own and control their lands, territories and resources traditionally owned or otherwise occupied and used – shorthand for the common formulation used in international standards – the land titling procedure would primarily concern identifying these lands and require that the Minister issue title and demarcate the same. This provides an objective standard against which the decisions of the Minister can be judged and mandates an outcome that provides some measure of predictability and certainty.

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406 *See e.g.*, Saramaka People, para. 194 and 214(7) (where the IACTHR explicitly ordered that legislative recognition of indigenous territorial rights must include recognition of the "right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system").

407 IACHR Indigenous Lands, para. 94.

408 *Id*. para. 82.

409 *Id*. para. 94.

410 Maya Indigenous Communities, para. 132.

411 IACHR Indigenous Lands, para. 98 and; *id*. para. 130 and 197.

412 CERD/C/GUY/CO/14, para. 16 (emphasis added).

413 IACHR Indigenous Lands, para. 98 (explaining that "In determining the area in question, it further explains that "the organs of the Inter-American system have looked to evidence of the historical occupation and use of the lands and resources by members of the community, of the development of traditional subsistence, ritual and healing practices therein, of the names given to the area in the community's language, and also to technical studies and documentation, as well as to evidence of the adequacy of the claimed territory for the development of the corresponding community…").

At best it may be said that indigenous villages/communities are entitled to apply for grant of state land or extension of an existing title and the Minister is obligated to "consider" the extent of their various relations to land when deciding on whether to grant title and the extent thereof. Even if it is accepted that this obligation gives rise to a corollary right, the latter is constrained by the former and, thus, and for the sake of argument, would be a right to have considered the extent to which information collated by the State may show that indigenous peoples have relations to land, which then results in decision about title that could, but certainly is not guaranteed to, correspond to their property rights as defined by their customary tenure systems. Also, while it is possible for the Act to be consistent with human rights norms without any explicit mention of the word 'rights', this would require that the criteria, parameters, and procedures set out in the Act are consistent with those standards and the corresponding obligations of the State, and they are clearly not.

Recall also that the Act potentially renders some indigenous communities ineligible to apply for title. According to Section 60, only those communities that have been inexistence for 25 years and that have a population of at least 150 persons for five years prior to their application may apply. Criticism of this provision maintains that this has nothing to do with whether an indigenous community may be able to demonstrate that it has rights to its lands and that this can be done by 149 or less persons according to human rights standards. Are 149 or 125 persons, self-identifying as an indigenous community, less deserving of respect for their rights than 150 persons? In *Kaliña and Lokono Peoples*, three of the eight plaintiff communities have populations of less than 150 persons. This fact was not even commented on by the IACHR and IACTHR when holding that these communities, separately and collectively, have proven rights to own and control their lands and territory, yet they would be ineligible to even apply for title under the *Amerindian Act*.

Second, Section 61(2) requires that the Minister "cause[s] an investigation to commence" to obtain information about an applicant community. Most relevant for our purposes, this information shall include: "the length of time the Amerindian Village or Community has occupied or used the area requested; the use which the Amerindian Village or Community makes of the land; the size of the area occupied or used by the Amerindian Village or Community; a description of the customs and traditions of the Amerindian Village or Community; the nature of the relationship which the Amerindian Village or Community has with the land … [and] any other information which the Minister reasonably considers to be relevant." Population size is also listed even though it is not directly related to the existence of customary tenure. In the case of Isseneru, it was cited as one reason for rejecting the community's initial application. The Minister may also, but is not required to, look at: "oral or written statements from the Amerindian Village or Community; authenticated or verified historical documents; sketches and drawings prepared by the Amerindian Village or Community; surveys prepared or authorised by the Guyana Lands and Surveys Commission [also meaning not maps made by indigenous peoples]; … [and] reports or documents from anthropologists or archaeologists…."

It is unclear why some of this information is required and some is optional as the Minister is only required take it into account when deciding and s/he is not bound to follow or agree with any of it. Also, the catch all language "any other information which the Minister reasonably considers to be relevant" allows for consideration of a range of issues that may have little to do with the applicant community or its rights. Plans to construct a hydroelectric dam in the area may be relevant information to the Minister, but are not, at least as part of the initial analysis, directly related to regularizing the applicant's traditional tenure. Moreover, much of the optional

information could supplement the mandatory information and, assuming both are focused on the right issues, more than likely would provide important information not otherwise gathered. Oral history, traditional knowledge and ethnographic studies are, for instance, often of crucial importance to correctly understanding and ascertaining traditional tenure systems and the nature of relations to lands. Since community members, especially elders, are the primary holders and authoritative interpreters of their peoples' traditions and knowledge, including as related to their various relationships to land, it is difficult to understand why this is not included in the mandatory information to be gathered. This point bears emphasizing: the Minister is not required to even consider the bulk of information that may be submitted by an applicant community, and this speaks volumes about the fairness of this system.

Nonetheless, and leaving aside the highly relevant issue of the capacity of the now-Ministry of Amerindian Affairs to adequately conduct the required investigation or its 'independence' in this regard, some of the information is, or at least could be if assessed correctly, relevant to assessing traditional ownership (e.g., duration of occupation and use of the land, description of customs and traditions and nature of the relationship to the land, provided that the latter also documents customary laws and tenure, which is not explicitly specified). This does not mean however that the investigations conducted to date have assessed customary tenure systems, or are even understood in this way, and there is considerable evidence that they have not and are not. There is also considerable evidence that the decision-making process largely revolves around assessing the size of the requested land based on not much more than the application submitted and then, after a cursory investigation, a few brief discussions and meetings with state agencies responsible for handing out concessions, communicating a decision to the community. In other words, and to quote the IACHR, there is little evidence that the State conducts a "substantial independent review of the historical or other evidence" in order to decide on indigenous peoples' "territorial claims over their ancestral lands in a substantive manner, through an effective and fair procedure."[414]

Third, indigenous peoples are also painfully aware that their only option to challenge the Minister's decision is through an appeal on, at best, murky grounds to an alien, lumbering and expensive judicial system that has repeatedly shown that it is neither aware of nor greatly concerned about their rights. This is provided for in Section 64, which states that "An Amerindian Village or Community which is dissatisfied with the Minister's decision under section 62 may apply to the High Court for a review of the decision." While the High Court could and should resort to the Constitution and human rights law as part of its analysis, this rarely occurs, even when extensively briefed, leaving either the language of the Act or administrative law standards, or some combination thereof, as the basis for a decision.[415] While these may curb the most serious abuses of discretion, e.g., absolute rejection of the application without valid reason, these will be of little use considering the enunciated duties of the Minister – e.g., accounting for and considering extant third-party interests or future competing plans for the same lands – and the inability of administrative law to fully contemplate the details of land titling decisions e.g.,

[414] IACHR Indigenous Lands, *supra*, at para. 346 (footnotes omitted).

[415] *See e.g.*, B. Ramcharran, THE GUYANA COURT OF APPEAL. THE CHALLENGES OF THE RULE OF LAW IN A DEVELOPING COUNTRY, Cavendish: London (2002), p. 140 (explaining that there "is no evidence of the courts insisting on the application of international standards in the defense of fundamental human rights" and; the "application of international human rights law by the Court of Appeal has hardly even begun").

on where the precise boundaries should lie.[416] The *ab initio* and automatic privileging of third party interests further illustrates how decision making under the land titling procedure set out in the Act may be ineffective in regularizing and securing indigenous property rights.

Finally, Sections 61 and 62 of the Act both contain a series of deadlines by which the Minister must acknowledge an application, commence an investigation, and make a decision. These are clearly defined obligations and reasonable on their face, even if the period in which an investigation must be completed is not defined. This is an improvement over the situation prior to 2006 insofar as clear deadlines are provided, but the failure to circumscribe the period for the investigation often allows the process to drag on indefinitely, even if legally it may be implied that the investigation should be completed within a reasonable time (note that there were three persons employed by the Ministry to this end in 2020, among other duties, and around 50 villages on the list). Prior to 2006 applications often were simply unanswered. Recall, for instance, that Isseneru first requested title in 1987, but didn't get a response until 2005. The Wapichan and others have requested title to their traditional lands since 1967, a year after Guyana became independent, and are still insisting on the same today, some five years after Guyana celebrated the 50th anniversary of its independence. Just last week, the Minister claimed to have lost one of the village's applications for extension of title, coincidentally in relation to the same area that the Government has recently granted mining permits over without even notifying the affected villages.

To conclude this section, while Guyana's land titling process usually results in a land title at some point, even if it takes many years, these very rarely actually conform to what indigenous peoples understand to be their lands and to which they have rights in international law. While not directly analogous, one would expect that the state would strenuously object if the obligation to pay tax were subject to the same treatment. It is hard to imagine that the state would enact legislation that allowed citizens to take into account the information underlying their tax assessment or contrast it with the amount of tax assessments in other countries or any other information they consider relevant (gathered through an investigation that is not time bound), such as the amount of money they would have available for other things, and then consider the amount they would pay, should they choose to pay anything, based on what they, subjectively, deem to be reasonable, save and except any payments they think that they have made to others over the years. The most likely result would be a budget crisis. Moreover, contrast this with the Delimitation Principles and Methodology, jointly agreed and adopted by the Maya and the government of Belize to govern the regularization of the land rights of 41 Maya villages in southern Belize (see annex 2). This is firmly ground in human rights law and is an agreed, consensual process in which Maya perspectives and agency are fully incorporated, albeit requiring the enactment of legislation to complete the process. That is assuming that the new government does not unilaterally amend the same, which it is currently proposing to do.

### J. Internal/ITPs' Justice Systems

The last point identified by the IACTHR above in relation to remedies and access to justice concerns "Respect for the internal [ITPs'] mechanisms for deciding disputes on indigenous issues, which are in harmony with human rights."[417] This is consistent with Article 34 of the UNDRIP, which provides that ITPs "have the right to promote,

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[416] *In the Matter of an application by Carl Hanoman, for prerogative writs of Certiorari, Mandamus and Prohibition*, No. 23, High Court of Guyana, 3 June 1999 (holding that while a Minister's decision inevitably involves the exercise of a discretion, inherent in that discretion is an obligation to act fairly and reasonably within the boundaries of the Statute granting the discretionary power).

[417] Kaliña and Lokono Peoples, para. 250.

develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards."[418] Likewise, the EMRIP explains that "In conformity with the right to self-determination, indigenous peoples must have access to justice externally, from States, and internally, through indigenous customary and traditional systems."[419] The UNCERD has also expressed concern about the failure to recognize indigenous peoples' legal systems and customs, both alone and in the administration of state-based justice.[420] Its General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system calls on states parties, *inter alia*, to ensure respect for and recognition of ITPs' traditional systems of justice.[421]

The former UNSRIP discussed some of these issues in her report on autonomy and self-government. She concluded that the "imposition of State frameworks in the implementation of arrangements for autonomy or self-government has often resulted in what could be termed 'fragmented autonomies';" instead, a "comprehensive approach is needed that includes the indigenous conceptions of territory, control, power and relations."[422] She adds that effective guarantees for this right "cannot be achieved without the adequate implementation of their rights to the lands and territories," and measures that "result in territorial fragmentation and limited jurisdiction hinder the exercise of autonomy or self-government."[423] The same is also the case with respect to the operation of ITPs' legal systems, customary or otherwise (e.g., Village Councils in Guyana that are denied full jurisdiction due to inadequate titling of their lands, and indigenous peoples collectively, who are denied full jurisdiction because Guyana refuses to title their territories as opposed to their individual villages). The state is obligated to amend its laws to "provide spheres of governmental autonomy for indigenous peoples and their communities, while also ensuring their participation in decisions affecting them."[424]

ITPs legal systems continue to exist and operate both *de facto* (or they would no longer exist) and with varying degrees of *de jure* recognition in all countries except SVG and T&T, albeit perhaps not in their customary forms in all instances. For ease of use, I will refer to both customary and statutory forms of indigenous governance and legal systems as 'indigenous legal systems'. In **Belize**, the Alcalde system is the primary dispute resolution mechanism at the community level. It operates in conjunction with collective decision making by the village in plenary and sometimes also informal processes, such as house-to-house consultations (the same is also the case in indigenous villages in Suriname).[425] Bearing in mind that the Alcaldes have existed since time immemorial, at

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[418] *See also* UNDRIP Art. 3 (self-determination); Art. 4 (autonomy or self-government); Art. 5 ("Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State"); and Art. 35 (Indigenous peoples have the right to determine the responsibilities of individuals to their communities").

[419] *Access to justice in the promotion and protection of the rights of indigenous peoples*, A/HRC/EMRIP/2013/2 (29 April 2013), para. 5.

[420] *See e.g.*, Guatemala, 15/05/2006, CERD/C/GTM/CO/11, at para. 15 (expressing concern "at the problems experienced by indigenous peoples in gaining access to the justice system, particularly because the indigenous legal system is not recognized and applied and because of the lack of interpreters and bilingual counsel available for court proceedings").

[421] *General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system* (2005), https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/INT_CERD_GEC_7503_E.doc.

[422] *Report of the Special Rapporteur (Implementing the right of indigenous peoples to self-determination through autonomy and self-government),* A/74/149, 17 July 2019, para. 20.

[423] *Id*. para. 23.

[424] A. Xanthaki, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND (Cambridge: CUP 2007), p. 140.

[425] *See e.g.*, M. Mark, *Continuity under Colonial Rule: The Alcalde System and the Garifuna in Belize 1958-1969*, 39 ETHNOHISTORY 1 (1992).

the statutory level, the Alcaldes are recognized as magistrates under the *Inferior Courts Act,* which also provides for "the Alcaldes Court," and their limited civil and criminal jurisdiction under the *Alcaldes Jurisdiction Act,* which does not "encompass the full scope of the alcaldes role in their communities."[426] For instance, while the Alcaldes have a fundamental role in land and resource management, their jurisdiction does not extend to land issues, which are reserved for the jurisdiction of the state's local government system established in the *Village Councils Act*. Village Councils often compete with and seek to override the Alcaldes, and many Maya consider them to be an imposition.[427] A 2011 attempt to enact a new *Alcaldes Act*, better defining and recognizing the crucial role that the Alcaldes play in both intra- and inter-community legal matters, failed however, and this is now part of the discussion on the legislation that will be required pursuant to the 2015 Consent Order.

In **Suriname**, the indigenous legal system is *de facto* the only functioning legal system in many of the ITPs' territories (less so in those that are very close to non-ITPs population centers), despite the claims of the state to the contrary. ITPs continue to deal with most matters internally, although there is a tendency to involve the state for serious crimes like murder or where one party is not a member of the ITPs. The Framework Bill on Collective Rights does provide the legal space in which these systems can continue to operate, assuming it is enacted in its present form, although it is unclear what the required (but yet undrafted) subsidiary law on traditional authorities may say or how it may affect the current system.

**Dominica** is more along the lines of Belize than Suriname to the extent that there is some legislative basis for the exercise of the powers of the Chief and Council in the Kalinago Territory, including some law-making powers (by-laws, s. 29), albeit subject to state review and veto. In addition to the authority recognized in the *Kalinago Territory Act,* the Council is also a local government body with the powers of a Council under the *Village Councils Ordinance* 1954. The Council does have jurisdiction over the lands in the Reserve, even if the overall responsibility for development and planning in the Territory is retained by the Government (s. 48). Section 25(2) provides that the Council shall "provide for the good government and improvement of the Reserve [and] enforce the provisions of this or any other Act relating thereto, and also of all Regulations and By-Laws made under this or any other Act." While Section 25(3) provides that "The Council may endeavour to settle disputes among persons resident in the Reserve but shall not have the right to try cases or impose fines on persons in the Reserve, other than under section 29(4)." Section 29(4) provides that "The powers conferred by this section shall include power to require, impose and charge licences, rates, dues and fees within Reserve limits with respect to matters dealt with under any By-Law."[428] It may also establish committees and appoint advisors, where desired: e.g., although not specified, a Council of Elders to advise on traditional dispute resolution concepts and methods (s. 27(1)). This

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426 L. Mendez, *Baseline Study (Belize),* December 2021, p. 6.

427 *See e.g.,* CERD/C/CRI/CO/19-22 (2007), 25 September 2015, para. 25-6 (observing that "… bodies established by the State party, such as the comprehensive development associations and the National Commission on Indigenous Affairs, have supplanted indigenous peoples' own institutions in their relations with the State. As noted by the Special Rapporteur on the rights of indigenous peoples, and as acknowledged by the State party's delegation during the dialogue with the Committee, the development associations constitute an imposed institution that does not properly represent the indigenous peoples. The Committee is concerned by the fact that the associations have extensive powers in relation, for example, to the award of land titles in indigenous territories." Recommending "that indigenous peoples' authorities and representative institutions be recognized in a manner consistent with their right to self-determination in matters relating to their internal and local affairs").

428 *See also Kalinago Territory Act*, sec. 29(5), providing that "The Council may by any By-Laws, Rules, or Regulations made under this Act impose on offenders against the same such penalties as it may think fit, not exceeding two hundred dollars for each offence, and in the case of a continuing offence, a further penalty not exceeding fifteen dollars for each day during which the offence continues after service of written notice thereof by the Council, and in default of payment of the penalties, imprisonment for any term not exceeding six months").

system is far too prescriptive and restrictive to give effect to the right to autonomy and self-government and the maintenance/resuscitation of indigenous legal systems, although it would be for the Kalinago to determine what form an amendment of the law, if any, should ultimately take.

**Guyana's** Village Council system, governed solely today by the *Amerindian Act* 2006, is essentially a more elaborate form of the Chief and Council employed in Dominica, and it is supplemented by various other institutions[429] that each have specific functions.[430] The first Village Council was established in 1959 in what one commentator has described as an administrative annexation of indigenous government.[431] Nonetheless, it is generally considered the traditional form of government today given that it is the only system most of the current generations have known. As in Belize, it tends to operate in conjunction with the traditional indigenous legal system and customs. It has jurisdiction over titled lands (s. 13(e)(f) and (h)) and law-making powers in defined areas (s. 14, Rules), subject to Ministerial veto (s. 15(b)), and may apply a series of fines as specified in the Act for breaches as determined by the Village Council (ss. 14(2)(3) and 16) (acting as police, prosecutor, judge, jury and executioner according to some). Should a person fail to appear, they are liable on summary conviction before a magistrate to a fine of "not less than ten-thousand dollars [US$50] and nor more than thirty thousand dollars [US$150] and imprisonment for one month" (s. 17). Section 14(3) provides that "A rule made by a Village Council shall not be inconsistent with any other law and shall be void to the extent of such inconsistency." While this has not been pronounced on by the judiciary – mainly because the Minister rarely approves any by-laws submitted, by omission, rather than rejection – this provision raises many questions (e.g., would this in practice invalidate many of the written by-laws, proposed or used?). As with Dominica, this system is far too prescriptive and restrictive (the same is the case for elections), and indigenous peoples have called for it to be amended to provide greater autonomy.

The *Amerindian Act* also provides for District Councils (s. 35), unhelpfully defining a 'District' as "an area under the authority of a District Council" (Sec. 2).[432] There is only one that has been formally established to-date, the South Rupununi District Council, which represents 21 mostly Wapichan communities,[433] not all of them contiguous, raising questions about what the geographical extent of the District may be as this is not defined, and

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[429] In addition to those discussed below, *see also* the National Toshaos Council (Am. Act., sec. 41(c), providing that "The functions of the National Toshaos Council are … (c) to promote good governance in Villages including investigating matters as requested by a Village and making recommendations, provided that the National Toshaos Council may not investigate any matter which has been referred to the Minister and must ensure that any person involved in the investigation is given a reasonable opportunity to be heard…").

[430] Prior to 2006, the Village Council were also incorporated into the Local Government system as the lowest tier of the local democratic organs, a system introduced during the Cooperative Socialism period in Guyana and governed by the Local Democratic Organs Act. This is the reason that the regional administration continues to treat these indigenous government boidies as subordinates and service providers, in one case even holding the bank accounts of the Village Councils. See Amerindian Act 2006, sec. 83 and the Second Schedule (amending: "In the definition of local democratic organ, delete the words, and any council established under the Amerindian Act").

[431] S. Cordis, *Push Ya' Body: Imaginaries of the 'Bush' and the Amerindian Body in the Guyanese State* in A. Bulkan and D. A. Trotz (eds.), UNMASKING THE STATE: POLITICS, SOCIETY, AND ECONOMY IN GUYANA, 1992-2015 (Kingston: Ian Randle 2019), p. 438 ("The subsequent Amerindian Ordinance of 1951 granted provisions for state management of indigenous peoples, erecting what Butt-Colson has called the 'administrative annexation' of Amerindian peoples and their territories' (cited in Colchester 2005, 280–81)").

[432] Sec. 35 provides that "The Minister may by order establish a District Council if (a) at least three Village Councils make such a request in writing to the Minister; (b) the Village Councils making the request are in the same geographic area; (c) none of the Village Councils is a member of another District Council; and (d) each Village Council has obtained the approval of its Village general meeting. (2) The Minister may include in a District only those Villages whose Village Councils have made the request. (3) A District Council comprises the Toshao and one Councillor from each Village in the District. (4) A District Council may elect a Chairman, a secretary and a treasurer."

[433] Order 6 of 2017, made under Sec. 35 of the *Amerindian Act* 2006, *Official Gazette* (25 March 2017).

it cannot be the same as the titled lands held by 14 of those villages.[434] Importantly for present purposes, the District Councils could provide for some collective action across and among the villages insofar as Sec. 36 defines their functions to include: (b) working towards "consistency in the rules made by the Village Councils as far as is reasonable;" (e) monitoring compliance with and assisting in "the enforcement of rules made by Village Councils;" (f) building consensus and assisting "in resolving conflicts and disputes within the District;" and (g) providing "technical advice and assistance to the constituent Village Councils or to other Village Councils at their request." The SRDC has incorporated and elaborated on these functions in its Mandate and Procedures, its constitutional instrument, ratified by its constituent villages, and adapted these to Wapichan tradition and notions of justice, which emphasize cooperation and harmony more so than punishment. It has also formalized proposals for an inter-village Council of Elders to assist in such processes. What will happen should the government choose to intervene is unclear if domestic law is the measure, whereas this would appear to be fully supported by human rights law applicable to ITPs.

### K. Gender

While cognizant that gender encompasses more than women's rights and issues and includes the full range of rights, it is important to note that various international instruments have been interpreted to uphold rights that are vested in ITPs women and girls, both via generally applicable women's rights and as specifically related to their status as members of ITPs.[435] The UNCERD has long drawn attention to "the multiple forms" of discrimination faced by ITPs women,[436] including intersecting forms of discrimination,[437] e.g., aggravated forms discrimination on account of being both indigenous (race/ethnicity) and a woman (sex, gender).[438] In the case of **Suriname**, it recommended in 2018 that the State raise awareness among officials of "the need to eliminate the intersecting

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[434] *See Amerindian Act* 2006, sec. 13(1) defining the functions of the Village Council, including ownership of and authority over titled lands, and sec. 13(2) providing that "A Village Council may assign tasks but may not delegate its functions to any other person."

[435] *See e.g.*, *Rosendo Cantú et al. v. Mexico*, Judgment of 31 August 2010. Ser C No. 216 (involving severe sexual and physical abuse of an indigenous woman by the Mexican army, and finding, *inter alia*, para. 252, "that it is essential to order a measure of reparation to provide appropriate care for the physical and psychological effects suffered by the victims, having regard to their gender and ethnicity;" and, para.184, "based on the principles of non-discrimination enshrined in Article 1(1) of the American Convention, in order to guarantee access to justice to members of indigenous communities, "it is essential that States offer effective protection that takes into account their particularities, social and economic characteristics, as well as their situation of special vulnerability, customary law, values, customs and traditions."); and *Fernández Ortega et al. v. Mexico*. Judgment of 30 August 2010. Series C No. 215 (containing similar facts and decisions).

[436] *See e.g.,* CERD/C/COL/CO/15-16, para. 31-2; CERD/C/GTM/CO/14-15; and CERD/C/PRY/CO/4-6, 4 October 2016, para. 41-2.

[437] *See also Cecilia Kell v. Canada*, CEDAW/C/51/D/19/2008 (26 April 2012) (finding that "an act of intersectional discrimination has taken place against the author," an aboriginal woman); and *L.N.P v. Argentina*, CCPR/C/102/D/1610/2007 (16 August 2011) (taking note, para. 13.3, "of the author's allegations to the effect that she was a victim of discrimination based on the fact that she was a girl and an indigenous person, both during the trial and at the police station and during the medical examination to which she was subjected," and "conclud[ing] that these facts reveal the existence of discrimination based on the author's gender and ethnicity in violation of article 26 of the Covenant"); and, more generally, S. Atrey, INTERSECTIONAL DISCRIMINATION (Oxford: OUP 2019).

[438] *See e.g.*, *General recommendation XXV on gender-related dimensions of racial discrimination* (2000), para 1-2 ("There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men"); and Committee on Economic, Social and Cultural Rights, *General Comment No. 24 on State Obligations in the Context of Business Activities* (2017), para. 9 (explaining that "Certain segments of the population face a greater risk of suffering intersectional and multiple discrimination. For instance, investment-linked evictions and displacements often result in physical and sexual violence against, and inadequate compensation and additional burdens related to resettlement for, women and girls. In the course of such investment-linked evictions and displacements, indigenous women and girls face discrimination both due to their gender and because they identify as indigenous people") (footnotes omitted); and *Corey Brough v. Australia*, CCPR/C/86/D/1184/2003 (27 April 2006), para 8.9 (Given the author's age, his intellectual disability and his particularly vulnerable position as an Aboriginal…"), and para. 9.4 ("In the circumstances, the author's extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal").

forms of discrimination faced by disadvantaged groups of women, especially … Maroon women and indigenous women."[439] It also addresses issues that are part of the broader ITPs' rights framework, recommending, for example, that a state party "systematically consult" ITPs women and seek their FPIC "in decision-making processes relating to large-scale projects for the exploitation of natural resources that have an impact on their rights and legitimate interests."[440]

Likewise, CEDAW regularly addresses land rights concerns, for example, recommending that a state "ensure[s] that indigenous people, including women, have … unobstructed access to their ancestral lands."[441] It has expressed concern about **Guyana's** "failure to recognize collective land rights of Amerindian communities, which disproportionately affects women and girls, as they depend on traditional lands for their livelihoods."[442] CEDAW's General recommendation No. 34 on the rights of rural women is the first attempt to fashion specific rights standards for ITPs women outside a specific country context. Adopted in March 2016, it classifies their "… rights to land, natural resources, including water, seeds and forests, and fisheries as fundamental human rights."[443] Specifically addressing indigenous women, it explained that "States parties should ensure that legislation … ensure[s] that indigenous women in rural areas have equal access with indigenous men to ownership and possession of and control over land, water, forests, fisheries, aquaculture and other resources that they have traditionally owned, occupied or otherwise used or acquired, including by protecting them against discrimination and dispossession."[444] Note also that the former UNSRIP recommended in 2015 that CEDAW "develop a general comment on the rights on indigenous women and girls."[445] CEDAW commenced this process in 2020.[446] She also highlighted the need for all UN human rights mechanisms to "direct additional attention to the nexus between individual and collective rights and how that impacts indigenous women and girls…."[447]

As noted above, CEDAW also invokes the UNDRIP in its various interactions with state parties.[448] Article 44 of the UNDRIP provides that "All the rights and freedoms recognized herein are equally guaranteed to male

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439 CEDAW/C/SUR/CO/4-6, para. 23 (recommending also, para. 11(b), that Suriname "[a]mend article 8(2) of the Constitution to recognize intersecting forms of discrimination against rural women, Maroon women and indigenous women…"). *See also* CEDAW/C/GUY/CO/9, para. 43 (expressing concern that in Guyana "indigenous women face multiple and intersecting forms of discrimination on the grounds of their geographical location, ethnicity and gender…").

440 CEDAW/C/ECU/CO/8-9, para. 39. *See also* CEDAW/C/BOL/CO/5-6, para. 34-5; CEDAW/C/ARG/CO/7, para. 41(e) (recommending that the State "Set up a mandatory and effective consultation and benefit sharing mechanism to seek the free, prior and informed consent of indigenous women regarding the use of their natural resources and lands").

441 CEDAW/C/GAB/CO/6, para. 43. *See also* CEDAW/C/RUS/CO/8, para. 40(b) (recommending that Russia "Guarantee that indigenous women have full and unrestricted access to their traditional lands and the resources on which they depend for food, water, health and to maintain and develop their distinct cultures and identities as peoples").

442 CEDAW/C/GUY/CO/9, para. 43(b) (recommending, para. 44(b), that Guyana "[a]mend the Amerindian Act (2006) and other relevant laws, using a gender-sensitive approach, with a view to ensuring that the rights of Amerindian communities to their lands, territories and resources are fully recognized and protected, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples").

443 *General recommendation No. 34 on the rights of rural women*, CEDAW/C/GC/34, 7 March 2016, para. 55.

444 *Id*. para. 59 (also stating, para. 56, that that "Rural women often have only limited rights over land and natural resources. In many regions, they suffer from discrimination in relation to land rights, including with respect to communal lands, which are controlled largely by men").

445 *Report of the Special Rapporteur on the rights of indigenous peoples (Rights of indigenous women and girls),* A/HRC/30/41 (6 August 2015), at para. 82.

446 https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/DGDRightsIndigenousWomenAndGirls.aspx.

447 *Id*. at para. 81.

448 CEDAW/C/BOL/CO/5-6, para. 25(c) (recommending that Bolivia "Ensure that indigenous women have access to education in compliance with the criteria enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (General Assembly resolution 61/295)"); CEDAW/C/PHL/CO/7-8, 26 July 2016, para. 46(c); and CEDAW/C/CAN/CO/8-9, para. 29(c) (recommending that the State

and female indigenous individuals."[449] Article 22 adds that "Particular attention shall be paid to the rights and special needs" of ITPs women and states "shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination."[450] Articulating what this means in principle (e.g., in relation to land and resource or participation or cultural heritage rights), and more importantly, in practice, is the crux of the matter as is a fuller understanding of "the nexus between individual and collective rights and how that impacts indigenous women and girls…."[451] Put another way, this nexus between individual and collective rights may have an effect on how to interpret and apply the women's rights paradigm as it relates to ITPs, at least to the extent that issues transcend the standard, individual non-discrimination framework.[452]

While a full picture is hampered by a lack of disaggregated data, there are very real and sometimes debilitating violations of ITPs women's rights in the countries under review, and these are especially pronounced in the extractive and other land intensive sectors (e.g., logging and large-scale agriculture).[453] These issues require an appropriate response at both the internal ITPs and national levels, and this is often lacking or remains underdeveloped in practice. These range from afflictions that affect all societies, such as domestic and sexual violence, and various other forms of direct or indirect discriminatory treatment (e.g., membership rules that deny women membership due to the ethnicity of their spouse and which do not apply to men).[454] As in North America,[455] ITPs women are often targeted simply because perpetrators are aware that they are unlikely to be arrested, let alone prosecuted.[456] This is especially pronounced in the mining sector,[457] where abductions and

"Promote and apply the principles enshrined in the United Nations Declaration on the Rights of Indigenous Peoples"). *See also* Gabon, CRC/C/GAB/CO/2, para. 61(a) (recommending that Gabon "(Adopt a law for the protection of indigenous people based on the United Nations Declaration on Rights of Indigenous Peoples").

449 *See also* ADRIP, Art. XXXII (providing that "All the rights and freedoms recognized in the present Declaration are guaranteed equally to indigenous women and men").

450 Further providing in (1) that "Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration."

451 *Report of the Special Rapporteur on the rights of indigenous peoples (Rights of indigenous women and girls),* A/HRC/30/41 (6 August 2015), para. 81.

452 *See e.g.*, *Aloeboetoe v. Suriname, Reparations*, Judgment of 10 September 1993. Ser C No. 15 (applying Saamaka customary law, rather than Suriname civil law, to determine 'descendants' for the purposes of reparations).

453 *See e.g., Indigenous women's realities: Insights from the Indigenous Navigator* (IWGIA/ILO 2020) (discussing the experiences, needs, concerns and aspirations of indigenous women in 11 countries across Africa, Asia and Latin America); and N. Bellot, *Gendered vulnerabilities in the Caribbean: A focus upon indigenous Kalinago (Carib) women in Bataka, Dominica* (PhD Diss. Arizona State U. 2009).

454 *See e.g., Sandra Lovelace v. Canada*, CCPR/C/13/D/24/1977 (30 July 1981) (referring to the Canadian *Indian Act* and denial to an indigenous woman 'Indian status' after marriage to non-Indian man); and CCPR/C/CAN/CO/5 (2006), para. 22 ("While stressing the obligation of the State party to seek the informed consent of indigenous peoples before adopting decisions affecting them and welcoming the initiatives taken to that end, the Committee observes that balancing collective and individual interests on reserves to the sole detriment of women is not compatible with the Covenant (arts. 2, 3, 26 and 27)"). *See also* G. Brodsky, *Indian act sex discrimination: enough inquiry already, just fix it,* 28 CAN. J. WOMEN AND THE LAW 314 (2016).

455 *See e.g.*, IACHR, *Missing and Murdered Indigenous Women in British Columbia, Canada*, OEA/Ser.L/V/II. Doc.30/14 (21 December 2014); and IACHR, *Indigenous Women and Their Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 44/17 (17 April 2017), https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/reports/thematic.asp.

456 *See e.g., Study on Indigenous Women & Children in Guyana* (Georgetown: UNICEF, September 2017), p. 133 *et seq* https://www.unicef.org/lac/media/4691/file/PDF%20Study%20on%20indigenous%20women%20and%20children%20in%20Guyana.pdf.

457 *See e.g.*, *Gold Mining in Guyana. The Failure of Government Oversight and the Human Rights of Amerindian Communities*, International Human Rights Clinic, Harvard Law School (2007), http://www.commdev.org/userfiles/files/959_file_AllThatGlitters_FINAL_.pdf.

rapes of indigenous women are well known and rarely punished, even in the most notorious situations where the central government is not only aware, but has declared an emergency situation.[458]

Some violations are very specific to ITPs, however. For instance, the genesis of the *Saramaka People* judgment was the destruction by a logging company of a swidden farm owned by Silvi Adjako, the daughter of the Chief of Kajapaati, a Saamaka village. In Saamaka culture men are responsible for clearing the forest to make a farm for their wives, whereas the women cultivate the same and are the owners of the farm and its produce. A woman without a farm is not considered to be a full or productive member of the community and she is often forced to beg for food from other community members, further diminishing her status.[459] While destruction of a farm or farms, routine in mining and logging areas, has repercussions for men as well, this disproportionately affects women and in a much more profound manner. This scenario is common across the Amazon basin,[460] as it is for other resources that may be owned by women under customary law e.g., cotton plants for making hammocks.[461] Climate change is thus also disproportionately affecting ITPs women as it has already begun to seriously affect planting seasons and the maintenance of farms.[462] On a more structural level, some serious intellectual work is required to articulate ITPs women's rights within the broader ITPs self-determination and collective rights framework, more so as this may be considered unfinished business in relation to the broader ITPs rights framework.[463]

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[458] See *e.g.*, 'Dysfunction paralyzing Baramita – rapes, drunkenness, stabbings among ills', *Stabroek News*, 12 February 2017 (reporting, *inter alia*, that "the incidence of sexual and physical violence is so high among women and children that young girls are forced to walk with broken bottles in their bosoms as a form of protection;" and that "government says it is aware of the many ills in the community and has started an urgent intervention that has already seen a reduction in suicides and gang rapes"), https://www.stabroeknews.com/2017/news/stories/02/12/dysfunction-paralyzing-baramita/; J. Forte, *Impact of the Gold Industry on the Indigenous Peoples of Guyana*, 27-28 TRANSITION 71, 89 (1998) (reporting that the Jawalla police station in the Upper Mazaruni has reported many instances of rape of Amerindian girls by miners"); L. Anselmo and F. Mackay, MINING, LAND RIGHTS AND INDIGENOUS PEOPLES IN THE UPPER MAZARUNI, GUYANA (Tilburg: Global Law Association 2000) (reporting, p. 41, that "Frequent acts of sexual abuse, including rape, perpetrated against Amerindian women occur without investigation. The same can also be said about alcohol related and violent deaths. The security and protection from miners promised to the village leaders by the government is non-existent and government officers routinely support miners if Amerindians complain;" and, p. 66, that "Kambaru … reports that Amerindian women and girls are regularly kidnapped and raped by miners. Many of these women end up living in Imbaimadai as they are too ashamed to return home. Community members have made regular complaints to the police stationed at Imbaimadai, but report that nothing ever happens: no investigation and certainly no arrests or punishment. According to one miner, abduction and rape of Amerindian women is commonplace and is frequently joked about").

[459] *Affidavit of Silvi Adjako*, Saramaka People v. Suriname, 2 May 2007, para. 9 (explaining that "Because my farms were destroyed, I lost enough food for my family for more than one year…. I had to ask my relatives for food and I was ashamed that I did not have a farm of my own. Saamaka women must have a farm or people think that we are lazy and not doing our part for our family and our community. It hurt me very much what Ji Shen did and it also hurt my community because what one of us suffers we all suffer when our land is involved and when our food supplies and the forest are destroyed. It reminds us that it is still possible for the time of slavery to come back again when we see these things"), https://www.forestpeoples.org/sites/fpp/files/publication/2010/09/surinameiachrsaramakaaffidavitadjakomay07eng.pdf.

[460] *See e.g.*, E-R. Kambel, INDIGENOUS RIGHTS, WOMEN AND EMPOWERMENT IN SURINAME (Tilburg: Global Law Association 1999).

[461] *Cf.* M. Murray, *As Ye Sow, So Shall Ye Reap: Granting Maya Women Land Rights to Gain Maya Land Rights*, 18 WILLIAM & MARY J. RACE, GENDER, AND SOCIAL JUSTICE 651 (2012), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1343&context=wmjowl.

[462] *See e.g.*, *Ensuring Community Voices Influence National Policy in Suriname. A Local to National Policy-Level Initiative*, VIDS, IUCN and USAID, n.d, https://www.climatelinks.org/sites/default/files/asset/document/vids_final_copy.pdf.

[463] *See e.g.*, *Report of the Special Rapporteur on the rights of indigenous peoples (Rights of indigenous women and girls),* A/HRC/30/41 (6 August 2015); and M.N.L. Zardo, *Gender Equality and Indigenous Peoples' Right to Self-Determination and Culture*, 28 AM. U. INT'L L. REV. 1053 (2012).

## IV. Recommendations

> I come from an island where the descendants of the indigenous people, who once controlled this entire region, still survive. When their Caribbean society was in its prime, they had full freedom of movement to settle and work along these islands and the mainland as they pleased. They utilized the resources of this region in a balanced way for their mutual benefit. They had an amazing trade network that extended from the islands far into South and Central America. Buried in ancient village sites across these islands, our archaeologists have found pitch that was traded from the Pitch Lake in Trinidad, green stones from the Amazon region and Guyana; special flint tools from Antigua, and jade from as far as Belize and Guatemala. This was a truly interconnected region. The sea united the people, it did not divide them. Integration was not an issue because it was a way of life. One of our Caribbean Nobel Laureates, the poet Derek Walcott, in his acceptance speech for his Nobel Prize, likened this region to a beautiful vase that had been shattered by its history into many pieces. What we in CARICOM are intent on doing, is to play our part in fitting those broken pieces together and to recreate a unified society of states that is modern and contemporary, but is inspired by the unity of our first people and the common heritage of those who followed them.[464]

Returning to where we started, a cynic might point out that the true measure of this intention also involves the various homes that must be put in order first and, in this instance, this would entail structured dialogue with the Kalinago people in **Dominica** and concerted efforts to secure their rights as both Kalinago and citizens of the country. "[F]itting those broken pieces together" starts at home, even if regional and international attention may also be required and/or beneficial, and both are very much dependent for their legitimacy and efficacy on the effective participation of ITPs.[465] Some of the problems are substantial, structural, and perhaps even daunting, yet there are many models and lessons that may be adapted to local circumstances. Some are relatively simple, however (e.g., recognition of ITPs' status and land rights in **Dominica**, **SVG** and **T&T**). Human rights law provides the parameters and a set of legal obligations for this process. This does not rest solely on the sins of the past, but, instead, provides a common set of contemporary norms and aspirations that bind ITPs and non-ITPs Caribbean citizens together. It also provides a transparent and verifiable path into a common future that "is inspired by the unity of our first people and the common heritage of those who followed them."

One important step in this process, particularly in **Guyana**, **Suriname** and **Belize**, is to dispel the notion that ITPs' rights somehow undermine or obstruct national development. For one, ITPs very much contribute now to national development (e.g., agricultural production in the interior of Guyana and Suriname, although generally uncounted, may exceed that in the rest of the country), and ITPs' active management of their lands and resources supports valuable ecosystem services for all the countries under review as well as the Caribbean basin more generally in some respects (e.g., freshwater discharges from the rivers originating in ITPs territories and the active

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[464] 'The Future of Caricom and Regional Integration'. Lecture By Hon. Roosevelt Skerrit, Prime Minister of The Commonwealth of Dominica, Delivered at The David Thompson Memorial Lecture, October 27, 2011, UWI, Cave Hill, Barbados, p. 3, http://caribelect.easycgi.com/eDocs/articles/bb/David%20Thompson%20Memorial%20Lecture%202011.pdf.

[465] *See e.g.,* Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation, A/HRC/EMRIP/2019/3/Rev.1, para. 79. ("In devising, implementing and evaluating reparation and reconciliation initiatives, indigenous peoples and States should bear in mind that the process is as important as the outcome. As several of the examples cited in the present report show, a crucial factor in the success of reconciliation and reparation initiatives is the incorporation of indigenous perspectives at all stages and the full and effective participation of indigenous peoples, which is essential if these processes are to have a successful, legitimate outcome").

protection of substantial forest estates and biodiversity). It is important to see ITPs as valid and autonomous actors and contributors to national development and to understand the conditions that enhance their role and well-being, and these are very much grounded in recognition of their rights. The EMRIP, for example, observes that ITPs "with recognized land and resource rights and peoples with treaties, agreements or other constructive arrangements with States have had greater success in conducting beneficial relations with private sector natural resource companies on the basis of free, prior and informed consent than have peoples without recognized rights."[466] This is well documented in numerous countries as is the often unseen economic cost to the state of addressing, or ignoring, conflicts with ITPs.

The EMRIP further observes that the long-standing Harvard Project on American Indian Economic Development has concluded "that when Native nations make their own decisions about what development approaches to take, they consistently outperform external decision-makers" in areas such as governmental form, natural resources management, economic development, health care and social services'."[467] Similarly, various studies have concluded that forests designated as strictly protected areas "have annual deforestation rates much higher than those managed by" ITPs,[468] and they also "underscore earlier findings by other scientists that show that greater rule-making autonomy at the local level is associated with better forest management and livelihood benefits."[469] With this in mind, below are a set of summarized recommendations for future initiatives/activities that are derived from the priorities identified by ITPs in the countries under review. This is followed by a more complete listing taken directly from the in-country studies

### A. Summary of Priorities and Recommendations

The in-country studies set out various priorities and recommendations for future actions/projects. These were mostly generated in specific consultation processes undertaken in each country. They are summarized and grouped below, but they are not presented in any order of precedence. Some of these initiatives are short-term, whereas others are mid- or longer-term. It would be ideal if this current project would be renewed or extended so that it could be part of developing and supporting the mid- to long-term initiatives together with ITPs, building on the baseline data gathered to-date. One possible short-term initiative that is not mentioned in the in-country studies would be to commission a baseline study about the legal status and rights of Maroons in Jamaica as well as to gauge interest in further participation in this process. In terms of follow up on these recommendations, members of the steering committee should be contacted, individual or collectively, to discuss specific in-country or regional initiatives.

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[466] *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination*. Report of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/48/75 (2020), para. 39 (citing A/69/267).

[467] Harvard Project on American Indian Economic Development, https://hpaied.org/; and the Native Nations Institute for Leadership, Management and Policy at the University of Arizona, http://nni.arizona.edu/. *See also* G. Hingangaroa Smith, R. Tinirau, A. Gillies and V. Warriner, *He Mangopare Amohia – Strategies for Mori Economic Development* (Te Whare Wānanga o Awanuiārangi 2015), http://www.maramatanga.ac.nz/sites/default/files/He%20Mangopare%20Amohia_0.pdf; *Linking Indigenous Communities with Regional Development in Canada* (OECD Rural Policy Reviews, 21 January 2020), esp., Ch. 3, The importance of land for Indigenous economic development, https://www.oecd-ilibrary.org/sites/fc2b28b3-en/index.html?itemId=/content/component/fc2b28b3-en; and various issues of the JOURNAL OF ABORIGINAL ECONOMIC DEVELOPMENT, https://www.edo.ca/edo-tools/jaed.

[468] *See e.g.,* L. Porter-Bolland, et al, *Community managed forests and forest protected areas: An assessment of their conservation effectiveness across the tropics*, JOURNAL OF FOREST ECOLOGY &. MANAGEMENT (2012) (comparing cases in 16 countries across Latin America, Africa and Asia, finding that state-run protected areas lost, on average, 1.47 percent of forest cover per year compared to just 0.24 percent in ITPs-managed forests. In addition, the range of variation within the values of deforestation rates around each of these two averages was much larger in state-run-protected areas than in ITPs-managed forests").

[469] 'Deforestation much higher in protected areas than forests run by local communities', *CIFOR Press Release*, 23 August 2011, at p. 1.

**1. Capacity building**

Most of the in-country studies prioritize and recommend education and training on ITPs' rights, both for ITPs and their institutions and for public authorities, including police, judicial officers, and lawyers/bar associations. This also includes capacity building measures specifically directed at strengthening ITPs' juridical systems and institutions, including on the role of customary law. While this can be done on an ongoing basis, particularly if attached to a Continuing Legal Education or other certification programme, some can also be done in the short-term, e.g., support for specific trainings organized by ITPs alone or in conjunction with others (e.g., exchanges with ITPs in other countries, developing courses or programmes with university departments (UWI would seem to be a logical partner in this respect)). These can be about general rights issues, issues of relevance locally (e.g., proposed legislative enactments in **Suriname** and **Belize**, agreeing on and proposing legislative amendments in **Guyana** and **Dominica**, seeking strategic advice on issues related to rights recognition, etc.).

**2. Informational Materials and Documentation**

Related to capacity building, other short-term priorities and initiatives include the development of capacity building and educational materials concerning access to justice for ITPs. This is both user friendly information for ITPs and information to explain critical issues to policy makers and the legal profession. For instance, developing written and visual materials that explain how the right to cultural heritage and way of life in Guyana's Constitution should be understood from an indigenous perspective and using specific examples may greatly assist in upholding this and other rights, both per se and in relation to other areas, such as the land titling process.

- The South Rupununi District Council in **Guyana** has already collected a great deal of relevant information and supporting it to both write up this information and to develop specific visual materials would be the most efficient means of starting such an initiative, one that can be easily scaled up to other regions of Guyana (and beyond given the ongoing development of cultural heritage rights in international law).
- Similarly, in the case of **T&T**, support could be provided to collate anthropological and other materials that substantiate traditional ownership of lands and to frame these in legal terms that may allow for a sustained dialogue with the state aimed at securing an adequate area of land in which indigenous people determine what initiatives may be executed.
- More broadly, specific materials could be developed on the rights and roles of ITPs women in relation to access to justice, both for policy makers and the judiciary and for ITPs internally (e.g., in relation to the issues identified in Dominica set out below). This could include specific explanatory materials on the soon to be finalized CEDAW General Comment on the Rights of Indigenous Women and Girls as well as how to understand women's rights in relation to the UNDRIP and in the light of intersecting forms of discrimination.[470]

**3. Alternative Dispute Resolution, Paralegals and Legal Aid Centres**

In the mid-term, recommendations identify the need for specific ITPs' alternative dispute resolution mechanisms that support ITPs and whose decisions are respected by state bodies and procedures. There are models, both traditional and statutory, that could assist in developing such mechanisms. Longer-term priorities and recommendations include training of paralegals to support ITPs and the establishment of legal aid centres that are accessible and responsive to ITPs. In the author's experience, paralegal training programmes work best when

[470] *See* for the latest draft https://www.ohchr.org/Documents/HRBodies/CEDAW/Draft-GR-rights-indigenous-women-and-girls/Draft-GR-indigenous-EN.DOCX.

anchored to ITPs' organizations that have a strong relationship with their constituent communities and that have some degree of long-term, secure funding.

**4. FPIC Protocols and Legislation**

Several studies highlight the need for the development and implementation of FPIC Protocols. These would be developed by communities, sets of communities or territories as a means of informing external actors about the way consultation, participation and FPIC shall take place for activities that may affect the lands and lives of the people in question. Other than specific activities related to new enactments (**Belize** and **Suriname**) or proposed amendments (**Dominica** and **Guyana**), such as capacity building, support for gatherings, and technical support, initiatives related to legislation are likely longer-term advocacy initiatives (**SVG** and **T&T**), although they need not be if there a specific aperture that may allow for more immediate action (e.g., simply drafting a bill and then seeking political support for the same). In the case of **Suriname**, a series of subsidiary laws will also be drafted to give effect to the Framework Law should be enacted in its current form.

**5. Traditional Knowledge and Intellectual Property Rights**

Some of the studies highlight the need to develop legislative and other measures to address the lack of protection for ITPs traditional knowledge and intellectual property rights as well as initiatives aimed at correcting perceived violations of associated rights in some instances. This also crosses over to some extent with cultural heritage and other rights. In some of the countries under review some of the issues may also be addressed in by-laws or rules adopted by ITPs or, at least initially, by policy instruments where this is not possible. It makes sense that this could be one area of follow up in the light of Article 66(c) of the Revised Treaty of Chaguaramas (concerning "the legal protection of the expressions of folklore, other traditional knowledge and national heritage, particularly of indigenous population in the Community") and, while only applicable to **Dominica**, Article 23 of Revised Treaty of Basseterre (2011). The Convention on Biological Diversity is also relevant in context. This provides a regional level opening to develop specific measures within the confines of existing law and procedures as well as to ensure that ITPs are fully engaging any regional process or mechanisms and any resulting national processes. For example, a model law and/or regulations could be developed by ITPs and used to seek national-level action as well as regional actions to the extent necessary or desirable, even more so given that this is part of the economic union of the CARICOM.

**6. Caribbean Network of Indigenous and Tribal Peoples: Engaging at the Regional Level**

While ITPs all have pressing concerns nationally, sharing and organizing at the regional level is also important. This may mean organizational meetings in the short-term and sustained institutional support in the mid- to longer-term. For instance, supporting a regional voice for ITPs may assist with promoting an ITPs perspective in relation to the CARICOM Reparations Commission and its activities or about regional action on traditional knowledge and intellectual property rights as proposed above or in the next section. The same may also be said in connection with the clarification and operationalization of the meaning, scope, and utility of Charter of Civil Society as it relates to ITPs, including the meaning of 'historical rights' and how the states should be undertaking to respect ITPs rights, both historical and in contemporary human rights law. It will also likely facilitate greater exchanges within the region as this at present is ad hoc and patchy. Assistance to ITPs to engage in direct dialogue with e.g., the Conference of Heads of Judiciary of CARICOM (the Conference) and the CCJ could also be important. The same is also the case with the UWI, particularly its law faculties, to promote additional course work, seminars, and support to ITPs.

Beyond the Caribbean region, it is also important for ITPs and Caribbean institutions to engage with the organs of the OAS that are concerned with ITPs issues and human rights more broadly (e.g., but not limited to, the IACHR, IACTHR, Inter-American Institute for Human Rights and the General Secretariat of the OAS via the Office of the Secretary General). This would be mutually beneficial as a greater understanding of issues in the Caribbean, explained by persons from the region, will enable OAS institutions to be more responsive to needs identified in the region (including a better understanding of the relative roles of the CCJ and the IACHR and the IACTHR) and a greater understanding of OAS jurisprudence in the region and greater collaboration would facilitate increased attention to access to justice issues as they relate to ITPs. Likewise, the extensive experience of many OAS member states, in all regions, provides invaluable background, learning and potential models that may contribute to positive advances for Caribbean states and ITPs.

**7. Jurisprudence Compilation**

To assist ITPs in the region to engage with human rights bodies and the judiciary on human rights issues, a compilation of UN jurisprudence and recommendations concerning the countries under review would be helpful and an important resource. Such a compilation would not require much work and can be updated as new information comes in and is a short-term initiative beyond supporting the entity that would be responsible for updating and dissemination. This could include ensuring that constituents are informed of important jurisprudential developments from within and outside of the region.

## B. Compilation of Priorities and Recommendations from In-Country Studies

Below is an edited list of priorities and possible projects/actions from the in-country studies. It is recommended that the full explanations of each of these are also reviewed.

**1. Belize**

**Priorities:**

- Capacity Building of Public Authorities: A priority for indigenous peoples is for public officials, including judicial officers, to be educated on indigenous people's rights and the various legal obligations which both individuals and public officers have in connection with these rights.
- FPIC: A major priority area is the implementation of the FPIC protocol. This includes empowering communities on how to utilize this protocol and agree on benefit sharing mechanisms. Also includes capacity building with GoB and institutionalization of the FPIC process by government departments and agencies.
- Legal Information Accessible: Increasing access to user-friendly information on legal rights and mechanisms is also critical for an increased engagement of indigenous peoples with the state judicial fora.
- Recognition of Community Decisions: Access to justice for indigenous peoples must mean access to their own dispute resolution mechanism in a way they may feel confident that their own mechanism and decisions will be respected by state authorities. Part of the capacity building of judicial officers, thus, must include increasing awareness of the need to establish collaborative and equal relationship with traditional dispute resolution mechanisms.
- Legislation for Indigenous Peoples: The development of legislation for indigenous peoples, in compliance with the Consent Order 2015 is another major priority.

- Alternative Dispute Resolution Mechanisms: Given the difficulties which exist for indigenous rural communities in accessing the courts, the participants indicated that an area of priority is enhancing the capacity of community leaders to function as mediators to assist in the settlement of disputes within their communities.

**Project Proposals:**

- Training of community leaders in mediation and other alternative dispute resolution mechanisms
- Enhancing access to information-legal information campaigns
- Enhancing the capacity of lawyers to know indigenous people's rights
- Training of judicial officers, including clerks of court about the rights of indigenous peoples
- Training of judicial officers, including clearly of courts, in professionalism
- Enhance capacity of indigenous peoples to protect their intellectual property rights
- Support initiatives to improve police culture

**2. Dominica**

- Collective intellectual property rights and addressing exploitation of Kalinago traditional knowledge to both remedy the lack of policy and legal protection presently as well as perceived violations of the associated rights.
- Addressing child sexual abuse, sexual abuse, and domestic violence, including addressing perceived discrimination in the functioning of the criminal justice system and the need for a dedicated social worker in the Territory.
- Measures to eliminate political discrimination, including measures directed towards the operations of both the Kalinago Chief and Council and the Department of Kalinago Affairs, and which could be addressed by the adoption of by-laws or regulations in the principal Act or by amending the latter. Amendments are also proposed in relation to the elections process within the Territory, especially as it concerns external financing by political parties.
- Settling Disputes (S. 29 of KTA) ensuring that due process and other norms are respected within internal land allocation decisions in the Territory (e.g., by amending the Act or by the adoption of by-laws to the extent possible under the current Act). Strengthening internal financial accountability mechanisms are also highlighted as is the need for the Chief and Counsel to have direct control over funds raised by or on behalf of the Kalinago.
- Alternative finance mechanisms could be established in relation to the inability of Kalinago Territory residents to secure loans using land as collateral (e.g., a dedicated micro-finance mechanism) and regularizing the process by which Kalinago may be able to obtain bail (a process that can likely be addressed by a Ministerial Order or statutory instruction, other subsidiary legislation or perhaps even just an internal memo).
- There is an identified need for a High School to be established in the Kalinago Territory. Indeed, experiences in other countries strongly confirm that the removal of indigenous children from ancestral land and their culture/family is detrimental to identity, among other concerns. A High School however should also have the option of teaching Kalinago history and culture – something that should start even at pre-school levels – and the Kalinago should have a primary voice in deciding on the curriculum and teaching methods (while also meeting national or regional standards).

- The need for educational scholarships is noted, while appreciation is expressed for the existing University of the West Indies Scholarship for Indigenous Peoples and the Cuban Scholarship Program. It is recommended that these be expanded, especially as related to law and medicine.

**3. Guyana**

- Education and training in rights of indigenous peoples' rights, national laws, national judicial systems and processes.
- Education and training in traditional indigenous juridical systems and processes.
- Paralegal training in national and customary laws for Village Councils, youth, women and disabled.
- Establishment of legal aid centres in the administrative regions and which are accessible to indigenous communities.

**4. Suriname**

**Priorities:**

- Top priority is to be legally recognized as ITPs and have minimum set of collective rights as ITPs recognized. The current draft law on collective rights largely provides for such recognition but is not sufficient for the protection of these rights as it will need various additional legislation to be fully operational.

- Next priority is strengthening capacity of our communities and leadership under the assumption that the law will be approved in the not-too-remote future and the villages (leaders) will have legal tasks and responsibilities, including the responsibility for:

  - Governance of the people and the traditional territories, in the past undocumented but under the new Collective Rights legislation this will require written governance practices. Much work has already been done by VIDS in the form of model village regulations.
  - Capacity strengthening for planning and financing, for the village/region internally but also to link with the national and district level decentralized district plans and budgets.
  - Documenting (putting on paper) previously undocumented procedures of decision-making and complaints procedures in relation to FPIC. VIDS is currently in the process of developing regional-level generic FPIC protocols.
  - Also, in light of REDD+ and carbon offsetting deals and the development plans of the government in relation to (offshore) oil industry and related "local content" development (i.e., economy focused on servicing the oil industry) with corresponding stronger pressure on environment and natural resource exploitation, pressure on ITPs' territories will fast become more intense and we need to get prepared for this.
  - The law (if adopted) will require much other further work including on self-governance and autonomous judicial systems and (internal) conflict resolution.

- Related to the previous point but a priority itself, is strengthening of our communities and leadership to know and defend their rights, and to be able to effectively take steps and lead that process towards justice including traditional justice. Even if the law on Collective Rights is approved, the need is still very big for effective participation in, and utilization of, the mainstream legal system and to tackle all the impediments mentioned above.

- Public legal education (which includes the previous point but also extends to the public) on ITPs' rights is a continuing priority. Mainstream society is not aware of what and why of ITPs' rights.
- Sensitization and targeted programmes towards juridical and judicial actors incl. the Police, is another high priority. They need to understand and respect ITPs' cultures and customs, differential justice systems, self-governing institutions and mechanisms, and above all ITPs' rights under international human rights law and as a result of Suriname's obligations (e.g., in the IACTHR judgments) that must be respected and protected.
- Support for ITPs throughout juridical processes, varying from practical things such as translation and explanation of opportunities for undertaking legal action (or legal defense) to financial and technical support for qualified legal assistance and fair trials.
- Support for ITPs to effectively participate in climate change and other environmental processes, including to demand and enact FPIC and benefit-sharing mechanisms.
- Support for ITPs to effectively bring the persistent discrimination and gaps in the fulfilment of human rights (e.g. education, health, development chances) to the policy-level and effectively demand changes.

**Recommendations (**all points above can be transformed into projects and programmes on their own. A strong need is for long-term empowerment of ITPs, in the form of scholarships and targeted interventions, as (legal) capacity is very limited among ITPs. In other words, programmes specifically designed for):

- Support for the process towards adoption of the new legislation at highest international standards level, and support for the development of additional operational legislation to make it effective;
- Capacity strengthening of ITPs for enacting their future legal tasks and responsibilities, including on self-governance (e.g., village regulations), FPIC (regional and village FPIC protocols), planning and budgeting, autonomous financing of sustainable and culturally appropriate development;
- Strengthening and documenting of traditional governance and justice systems;
- ITPs' rights awareness programmes, internally and through public legal education programmes specifically for this topic;
- Targeted professional legal education programmes for juridical and judicial actors, to be designed and implemented in close collaboration with VIDS (and other pertinent actors);
- Programme of practical support to IPs for juridical processes, with low threshold and administered by trusted institutions (incl. VIDS);
- Programme for empowerment of ITPs to effectively participate, give FPIC and have benefit-sharing from environmental processes, including empowerment to effectively participate and influence processes related to extractive exploitation of natural resources, carbon-offset deals and the like, infrastructure and construction work and other actions impacting the rights and livelihoods of our communities and traditional resources;
- Programme of support for ITPs to effectively advocate for equal treatment and non-discrimination in all human rights and aspects of daily life, ranging from education and health care to self-determination and self-governance;
- Programme of support to ITPs to effectively take and maintain ownership and leadership over future support programmes as mentioned above.

**5. SVG**

- Legal empowerment and capacity building with ITPs and revising or writing new legislation in SVG to protect ITPs' rights and access to justice (e.g., to raise awareness of international human rights standards and regional and global developments). This work could be carried out with ITPs communities as well as

with the Garifuna Heritage Foundation as a partner. Ideally, government officials and members of the legal profession in SVG would also undergo international human rights legal training to better understand ITPs' rights.

- Capacity building can act as a precursor to participatory drafting of new laws or revision of existing laws that limit ITPs' rights and access to justice in SVG, including Constitutional reforms and drafting of laws to protect IP cultural heritage and other rights, including land rights.
- Conducting a review of national policies and programmes related to land management, climate change, environmental protection, and disaster management, to ensure that ITPs are included in the design and management of such programs (e.g., in line with CEDAW's 2015 Concluding Observations on SVG.
- Supporting IPs in SVG to reclaim their cultural heritage. The International Garifuna Heritage Foundation Conference raised the need for proper documentation, archaeological research, and other information gathering on the history of Balliceaux Island. More broadly, the Special Rapporteur on Cultural Rights also noted the strong demand for Garifuna and/or Kalinago to research their own history.

**6. T&T**

**Thematic Areas and Possible Linkages:**

- The failure to repair past harms in relation to land and cultural identity is perpetuated in the modern legal system, thereby depriving First Peoples of an opportunity to genuinely develop such rights. The justice system has an opportunity to clearly identify such rights in relation to the First Peoples.
- Legal know-how on the holding and managing of collective title as is envisaged for the Heritage Village and future land restorations, such knowledge being lost
- Continued training in Intellectual Property. It is evident that while persons in the indigenous community practice cultural and knowledge traditions that are scarce, not all such practices may be the subject of intellectual property rights, given the demands of uniqueness etc. Expertise is needed to identify appropriate intellectual property accruing to the First Peoples and to inform of the ways to protect such intellectual property.
- Agricultural expertise and equipment capacity building
- Transfer of technology and communication expertise for use in the Heritage Village and beyond
- Legal and anthropological expertise in defining and pursuing legal identity for indigenous peoples in international law.

**Possible Project Proposals**

- Logistical and funding support for the Heritage Village to support identity, self- aspirations and sustainability goals;
- Logistical and funding support for transfer of indigenous skills linked to climate change and justice (environmental) and food security such as reforestation, water management etc. This could include the growing of cannabis, an emerging legal industry in Trinidad and Tobago and which has potential for alternative medicines.
- Small enterprise development with an emphasis on innovative indigenous green products supported by technical intellectual property know-how to address poverty index and further environmental goals.

## Annex 1 – Authors

Baseline Study Coordinator:

**Fergus MacKay** (BA, JD) is Senior Counsel at the UK-based NGO, the Forest Peoples Programme. He has worked in the Caribbean region since 1995, when he was Legal Advisor to the World Council of Indigenous Peoples. He has litigated several cases before United Nations treaty bodies, the International Labour Organization, and the Inter-American Commission and Court of Human Rights, including *Saramaka People* (2007) and *Kaliña and Lokono Peoples* (2015). He also previously served as an expert advisor to the Organization of American States concerning its American Declaration on the Rights of Indigenous Peoples and as a member of the advisory panel to the World Bank's Extractive Industries Review.

In-country Studies:

**Rose-Marie Belle Antoine** (T&T): Pro-Vice-Chancellor of Research & Graduate Studies, UWI, Professor Antoine is an Oxford and Cambridge scholar, an attorney and award-winning author/academic, who has published 17 books and numerous scholarly articles. She is also an international consultant and activist who has often been described as a "change agent". She was President of the Inter-American Commission on Human Rights, Washington, the OAS Rapporteur for Persons of African Descent, Rapporteur for Indigenous Peoples, Head of the OAS Economic, Social and Cultural Rights Unit and Spokesperson for HIV, LGBTI rights and Disability. She is President of the Family Planning Association, Trustee on the Board of IPPF London, a member of Trinidad & Tobago's Industrial Relations Advisory Committee and an Honorary Fellow of the Society of Trust and Estate Practitioners, London. She worked previously at the ILO in Geneva. In 2018, Antoine was honoured by UWI as an ''Outstanding Alumnus'. She also won the VC's Award of Excellence twice, in 2006 for Research and in 2013 - Public Service. As Consultant to all of the governments in the Caribbean, Canada, UK, USA, the judiciary, many international organizations and resource person for NGOs, she has engaged in transformational work, drafting legislation and authoring influential policy reports on several varied issues, including labour law reform and non-discrimination legislation, CSME legal reform, and more recently, as Chair, the CARICOM Report on Marijuana. Antoine remains committed to development within the framework of human rights. In 2021 Professor Antoine was honoured as an *Eminent Jurist and Pioneering Woman Jurist* by the Caribbean Court of Justice (CCJ), the highest court in the region.

**Cylene France** (Suriname) is Warao and Lokono from the Lokono village of Apoera on the lower Corantyn River in West Suriname. She holds a Bachelor of Science degree in Public Administration and is currently in the final phase of the Master Program in 'Education and Research for Sustainable Development' (MERSD) at the University of Suriname. Since 2008, Cylene has been involved in research projects of the Association of Indigenous Village Leaders in Suriname related to Indigenous Peoples rights in conservation and more recently in institutional capacity strengthening of indigenous peoples' organizations. In 2021 she has been appointed as the current acting director of bureau VIDS, the secretariat of the Association.

**David James** (Guyana) (B.Ed, LL.B, L.E.C.) is the first indigenous lawyer in Guyana. Formerly headmaster of his Village School, David has also served two terms as the President of the Amerindian Peoples Association of Guyana, the primary national indigenous organization, and as a legal advisor to the Minister of Indigenous Peoples' Affairs between 2015 and 2020. He is also an inaugural and current member of the Constitutional Indigenous Peoples Commission. He is presently in private practice in Georgetown.

**Lan Mei** (SVG) (BS, JD) is a lawyer with the UK-based NGO, the Forest Peoples Programme. She has worked with indigenous communities in Guyana and Belize in their efforts to secure legal recognition and protection of their land rights. She has also supported land rights work in other regions, as well as work on business and human rights policies.

**Leslie Mendez** (Belize) (LLM, LEC, LLB) is a Belizean lawyer working closely with the Toledo Alcaldes Association and the Maya Leaders Alliance, including in relation to the ongoing implementation of the judgment in *Maya Leaders Alliance*. She has been in private practice in Belize since 2013 as well as working with the UNDP to provide legal assistance and advice to UNIBAM, a nongovernmental organization advocating for LGBTI rights, and as a fellow at the Inter-American Commission on Human Rights 2015-2016.

**Joel Paris** (Dominica): is an Attorney-at-Law and Solicitor, who was called to the bar in the Commonwealth of Dominica on 15 November 2019. He holds a BSC in Political Science with History (2010) and LLB in Law (2014) from the University of the West Indies, Cave Hill Campus in Barbados. Mr. Paris attained the Legal Education Certificate from the Hugh Wooding Law School in Trinidad and Tobago in 2019. He is a former Youth Development Officer with the Government of Dominica and has also worked in the NGO sector. He is currently in private practice, embarking on the start-up of an independent chamber. Mr. Paris has long been an ardent advocate on indigenous peoples' rights, including in forums organised at the schools attended (above) and on local and regional media. He is the founder of the Jerome Octave Movement for Indigenous Rights, a local NGO mobilizing and educating locals on the rights of indigenous peoples and seeking to explore ways to challenge the decision of the State as it pertains to indigenous infringements. Apart from indigenous rights, he is interested in the areas of Judicial Review and Constitutional Law, Employment, Probate, Conveyancing and Land Law, and Contract and Tort. Mr. Paris assists persons accused of crimes from the Kalinago Territory but almost wholly on a pro-bono basis. He is the fifth child of a single indigenous mother of six (a retired community nurse) whom he credits for his interest in indigenous rights. In December 2020, he was dubbed "the Kalinago Man of the Year" for his advocacy and involvement in community work by a committee of local graduates in Dominica and the diaspora.

**Annex 2:**

## DELIMITATION: PRINCIPLES AND METHODOLOGY

### I. OVERVIEW AND PURPOSE

In its judgment in the case of the *Maya Leaders Alliance v. A.G. Belize*, the Caribbean Court of Justice, *inter alia*, accepted the undertaking of the Government of Belize ("GoB"), made in the Consent Order of April 22, 2015, to adopt affirmative measures "to create an effective mechanism to identify and protect the property and other rights arising from Maya customary land tenure, in accordance with Maya customary laws and land tenure practices."[i] In relation to this, the GoB further committed to the "demarcation and registration of all property rights that each of the Maya villages of the Toledo District holds over the lands … in accordance with their customary land tenure system…."[ii]

The first step in the above referenced process is normally 'delimitation'. According to the Inter-American Court of Human Rights ("IACTHR"), delimitation involves the identification of the lands and territory traditionally owned[iii] by indigenous peoples, which, in turn, entails "establishing borders and boundaries, as well as its size."[iv] Lands 'traditionally owned' are those encompassed by the Maya people's customary tenure system, in accordance with Maya customary laws and land tenure practices. Delimitation is not the same thing as demarcation (the physical marking of borders on the land); it is a precursor to demarcation, which is based on the results of the delimitation exercise, and other aspects of the indigenous land regularization process (e.g., titling and assessing third party interests and overlapping land use designations).[v]

The traditional ownership of the Maya over their lands, territory and resources in southern Belize has been proven before the judiciary on a number of occasions and is affirmed and embedded in the Consent Order.[vi] As ordered in the corresponding judgments, the State has an obligation to identify and protect the Maya people's customary tenure system and to regularize the rights arising therefrom in law and practice (*inter alia*, to secure and guarantee the lands of "each of the Maya villages" through delimitation, demarcation and titling).[vii] As ordered by the Belize Supreme Court, for instance, the Maya Villages hold collective title to their respective lands "within the boundaries established through Maya customary practices…."[viii] The IACTHR observes in this regard that its jurisprudence holds that "traditional indigenous land ownership is equivalent to full title granted by the State" and that such traditional ownership includes the right to official recognition and registration of indigenous peoples' communal property rights.[ix]

In accordance with the 7 December 2018 *Agreement reached between the Toledo Maya Land Rights Commission and the Maya Leaders Alliance and Toledo Alcaldes Association* ("the Agreement"), this document sets out principles and methodology to facilitate the delimitation of Maya lands and territory in southern Belize and verification of the same by the Toledo Maya Land Rights Commission ("TMLRC"). Elaborating on the TMLRC's approved *Logical Framework and Workplan (July 2018 – June 2020),* the Agreement provides in this regard that: "2. As a first step in the regularization process, the TAA/MLA will auto-delimit the outer boundaries of Maya lands and territory, and: (a) a methodology shall be developed and agreed upon to guide this process, including the verification component…." The Agreement provides also that the result will be maps and plans depicting and geo-referencing the delimited areas, produced "in a GIS system that is compatible with the system(s) and/or databases used by the State." This is consistent with the 2014 statement of the Belize Supreme Court that the GoB must collaborate "with the Maya to set up a system which would demarcate the lands that fall under Maya ancestral

title,"[x] thereby facilitating "mutual understanding and agreement as to what areas of land will be demarcated as Maya Lands."[xi]

The Agreement further provides, in Point 3(d), that "The TAA/MLA shall consult with the affected Maya communities and provide a written statement confirming that the Maya accept and agree to the continued occupation of non-Maya villages as they are presently situated, and as confirmed by written boundary agreements between the Maya and non-Maya villages."[xii] This is part of a broader assessment of third party interests that may affect the traditionally owned lands of the Maya people, which is to take place once the delimitation process has been concluded. Nonetheless, the Agreement also provides that, "As the core areas of the Maya territory are presently known, this inventory can commence prior" to the completion of the delimitation process, and this is accounted for in some respects in the methodology below. This aims to consolidate parts of the regularization process to improve efficiency and reduce overall costs by collecting multiple forms of information at the same time, rather than via additional meetings and field visits.

This *Delimitation: Principles and Methodology* is an integral part of the Agreement and authoritatively elaborates on and supplements its corresponding provisions and processes.

## II. IMPLEMENTING ENTITIES

Implementation of the methodology herein shall be coordinated by the TMLRC, on behalf of the GoB, and the Maya Leaders Alliance and Toledo Alcaldes Association ("TAA/MLA"), on behalf of the Maya people (collectively "the Parties"). The respective roles and responsibilities of the Parties are set out in the methodology.

## III. CONCEPTS AND PRINCIPLES

The following concepts and principles inform and provide a framework for the implementation of the methodology set out in Section IV below.

### A. CONCEPTS

- **Customary land tenure system** refers to the way the Maya people hold, manage and internally allocate lands and resources in accordance with their associated customary laws and governance mechanisms. This includes various cultural, spiritual and other aspects that are intertwined with indigenous peoples' multifaceted relationship to traditional lands and territory.[xiii] The term 'traditionally owned' is synonymous and refers to customary ownership of the lands and territory held in accordance with and encompassed by the Maya people's customary tenure system and related customary laws.[xiv]
- **Customary Law(s) and Practices** refers to customs that are accepted as legal requirements or obligatory rules of conduct, including in relation to governance, regulation of interpersonal interactions and land tenure (e.g., how lands are acquired, owned, used and transferred); and practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.[xv] Customary law is, by definition, intrinsic to the life and custom of indigenous peoples; what has the status of 'custom' and what amounts to 'customary law' depends on how indigenous peoples perceive these questions.[xvi]
- **Auto-delimitation** refers to the process of delimitation as conducted by the Maya people themselves in a manner consistent with their customs and traditions, including internal consultation processes and consensus-based decision-making, in which they identify and document the lands encompassed by their customary tenure system, in accordance with their customary law and practices. Consequently,

delimitation entails "establishing borders and boundaries" of the lands subject to their customary tenure system, which in turn will establish the boundaries of Maya territory, "as well as its size." This is to be done "in accordance with Maya customary laws and land tenure practices," which implies some degree of deference to the Maya's perspectives and traditional knowledge, as the authoritative interpreters of their own customs, traditions, practices, laws and spiritual relations to land.

- **Village Meeting** is the fundamental authority and primary decision-making body in the village. All decisions, including the consents required herein, shall be taken in accordance with its customary law and practice. For the purposes of this methodology, the persons who may participate in and vote on decisions in the Village Meeting are those who are village members in good standing; that is, who are either resident in the village according to custom or temporarily not resident in the village but recognized by the village as residents; who are of an age to vote in the customary election for alcaldes; and who are in compliance with their customary obligations (*fajina,* etc.).
- **Verification** refers to the process by which the TMLRC shall assess and confirm the results of the auto-delimitation process, "in accordance with the agreed methodology" set out herein.
- **Plan** refers to a map produced following a survey and is a requirement of registering title to land under the laws of Belize (see e.g., the *General Registry Act* (Cap. 327) and the *Land Surveyors Act* (Cap. 187)). It could and should also be used in relation to a land titling procedure to be included in the legislation that will be drafted pursuant to the Agreement.
- **Traditional knowledge** is knowledge, innovations and practices of indigenous peoples and their communities developed from experience gained over the centuries and adapted to the local culture and environment of the indigenous communities. Traditional knowledge is generally transmitted orally from generation to generation.[xvii] See also UNDRIP, Article 31 in this regard.
- **Demarcation:** entails physically surveying and marking the borders or boundaries determined during delimitation to ensure that the boundaries are visible and known. The use of natural boundaries (e.g., rivers or creeks), where relevant, obviates the need for physical surveys of the corresponding border(s).
- **Registration/titling** is the process of recording (e.g., entering on the Land Register) and providing official, legal documentation that confirms collective title to the delimited and demarcated area or areas and protects the associated rights under domestic law.
- **Third parties** are non-Maya persons and entities (i.e., legal persons) occupying or using Maya lands, including those who have valid and registered property rights granted by the State in the form of leaseholds, titles and other potentially conflicting land uses (e.g., private protected areas).

**B. PRINCIPLES**

- **Mutual Respect:** the Parties shall cooperate on joint activities, facilitate the effective completion of their respective roles as defined in the methodology, and shall respect each other's internal consultation and decision-making processes.
- **Good faith:** engaging in meaningful and iterative dialogue, exchanging and explaining views and positions, and making reasonable and genuine efforts to arrive at an agreement.
- **Transparency:** requires open communication concerning proposed activities and the reasons behind decisions that are made, including sharing of related information. It requires that such communication and information sharing take place as early and as often as possible so as to provide sufficient time to digest and respond as may be needed to contribute productively.

- **Free, prior and informed consent ("FPIC"):** derives from indigenous peoples' right to self-determination and other human rights guarantees. It operates as a fundamental safeguard for their collective rights, arises whenever their substantive rights may be affected by a particular plan or action, and is a key element in forging a new relationship between the Maya people and the State.[xviii] 'Consent' in this context is understood in accordance with the plain meaning of the term (i.e., the ability to say yes or no, including conditionally) and, for the purposes of this methodology, refers to a decision taken by the Maya villages, via their respective Village Meetings, in accordance with their customary law and traditions.
- **Conflict mitigation and resolution:** The Parties, at all times, shall be cognizant of the need to avoid, or where not possible, mitigate conflicts that may arise or that do arise in the process of implementing the methodology. Where conflicts do arise that may affect implementation of the methodology, the Parties shall collaborate to resolve these.
- **Technical compatibility:** requires using GPS settings and the GIS system that is compatible with those used by the GoB (UTM NAD 1927 Zone 16N). This does not preclude striving to ensure that data collected and recorded may also be compatible with any proposed or prospective changes to the GoB's existing system (e.g., UTM WGS 1984 Zone 16 N; ARC View GIS).

## IV. METHODOLOGY

### A. AUTO-DELIMITATION

In order to identify and document the borders/boundaries and size of Maya lands, the following methodology sets the framework to be employed:

***First Phase:***

**1. Indicative Analytical Map**

(1) The TAA/MLA shall:

(a) identify and list the villages holding lands that are contiguous to the external boundaries of Maya territory; and

(b) produce indicative, sketch maps of the approximate outer boundaries of Maya territory. The approximate boundaries so sketched shall be shown on 1:100,000 maps, which shall be known as the Indicative Analytical Maps ("IAM"), and copies shall be shared with the TMLRC on completion.

(c) The IAM are solely for the purpose of an inventory and analysis of third-party rights and interests. They shall not be considered definitive, final or authoritative, nor be used for any other purpose. This shall be clearly stated on the IAM as follows: "*This map is indicative only and shall not be considered definitive, final or authoritative and is solely for the purpose of an inventory and analysis of third-party rights and interests.*"

(2) The TMLRC shall:

(a) based on the IAM, seek an authorization to conduct an inventory of third-party rights and interests that may be affected.[xix]

(b) seek the agreement of the competent authority to conduct the inventory process in accordance with the sequence of delimitation set by the TAA/MLA pursuant to section 3(2); and

(c) identify and, as soon as funding is available, contract the services of a qualified person to support this process in relation to the area depicted on the IAM, in accordance with terms of reference developed by the TMLRC in consultation with the TAA/MLA and the Commissioner of Lands.

**2. Documentation of Prior Delimitation Processes**

(1) The TAA/MLA shall list the Maya villages that have previously engaged in delimitation processes, including land use mapping, and explain the extent to which these may have been completed; where not completed, they should explain the stage to which the process has reached to date (in both cases, listing also which GPS and/or GIS system and/or database(s) have been used in the processes).

(2) The TMLRC shall maintain a digital record of the information provided by the TAA/MLA, organizing the same to the extent possible under the name of each village and share the same with the TAA/MLA. Alternatively, and as agreed, the TAA/MLA may produce the same and share with the TMLRC.

**3. Consultation Plan and Delimitation Schedule**

(1) The TAA/MLA will develop a consultation plan and delimitation schedule and submit the same to the TMLRC. The objective of the consultations shall be:

(a) to inform the villages about the auto-delimitation process, its objectives, components and process. This shall be done orally as well as by circulating a written explanation in each village and posting the same at a central location; and

(b) to begin and, where possible, to conclude the process of obtaining the consent of each village to commence or complete auto-delimitation. Consent shall be documented in writing and subject to verification by the TMLRC in accordance with the procedure in sections 14-17 and 21(2).

(c) Sub-sections (a) and (b) may be done in one meeting or in more than one meeting, depending on the circumstances.

(2) In the schedule, the TAA/MLA shall indicate the sequence in which the villages will commence auto-delimitation, provided that this sequence shall:

(a) take into account available funds in accordance with the agreed and allocated budget;

(b) prioritize those villages considered to be relatively simple for delimitation purposes and those that can be clustered;

(c) take into account prior delimitation efforts and consider the extent to which they may be completed expeditiously and, thus, prioritized; and

(d) include only those villages that have expressly consented to auto-delimitation and this has been verified by the TMLRC.

**4. Base Maps**

(1) The TAA/MLA shall compile a list of digital and/or hard copy base maps that may be required for the auto-delimitation process and transmit a request for the same to the TMLRC. This request may be sequenced according to the schedule or may encompass all maps that are projected to be required, irrespective of the sequence.

(2) The TMLRC shall request these base maps from the relevant GoB ministry or agency and, once obtained, transmit the same to the TAA/MLA within a reasonable period.

(3) The Parties agree to comply with any conditions on the use of the base maps as these may relate to distribution or use for purposes that may not relate to the auto-delimitation and connected processes.

**5. Transmission of Funds**

The Parties shall facilitate the transmission of any funds designated for delimitation and connected processes within a reasonable time and in accordance with the budget developed pursuant to 2(b) of the Agreement, or agreements with donors, or related memoranda of understanding/joint statements of commitment that have been subscribed to by the Parties.[xx]

**6. Identification and Contractor of Licensed Surveyor**

The TMLRC shall, as soon as it is feasible, identify and contract the services of a licensed land surveyor or surveyor(s) ("the Surveyor"),[xxi] who shall be consulted about technical aspects of the methodology as these may relate to the verification process and conduct the technical verification process (sections 18-9).[xxii] The Surveyor shall be independent from the TAA/MLA technical mapping team.

**7. Requests for Support for Delimitation Process**

In any phase of the implementation of this methodology:

(1) where requested by the TAA/MLA, based on a justified need or concern related to the effective implementation of the methodology or parts thereof, or related to conflict mitigation:

(a) the TMLRC shall communicate with GoB ministries or agencies, local government bodies, civil society, the private sector, or private persons to request their support or to request that they refrain from activities that may negatively affect implementation;

(b) where necessary, this may be done via the Ministry of the Attorney General and, to the extent possible, in the form of a directive;

(2) the TMLRC may identify the need for the measures in (a) and (b) above and, provided it has first consulted with and obtained the consent of the TAA/MLA, seek the same.

***Second phase:***

**8. Commencement and Process**

The TAA/MLA shall commence the process of auto-delimitation in accordance with the consultation plan, delimitation schedule and the agreed budget, as follows:

(1) Following the consultation process or, where relevant, a *Maya Boundary Harmonization* process (see section 9(2)), collection of verifiable GPS coordinates at set intervals along village boundaries and the recording of the same in a database and GIS system;

(a) where a natural feature comprises a boundary or part thereof, said feature will be georeferenced and identified by the Maya name and, if applicable, the name recorded in the *Gazetteer of Belize*

(2014).[xxiii] In the case of rivers or creeks forming a boundary or part thereof, two coordinates shall be collected, each recording the start and end points of the river or creek as it comprises the boundary or geo-referencing the source or mouth of the river or creek, as applicable;

(2) Collection and collation of information evidencing physical, traditional, cultural and/or spiritual relationships with the land or otherwise corroborating a correspondence between the delimited area and boundaries and the customary tenure system.[xxiv] This information may include:

(a) statements by village elders and other knowledge holders (this may be done in writing or recorded in digital audio or video formats);

(b) relevant archival materials;

(c) reports or documents from historians, anthropologists or archaeologists, including those which may have submitted as part of the litigation; and

(d) relevant published works (e.g., *The Maya Atlas*).

(3) The results of the auto-delimitation process, including as depicted on the map(s) produced, shall be reviewed by the each Maya village in conjunction with the TAA/MLA, as often as circumstances may require, and consented to by Maya Village Meeting in question prior to submitting written notice to the TMLRC pursuant to section 12.

(4) All maps and/or reports shall be clearly marked as "Draft Only" until finally consented to by a Maya village. Once consented to, the map shall be referred to as the '*[name of village] Village Delimitation Map*' ("the VDM").

**9. Common Boundary Agreements**

Where Maya villages share common boundaries with each other:

(1) an inter-village boundary agreement shall be concluded to confirm that each village accepts the common boundary and the consent of the respective villages shall be obtained in a Village Meeting, documented in writing and verified by the TMLRC; and

(2) if, at any time during the implementation of sections 8 or 9(1), a dispute may arise, or be identified as existing, between Maya villages with respect to the delimitation of their respective village lands, the *Maya Boundary Harmonization* process set out in Annex A hereto shall be followed.

**10. Collection of Information about Third Parties**

During the consultation/delimitation process involving each village, the TAA/MLA should collect, or facilitate the collection of, information concerning the identification and presence of third parties that are within the village area(s) identified for delimitation, or contiguous thereto, and:

(1) where available information permits, specify whether each third party holds any registered right to or interest in land (i.e., a valid title or leasehold or other valid interest) and any additional information about the same;

(2) indicate whether the Maya village in question has an objection to their continuing occupation or use of lands, and:

(a) where it has no objection:

(i) this shall be confirmed in written agreements with each third party (specifying any boundaries to the extent necessary and possible), which shall be further consented to in a Maya Village Meeting. Village consent shall be documented in writing and, together with copies of the collated agreement(s) with third parties, transmitted to the TMLRC no later than 15 days after said meeting(s); or, alternatively,

(ii) where, for whatever reason, an agreement is not possible,[xxv] this shall be confirmed in written statements of no objection, which shall explain the reason that an agreement was not obtained, and which shall be subject to the consent of the Maya Village Meeting and the procedure in (i);[xxvi]

(b) where there is an objection, this shall be explained in writing and recorded; and

(3) indicate whether the area affected by a third party may be excised from delimited Maya lands or will remain within the delimited area and whether any conditions may apply (these conditions should be included in the written agreements and statements of no objection as provided for in subsection 2(a)).[xxvii]

(4) The preceding information shall be recorded in a digital file, which shall be shared with TMLRC whenever updated.

(5) The measures set out in this section are without prejudice to those parts of the Agreement that concern the process of making "an inventory of third-party rights and interests" and related provisions, and, instead, are intended to contribute to, corroborate and expedite this process to the extent possible.

## 11. Non-Maya Villages

In accordance with the Agreement (paragraph 3(d)), in the case of non-Maya villages within or contiguous to the area depicted on the IAM, unless it excludes the same:

(1) the TAA/MLA shall consult with the affected Maya villages and provide a written statement confirming that they accept and consent to the continued occupation of the non-Maya villages as they are presently situated, and, if feasible at that time, conclude written boundary agreements between the Maya and non-Maya villages;[xxviii] and

(2) said statements shall be consented to in a Maya Village Meeting, which shall be documented in writing, verified by the TMLRC, and, together with copies of any boundary agreements, transmitted to the TMLRC no later than 15 days after the conclusion of said meeting(s).

(3) Where a written boundary agreement has not been concluded, the written statement in subsection (1) shall set out a time-bound process for determining the boundaries, agreed to by the Maya and non-Maya villages, and shall indicate whether any support from the TMLRC or the Commissioner of Lands may be required (e.g., to ascertain and verify boundaries based on existing or planned survey plans of leaseholds and titles held by non-Maya persons residing in the non-Maya villages).

(4) Where the Maya and non-Maya village cannot agree on a boundary determination process or where agreement on boundaries between the Maya and non-Maya villages cannot be reached:

(a) in the case of Garifuna villages, and subject to consultation with and the input of any Garifuna village that may have such a dispute, the respective villages shall attempt to resolve the dispute with the assistance of an independent mediator, appointed by mutual consent of both communities, that seeks to identify and agree on the traditional, customary boundaries between the villages and, where relevant or necessary, to conclude a 'Joint Resource Use Agreements' to address customary use of resources that may pertain in the area of the boundary; The costs of up to three sessions with such a mediator will be paid for by the Government, or if available, such funds as may exist to support the delimitation and demarcation process.

(b) in the case of the other non-Maya villages, the TMLRC will request that Commissioner of Lands provide a map outlining existing or planned survey plans of valid leaseholds and titles held by persons residing in the non-Maya villages; and

(c) if the dispute persists, the matter shall be submitted to a panel established by the two conflicting villages consisting of one panellist appointed by each village and a third agreed upon by both villages, which shall be statutorily authorized to make a final decision on the disputed boundary.

**12. Notice of Readiness for Technical Verification**

(1) Once the VDM and any related inter-village agreements have been consented to by the village(s) in question, the TAA/MLA shall submit written notice of the same to the TMLRC and state that the village(s) is/are ready for technical verification, as provided for below. Said notice shall be submitted:

(a) within 7 days after final consent to the VDM by one or two village(s), or

(b) in relation to a larger number of villages jointly and within 7 days from the date that the last village in the group has consented.

(2) The TMLRC shall acknowledge receipt of notice within 14 days and act accordingly.

## B. VERIFICATION BY THE TMLRC

**13. Aspects of Verification**

Verification by the TMLRC has two aspects:

(1) verification of village consent to auto-delimitation and its results, including the VDM, any inter-village boundary agreements, and the Plan; and

(2) technical verification by a licensed surveyor ("the Surveyor") of the VDMs produced in the auto-delimitation process.

### *1. Verification of Consent by Maya Villages*

**14. TMLRC Delegate and Required Consents**

(1) The TMLRC shall designate one or two persons ("TMLRC Delegate") to attend and observe Village Meetings and to verify:

(a) final consent by each Maya village to commence, or where previously commenced but not finalized, to complete, the auto-delimitation process;

(b) final consent by each Maya village to the results of the auto-delimitation process, including as depicted on the VDM and, subsequently, the Plan produced by that process;

(c) final consent to any inter-village boundary agreement or confirmation of consent where adopted and endorsed prior to the auto-delimitation process; and

(d) final consent to statements pertaining to non-Maya villages and any associated written boundary agreements (sec. 11(2)).

(2) Consent to the VDM (b), inter-village boundary agreements (c) and statements pertaining to non-Maya villages (d) may occur and be verified simultaneously in a single meeting.

(3) Consent shall be obtained in accordance with Maya customary laws and processes and that this shall be given due accord when verifying consent. As such the TMLRC Delegate must have knowledge of these customs and practices.

(4) Without prejudice to (3), each Alcalde shall provide a list of the persons eligible to participate in a Village Meeting and certify that the persons participating in decision making in a Village Meeting in which consents are sought or obtained are village members in good standing and who are eligible to vote in an Alcalde election. A copy of this list shall be provided to the TMLRC, which shall include it in the file for each village.

(5) The TMLRC Delegate will not attend all and any meetings related to the auto-delimitation process, only those where a Village Meeting is convened for the purpose of verifying the final and definitive consent of each village or villages (per a-c above), and the TMLRC has been notified that it is the designated meeting in which verification is to take place in accordance with the following section.

**15. Notice and Schedule of Meetings**

(1) The TAA/MLA shall provide the TMLRC at least 7 days' notice of the verification meetings required by section 14.

(2) Where possible, villages should be clustered for the purposes of scheduling and holding verification meetings and, where this is the case, the TAA/MLA shall provide a schedule of the verification meetings at least 7 days prior to the first scheduled meeting in the cluster.

(3) Unless otherwise agreed, the TAA/MLA shall provide at least 2 days' notice of changes to scheduled meetings and, where possible, specify an alternative date.

**16. Observer Status**

In the verification meetings required in section 14, the TMLRC Delegate shall be an observer only and shall not speak or intervene unless authorized by the Village Meeting in accordance with Maya custom. At the beginning of each meeting, the Village Leaders shall explain the purpose of the presence of the TMLRC Delegate to those present.

**17. TMLRC Delegate Report**

Within three days of the conclusion of the meetings in section 14 above, the TMLRC Delegate shall provide a brief, written report to the TMLRC stating his or her view about whether the required consents were given by the Village Meeting:[xxix]

(1) a report confirming consent shall constitute positive verification of the same by the TMLRC and this shall be recorded in a digital file listing the names of the villages. This file shall be shared with the TAA/MLA at agreed intervals in the process and/or when requested;

(2) a report questioning whether consent was obtained shall state the reasons and the Parties shall agree on how to address the issue(s) or concern(s) within 30 days and, where necessary, hold another meeting with the village(s) in question to clarify or otherwise resolve the issue or concern, and to verify again whether consent has been obtained; and

(3) a report stating that consent was not obtained shall be recorded, in which case the verification process described in parts 14-17 shall begin again and shall be repeated until verified consent is obtained.

(4) The TMLRC shall notify the TAA/MLA of (1-3) no more than seven days after receiving the written report.

***2. Technical Verification***

**18. Verification of VDM and Survey**

(1) In collaboration with the TAA/MLA and village representatives:

(a) the Surveyor shall verify the georeferenced points shown on the VDM produced for each village as well as any other relevant geographical information that could affect the accuracy of the map,[xxx] and conduct a survey of the corresponding lands;

(b) the Surveyor shall place georeferenced survey markers/poles at each of the verified georeferenced points shown on the VDM.[xxxi]

(2) Should any technical discrepancies be identified, these shall be discussed and, where necessary, rectified through an agreed process. If an agreement cannot be reached, the area of the boundary containing the technical discrepancy shall be marked as provisional, and the nature of the discrepancy and the reason for the disagreement shall be attached and written by the technicians who are in disagreement. The parties shall then jointly agree on independent technical assistance to resolve the discrepancy.

**19. Plan**

(1) When the VDM has been verified by the Surveyor and the survey has concluded:

(a) the Surveyor shall produce a Plan depicting the same; and

(b) the Plan shall be reviewed by the TAA/MLA, which shall consult the village in question to confirm its consistency with the VDM.

(2) If the Plan:

(a) is confirmed by the TAA/MLA to be consistent with the VDM, the VDM and the Plan shall then be presented to the Maya village in question for its final consent and verification of consent by the TMLRC Delegate;

(b) is not confirmed to be consistent with the VDM, the discrepancies shall be discussed with the Maya mapping team and the surveyor and, where necessary, rectified through discussion and agreement. If the issue still cannot be resolved, the parties will agree on an independent surveyor who will resurvey the area of discrepancy and assist the parties in resolving the issue.

### 20. Deposit

Where consent is given by the Maya village and verified by the TMLRC:

a) the Surveyor shall sign and date the Plan and copies shall be deposited with each village, the TAA/MLA and the TMLRC. The original signed and dated Plan shall be deposited with the Commissioner of Lands; and

b) a table shall be compiled by the TMLRC listing each village by name and its corresponding Plan number. Table shall be shared with the TAA/MLA.

## V. ADDITIONAL CONSIDERATIONS

### 21. Amendment

(1) The methodology herein may be supplemented or modified as necessary or desired, provided that any changes are intended to make the process more effective or transparent, or to address logistical concerns (e.g., timing issues); and any supplements or changes made are agreed to in writing by the Parties.

(2) Based on prior agreement between the Parties, the TAA/MLA shall draft criteria by which the TMLRC Delegate shall verify the consents required herein and shall submit this to the TMLRC for comment and agreement. When agreed, these criteria shall be supplement and be incorporated into this Principles and Methodology in accordance with (1) of this section.

### 22. Reasonable Flexibility

The Parties accept and understand that the methodology is to be implemented with reasonable flexibility as may be required.

### 23. Due Process Rights

The Parties accept and understand that nothing herein shall be construed to affect or diminish any due process rights of third parties; and nothing herein presently affects said due process rights, which would be triggered only in relation to government action that may be taken outside of the scope of implementation of this methodology and at some point in the future.

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[i] *See e.g., Maya Leaders Alliance v. A.G. Belize*, [2015] CCJ 15 (AJ) (hereinafter "CCJ 2015"), para. 9.

[ii] *Statement of the GOB's commitment to advance the undertakings contained in the judgment in CCJ Appeal No. 2 of 2014 (20 April 2015*), Commitment 1 (referring to paragraph 3 of the Consent Order).

[iii] *See e.g.*, UNDRIP, Art. 26(1), providing that "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." In *Kaliña and Lokono Peoples v. Suriname,* 2015, para. 139, footnote 178, the IACTHR Court cites UNDRIP, Art. 26, and states that "Similarly, [that article] recognizes the right to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, as well as the right to own, use, develop and control these lands; thus, States must give legal recognition and protection to these lands, respecting the customs, traditions and land tenure systems of the indigenous peoples concerned."

[iv] *Kaliña and Lokono Peoples v. Suriname, id.*; and *Yakye Axa v. Paraguay*. *Interpretation of the Judgment*, 2006, para. 34.

[v] 'Regularization' means "to make something regular, legal, or officially accepted."

[vi] The Consent Order refers to rights "arising from Maya customary tenure" and "the property and other rights arising from Maya customary land tenure, in accordance with Maya customary laws and land tenure practices." *See also* UNDRIP, Article 26(3), providing that "States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned." In the *Maya Indigenous Communities Case*, 2004, para. 117, the I-A Commission on Human Rights observed that "the jurisprudence of the system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition."

[vii] *See also Maya Indigenous Communities Case,* 2004, (where the I-A Commission on Human Rights held that Belize is obligated to "effectively delimit and demarcate the territory to which the Maya people's property right extends and to take the appropriate measures to protect the right of the Maya people in their territory, including official recognition of that right").

[viii] *Re Maya Land Rights,* Consolidated Claims 171 and 172 of 2007 (Supreme Court of Belize), para. 136.

[ix] *Sawhoyamaxa Indigenous Community Case*, 2006, para 128. This principle of equivalency with full fee-simple title is reflected in the *Statement of GOB's Commitment to advance the undertakings contained in the judgment in CCJ Appeal No. 2 of 2014* (April 20, 2015), paras. 2-4.

[x] *Sarstoon Temash Institute for Indigenous Management et al v. Attorney General et al*, Claim 394 of 2013 (Supreme Court of Belize), 3 April 2014, at p. 50.

[xi] *Id*. at p. 31.

[xii] The Agreement further explains that "Boundaries may be based on the prior surveys of existing leases or titles to the extent that this is accepted by the Maya and the non-Maya villages and to the extent that this information has been collated or is otherwise available."

[xiii] UNDRIP, Art. 25. *See also e.g.*, *Kaliña and Lokono Peoples v. Suriname,* 2015, para. 124 (observing that the IACTHR's analysis "supports an interpretation of Article 21 of the American Convention that requires recognition of the right of the members of indigenous and tribal peoples to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied").

[xiv] *Mayagna (Sumo) Awas Tingni Community Case,* 2001, para. 164 (where the I-A Court ruled that "the State must adopt the legislative, administrative, and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores").

[xv] BLACK'S LAW DICTIONARY (8th ed., 2004).

[xvi] In the case of the Maya villages in southern Belize, the traditional leaders (Alcaldes) are the arbiters of Maya customary law and practice.

[xvii] An extensive (albeit not the only) framework in relation to traditional knowledge and associated rights has been developed pursuant to the Convention on Biological Diversity (ratified by Belize in 1993). *See e.g.*, https://www.cbd.int/traditional/.

[xviii] *See e.g.*, *Free, prior and informed consent: a human rights-based approach. Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62, 10 August 2018, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/245/94/PDF/G1824594.pdf?OpenElement.

[xix] The inventory would then be conducted under the authority of the Minister responsible for Lands and consist of a listing of and status report on third party rights and interests.

[xx] Funding may also be sequenced (i.e., provided in tranches) and will be subject to the reporting and accounting procedures set out in a funding contract, agreements with donors, and/or related memoranda of understanding/joint statements of commitment that have been subscribed to by the Parties.

[xxi] *Land Surveyors Act* (Cap. 187).

[xxii] The aim of consultation with the Surveyor in Phase 1 is to avoid or minimize delays in the verification process due to technical incompatibility issues, caused by equipment, software or procedures, including as this may relate to the surveys and Plans that will based on the maps (VDMs) produced in the auto-delimitation process.

[xxiii] https://www.slideshare.net/peivhau/gazetteer-of-belize.

[xxiv] This information does not need to be comprehensive and the absence of any one or more of the enumerated sources of information shall not be considered prejudicial. The sole aim of collection of this information is to corroborate the correspondence between the delimited area and the customary tenure system of the Maya village in question.

[xxv] For example, where the person(s) in question cannot be located.

[xxvi] Discussion of and consent to these agreements or statements may be combined with another meeting where consent is sought in relation to other issues, as required in this methodology (e.g., consent to the VDM).

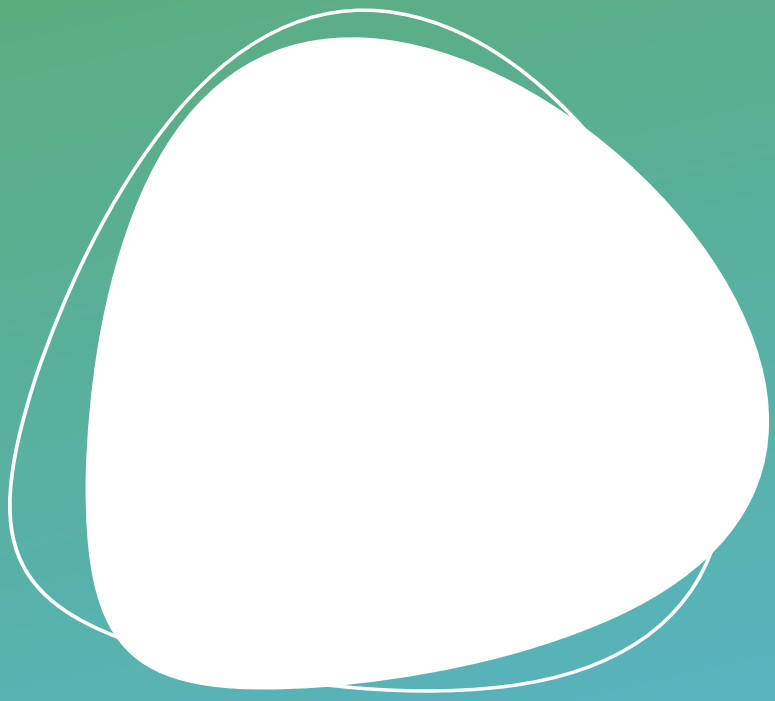
[xxvii] For example, a condition may be that the lease held by a third party will terminate upon expiration or with immediate effect and be renewed as a lease between the village and the third party; or that a title holder will not alienate their land and/or that it will be subject to a right of first refusal held by the village.

[xxviii] Boundaries may be based on the prior surveys of existing leases or titles to the extent that this is accepted by the Maya and the non-Maya villages and to the extent that this information has been collated or is otherwise available.

[xxix] The written report may be submitted electronically.

[xxx] This may be done by verification of the information in the GIS system, by using other relevant technology, or by physical verification at the site of each or some of the georeferenced points.

[xxxi] The form of survey marker/pole to used shall be agreed to by the Parties, taking into account the available budget. These survey markers/poles may be used as evidence of physical demarcation in the legislation that will be drafted to legally secure Maya land and associated rights.



# Judicial Reform and Institutional Strengthening (JURIST) Project

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