



Conservation and Indigenous Peoples in Mesoamerica: A Guide

Written and edited by the

Indian Law Resource Center

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This guide is intended to help conservation actors, especially government agencies and non-governmental organizations that are members of the International Union for the Conservation of Nature, to bring their practices, policies, and laws in line with the United Nations Declaration on the Rights of Indigenous Peoples and other legal norms, including indigenous peoples' customary laws, treaties, and the decisions of the Inter-American Court of Human Rights on the rights of indigenous peoples.

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A Guide

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The Center brought more than 30 years of experience and legal expertise on the UN Declaration on Rights of Indigenous Peoples to the task of developing the *Guide*, with its recommendations and standards for improved governance of natural resources. Indian Law Resource Center Attorneys Leonardo A. Crippa* and Christopher T. Foley** led the drafting efforts. Center Attorneys Jana L. Walker and Karla E. General, and a team of legal and policy fellows, Michelle Cook, Memmi Rasmussen, Carmen Mestizo, and Sarah Armstrong, provided tremendous support. Robert T. Coulter, Executive Director of the Center, and Armstrong A. Wiggins, Director of the Center's Washington D.C. Office, contributed their vision, experience, and expertise to the *Guide*.

At its heart, the *Guide* is grounded in the experiences and realities of indigenous leaders living and working in Mesoamerica. We are indebted to the many indigenous men and women, elders, and youth that contributed greatly in regional meetings. We are especially appreciative of the leaders and authorities of the Mayagna, Miskito, and Q'eqchi' peoples, many of whom travelled long distances to join in the discussions and share with us their knowledge about how they care for the lands and resources in their homelands. They have much to teach about conservation and co-existence with our environments. For assistance with organizing these regional meetings in Mesoamerica, we are very grateful to MOPAWI and MASTA (Moskitia Asla Takanka-- Moskitia Union) for their help with logistics in Ahuas, Honduras. In Guatemala, we thank the Asociacion Estorena Para el Dessarrollo Integral/Defensoria Q'eqchi' for their assistance in organizing a consultation meeting in Livingston, Guatemala.

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^{***} The analysis and views presented in this Guide are those of the authors and are not necessarily shared by the IUCN Commission on Environmental, Economic and Social Policy (CEESP) or by the Rights and Resources Initiative.

FOREWORD

Conservation and the human rights of indigenous peoples

When Indian leaders from the Americas went to the United Nations in 1977 demanding recognition of their human rights, especially their rights as distinct peoples, they spoke at length about the need to protect the environment, including those creatures that “cannot speak for themselves.” Old hands at the UN and delegates of member states thought these indigenous speakers didn’t understand that the conference was devoted to human rights. The draft declaration of rights that the indigenous participants proposed to the UN prominently included the right to environmental protection – a concept all but unknown at the time. For these indigenous leaders from North, Central, and South America, the human rights essential for their survival as nations, peoples, and cultures were inextricably intertwined with the well-being and protection of the natural world.

That proposed declaration was taken up by the United Nations, and it led to the adoption 30 years later of the UN Declaration on the Rights of Indigenous Peoples. The right to environmental protection remained a distinctive part of the UN Declaration in its final form. The Declaration became the first UN human rights instrument to formally declare international recognition of an array of legal rights relating to protection of the environment. By this time, some of the major environmental organizations, at least in the United States, had actively joined in the human rights work of the UN and embraced the concept that human rights are an important part of conservation and environmental protection.

Perhaps this interconnectedness is not surprising today, and it is only surprising that the connection is not better understood and more widely acknowledged. Those who work in the field of indigenous peoples’ rights and many conservationists who are in contact with indigenous communities know that as a practical and factual matter conservation and human rights must be considered together. They cannot be separated with any real hope of success. Indigenous advocates nearly always give high priority to the need to protect natural resources, habitat, and the environment generally, because these are essential to the survival of indigenous peoples, their cultures, and ways of life. And conservationists working in areas where indigenous peoples live almost inevitably find that whatever they might do will have serious effects on those indigenous communities.

The intertwining of conservation and the human rights of indigenous peoples is probably a result of, or a reflection of, the special and distinct relationship that indigenous peoples have with “the land” – their homeland. It has often been observed that profound cultural, ethical, and spiritual values deeply imbedded in indigenous cultures create a special relationship with the land, a relationship that is distinctive and extraordinarily strong. This relationship is recognized in part in Article 25 of the UN Declaration:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

It is not too much to say that for many indigenous peoples environmental conservation and human rights are not separate fields but a single, integral concept.

It is little wonder, then, that working on conservation projects that may affect an indigenous people or peoples requires a considerable depth of understanding and insight. The need for this *Guide* is all the greater because the legal and policy norms that relate to indigenous peoples and to their lands and resources are of relatively recent development. Less than a generation ago, the rights of indigenous peoples were virtually unknown. Fortunately, that is changing rapidly, and we are optimistic that human rights rules and principles can facilitate and improve the relations between conservation actors and indigenous peoples.

The problem that this *Guide* addresses is a global one – not one that is exclusive to Mesoamerica. Serious allegations of human rights violations against indigenous people by “ecoguards” charged with protecting conservation areas in Central Africa have recently been reported – to mention just one example of a global concern. Situations and circumstances vary in important ways around the world, but we can hope that some of the insights and recommendations in this *Guide* will prove helpful in other places beyond Mesoamerica.

Robert T. Coulter
Executive Director
Indian Law Resource Center

A new conservation ethic

With the adoption by the UN General Assembly of the UN Declaration in 2007, governments and many organizations have been trying to work out how best to implement the Articles of the Declaration within their organizational culture and work programs. The International Union for Conservation of Nature (IUCN) is one such organization.

The UN Declaration on the Rights of Indigenous Peoples is the only international instrument that recognizes conservation as a ‘right’ of peoples (Article 24) and thus it has particular significance for the conservation community in general, and in particular IUCN.

At the 2008 World Conservation Congress members of IUCN adopted Resolution 4.052 endorsing the UN Declaration on the Rights of Indigenous Peoples and called upon all IUCN members to endorse or adopt the UN Declaration and to apply it in their relevant activities. In adopting this resolution, IUCN acknowledged the injustices to indigenous people that have been and continue to be caused in the name of conservation of nature and natural resources.

In the same Congress, members also adopted two other relevant resolutions. First, Resolution 4.048 which resolved “to apply the requirements of the UN Declaration on the Rights of Indigenous Peoples to the whole of IUCN’s Programme and operations” and called on

governments “to work with indigenous peoples’ organizations to . . . ensure that protected areas which affect or may affect indigenous peoples’ lands, territories, natural and cultural resources are not established without indigenous peoples’ free, prior and informed consent and to ensure due recognition of the rights of indigenous peoples in existing protected areas.” Members also adopted Resolution 4.056, titled *Rights-based approaches to conservation*. These decisions, together with numerous other Resolutions, highlight the fundamental role of the Declaration in guiding all aspects of IUCN’s work.

This *Guide* has been developed as a collaborative project by the Indian Law Resource Center and the IUCN Commission on Environmental, Economic and Social Policy (CEESP). CEESP’s interest in supporting the *Guide* stems from a desire to examine how well the intent of the Declaration is being applied in conservation policies and actions at local and national levels. The *Guide* reveals that there is an ongoing need to deepen conservation actors’ understanding of the rights of indigenous peoples. It also reinforces the imperative to develop a new conservation ethic that supports diverse knowledge systems and values and delivers rights-based approaches to natural resource management and governance that promote social and cultural equity, indigenous peoples’ self-determination, community governance, sustainable livelihoods, and human security.

Aroha Te Pareake Mead
Chair
IUCN Commission on Environmental,
Economic & Social Policy

INTRODUCTION

This *Guide* is meant to inform conservation actors about the rights of indigenous peoples that conservation policies and projects must respect, especially when projects would affect indigenous peoples' lands, territories, resources, and environments. In particular, the *Guide* offers guidance to conservation actors on how to incorporate into their policies and projects the standards found in the UN Declaration on the Rights of Indigenous Peoples and in legal sources such as International Labor Organization (ILO) Convention No. 169 and the decisions of the organs of the Inter-American Human Rights System (Inter-American System). "Conservation actors" is an inclusive term used throughout the *Guide* to designate all those participating in the design, implementation, and management of conservation projects, especially protected areas; it includes state agencies, non-governmental organizations (NGOs), and their employees.

Indigenous peoples are custodians of some of the most biologically diverse territories remaining on the planet. Simultaneously, they preserve much of the world's linguistic and cultural diversity, maintaining worldviews and traditional knowledge that are valuable and beneficial to all humanity.¹ Currently, it is estimated that over 12 percent of the Earth's land surface has been formally conserved as protected areas. Some estimates indicate that about 50 percent of those protected areas are on indigenous peoples' territories.² In North, Central and South America the estimate is more than 80 percent.³ Not surprisingly, areas managed by indigenous peoples have been shown to be especially successful at preventing or avoiding deforestation.⁴

However, the conservation movement's very success in obtaining protected status for lands has too often been a primary cause of gross violations of the rights and fundamental freedoms of indigenous peoples.⁵ Conservation projects have a long and unfortunate record of dispossessing indigenous peoples from their traditional territories, rendering them homeless within their own lands,⁶ a record which must be understood within the historical context of colonization and colonial violence. Colonialism treated the harm to the lives, bodies, and

¹ See, e.g., UN Econ. & Social Affairs, The Secretariat of the UN Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples*, ST/ESA/328 v (2009) http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf.

² S. Amend & T. Amend, *Espacios sin habitantes? Parques Nacionales de America del Sur*, IUCN (1992). Mark Dowie, *Conservation Refugees, The Hundred-Year Conflict Between Global Conservation and Native Peoples* xxi (The MIT Press 2009).

³ Fergus Mackay, *Addressing Past Wrongs, Indigenous Peoples and Protected Areas: The Right to Restitution of Lands and Resources*, Occasional Paper 33 (Oct. 2002), <http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/ipsrestitutionprotectedareasoct02aeng.pdf>.

⁴ Andrew Nelson & Kenneth Chomitz, *Protected Area Effectiveness in Reducing Tropical Deforestation: A Global Analysis of the Impact of Protection Status*, in World Bank Independent Evaluation Groups Evaluation Brief 7, viii (Oct. 2009), [www://http://siteresources.worldbank.org/INTOED/Resources/protected_areas_eb.pdf](http://siteresources.worldbank.org/INTOED/Resources/protected_areas_eb.pdf).

⁵ E.g., International Working Group for Indigenous Affairs, *The Indigenous World* 15 (2013), http://www.iwgia.org/iwgia_files_publications_files/0613_EB-THE_INDIGENOUS_ORLD_2013.pdf (finding examples of indigenous peoples being forcibly evicted from or refused entry to their traditional lands because of conservation bans in numerous countries, including Tanzania, Kenya, the DRC, Uganda and Cameroon).

⁶ See generally MARK DOWIE, *CONSERVATION REFUGEES, THE HUNDRED-YEAR CONFLICT BETWEEN GLOBAL CONSERVATION AND NATIVE PEOPLES* (The MIT Press 2009).

cultures of indigenous peoples as collateral damage in the quest to seize control of indigenous peoples' land and resources. It is past time to turn away from this discredited model of land-grabbing and towards a practice that recognizes and protects indigenous peoples' human rights, particularly their land rights, which are so central to their identity and survival. The Promise of Sidney, the outcome document of the 2014 World Parks Congress, points out that work on protected areas will considerably intensify in the years ahead because protected areas are seen as "effective and efficient solutions to some of the world's most challenging development goals."⁷ This makes it particularly urgent that greater attention be given now to protecting human rights in creating and managing protected areas.

The Indian Law Resource Center prepared this *Guide* to provide a sound, Indian law based perspective on conservation initiatives in indigenous territories and to ground natural resource and conservation policies, such as the Natural Resource Governance Framework (NRGF) of the International Union for the Conservation of Nature, in applicable international law. The NRGF will lay out a set of normative principles which are meant to improve decision making and implementation at all levels regarding the use of natural resources and the distribution of nature's benefits. We believe that indigenous peoples' customary law as well must inform the development of the NRGF, both because indigenous peoples contribute considerably to the conservation of nature and because their rights as peoples are at stake.

Indigenous peoples' customary law is a valid and well-recognized type of law that can be relevant to conservation. Both the UN Declaration⁸ and the ILO Convention 169⁹ uphold the rights of indigenous peoples to maintain or strengthen their legal systems and the rules that emerge from their customs and traditions. The Inter-American Court of Human Rights (Inter-American Court)¹⁰ and the Inter-American Commission on Human Rights (Inter-American Commission)¹¹ have taken into account indigenous peoples' customary law in determining the content of indigenous peoples' full collective ownership of the lands and resources under their possession.

This *Guide* urges a paradigm shift toward a practice in which conservation actors work with indigenous peoples as collective legal rights-holders and equal partners, and not as mere stakeholders. For this purpose, particular attention should be given to collective substantive rights, including self-determination and ownership of lands, rather than merely participatory rights, such as those relating to participation in decision making or consultation. As an IUCN study rightfully states, "both the wider use of indigenous [peoples' traditional] knowledge in

⁷ IUCN 2014 World Parks Congress, *The Promise of Sidney*, http://worldparkscongress.org/about/promise_of_sydney.html (last visited Dec. 29, 2014).

⁸ See, e.g., UN Declaration, art. 5 (stating that "Indigenous peoples have the right to maintain and strengthen their distinct... legal... institutions").

⁹ See, e.g., ILO Convention 169, art. 8(1) (indicating that "In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws").

¹⁰ See, e.g., Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79.

¹¹ See e.g., Inter-Am. Comm'n H.R., *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II, Doc. 59/09, para. 63 (Dec. 30, 2009), <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf>.

sustainability strategies and successful *in situ* conservation depend primarily on strengthening Indigenous Peoples rights to self-determination.”¹² We have noticed, as this IUCN study did, that states, NGOs and corporations have deliberately used participatory rights “to give the false impression that the views of Indigenous peoples are being taken into account when in fact they are not.”¹³

The relationship between conservation actors and indigenous peoples should be governed by law. Clear legal standards facilitate mutual understanding and address the concerns and interests that both conservation actors and indigenous peoples have in connection with conservation projects. Initiatives based only on conservation goals are not likely to build partnerships with indigenous peoples whose lands and resources have been targeted for conservation purposes. Such initiatives, lacking a partnership with affected indigenous peoples, will, as a result, often fail on their own conservation terms as well.¹⁴

Conservation goals should not be an excuse to brush aside indigenous peoples’ demands for full recognition and respect for their rights as distinct peoples. Rather, recognizing and respecting indigenous peoples’ rights is a pre-requisite to attaining both social and environmental objectives through conservation efforts. Accordingly, conservation actors should recognize and use existing legal standards as well as indigenous peoples’ legal systems instead of using only ad hoc conservation guidelines without a foundation in the law.

The *Guide* has a regional focus on Mesoamerica. Mesoamerica is the central region of the Americas, extending roughly from central Mexico south through Belize, Guatemala, El Salvador, Honduras, Nicaragua, and northern Costa Rica. A number of pre-Colombian societies flourished in this region prior to Spanish colonization of the Americas in the 15th and 16th centuries.¹⁵ Patterns of interaction between conservation actors and indigenous peoples were found to be similar in the three Mesoamerican conservation projects that the *Guide* discusses in detail. Some 90 percent of the work of the IUCN Regional Office for Mesoamerica and the Caribbean (ORMAC) is done with Indigenous Peoples “due to the significant overlap between biodiversity and Indigenous Peoples in Mexico and the Central America region.”¹⁶

In addition, Mesoamerica’s legal and political structures share important common features. For example, all Mesoamerican states acknowledge the existence of indigenous peoples within their borders, and they have all endorsed the UN Declaration.¹⁷ Many have

¹² IUCN INTER-COMMISSION TASK FORCE ON INDIGENOUS PEOPLES, INDIGENOUS PEOPLES AND SUSTAINABILITY, CASES AND ACTIONS 82 (IUCN Indigenous Peoples and Conservation Initiative International Books 1997).

¹³ IUCN INTER-COMMISSION TASK FORCE ON INDIGENOUS PEOPLES, INDIGENOUS PEOPLES AND SUSTAINABILITY, CASES AND ACTIONS 87 (IUCN Indigenous Peoples and Conservation Initiative International Books 1997).

¹⁴ Armstrong Wiggins, *Indian Rights and the Environment*, 18 YALE J. INT’L L. 345 (1993).

¹⁵ Robert N. Zeitlin et al., Cambridge History of the Native Peoples of the Americas: Volume II: Mesoamerica 2, 45-46 (Richard E. W. Adams, Murdo J. MacLeod eds., Cambridge Univ. Press 2000).

¹⁶ Forest Carbon Market and Communities, *FCMC Participates in Natural Resource Governance Framework Scoping Workshop in Central America*, Dec. 2013, http://fcmglobal.org/nrgf_december_workshop.html.

¹⁷ The UN General Assembly adopted the UN Declaration on Thursday, 13 September 2007, by a vote of 144 states in favor, 4 against (Australia, Canada, New Zealand and the United States), and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). United Nations Bibliographic Information System, UN Voting Records,

ratified the binding ILO Convention No. 169, including Costa Rica, Guatemala, Honduras, Mexico, and Nicaragua.¹⁸ All of these countries are also parties to the Inter-American System, whose organs, the Inter-American Commission and the Inter-American Court, have built a consistent body of decisions on indigenous peoples' land and resource rights. This broadly shared legal framework makes it possible to apply this *Guide's* law-based approach to conservation and indigenous issues throughout the area.

This *Guide* suggests that a human rights-based approach to conservation is best understood as a law-based approach. This means that conservation actors should take account of the governing legal rules. These rules include indigenous peoples' positive and customary laws, states' domestic laws that are consistent with relevant international law standards, such as the UN Declaration and the decisions of the Inter-American System. It also calls for recognition of non-regional sources of law, including rules developed by the UN and the ILO, particularly ILO Convention No. 169. The outcome document of the 2014 Mesoamerican Pre-Congress on Protected Areas for Indigenous Peoples, calls for respect for the knowledge and rights of indigenous people in the conservation context in accordance to the UN Declaration.¹⁹

The *Guide* seeks to reflect the views and concerns that many indigenous peoples from Mesoamerica have about conservation projects such as protected areas. To do this, the authors prepared the three case studies presented in Part Three, consulted with key experts²⁰ regarding a draft version of this *Guide*, and carried out in-person consultation meetings in Honduras²¹ and Guatemala²² with representatives of indigenous grassroots organizations affected by conservation projects. The Mayagna Nation of Nicaragua,²³ Moskitia Asla Takanka of Honduras (MASTA),²⁴ and AEPDI/Defensoria Q'eqchi' of Guatemala²⁵ helped ensure that women, elders,

<http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares61295> (last visited on Dec. 29, 2014).

¹⁸ See, ILO, Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169) (Sept. 5, 1991), http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 (last visited on Dec. 29, 2014). Convention text available at <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>.

¹⁹ Mesoamerican Pre-Congress on Protected Areas for Indigenous Peoples, *Declaration*, (Mar. 2014), <http://precongreso.alianzamesoamericana.org/participantes-del-precongreso-mesoamericano-exponen-importante-declaracion/>.

²⁰ These experts include: Gregory Choc, former Executive Director of SATIIM (Sarstoon Temash Institute for Indigenous Management) from Belize; Jose Aylwin, Co-Director of Observatorio Ciudadano (Citizens Observatory) from Chile; and Estuardo Secaira, Staff of the IUCN ORMAC Office in Costa Rica.

²¹ On October 9, 2014, the Indian Law Resource Center held this meeting in the Ahuas Municipality, Department of Gracias a Dios. About 125 Miskito representatives attended this meeting, including 50 leaders representing the 5 indigenous territorial governments located within the Río Plátano Biosphere Reserve.

²² On October 21-22, 2014, the Indian Law Resource Center held this meeting in the Livingston Municipality, Department of Izabal. The 43 Q'eqchi' Maya communities located in the proposed Sierra Santa Cruz Protected Area were represented at this meeting. Elias Pop Curul attended on behalf of the Asociacion Aj Ilol K'iche', a Q'eqchi' Maya non-governmental conservation organization created by 21 of the 43 communities in question. In addition, Taymond Robinson and Christian Bucardo, attended on behalf of the Mayagna Nation of Nicaragua.

²³ The Mayagna Nation is an indigenous nation, which has been living since time immemorial in the area now called the "Bosawas Biosphere Reserve" in Nicaragua. See Brochure from the Mayagna Nation (Oct. 21, 2014) (on file with the Indian Law Resource Center).

²⁴ MASTA is an indigenous organization that represents the Miskitu people located in La Mosquitia, Honduras. See <http://mastamiskitu.org/index.php/nosotros> (last visited on Dec. 29, 2014).

and legitimate leaders were all able to attend these meetings. In addition, the Mayagna Nation and AEPDI/Defensoria Q'eqchi' visited affected communities and carried out additional interviews about the most important issues addressed in the *Guide*.²⁶

Human rights lawyers, indigenous experts, and conservation professionals have also contributed valuable material and insights for this *Guide*. A draft of the *Guide* was presented in various workshops held at the IUCN 2014 World Parks Congress, in which governance²⁷ and indigenous peoples' rights²⁸ were the themes discussed by the participants. The authors have also drawn on legal research²⁹ and policy analysis³⁰ about conservation generally and about climate change-related programs such as Reducing the Emissions from Deforestation and Forest Degradation.³¹

Part One of the *Guide* explains the various types of indigenous institutions that conservation actors often encounter in Mesoamerica, including indigenous peoples and their governments and civil society organizations. This is key not only to understanding and recognizing the entity entitled to the rights recognized by the UN Declaration, but also to understanding and identifying the entity with which conservation actors should build partnerships.

Part Two provides a brief legal review of those rights of indigenous peoples that are likely to be relevant where a protected area may affect indigenous lands or resources. Many of these rights proved to be particularly significant to the conservation projects discussed in Part

²⁵ Asociación Estorena Para el Desarrollo Integral (AEPDI)/Defensoría Q'eqchi' is a non-governmental organization created to provide technical assistance to the Q'eqchi' Maya communities located in the El Estor Municipality, Department of Izabal. AEPDI/Defensoría Q'eqchi', Publications – Trifoliar AEPDI 1, <http://www.aepdi.org.gt/wp-content/uploads/2014/07/Trifoliar-AEPDI-1.pdf> (last visited on Dec. 19, 2014).

²⁶ The Indian Law Resource Center produced the questionnaire that was used to carry out the interviews. The interviewees did not receive copies of the draft of the *Guide* in order to ensure that their responses were independent and uninfluenced. The Mayagna Nation interviewed three elders, including two women, as well as one leader and a young man. AEPDI/Defensoría Q'eqchi' interviewed four women, four elders and four leaders. These interviews were conducted in Q'eqchi' and recorded. Hard copies of these interviews are on file with the Indian Law Resource Center.

²⁷ Leonardo A. Crippa, Address at the Governance and Procedural Rights: Securing Collective Responsibilities and Citizen Oversight in Conserving Nature workshop of the 2014 IUCN World Parks Congress (Nov. 17, 2014) (presentation of file with the Indian Law Resource Center). See also, Leonardo A. Crippa, Address at the Community Land Tenure Reform as a Global Conservation Priority workshop of the 2014 IUCN World Parks Congress (Nov. 14, 2014).

²⁸ Leonardo A. Crippa, Address at Human Rights Standards for Conservation workshop of the 2014 IUCN World Parks Congress (Nov. 18, 2014) (presentation on file with the Indian Law Resource Center).

²⁹ See, e.g., Leonardo A. Crippa, *Cross-cutting Issues in the Application of the Guatemalan "NEPA": Environmental Impact Assessment and the Rights of Indigenous Peoples*, 24 AM. U. INT'L L. REV. 104 (2009); Armstrong Wiggins, *Indian Rights and the Environment*, 18 YALE J. INT'L L. 345 (1993).

³⁰ See, Leonardo A. Crippa & William David, Indian Law Resource Center, Protected Areas on Indigenous Lands in Guatemala, study presented at a thematic hearing held at the Inter-American Commission on Human Rights on Protected Areas on Indigenous Lands in Guatemala (Wash., D.C., 2008) (on file with the Indian Law Resource Center).

³¹ See, e.g., Leonardo A. Crippa & Gretchen Gordon, Indian Law Resource Center, *Principles of International Law for REDD+: The Rights of Indigenous Peoples and the Legal Obligations of REDD+ Actors* (Sept. 2013), [http://www.indianlaw.org/sites/default/files/2013-09 REDD Principles ENG FINAL Ref.pdf](http://www.indianlaw.org/sites/default/files/2013-09%20REDD%20Principles%20ENG%20FINAL%20Ref.pdf).

Three. These rights are likely to be of recurring significance in conservation projects in indigenous territories in Mesoamerica. Part Two, Section I provides an overview of indigenous peoples' land and natural resource rights, as well as other real property rights. Section II addresses the question of who has governmental authority to manage lands and natural resources located in indigenous territories and discusses indigenous peoples' own management and environmental protection systems.

Part Three analyzes three specific conservation projects in Mesoamerica, the Bosawas Biosphere Reserve in Nicaragua, the Rio Plátano Biosphere Reserve in Honduras, and the proposed Sierra Santa Cruz protected area in Guatemala, in order to illustrate how failure to respect indigenous rights harms indigenous peoples and conservation outcomes. Finally, Part Four offers practical guidance on what conservation actors can do to follow the law, implement the UN Declaration, and practice a human rights-based approach to conservation.

Finally, the Annexes provide complementary information to help readers further educate themselves and better comprehend the issues discussed in the *Guide*. Annex 1 suggests reading materials that are divided according to each of the *Guide's* Parts, including not only sources used by the authors but also other publications that might be of interest. Annex 2 contains a glossary with definitions and explanations of some of the legal and conservation terms frequently used throughout the *Guide*. Annex 3 lists acronyms and terms.

PART ONE: INDIGENOUS PEOPLES IN MESOAMERICA

While the UN Declaration does not define “indigenous peoples,” the term has a generally accepted meaning that has developed over the past 30 years in UN bodies and studies and in actions and decisions of many other inter-governmental organizations, including the ILO,³² the World Bank,³³ and the Inter-American Development Bank,³⁴ among others. The UN Study of the Problem of Discrimination Against Indigenous Populations, completed in 1983, often referred to as the “Cobo Study” includes an influential definition:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.³⁵

A prominent part of all the definitions of “indigenous” and “indigenous peoples” is the element of self-identification. The UN Declaration itself shows that self-identification is a primary criterion in determining who is “indigenous.” Article 33(1) of the UN Declaration states:

Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

³² The ILO Convention No. 169 Article 1(b) states that the Convention applies to: “peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”

³³ World Bank, Operational Policy 4.10(4), Indigenous Peoples (July 2005) (“For purposes of this policy, the term “Indigenous Peoples” is used in a generic sense to refer to a distinct, vulnerable, social and cultural group possessing the following characteristics in varying degrees: (a) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others; (b) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories; (c) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and (d) an indigenous language, often different from the official language of the country or region”), <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>.

³⁴ Inter-American Development Bank, Operational Policy on Indigenous Peoples and Strategy for Indigenous Development I (Feb. 22, 2006) (“For the purpose of this policy, the term indigenous peoples refers to those who meet the following three criteria: (i) they are descendants from populations inhabiting Latin America and the Caribbean at the time of the conquest or colonization; (ii) irrespective of their legal status or current residence, they retain some or all of their own social, economic, political, linguistic and cultural institutions and practices; and (iii) they recognize themselves as belonging to indigenous or pre-colonial cultures or peoples”), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1442299>.

³⁵ *Study of the Problem of Discrimination Against Indigenous Populations*, Final Report (last part) submitted by the Special Rapporteur, Jose R. Martinez Cobo, to the now defunct UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1983/21/Add. 8, para. 379 (Sept. 30, 1983).

This does not, however, mean that individuals or groups that are not indigenous under any meaningful definition and that do not satisfy other reasonable criteria may define themselves as “indigenous.” Rather, it permits those who are in fact indigenous to identify themselves as such and to define their own identity and membership in a manner consistent with their culture, tradition, and customary law. For example, the Mayagna People of Nicaragua reject the “Sumu” designation used by Nicaragua and other entities, preferring to self-identify as Mayagna.³⁶

In view of these definitions, conservation actors are left with a very limited discretion to decide what groups are or are not indigenous. To ignore the widely shared understanding of these terms would be contrary to the object and purposes of the UN Declaration.

I. Indigenous Peoples and Communities

Existing definitions of the term “indigenous peoples” include almost all native groups in Mesoamerica. In Mesoamerica, indigenous peoples or nations usually consist of various indigenous communities. In most cases, an indigenous “community” is a group of individuals that is governed by the same authority, shares cultural and linguistic values, and has a particular attachment to the group’s traditional lands. For example, in Guatemala, each of the forty-three groups located within the proposed Sierra Santa Cruz protected area is a Q’eqchi’ Maya community. All the members of these communities are Q’eqchi’ Maya, they all speak the same native language, Q’eqchi’, and they have a special relationship to their land.³⁷ The relation of each community to other Q’eqchi’ Maya communities is largely cultural, although some or all of these various Q’eqchi’ Maya communities may at times form political bodies for various purposes. If they do, the individual community that holds collective indigenous rights may elect to delegate some portion of its inherent authority to this intergovernmental authority.³⁸

Indigenous peoples and communities are in almost all cases the entity entitled to land, natural resources, and self-determination rights. Many rights in the Declaration are held by indigenous individuals, but the Declaration also recognizes certain collective rights of indigenous peoples, including the right to ownership of land and resources and the right of self-determination.³⁹ Further, international law standards relating to the rights of indigenous peoples, such as those established under the UN Declaration, apply to indigenous peoples, not to

³⁶ S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 Ariz. J. Int’l & Comp. L. 1, 1 n.1 (2002) (“The people of Awas Tingni prefer to call themselves Mayagna, as opposed to Sumo, a commonly used designation. They regard the latter term as one imposed by outsiders”).

³⁷ AEPDI/Defensoría Q’eqchi’, Report filed with the Inter-American Commission on Human Rights in Thematic Hearing: *Indigenous territories and protected areas in Guatemala*, Inter-Am. C.H.R. 131st Ordinary Sessions Period, 11 (Mar. 10, 2008) (on file with the Indian Law Resource Center).

³⁸ See Section III below for more details on these indigenous peoples’ representative bodies.

³⁹ Indigenous individuals are certainly entitled to own land, and many do own land, usually under the domestic or state legal system. As land owners, they have human rights as individuals to own and use the land and to be free from discrimination with regard to their land ownership. Such individual rights to own and use lands and resources are explicitly protected in human rights instruments such as the American Convention on Human Rights and the Convention on the Elimination of all forms of Racial Discrimination. All such individual human rights are incorporated into the UN Declaration on the Rights of Indigenous Peoples and made applicable to indigenous individuals by Articles 1 and 2 of the Declaration.

indigenous NGOs. For example, each of the Q'eqchi' Maya communities described above is the holder of collective indigenous rights under international law.

The critical question for conservation actors to answer is who is the rights-holder under international law. It is almost impossible for NGOs or CSOs to hold collective indigenous rights under international law. In Mesoamerica, the answer to this question will almost always be the indigenous community, although, as already mentioned, that community may at times exercise its rights through a larger coalition of indigenous peoples or governments.

Lawful and transparent state-indigenous relationships can be helpful in identifying who the collective right holder is. Whatever the precise contours of this relationship, established principles of international law place certain requirements on states regarding their interactions with indigenous peoples and their governments or other decision-making institutions. These obligations, discussed generally in the following sections, can be helpfully categorized within the “respect, protect, and fulfill” human rights framework.⁴⁰

The role of the states' governments at the national, regional and local levels in interacting with indigenous peoples depends on the applicable domestic laws and the structure of the governments. To mention two examples, Nicaragua's domestic law recognizes indigenous peoples' autonomy,⁴¹ and the state government interacts with indigenous peoples largely through regional territorial governments, some or all of which are predominantly indigenous governments.⁴² In contrast, Guatemala's domestic law does not recognize indigenous autonomy, and the national government only relates to indigenous peoples through “community development councils” that the state imposes on each community.⁴³

⁴⁰ The UN Office of the High Commission for Human Rights explains this framework in the following way:

By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfill human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights.

UN Office of the High Commissioner for Human Rights, International Human Rights Law, <http://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>.

⁴¹ See Constitution of Nicaragua, art. 181 (Jan. 1, 1987) (stating that “The State shall organize by means of a law the regime of autonomy for the indigenous peoples and ethnic communities of the Atlantic Coast, which regime must provide for, among other matters: the functions of their government organs, their relation with the Executive and Legislative Power and with the municipalities, and the exercise of their rights”) (translation ours).

⁴² See Law 28 - Statue of Autonomy of the Regions of the Atlantic Coast of Nicaragua (Sept. 7, 1987), art. 1, 6 (creating a regime of autonomy for two regions of the Atlantic Coast of Nicaragua inhabited by indigenous peoples).

⁴³ See Urban and Rural Community Development Counsel Law, Decree No. 11-2002, art. 1 (Mar. 12, 2002) (stating that “The Development Councils System is the primary means of participation for the Maya, Garifuna and Xinca and non-indigenous population in public administration, in order to carry out a democratic development planning process, taking into account the national, multiethnic, multicultural and multilingual nature of Guatemala”) (translation ours).

II. Indigenous Peoples' Governments and Laws

Indigenous peoples in Mesoamerica are distinct political, social, and legal entities whose institutions and cultures existed before European colonization and who continue to live within existing nation-states. As further explained in the following sections, under international law indigenous peoples, as distinct peoples, are entitled to the right of self-determination, which includes the right of self-government but not the right to secession or independence except under the most extreme circumstances.⁴⁴ In the case of *Masacre Plan de Sánchez*, the Inter-American Court recognized that the Maya communities of Guatemala “possess their own traditional authorities and forms of community organization, centered on consensus and respect. They have their own social, economic and cultural structures.”⁴⁵

Indigenous peoples in Mesoamerica, as a general matter, have governmental authorities, elected leaders that represent them, decision-making processes, and their own laws and rules. One example of an indigenous government in the region is the Mayagna Nation of Nicaragua. The Mayagna Nation has three distinct governmental authorities: 75 Mayagna communities called the *Mapaki*; 9 indigenous territorial governments known as the *Alas Yalahna*; and the *Sulani Uduhna*, the Mayagna Nation Government.⁴⁶ These authorities have established a zoning regime to govern the use of natural resources within their territory. This zoning regime establishes six usage categories, one of which is conservation.⁴⁷

In Honduras, the Miskito representative organization, MASTA has helped to create the Bio-cultural Protocol of the Miskito People, which establishes a seven-part consultation process designed to govern attempts to obtain their communities' free, prior and informed consent.⁴⁸ Projects affecting the Miskito communities and their natural resources, such as conservation projects, fall within the Protocol's scope of application.⁴⁹

Indigenous peoples' right of self-determination includes the right to live under their own legal systems and have their own laws respected by outside entities. These legal systems existed prior to the formation of the modern nation-states and continue in force today; they emerge from indigenous peoples' own customs and traditions, and usually not from the policies of the nation-state or through a delegation of power by the state. Indigenous peoples' laws regarding the

⁴⁴ See generally Robert T. Coulter, *The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples*, 15 UCLA J. INT'L L. & FOREIGN AFF. 1 (2010).

⁴⁵ Case of Plan de Sánchez Massacre v. Guatemala, Reparations, Inter-Am. Ct. H.R. (ser. C) No. 116, para. 85 (Nov. 19, 2004).

⁴⁶ See Brochure from the Mayagna Nation (Oct. 21, 2014) (on file with the Indian Law Resource Center). At the Guatemala meeting, the representatives of the Mayagna Nation provided detailed descriptions of how these governmental authorities function.

⁴⁷ *Id.* See also, E-mail from Noe Coleman Dalmacio, Alternate Member of Nicaragua's Congress, to Armstrong Wiggins, Indian Law Resource Center's Washington Office Director (Oct. 1, 2014, 6:14:39 PM EDT) (on file with the Indian Law Resource Center).

⁴⁸ See MASTA (Mosquitia Asla Takanka-Unidad de la Mosquitia), Protocolo Bio-Cultural del Pueblo Indígena Miskitu, El derecho al consentimiento libre, previo e informado en nuestro territorio de la Muskitia Hondureña [The Miskito Indigenous People's Bio-Cultural Protocol, The Right to Free, Prior and Informed Consent In Our Territory of the Honduran Muskitia], 2012, p. 43-53, http://cmsdata.iucn.org/downloads/protocolo_miskitu.pdf.

⁴⁹ See *id.* at 43.

management of natural resources and biodiversity typically arise out of a long and continuous relationship with their lands and represent unique and place specific solutions to natural resource management. Article 34 of the Declaration is useful on this point:

Indigenous peoples have the right to promote, 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.

Conservation actors must take into account indigenous peoples' laws when determining the applicable law in relation to a conservation project. While indigenous peoples' laws may or may not be codified or written down, they function and operate in the same way as laws in any legal system. These laws regulate internal affairs, govern the relationships amongst their members, and provide the basis for interaction with state and non-state actors. Acts and omissions in violation of indigenous laws can place conservation projects at risk, may be legally challenged in a domestic court, and can compromise the state's international responsibility before the organs of the Inter-American System and the United Nations.

While in most cases the governing rules are part of customary laws, some communities have codified their customary rules and established them as positive, that is, written laws. The Statute of the Rama and Kriol Peoples' Territory in Nicaragua is an example of this sort of codification.⁵⁰ Apart from regulating the elections and functioning of the Rama and Kriol Peoples' Territorial Government, the Statute devotes an entire section to a range of issues relating to management of the territory and the natural resources.⁵¹

In its *Awas Tingni* decision involving indigenous lands in Nicaragua, the Inter-American Court recognized that the customary law of the Mayagna communities in Nicaragua has external legal implications, especially when determining who owns lands and resources. For this reason, conservation actors must consider indigenous laws and respect them with regard to all conservation activities and projects. According to the Court:

Indigenous peoples' customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.⁵²

The Court in this case found that, for indigenous peoples, indigenous customary law coupled with possession of land is in itself sufficient to obtain official state recognition of their ownership rights. Based on the above analysis, the Court upheld the Awas Tingni community's collective ownership of the land and ordered the state of Nicaragua to:

[A]dopt in its domestic law, pursuant to article 2 of the American Convention on Human Rights, the legislative, administrative, and any other measures necessary to create an effective mechanism

⁵⁰ Rama and Kriol Peoples, Estatuto del Territorio Rama y Kriol [Statute of the Rama and Kriol Peoples' Territory] (2010) (on file with the Indian Law Resource Center).

⁵¹ *Id.* at Title IV, at 16-22 (2010) (devoting eight chapters to regulate management of their territory and natural resources).

⁵² Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79, para. 151 (Aug. 31, 2001).

for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores. . . .⁵³

III. Indigenous NGOs & Indigenous Peoples' Representative Organizations

In Mesoamerica, indigenous individuals have created NGOs for various purposes. As private sector entities, these organizations are subject to the law of the country where they were created. Domestic law regulates their rights and duties. For example, in Guatemala, the AEPDI/Defensoría Q'eqchi is a NGO created for the purpose of improving opportunities for participation, leadership and representation of the Q'eqchi' Maya People, and for improving their access to justice.⁵⁴ Other NGOs may have a conservation focus, such as Sotzil in Guatemala.⁵⁵ Like any other NGO established in Guatemala, both of these indigenous NGOs are established under and regulated by Guatemalan domestic law.

In other cases, groups of indigenous communities, through their traditional decision-making processes, have created or supported an indigenous NGO with an exclusive conservation focus to help them manage and control their natural resources. Indigenous peoples may choose to do this when either the state or a non-indigenous conservation NGO attempts to impose a conservation project. This happened to the Q'eqchi' Maya People located in Guatemala and Belize. Guatemala and a conservation NGO called Foundation for Eco-Development and Conservation (Fundaeo), targeted the communities' lands to establish a protected area to be called "Sierra Santa Cruz." In response, 21 Q'eqchi' Maya communities located in Sierra Santa Cruz created the Asociacion Aj Ijol K'iche' in 2007, in order to ensure their control and management of the natural resources located in their lands.⁵⁶ In Belize in 1994, the Q'eqchi' Maya communities located in the Toledo District of Belize, authorized the Sarstoon Temash Institute for Indigenous Management (SATIIM) to help them co-manage with the Belizean Forestry Department the Sarstoon Temash National Park.⁵⁷ These two organizations are legal entities under the domestic law of Guatemala and Belize respectively.

International human rights law relating to the rights of indigenous peoples does not apply to NGOs. NGOs are typically allowed to participate in the activities of intergovernmental organizations as CSOs. For example, the United Nations regulates NGO participation under UN General Assembly Resolution 1996/31. But the rights of indigenous peoples and indigenous individuals under international law are not rights held by NGOs, and the formal obligation to respect and protect indigenous rights applies to states, not NGOs.

⁵³ *Id.* para. 173(3).

⁵⁴ AEPDI/Defensoría Q'eqchi, Publications – Trifoliar AEPDI 1, <http://www.aepdi.org.gt/wp-content/uploads/2014/07/Trifoliar-AEPDI-1.pdf> (last visited on Dec. 29, 2014).

⁵⁵ Sotzil, Conservation and Management, http://www.sotzilguatemaya.org/conservacion_y_manejo.html (last visited on Jan. 7, 2014).

⁵⁶ See Asociacion Aj Ijol K'iche', Plan Estrategico 2014-2018 [2014-2018 Strategic Plan] (on file with the Indian Law Resource Center).

⁵⁷ Sarstoon Temash Institute for Indigenous Management, About SATIIM, <http://www.satiim.org.bz/about-satiim/> (last visited on Dec. 29, 2014).

There are also indigenous peoples' *representative organizations* in Mesoamerica that should not be confused with indigenous NGOs. These organizations act in a governmental capacity and represent communities that are part of the same indigenous nation. For instance, the Consejo Maya Mam de Quetzaltenango is an ancestral governing organization of the Maya People in Guatemala that represents the Maya Mam communities located in eight municipalities of northern Quetzaltenango.⁵⁸ Unfortunately, most states' domestic laws do not acknowledge these organizations' governmental nature and do not provide them with an appropriate legal personality. Many of these organizations choose not to register as NGOs under states' domestic laws, often because they are in fact governmental organizations, and they refuse to accept the legal limitations that non-governmental status would impose. In effect, these sorts of indigenous representative organizations function in the same way as intergovernmental organizations or federations do; they exercise the rights and governmental authority of their constituent political units in specified arenas or matters.

Frequently, state agencies confuse indigenous NGOs with indigenous peoples as such, indigenous governments, and indigenous representative organizations. Instead of consulting with the actual affected indigenous peoples or communities within the project area, state agencies sometimes turn to indigenous NGOs to meet the consultation requirements set forth by applicable laws or policies.

The World Bank's Inspection Panel has stated that proper consultations with indigenous peoples must include their representative organizations. As a result of the investigation of the World Bank-funded Land Administration Project in Honduras, the Inspection Panel concluded that:

[A] consultation framework for Garífuna people in which their leading representative body or bodies are not part and do not give their support and guidance cannot ensure genuine representation of the Garífuna people, as required by [the Indigenous Peoples Policy] OD 4.20.⁵⁹

⁵⁸ These municipalities include Cabrican, Huitan, Cajolá, San Miguel Sigüilá, San Juan Ostuncalco, Concepción Chiquirichapa, San Martín Sacatepéquez y Palestina de los Altos. See Consejo Maya Mam de Quetzaltenango, *Nab'ab'l-Memoria de Labores 2009-2012*, at 6, 7 (June 2012) (on file with the Indian Law Resource Center).

⁵⁹ The Inspection Panel, *Investigation Report, Honduras: Land Administration Project* (IDA Credit 3858-HO), Report No. 39933-HN, 107 (June 12, 2007), [http://ewebapps.worldbank.org/apps/ip/PanelCases/38-Investigation Report \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/38-InvestigationReport%20(English).pdf).

PART TWO: THE RIGHTS OF INDIGENOUS PEOPLES IN CONSERVATION

This Part provides a brief analysis of key legal issues for conservation projects in indigenous territories in Mesoamerica. Most of these legal issues were identified through the study of the conservation projects addressed in Part Three.

Let us first make some general and preliminary observations that are important for all conservation actors and particularly important for the IUCN. We may begin by considering one Article of the UN Declaration as an example. Article 29 of the UN Declaration states in part:

Indigenous peoples have the right to the conservation of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.⁶⁰

This right to conservation, like many other rights in the Declaration, belongs to indigenous peoples, not NGOs or individuals, and this right is closely related to indigenous peoples' rights to self-determination, self-government, and property.

Problems arise when third parties attempt to unilaterally “conserve” indigenous peoples' lands without consideration of the rights held by indigenous peoples. We have often observed a fundamental lack of understanding of indigenous peoples' collective ownership of, and authority to govern, their lands, territories, and natural resources. Of course, it is the purpose of this *Guide* to help overcome this lack of information and lack of understanding.

The establishment of protected areas that include or are within lands claimed or owned by indigenous peoples naturally affects indigenous peoples' land and self-determination rights. According to the Inter-American Commission:

[I]n some cases the establishment of protected natural areas can be a form of limitation or deprivation of indigenous peoples' right to the use and enjoyment of their lands and natural resources, derived from the State's unilateral imposition of regulations, limitations, conditions and restrictions upon said use and enjoyment for reasons of public interest, in this case the conservation of nature.⁶¹

Rodolfo Stavenhagen, former UN Special Rapporteur on the rights of indigenous peoples, makes a similar observation. He highlights the need for a shift in conservation policy and acknowledges the role that World Parks Congresses can play in this regard. In his opinion:

⁶⁰ UN Declaration, art. 29(1). Cf. Draft American Declaration on the Rights of Indigenous Peoples, art. XVIII(2) (2012), http://www.oas.org/dil/indigenous_peoples_Negotiation_Texts.htm.

⁶¹ See Inter-Am. Comm'n H.R., *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser. L/V/II, Doc. 59/09, para. 222 (Dec. 30, 2009), <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf>.

[T]he establishment of protected areas such as national parks and nature reserves often involves eviction of indigenous people from large tracts of indigenous lands, the collapse of traditional forms of land tenure, and their impoverishment, which has led to many social conflicts. . . . At recent world congresses on parks and conservation (held, respectively, in Durban, South Africa, in 2003 and Bangkok in 2004), attention was drawn to the need for new paradigms for protected areas in order to ensure that violated indigenous rights are restored and are respected in the future.⁶²

For years indigenous people have fought to have conservation agencies recognize and respect their human rights in relation to conservation projects and designated “protected areas.” A particularly historic moment in this struggle occurred in 2003 during the World Parks Congress in Durban when conservationists announced their adoption of a fundamentally new paradigm for protected areas that would integrate conservation goals with respect for the rights of affected people, including indigenous peoples.⁶³ That Congress’ implementing document, the *Durban Action Plan*, was intended to help conservationists take indigenous peoples’ rights into account in conservation activities.⁶⁴ It is now eleven years later, and despite the *Action Plan*’s promise of respect and recognition for the rights of indigenous peoples, the promise has yet to be fulfilled. Instead, for indigenous peoples, the consequences of conservation policy too often include violent conflict, food insecurity, the inability to hunt, fish, gather, or practice traditional agriculture, and loss of access to cultural and sacred sites. Many of these adverse consequences are illustrated in Part Three of this *Guide*.

Recently, one of the outcome resolutions of the 2012 World Parks Congress asked the IUCN Council to propose “options on how IPOs [Indigenous Peoples Organizations] could be better represented within the structure of IUCN, including the option of the establishment of a fourth membership and voting category.”⁶⁵ In this regard, it is essential that the IUCN recognize that there is an important distinction between indigenous peoples’ organizations and indigenous governments. As discussed more fully in the sections following, indigenous peoples’ rights under international law are largely the result of their distinct political status as peoples, often with governments and governmental authorities that pre-exist the formation of modern nation-states. Indigenous peoples have governmental authority, they own and regulate lands, territories, and natural resources, and their governments are usually the decision-making bodies that conservation actors must interact with.

⁶² *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Report submitted by the Special Rapporteur, Rodolfo Stavenhagen, to the Human Rights Council, A/HRC/4/32, paras. 22, 23 (Feb. 2, 2007).

⁶³ “We urge commitment to ensuring that people who benefit from or are impacted by protected areas have the opportunity to participate in relevant decision-making on a fair and equitable basis in full respect of their human and social rights.” IUCN, World Parks Congress, The Durban Accord (Sept. 2003), <http://www.danadeclaration.org/pdf/durbanaccordeng.pdf>.

⁶⁴ “The plan aims to bring about eight further outcomes. . . . (5) The rights of indigenous peoples, including mobile indigenous peoples, and local communities are secured in relation to natural resources and biodiversity conservation.” IUCN, World Parks Congress, The Durban Action Plan (Mar. 2004), <http://cmsdata.iucn.org/downloads/durbanactionen.pdf>.

⁶⁵ IUCN, World Conservation Congress, *Establishing an Indigenous Peoples’ Organization (IPO) membership and voting category in IUCN*, Resolution WCC-2012-Res-007-EN, 2 (Sept. 2012), [https://portals.iucn.org/docs/iucnpolicy/2012-resolutions/en/WCC-2012-Res-007-EN Establishing an Indigenous Peoples Organization \(IPO\) membership and voting category in IUCN.pdf](https://portals.iucn.org/docs/iucnpolicy/2012-resolutions/en/WCC-2012-Res-007-EN%20Establishing%20an%20Indigenous%20Peoples%20Organization%20(IPO)%20membership%20and%20voting%20category%20in%20IUCN.pdf).

The term “indigenous peoples’ organization” is vague. It could perhaps include indigenous governments or other representative bodies with governmental authority, but it seems intended to include a range of organizations, including NGOs that usually have no meaningful decision-making power for any indigenous peoples. These sorts of entities have a legal status no different than that of other NGOs and civil society organizations (CSOs). As such, their participation in the IUCN is appropriate and valuable in the same way that the participation of any other NGO or CSO may be.

I. Who Owns the Lands and Natural Resources in Indigenous Territories?

Indigenous peoples’ collective property rights are at the core of their human rights and are critical for the survival of indigenous peoples as distinct peoples. A human rights-based approach to conservation must begin with a careful assessment of these rights. When conservation actors fail to respect these collective rights, they run a significant risk of violating or contributing to the violation of indigenous peoples’ ownership and governmental rights.

Other important rights flow from these underlying ownership and governmental rights, including indigenous peoples’ right to be consulted about conservation projects affecting their own territories. These consultation rights provide important protections to indigenous peoples and their lands, and they must be respected. However, they are best protected through careful attention to and respect for indigenous peoples’ primary rights of ownership and self-determination. An IUCN study agrees with a stronger protection of these rights because of their importance for sustainability strategies and successful in situ conservation projects.⁶⁶

a. Indigenous Territory

ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries is the only treaty that creates human rights standards specifically related to indigenous peoples. Today, twenty countries have ratified it, including five countries in Mesoamerica: Costa Rica, Guatemala, Honduras, Mexico, and Nicaragua.⁶⁷ Article 13(2) of the Convention defines indigenous territories by stating that “the use of the term “lands” . . . shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.”

Both the Inter-American Commission and the Inter-American Court have embraced the ILO definition when applying the American Convention on Human Rights, a core human rights treaty that has been ratified by all countries in Mesoamerica except Belize.⁶⁸ From the Inter-American Commission’s view point:

⁶⁶ IUCN INTER-COMMISSION TASK FORCE ON INDIGENOUS PEOPLES, *INDIGENOUS PEOPLES AND SUSTAINABILITY, CASES AND ACTIONS* 82, 87 (IUCN Indigenous Peoples and Conservation Initiative International Books 1997).

⁶⁷ See ILO, Status of Ratification of ILO Convention 169, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO (last visited on Dec. 30, 2014).

⁶⁸ See Organization of American States’ Dept. of Int’l Law, *Signatories and Ratifications of the American Convention on Human Rights*, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited on Dec. 30, 2014). For the Commission’s

[T]he relationship between indigenous peoples and their territories is not limited to specific villages or settlements; territorial use and occupation by indigenous and tribal peoples extend beyond the settlement of specific villages to include lands that are used for agriculture, hunting, fishing, gathering, transportation, cultural and other purposes; therefore indigenous and tribal peoples' rights encompass the territory as a whole.⁶⁹

Conservation actors have a duty to assure that the rights of indigenous peoples to their territories are not simply acknowledged but are actually respected during the creation and implementation of a conservation project. Thus, the creation of boundaries by conservation projects that conflict with indigenous peoples' customary use or spiritual activities will almost certainly violate indigenous rights to lands and resources and often indigenous cultural rights.

b. Collective Indigenous Ownership of Lands

As explained by the Inter-American Commission, the term "land" refers to a portion of the Earth's surface and the natural resources located on the surface and in the subsoil.⁷⁰ Black's Law Dictionary defines land as "An immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, as well as the space above and below the surface, and everything growing on or permanently affixed to it."⁷¹

"Land" has a particular meaning in the context of indigenous peoples' rights because of the special relationship of indigenous peoples with their lands. Both indigenous peoples' customary law and the Inter-American Court's decisions on the right of property are built upon this special relationship. In *Awás Tingni*, a case involving a Mayagna community in Nicaragua, the Court explained this by saying:

Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.⁷²

position, see Inter-Am. Comm'n H.R., *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II, Doc. 59/09, para. 39 (Dec. 30, 2009), <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf>; for the Court's position, see *Case of the People v. Suriname*, Inter-Am. Ct. H.R., (ser. C) No. 172, n. 63 (Nov. 28, 2007).

⁶⁹ Inter-Am. Comm'n H.R., *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II, Doc. 59/09, para. 40 (Dec. 30, 2009), <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf>.

⁷⁰ *Id.* at para. 39.

⁷¹ BLACK'S LAW DICTIONARY 892 (8th ed., West Group 2004).

⁷² *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, para. 149 (Aug. 31, 2001).

Indigenous peoples' land rights refer to a full collective ownership right to lands under possession, not to an individual right or some diminished form of a property right, such as use or usufruct. Ownership is an absolute and permanent right that gives the right-holder the power to control, manage, use and enjoy the fruits of the land, including the right to convey it to others.⁷³ Use and usufruct, on the other hand, are limited rights that enable the right-holder to only use and enjoy the fruits of the land for a limited period.⁷⁴ The UN Declaration Article 26(2) states:

Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

Thus, the Declaration recognizes full ownership on the part of indigenous peoples, that is, collective ownership. This ownership is established by present possession, including both occupation and use.⁷⁵ Indeed, Taymond Robins, a member of the Mayagna Nation's government staff, stated in a meeting held in October 2014 in Guatemala that:

[I]f we [the Mayagna People] had accepted the government's [agrarian] policy of land reform, we would have not been able to be a Nation. We have always thought in a collective manner, together, not individually. That's the difference with us the Mayagna People in Nicaragua; we fight for our ancestral territory, not for a lot.⁷⁶

The Inter-American Court⁷⁷ has repeatedly decided that indigenous peoples have ownership of the lands in their possession.⁷⁸ As stated in the *Awes Tingni* decision, "possession of the land should suffice for indigenous communities lacking real title to property of the land to

⁷³ BLACK'S LAW DICTIONARY 1138 (8th ed., West Group 2004).

⁷⁴ *Id.* at 1577, 1580

⁷⁵ Lands not presently in the possession of indigenous peoples may be subject to claims where the lands have been wrongfully taken. UN Declaration on the Rights of Indigenous Peoples, art. 28. Such land may be required to be returned to the indigenous peoples. Article 26(1) ["Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."] is open to an absurd misinterpretation because of a mistake in the English text. The Spanish text makes it clear that the use of the definite article is incorrect, and the sub-paragraph should read, "Indigenous peoples have a right to the lands territories and resources which they have traditionally owned, occupied or otherwise used or acquired." Read in this way, the Declaration states that indigenous peoples have full ownership of the lands they presently possess, and they have a right to "redress" for lands taken from them without their consent.

⁷⁶ Taymond Robinson, Mayagna Nation government staff, Remarks at a meeting held in Guatemala by the Indian Law Resource Center (Oct. 21, 2014) (audio tape, on file with the Indian Law Resource Center).

⁷⁷ Case of the Mayagna (Sumo) Awes Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79, para. 151 (Aug. 31, 2001). *See also* Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012); case of the Xákmok Kásek Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 214 (Aug. 24, 2010); Case of the Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007); Case of the Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); Case of the Sawhoyamaya Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006); Case of the Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005).

⁷⁸ According to most civil-law legal systems, there is *possession* when a person has the land in his power (*corpus*) with the intention of exercising an ownership right (*animus domini*). There is *tenure* when a person has the land in her power, but lacks the intention of exercising an ownership right (*animus domini*). *See* MARINA MARIANI DE VIDAL, CURSO DE DERECHOS REALES [LAW OF PROPERTY COURSE], Vol. 1 p. 108-110, 186-189 (4th ed., Zavalía 1997).

obtain official recognition of that property.”⁷⁹ Since 2012, Honduras started to recognize indigenous ownership of the land in indigenous peoples’ possession by, for example, issuing a collective title in favor of about thirty-eight Miskito communities represented by the Katainasta Territorial Council—the title officially recognizes their collective “ownership, possession... and other property rights.”⁸⁰

Both the Inter-American Commission and the Court hold that “the recognition [by states] of indigenous peoples’ territorial rights must be made in full, and have legal certainty as to its stability.”⁸¹ In a forestry case affecting the Saramaka people in Suriname, for example, the Court concluded that:

[T]he “community forests” permits are essentially revocable forestry concessions that convey limited and restricted use rights, and are therefore an inadequate recognition of the Saramakas’ property rights.⁸²

According to the Inter-American Court, domestic laws that recognize only indigenous peoples’ use and/or usufruct rights to land instead of full collective ownership violate Article 21 of the American Convention on Human Rights.⁸³ Such laws not only violate the Convention *per se*, but they can also lead conservation groups to violate indigenous peoples’ rights when they opt to comply with these sub-standard domestic laws rather than the applicable, and more protective, standards of the Convention. In Guatemala, some Q’eqchi’ Maya communities located in and around the proposed Sierra Santa Cruz protected area received such titles—i.e. the Sepac Community. In 2008, thirty-two of its members received a title that recognizes only usufruct in their favor, not ownership.⁸⁴ The usufruct is valid for twenty years, which can be extended for the same period, and is subject to regulations developed by a conservation NGO, among other conditions.⁸⁵ That is, this NGO not only reserves for itself ownership over the land, but also imposes on the Sepac Community regulations to govern its relationship with the land and the natural resources.

In Mesoamerica, domestic laws do not address indigenous peoples’ land rights in a uniform manner. On the one hand, there are a few states with a special law exclusively devoted to recognizing indigenous peoples’ full collective ownership of lands, and such laws generally

⁷⁹ Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79, para. 151 (Aug. 31, 2001). The Commission agrees. See Inter-Am. Comm’n H.R., *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser. L/V/II, Doc. 59/09, para. 68 (Dec. 30, 2009), <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf>.

⁸⁰ Honduras’ Agrarian National Institute, Definitive Title of Full Inter-Communitarian Ownership in favor of the Katainasta Territorial Council (Aug. 14, 2012) (on file with the Indian Law Resource Center).

⁸¹ Inter-Am. Comm’n H.R., *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser. L/V/II, Doc. 59/09, para. 93 (Dec. 30, 2009), <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf>.

⁸² Case of the Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, at para. 113 (Nov. 28, 2007).

⁸³ *Id.* at para. 116.

⁸⁴ See Guatemala’s General Registry of Property, Deed No. 21 (Sept. 17, 2008) (transferring usufruct from the Foundation for Eco-Development and Conservation (Fundaeo) to thirty-two members of the Sepac Community) (on file with the Indian Law Resource Center). See also, Guatemala’s General Registry of Property, Registry of Deed No. 08S100511112 (Sept. 23, 2008).

⁸⁵ See *id.*

create a specific property regime for indigenous lands. This is the case, for example, of Nicaragua's Law 445.⁸⁶ Other countries, such as Honduras, opted to devote one chapter of a general Property Law to that same purpose.⁸⁷ On the other hand, most of the states have not yet taken legislative measures similar to those of Nicaragua and Honduras. For example, Guatemala lacks such a law and, as a result, indigenous peoples' lands are subject to laws that address very different purposes and interests, such as protected areas, agrarian reform, and other topics. For this reason, among others, there are numerous land-related conflicts in Guatemala where indigenous peoples' lands and natural resources are at stake.

International law requires states to issue legal titles or formally recognize indigenous peoples' land rights. The UN Declaration in Article 27 requires a formal process for recognizing indigenous land rights.⁸⁸ The Inter-American Court has decided that states must issue to the appropriate indigenous peoples a collective title that reflects full community ownership of the land.⁸⁹ In most cases, titles issued in compliance with states' agrarian reform laws and policies fall short of this standard. For example, Guatemala's agrarian reform laws promote titles that acknowledge an individual co-ownership right rather than full community ownership of lands.⁹⁰ Guatemala's protected areas laws recognize some sort of collective property, but allow the protected area regulations to take precedence over the owners' use or usufruct rights.⁹¹ These are both examples of land titling laws that fall short of meeting the governing legal standard.

⁸⁶ See Law 445, Law of Communal Property Regime of the Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Rivers Bocay, Coco, Indio and Maíz, Jan. 22, 2003 (regulating the regime of collective ownership rights of indigenous peoples).

⁸⁷ See Decree No. 82-2004, Property Law, June 15, 2004 (devoting Chapter III of Title V to regulate indigenous peoples and afro-Hondurans property rights to land, and recognize indigenous peoples' full collective ownership to the lands under their possession).

⁸⁸ "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."

⁸⁹ Case of the Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, at para. 194 (Nov. 28, 2007).

⁹⁰ See e.g., Guatemala's National Institute for Agrarian Transformation (INTA), Definitive Property Title Granted by former President of Guatemala Marco Vinicio Cerezo Arevalo to Francisco Tzi Chub and 193 Peasants of the Cahaboncito Community (Sept. 8, 1989) (on file with the Indian Law Resource Center); INTA, Provisional Collective Agrarian Patrimony Title Granted by former Chief of State of Guatemala Oscar Humberto Mejia Victores to Rodrigo Tot and 64 Peasants of the Agua Caliente Lot 9 Community (Feb. 25, 1985) (on file with the Indian Law Resource Center). The agrarian reform laws, such as the Land Trust Fund Law (May 13, 1999) and the Agrarian Reform Law (Oct. 17, 1962), created the "collective agrarian patrimony" as a particular legal institution in Guatemalan law. These laws are the legal basis of Guatemala's agrarian reform policy, which seeks to strengthen the private property regime, to set up a special and exclusive legal regime for agrarian issues, and to support private property to the detriment of indigenous peoples' collective property rights. Indeed, the purpose of both laws is to facilitate the exploitation of the natural resources located in rural lands that are considered "*res nullius*" (without owner). The land titles themselves refer to members of indigenous communities as "peasants without lands."

⁹¹ See e.g., Guatemala's General Registry of Property, Public Instrument (Feb. 4, 2014) (transferring property to the Buena Vista II Indigenous Community but limiting its use because it was declared to be part of a protected area in accordance with Legislative Decree No. 49-90 that declares the Sierra de Las Minas Biosphere Reserve to be a protected area) (on file with the Indian Law Resource Center).

c. Indigenous Permanent Sovereignty over Natural Resources

Indigenous peoples have legal and governmental authority to manage natural resources in their territories. Indigenous peoples have been said to have “permanent sovereignty” over those resources. According to Professor Erica-Irene A. Daes, former UN Special Rapporteur, permanent sovereignty over natural resources is the principle of international law that “Peoples and nations must have the authority to manage and control their natural resources and in doing so to enjoy the benefits of their development and conservation.”⁹²

Daes observes that sovereignty in this context does not refer to the “abstract and absolute sense of the term, but rather to governmental control and authority over the resources in the exercise of self-determination.”⁹³ That is, indigenous peoples’ permanent sovereignty over natural resources is a right which itself “arises out of the right of self-determination, the right to own property, the right to exist as a people, and the right to be free from discrimination, among other rights, all of which are inalienable.”⁹⁴ It is “permanent” because it refers to “an inalienable human right of indigenous peoples.”⁹⁵ The principle does not however, preclude fair and voluntary sales or transfers by indigenous peoples, only unjust takings that are “a consequence of unequal or oppressive arrangements.”⁹⁶ “[I]ndigenous peoples have the permanent right to own and control their resources so long as they wish, free from economic, legal, and political oppression or unfairness of any kind.”⁹⁷

This general principle, applicable to all peoples, is enshrined in core international human rights treaties.⁹⁸ In the opinion of Special Rapporteur Daes:

[I]ndigenous peoples’ permanent sovereignty over natural resources might properly be described as a collective right by virtue of which the State is obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources.⁹⁹

In this sense, the principle is supported by many Articles of the UN Declaration,¹⁰⁰ though the Declaration does not deal with this principle explicitly.

⁹² *Indigenous Peoples’ Permanent Sovereignty over Natural Resources*, Final Report submitted by the Special Rapporteur Erica-Irene A. Daes, to the Sub-Commission on Promotion and Protection of Human Rights, E/CN.4/Sub.2/2004/30, para. 6 (July 13, 2004).

⁹³ *Id.* para. 18.

⁹⁴ *Id.* para. 47.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ International Covenant on Civil and Political Rights, art. 1; International Covenant on Economic, Social and Cultural Rights, art. 1.

⁹⁹ *Indigenous Peoples’ Permanent Sovereignty over Natural Resources*, Final Report submitted by the Special Rapporteur Erica-Irene A. Daes, to the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2004/30, para. 40 (July 13, 2004).

¹⁰⁰ UN Declaration on the Rights of Indigenous Peoples, arts. 4, 8, 26, 27, 28, 29, 30, 32. Cf. Draft American Declaration on the Rights of Indigenous Peoples, arts. III, XX(1) (2012), http://www.oas.org/dil/indigenous_peoples_Negotiation_Texts.htm. See also African Charter on Human and Peoples’ Rights (“Banjul Charter”), art. 21, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at

The question of ownership of subsoil resources pertaining to indigenous lands is unsettled under international law. Because this question typically arises in the context of resource extraction projects rather than conservation projects, this *Guide* does not analyze the issue in full. The UN Declaration does not address this point precisely but says in Article 26 that indigenous peoples “have the right to own the lands, territories and resources they possess. . . .” It does not distinguish between surface and subsurface resources. States in Mesoamerica generally hold that the state is the owner of all subsoil resources, regardless of whether those resources are found under indigenous or non-indigenous lands. There is no logical or principled reason for this position however, because the indigenous peoples’ ownership existed long before the state came into being. The better position is that taken by Special Rapporteur Daes that indigenous peoples’ ownership rights to their lands, territories, and resources include the subsoil resources pertaining to their lands.¹⁰¹

Article 15(2) of the ILO Convention No. 169¹⁰² calls for safeguarding of indigenous peoples’ rights to the natural resources pertaining to their lands, and it assumes that in some cases the state may retain the ownership of mineral or sub-surface resources. It does not however settle the general question of whether indigenous peoples or states hold rights to the sub-soil resources. ILO Convention No. 169 calls for consultation and benefit sharing with indigenous peoples if there is to be exploitation of state-owned resources pertaining to indigenous lands.

In the *Case of the Saramaka People v Suriname*¹⁰³ the Inter-American Court found that the state owned the sub-surface resources in that instance, but that case involved a people that was not actually indigenous and that had settled in Suriname *after* the state had come into being.

http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf; Convention on Biological Diversity, art. 3, 1760 UNTS 79 (1992), available at <http://www.cbd.int/convention/text/>; UN Conference on the Human Environment Stockholm, June 16, 1972, Stockholm Declaration, Principle 21, A/CONF.48/14/Rev.1, <http://www.un-documents.net/aconf48-14r1.pdf>; UN Framework Convention on Climate Change, PmbI. para. 8, FCCC/INFORMAL/84, (May 9, 1992), <http://unfccc.int/resource/docs/convkp/conveng.pdf>; UN Conference on Environment and Development, Aug. 12, 1992, Rio Declaration, Principle 2, A/CONF.151/26 (vol. I), <http://www.un.org/documents/ga/conf151/aconf15126-1>; Vienna Convention on the Succession of States in Respect of Treaties, art. 13, A/CONF.80/31, (Aug. 22, 1978), as corrected by A/CONF.80/31/Corr.2 (Oct. 27, 1978), http://legal.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf.

¹⁰¹ *Indigenous Peoples’ Permanent Sovereignty over Natural Resources*, Final Report submitted by the Special Rapporteur Erica-Irene A. Daes, to the Sub-Commission on the Promotion and Protection of Human Rights, para. 45, E/CN.4/Sub.2/2004/30 (July 13, 2004).

¹⁰² Article 15 of the ILO Convention No. 169 provides:

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

¹⁰³ *Case of the Saramaka People v. Suriname*, Inter-Am. Ct. H.R., (ser. C) No. 172, (Nov. 28, 2007).

The Court did not resolve the issue with regard to indigenous peoples with rights pre-existing the state. The Court called for benefit sharing with the Saramaka people and wrote:

The concept of benefit sharing...can be said to be inherent to the right of compensation recognized under Article 21(2) of the [American Convention on Human Rights], which states that “No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”¹⁰⁴

d. Benefit Sharing

Indigenous peoples normally have a right to the benefits derived from their lands, territories and natural resources. “Benefits” is an expansive term, and it can include such things as territorial defenses such as barriers, legal protection of the territory, demarcation of the territory, technical or financial support for the management of the area, and capacity-building actions. Economic benefits may include revenue from tourism or related activities; payments by the state or third parties for ecosystem services; or employment opportunities arising from the management and preservation of the protected area.

Benefit-sharing is specifically addressed in Article 8(j) of the Convention on Biological Diversity.¹⁰⁵ In the conservation context, it is often indigenous peoples’ traditional knowledge and customary practices that have preserved and will continue to preserve nature in protected areas. They should receive credit and compensation for that knowledge and practice, including, where possible, ownership rights over benefits derived from protected areas.¹⁰⁶

It is important to note, however, that some programs that may be called benefit-sharing programs can cause more harm than good. In a recent study of a payment for ecosystem services program in Mexico, the authors found that “dietary diversity, agricultural practices, household economies, and livelihoods may be negatively affected by strict preservation measures imposed under the guise of financial incentives.”¹⁰⁷

¹⁰⁴ *Id.* at para. 138.

¹⁰⁵ “Each contracting Party shall, as far as possible and as appropriate . . . (j) Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.”

¹⁰⁶ *Cf.* Rio Declaration on Environment and Development, The United Nations Conference on Environment and Development, June 3-14, 1992, Rio de Janeiro, Braz., Principle 22, <http://www.unep.org/Documents/Multilingual/Default.Print.asp?documentid=78&articleid=1163>; Agenda 21, The United Nations Conference on Environment and Development, June 3-14, 1992, Rio de Janeiro, Braz., Chapter 26 (1992), <http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>. Report of UN Conference on the Human Environment and Development, June 3-14, 1992, Rio de Janeiro, Braz., Statement of Principles for the Sustainable Management of Forests, Annex III, Princ. 10, A/CONF.151/26 (Vol. III) (1992).

¹⁰⁷ J.T. Ibarra, A Barreau, C. Del Campo, C.I. Camacho, G.J. Martin & S.R. McCandless, *When Formal and Market-Based Conservation Mechanisms Disrupt Food Sovereignty: Impacts of Community Conservation and Payments for Environmental Services on an Indigenous Community Of Oaxaca, Mexico*, 13(3) INT’L FORESTRY REV. 318, 331 (2011), <http://www.cifor.org/library/3626/when-formal-and-market-based-conservation-mechanisms-disrupt-food->

Programs that attempt to “improve” on indigenous peoples’ conservation and resource management regimes often offer indigenous peoples cash in exchange for a cessation of traditional hunting, fishing, gathering, and agricultural practices, and access to cultural and sacred sites. This can harm indigenous peoples’ health, food security and cultural vitality, and can disrupt the resource management systems that have effectively preserved the very biodiversity that attracted the interest of conservationists. A recent study commented, “By agreeing to conservation measures that restrict their use of ancestral agricultural land and prohibit hunting, villagers have seen local food security become less stable, leading to greater dependency on external food supplies.”¹⁰⁸ Apart from food security impacts, restricting indigenous peoples from using their ancestral agricultural practices harms their ability to transmit their culture, including traditional hunting, fishing, gathering, and agricultural knowledge, to younger generations.

II. Who Has Governing Authority Over Lands and Resources in Indigenous Territories?

This section addresses indigenous governmental authority to manage lands and natural resources located in indigenous territories. It discusses the legal standards established by the Declaration, the Inter-American System, and ILO Convention No. 169 regarding self-determination and land rights. This section also discusses the connection between the substantive rights of self-determination and land rights on one hand and, on the other hand, participatory and procedural rights, such as the rights to participate in decision-making and to be consulted about measures that will affect their communities, lands and resources.

a. Self-Determination and Land Rights

Indigenous peoples have substantial, and sometimes exclusive, governing authority over their lands, territories, and natural resources. This governing authority arises primarily from indigenous peoples’ rights of self-determination, self-government, and from their property rights to their lands, territories, and natural resources. Under international law, indigenous peoples’ right of self-determination includes the right to decide, according to their own customs and laws, how to use all the lands and natural resources that they own, lands upon which their lives and cultures may depend.

Indigenous peoples’ right of self-determination was recognized in Articles 3 and 4 of the UN Declaration:

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

[sovereignty-impacts-of-community-conservation-and-payments-for-environmental-services-on-an-indigenous-community-of-oaxaca-mexico/](#).

¹⁰⁸ *Id.* at 318.

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.¹⁰⁹

While there is no formal definition of “self-determination” in the UN Declaration or anywhere in international law, the general content of the right includes indigenous peoples’ right of autonomy, the right to form and be ruled by their own governments regarding internal and local affairs, and the right to make their own laws. At least 15 Articles in the Declaration give form to the right of self-determination by providing for decision-making by indigenous peoples and control over their own property and affairs.¹¹⁰ In Mesoamerica, very a few states have adopted a particular law to recognize and regulate indigenous peoples’ self-government and autonomy-related issues, such as Nicaragua’s Law 28.¹¹¹ Indigenous peoples located in other states are strongly demanding a similar legislation. This is the case, for example, with the Miskito people represented by MASTA in Honduras.¹¹²

The Declaration, in Articles 26, 28, 32, and 34, draws out the implications of self-determination in relation to indigenous peoples’ governance of their lands, territories and natural resources.¹¹³ Article 26 is the central lands provision in the Declaration. It guarantees ownership and legal control over the lands indigenous peoples currently hold. As we discussed earlier, Article 26 states that indigenous peoples have “have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.” It further provides that states “shall give legal recognition and protection to these lands.” Article 28 provides for redress for lands that were wrongfully taken. Article 32 further clarifies that “indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”

There are other Articles in the Declaration that further elaborate indigenous peoples’ land rights. These include provisions regarding indigenous peoples’ right to their own means of subsistence (Articles 11, 20, 31); the right not to be forcibly removed from their lands or territories (Articles 8, 10, 28); and the right to access in privacy to their sacred sites (Article 12). Environmental rights, including the right to conservation and protection of the environment and the productive capacity of lands, as well as of vital medicinal resources, are acknowledged in Articles 29 and 24.

¹⁰⁹ Cf. Draft American Declaration on the Rights of Indigenous Peoples, arts. III, XX(1) (2012), http://www.oas.org/dil/indigenous_peoples_Negotiation_Texts.htm.

¹¹⁰ Articles 3-5, 14, 16, 18, 19, 21, 23, 26, 27, 32, 33, 37, 40. For a thorough analysis of the right of self-determination in the UN Declaration, see Robert T. Coulter, *The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples*, 15 UCLA J. INT’L L. & FOREIGN AFF. 1 (2010).

¹¹¹ See Law 28, Statue of Autonomy of the Regions of the Atlantic Coast of Nicaragua (Sept. 7, 1987), art. 1, 6 (creating “a regime of autonomy for two regions of the Atlantic Coast of Nicaragua inhabited by indigenous peoples”) (translation ours).

¹¹² See IUCN & MASTA, Analysis of Honduras’ Forestry Law in light of ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples 10 (2013) (on file with the Indian Law Resource Center).

¹¹³ Cf. Draft American Declaration on the Rights of Indigenous Peoples, arts. VI(2), XX(1) (2012), http://www.oas.org/dil/indigenous_peoples_Negotiation_Texts.htm.

Beyond their rights as landowners, indigenous peoples' right of self-determination also includes rights of governmental authority. These governmental powers include, for instance, rights to make and enforce laws to govern their own affairs, as well as regulatory and dispute resolution powers. Indigenous peoples' governmental rights can often play an important role in conservation activities.

The Inter-American Court in the *Case of the Saramaka People* takes a somewhat different analytical approach and interprets indigenous peoples' right to property under Article 21 of the American Convention on Human Rights as including the principle of self-determination. The Court further states that indigenous peoples' right of self-determination necessarily extends to the use of natural resources on their lands because indigenous peoples depend on their land and natural resources for economic, social and cultural survival.¹¹⁴

Although ILO Convention No. 169 avoids the explicit language of "self-determination," the entirety of the convention presumes that indigenous peoples have their own governing bodies and have the capacity for self-government and resource management. Fourteen or more of its provisions generally support the right of self-determination. In relation to property rights, core provisions include Articles 14 and 15, which affirm indigenous rights to ownership and possession of their traditionally occupied lands and rights to the natural resources pertaining to their lands. In addition, Article 7(1) states that indigenous peoples have:

[T]he right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.¹¹⁵

Article 6 of ILO Convention No. 169 acknowledges indigenous peoples' right to participate in decision making through their representative bodies. Environmental rights under the Convention are recognized in the consultation guarantees of Article 7 and its requirement that states take measures to protect and preserve the environment of the territories indigenous peoples inhabit.

Special Rapporteur Erica Daes has recognized that, if deprived of the natural resources of their lands and territories, indigenous peoples would be deprived of meaningful economic and political self-determination, self-development, and, in many situations, would be effectively deprived of their cultures and the enjoyment of other human rights by reason of extreme poverty and lack of access to a means of subsistence.¹¹⁶ Special Rapporteur Daes also acknowledged that, in the absence of any prior, fair, and lawful disposition of the resources, indigenous peoples are the owners of the natural resources on or under their lands and territories.¹¹⁷ However, this last point is not finally resolved; Mesoamerican states do not accept the principle of indigenous ownership of subsoil resources.

¹¹⁴ *Case of the Saramaka People v. Suriname*, Inter-Am. Ct. H.R., (ser. C) No. 172, para. 95 (Nov. 28, 2007).

¹¹⁵ ILO Convention No. 169, art. 7(1).

¹¹⁶ See *Indigenous Peoples' Permanent Sovereignty over Natural Resources*, Final Report submitted by the Special Rapporteur Erica-Irene A. Daes, to the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2004/30, para. 58 (July 13, 2004).

¹¹⁷ See *id.* para. 54.

As these treaties and legal sources make clear, indigenous peoples' right of self-determination includes substantial governance authority in relation to their lands. This authority includes the right to control, use, and benefit from their lands, territories, and natural resources, as well as to participate in related decision making and to be compensated for any losses. It generally includes such governmental powers as the right to make rules about the use of land and to regulate activities on the land, the use of resources, and hunting, fishing, and gathering, as well as to exercise powers of criminal law enforcement and dispute resolution.

b. Participatory and Procedural Rights

Before concluding our consideration of self-determination, let us give some attention to the right to participate in decision-making and the right to be consulted about certain matters. To recapitulate, the right of self-determination includes: the rights of an indigenous people to form and change a government for itself; to determine the relationship of that government to the state (within certain limits); to make and enforce laws to govern their own affairs; to exist and act as a collective body politic within the country and to participate in the international community; to engage in political and economic relations with others, and to control, use and benefit from its lands and resources.¹¹⁸ Article 18 of the Declaration further states:

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.¹¹⁹

Under both the Declaration and ILO Convention No. 169, indigenous peoples have the right to be consulted, and at times to give or withhold consent, regarding projects in or affecting their lands, territories, or natural resources.¹²⁰ Indigenous peoples' right of self-government thus gives shape to these consultation and consent-seeking procedures by making it clear that it is indigenous peoples' self-chosen governing bodies that have decision-making authority.¹²¹ The duty to consult is conditioned by the duty to respect indigenous peoples' chosen decision-making and governing institutions.

Both the UN Declaration and ILO Convention No. 169 hold that the duty to consult is general. In the UN Declaration, Article 19 states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that affect them.

¹¹⁸ See UN Declaration, art. 4, 5, 20, 26. Cf. Draft American Declaration on the Rights of Indigenous Peoples, arts. VI(2), XX(1), XXI(2) (2012), http://www.oas.org/dil/indigenous_peoples_Negotiation_Texts.htm.

¹¹⁹ Cf. Draft American Declaration on the Rights of Indigenous Peoples, art. XX(2) (2012), http://www.oas.org/dil/indigenous_peoples_Negotiation_Texts.htm.

¹²⁰ UN Declaration, art. 19 and ILO Convention No. 169 art. 6.

¹²¹ UN Declaration, art. 19: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." Cf. Draft American Declaration on the Rights of Indigenous Peoples, art. XXII(2) (2012), http://www.oas.org/dil/indigenous_peoples_Negotiation_Texts.htm.

The duty to consult runs throughout ILO Convention No. 169,¹²² but it is most clearly enunciated in Article 6(1)(a):

In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.

In 2004, the seventh Conference of the Parties to the Convention on Biological Diversity adopted the Akwe: Kon Voluntary Guidelines.¹²³ Among other things, the Guidelines offer specific suggestions on holding consultations. They recommend that, to effectively provide for the participation of indigenous peoples, the project promoter should identify the indigenous peoples who have a stake in the proposed development, establish mechanisms for their participation, notify indigenous peoples of the proposed development, and generally follow a process based on the free and informed participation of affected indigenous peoples.¹²⁴

Because indigenous peoples own land, they, like any landowner, have the right to control or prohibit entry onto the land and to control or prohibit activities on or substantially affecting the land or related resources. In addition, because indigenous peoples also have a right of self-government, consultations and participation in decision-making must take place through indigenous peoples' governments or other institutions designated by the indigenous peoples concerned.

Consultation proceedings should meet the requirements of due process of law in order to comply with national law and to reduce the likelihood of lawsuits based on national law or complaints of violations of international human rights law. According to regional human rights courts, all state proceedings, including consultation proceedings, must provide for due process rights where decisions may affect human rights.¹²⁵ This is the case, for example, for consultation proceedings with indigenous peoples regarding the creation of protected areas on or affecting their lands or natural resources.

¹²² "The spirit of consultation and participation constitutes the cornerstone of Convention No. 169 on which all its provisions are based. The Convention requires that indigenous and tribal peoples are consulted on issues that affect them. It also requires that these peoples are able to engage in free, prior and informed participation in policy and development processes that affect them. The principles of consultation and participation in Convention No. 169 relate not only to specific development projects, but also to broader questions of governance, and the participation of indigenous and tribal peoples in public life." *The Basic Principles of ILO Convention No. 169*, <http://www.ilo.int/indigenous/Conventions/no169/lang--en/index.htm>.

¹²³ Secretariat of the Convention on Biological Diversity, *Akwe: Kon: Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities* (2004), <http://www.biodiv.org/doc/publications/akwe-brochure-en.pdf>.

¹²⁴ *Id.* at paras. 10-17.

¹²⁵ Both the European and Inter-American human rights courts agree on this rule. See *Albert and Le Compte v. Belgium*, 5 Eur.Court. H.R. (ser. A) 533, para. 39 (1983); *Case of Baena Ricardo et. al v. Panama*, Inter-Am. Ct.H.R. (ser. C) No. 72, at paras.125-29 (Feb. 2, 2001).

The UN Declaration calls for due process in all sorts of proceedings. The following elements of due process will often be required for consultation proceedings. First, consultations must be carried out within a reasonable time.¹²⁶ Secondly, clear information must be provided to indigenous peoples in a form that can be easily understood by them, and a translator or interpreter must be provided, if the language spoken in the project area is not the State official language.¹²⁷ Thirdly, adequate time and means for the consultation must be accorded, in order to give indigenous peoples an opportunity to comprehend project information and realize its implications.¹²⁸ Additionally, situations in which a deciding body's conflict of interests is so substantial or serious as to render the body's impartiality impossible may violate principles of fundamental fairness and constitute a violation of due process rights.¹²⁹ This problem could arise, for instance, in cases in which indigenous peoples' consent is required for a particular conservation project and yet the consultation proceedings designed to obtain and verify that consent are conducted only by project promoters, without the participation or verification of an impartial body.

Consultation rights are important and valuable rights, and proper consultation procedures can demonstrate respect for indigenous peoples' traditional knowledge and even lead to the achievement of sustainable conservation and cultural integrity.¹³⁰ However, it is important to recognize that an approach to human rights compliance that is limited to respect only for procedural rights such as consultation may still fail to recognize indigenous peoples' substantive rights, that is, rights of self-determination, rights to lands and resources, subsistence rights, and other such rights.

¹²⁶ UN Declaration art. 40 states that indigenous peoples have the right to *prompt* decisions through just and fair procedures. According to the European Court of Human Rights, three factors should be taken into account in determining the reasonableness of the time required to carry out a proceeding: (1) the complexity of the case; (2) the procedural activity of the interested party; and (3) the conduct of the judicial authorities. *Vernillo v. France*, Eur. Ct. H.R., para. 30 (1991); *Motta v. Italy*, Eur. Ct. H.R., para. 16 (1991); *Ruiz-Mateos v. Spain*, Eur. Ct. H.R., paras. 30-54 (1993). The Inter-American Court of Human Rights followed the same analysis. *Genie Lacayo Case v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 30, para. 77 (Jan. 29, 1997).

¹²⁷ UN Declaration art. 13(2).

¹²⁸ *See id.* at arts. 13(2) and 40.

¹²⁹ *Cf., Case of Cantoral-Benavides v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 69, para. 114 (Aug. 18, 2000), (finding a violation of due process where the armed forces had the dual function of combatting insurgent groups and of administering military courts tasked with judging and imposing sentence upon members of those same insurgent groups).

¹³⁰ Convention on Biological Diversity, art. 8(j).

PART THREE: CASE STUDIES

I. Introduction

Part Three presents three case studies that document certain indigenous peoples' efforts to maintain ownership of their lands, exercise self-determination, and protect their cultures in the context of conservation projects. These studies form a strong argument that respecting indigenous peoples' rights is essential to achieving conservation goals. The case studies are all Mesoamerican conservation projects: the Bosawas Biosphere Reserve in Nicaragua, the Río Plátano Biosphere Reserve in Honduras, and the Sierra Santa Cruz protected area in Guatemala.

At the outset, a word about the terms we use may be helpful. The terms “biosphere reserve” and “protected area” have particular meanings within the conservation context. “Protected area” is an umbrella term defined by the IUCN as:

An area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means.¹³¹

“Biosphere” is a term developed and used by the United Nations Educational, Scientific and Cultural Organization (UNESCO) to refer to a protected area that itself can include various other subcategories of protected areas.¹³² A biosphere may, for instance, contain a strict nature reserve, a type of protected area that is “managed mainly for science.”¹³³

The biosphere model was created in response to the growing recognition that nature was hardly ever as pristine and untouched as some environmentalists liked to imagine. In fact, most of the world's remaining forests were, and still are, on indigenous lands, where people have been managing and developing the environment sustainably for hundreds or thousands of years. Recognizing this, the biosphere reserve model tries to strike a sustainable balance between biodiversity and cultural conservation.¹³⁴ It accepts the possible presence of peoples and human settlements in protected areas and encourages the development of partnerships in conservation projects. This model encourages the preservation of the traditional lifestyles of its inhabitants and is therefore a relatively “user friendly” protected area.

¹³¹ IUCN Protected Areas Categories System http://www.iucn.org/about/work/programmes/gpap_home/gpap_quality/gpap_pacategories/ (last visited Jan. 3, 2015).

¹³² UNESCO, MAB: 40 Years of Conservation, Research and Development, <http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/man-and-biosphere-programme/mab40/infocus-archive/history/w1-potted-history> (last visited Dec. 19, 2014). The UN Man and the Biosphere program emerged from discussions at the International Biosphere Conference of September 1968 and was launched at UNESCO's General Conference in 1970.

¹³³ IUCN Protected Areas Categories System http://www.iucn.org/about/work/programmes/gpap_home/gpap_quality/gpap_pacategories/ (last visited Jan. 3, 2015).

¹³⁴ Mrat Özyavuz, *Biosphere Reserves*, in THE BIOSPHERE 175, 176 (Natarajan Ishwaran, ed., 2012). <http://cdn.intechopen.com/pdfs-wm/31346.pdf>.

These definitions and distinctions may be clear to professional conservationists, but for many indigenous peoples in Mesoamerica these are foreign concepts that do not reflect their worldviews, customs, or their relationships to land and space. For example,

The Miskito people have long practiced environmental conservation and promoted environmental protection. What elsewhere is called “conservation” was such normal behavior in Miskito Society that it was unremarkable.¹³⁵

This understanding still holds true for the Miskito People today. At a meeting held in Honduras in early-October 2014, the Chair of the Land Commission of MASTA, a regional Miskito organization, Donaldo Allen, stated:

The issue of protected area is not our concept. That's a made up government word. This is not the way we think and feel as indigenous peoples. That's the thinking and feeling of the state, of environmentalists. It is okay that an NGO wants to accompany us but they cannot come and tell us what to do. What we need to do and how we need to do it should be defined by us.¹³⁶

Indigenous peoples' customary laws relating to the use of natural resources generally call for sustainable practices, and while they function like conservation principles, they are based in an indigenous worldview, in spirituality, and in a cultural context.

In today's Mesoamerica, the increasing drug trafficking in and around protected areas in indigenous territories significantly undermine governance regimes and goals. The outcome document of the 2014 Mesoamerican Pre-Congress on Protected Areas for Indigenous Peoples points out that these illegal activities are a new source of deforestation that significantly challenges territorial governance and undermines indigenous peoples' traditional ways of life and their safety.¹³⁷ As will be noticed in the conservation projects described below, this is a current and common threat affecting both conservation actors and indigenous peoples. It is a threat that requires serious attention and cooperation among all parties. However, addressing this threat should not necessarily mean overwhelming military presence and activities in indigenous territories. The UN Declaration allows military activities in indigenous territories only if “freely agreed with or requested by the indigenous peoples concerned.”¹³⁸

II. Bosawas Biosphere Reserve Nicaragua

The Bosawas Biosphere Reserve in Nicaragua forms part of the Moskitia forest corridor. In the 1990s, after the civil wars of the 1980s, the Bosawas area was opened for settlement. The newly opened lands were attractive to many poor farmers from other parts of the country,

¹³⁵ Assistance for Mikupia, a Miskito Environmental Protection Organization 1 (March 18, 1991) (unpublished proposal, on file with the Indian Law Resource Center).

¹³⁶ Donaldo Allen, Chair of the Moskitia Asla Takanka's Land Commission (MASTA), Address at the Honduras meeting held by the Indian Law Resource Center (Oct. 9, 2014) (audio tape, on file with the Indian Law Resource Center).

¹³⁷ Conference Statement, Mesoamerican Pre-Congress on Protected Areas for Indigenous Peoples (Mar. 2014), <http://precongreso.alianzamesoamericana.org/participantes-del-precongreso-mesoamericano-exponen-importante-declaracion/>.

¹³⁸ UN Declaration, art. 30(1) (“Military activities shall not take place in the lands or territories of indigenous peoples, unless . . . freely agreed with or requested by the indigenous peoples concerned”).

loggers, ranchers, and many ex-combatants. Despite national designation as a Protected Area in 1991 and then as a Biosphere by UNESCO in 1997, management approaches to date have been largely ineffective in preventing environmental degradation caused by the influx of settlers and accompanying resource exploitation. In contrast, grassroots initiatives by indigenous people to demarcate and patrol boundaries have been much more effective, though these initiatives require greater government support.

a. Conservation Initiative's Location and Goals

Bosawas forms the Nicaraguan segment of the Moskitia Forest Corridor, a large contiguous tract of tropical forest running through Central America. Bosawas is the second largest rainforest outside the Amazon, and it covers an area about the size of El Salvador. Its sheer size earned it the nickname “Pulmón de Centroamérica” (Lung of Central America).

The area that was to become the Bosawas Biosphere Reserve was almost entirely forested until the 1980s, when an increase in migration to the area by loggers, small-scale farmers, and ranchers led to dramatic deforestation. By 1990, 25% of the Moskitia Forest Corridor had been deforested, causing concern among conservationists.¹³⁹ Amid calls for the creation of a system of protected areas, a number of parks and reserves were created in a frantic race to save what remained. At the same time, the United States was funneling money into the reconstruction of Nicaragua as part of a regional foreign policy shift following the end of the Cold War. Some \$12 million was made available for natural resource protection alone. Bosawas was one of three main conservation projects supported by the U.S. Agency for International Development (USAID) and the Nicaraguan Ministry of Natural Resources.¹⁴⁰

b. Physical and Biological Characteristics of Land

The terrain in Bosawas ranges from mountains that reach over 1,600 meters in elevation to rolling hills and flat lands. The area is mostly tropical humid forest, tropical cloud forest, and pine savannahs.¹⁴¹ Yearly rainfall averages between 1,600 mm in the west to 3000 mm in some of the higher elevations.¹⁴² Many streams and rivers crisscross their way down from the mountains via the Coco River towards the Atlantic Ocean. Indigenous settlements in the region were historically oriented around the area's rivers, including the Amaka, Bocay, Coco, Lakus,

¹³⁹ Peter H. Herlihy, *Indigenous Peoples and Biosphere Conservation in Mosquitia Rainforest Corridor, Honduras*, in CONSERVATION THROUGH CULTURAL SURVIVAL: INDIGENOUS PEOPLES AND PROTECTED AREAS 99, 124 (Stanley Stevens ed. 1997).

¹⁴⁰ Bernard Nietschmann, *Protecting Indigenous Coral Reef and Sea Territories, Miskito Coast, RAAN, Nicaragua*, in CONSERVATION THROUGH CULTURAL SURVIVAL: INDIGENOUS PEOPLES AND PROTECTED AREAS 193, 197 (Stanley Stevens ed. 1997).

¹⁴¹ UNESCO Biosphere Reserve Information, Nicaragua, Bosawas
<http://www.unesco.org/mabdb/br/brdir/directory/biores.asp?code=NIC+01&mode=all>.

¹⁴² David Kaimowitz, Angelica Faune, and Rene Mendoza, *Your Biosphere is My Backyard: The Story of Bosawas in Nicaragua*, Center for International Forestry Research 4 (April 2003),
<http://www.bio-nica.info/biblioteca/Kaimowitz2003.pdf>.

Wina, and Waspuk.¹⁴³ The name Bosawas is an invented name taken from the first two letters of the Bocay River, the Saslaya mountain, and the Waspuk River.¹⁴⁴

The forest contains countless plant species, including the commercially valuable mahogany (*Swietenia macrophylla*), royal cedar (*Cedrela odorata*), and andiroba (*Carapa guianensis*).¹⁴⁵ An estimated 200,000 types of insects live in the area.¹⁴⁶ It is also habitat for a huge number of animal species, including crocodiles, deer, jaguars, monkeys, parrots, tapirs, toucans, and the largest eagle in the Americas, the Harpy eagle.¹⁴⁷ The animal species in the biosphere represent 13% of the tropical species known to date, and undoubtedly there are more, as yet undiscovered and unstudied.¹⁴⁸

c. Brief History of Colonization

The indigenous peoples of Nicaragua have lived through multiple waves of imperial and colonial rule. “Like so many nations, Nicaragua is a creation of artificial colonial boundaries imposed over pre-existing indigenous territories, re-formed by competing regional states.”¹⁴⁹ Miskito, Sumo, and Rama people have long held distinct territories in modern-day Nicaragua.¹⁵⁰ During the 16th century, the communities of the Atlantic coast resisted and stopped Spanish invasion, instead forming strategic and trade alliances with the British. For 200 years Britain maintained a presence based on trade and resource extraction. While the British did install a Miskito leader as king in 1680, they then recognized the Miskito Kingdom as the legitimate government of the Atlantic Coast acting under British rule, and their commercial activities had little direct impact on indigenous sovereignty over their lands.¹⁵¹

In 1787, the British handed formal control over the region to Spain. The Miskito overthrew the new Spanish rulers, and Britain reasserted its influence in 1844. In 1860, Britain signed the Treaty of Managua, recognizing Nicaraguan sovereignty over the Atlantic Coast while at the same time establishing a Miskito Reserve that would have its own constitution but would continue to be governed by British laws. In 1894, Nicaragua violated the treaty, invaded these areas, and annexed them to the Nicaraguan state.¹⁵² President Jose Santos Zelaya exiled the

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Carlos Salina Maldonado, *The Decay of the Bosawas*, CONFIDENCIAL, June 6, 2014, <http://www.confidencial.com.ni/articulo/17863/the-decay-of-bosawas>.

¹⁴⁷ David Kaimowitz, Angelica Faune, and Rene Mendoza, *Your Biosphere is My Backyard: The Story of Bosawas in Nicaragua*, Center for International Forestry Research 4 (April 2003), <http://www.bio-nica.info/biblioteca/Kaimowitz2003.pdf>; Wildlife Conservation Society, Bosawas Biosphere, Nicaragua, <http://www.wcs.org/saving-wild-places/latin-america-and-the-caribbean/bosawas-biosphere-nicaragua.aspx> (last visited Jan. 3, 2015).

¹⁴⁸ Carlos Salina Maldonado, *The Decay of the Bosawas*, CONFIDENCIAL, June 6, 2014, <http://www.confidencial.com.ni/articulo/17863/the-decay-of-bosawas>.

¹⁴⁹ Bernard Nietschmann, *Inside and Outside the Indian Resistance in Nicaragua* 12 (April, 1984) (essay on file with the Indian Law Resource Center).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 13.

¹⁵² *Id.*

Miskito chief, appointed a new governor, made Spanish the official language, and created a new department covering the entire region, which he named after himself.

After a decade of further negotiations, in 1905 the British finally relinquished all claims to the region in the Harrison-Altamirano Treaty.¹⁵³ The Nicaraguan authorities, however, remained largely absent from the area and provided almost no social services to the region. Education and health services were mostly organized by missionaries through the Moravian Church, which had a strong presence along the Coco River. Otherwise, people continued to subsist and survive as they always had.

Outside of Miskito indigenous territory, political life was rapidly changing in Nicaragua. In 1936, Anastasio Somoza Garcia seized power. He ruled as dictator until 1979. According to a Miskito woman, “Somoza was bad but he just took money. We had our land to live from and to pass on to our children, and we could work anywhere.”¹⁵⁴ In 1979, the overthrow of the Somoza regime and the emergence of the Frente Sandinista de Liberación Nacional dramatically changed indigenous life.¹⁵⁵ While the indigenous organization made up of Miskitos, Sumos, and Ramas called MISURASATA had initially supported the Sandinista movement, tensions surfaced when the Sandinistas introduced a land reform law that threatened indigenous peoples’ communally owned lands and again when the Sandinistas sought to institute a broad Spanish literacy program that threatened native language and cultures.¹⁵⁶ Indigenous support for the Sandinistas rapidly eroded, and, as a result within a few weeks in February 1981 the Sandinista regime arrested and jailed nearly all of the indigenous leaders of MISURASATA.¹⁵⁷

Indigenous people found themselves and their concerns lost in the middle of what the outside world could only perceive as a struggle between east and west, capitalism and Marxism, the U.S. Central Intelligence Agency and the Sandinistas.¹⁵⁸ One close observer wrote at the time that because the indigenous movement was “anti-totalitarian, anti-capitalist and anti-marxist it [fell] outside the us-vs.-them analysis.”¹⁵⁹ Sandinistas called the Indians *contras* or counter revolutionaries, but “The Indians who are fighting against the states do not see themselves as *contras* (counter-revolutionaries), but revolutionaries, Indian warriors who were the first to rise up against the forces of the national government to liberate their own territory and people.”¹⁶⁰ Indigenous peoples wanted to be autonomous, free from all oppression, and to exercise self-determination.¹⁶¹ Full-scale war developed between indigenous and Sandinista forces.¹⁶²

¹⁵³ *Id.* at 6.

¹⁵⁴ *Id.* at 14.

¹⁵⁵ *Id.* at 1.

¹⁵⁶ Robert T. Coulter, *Proposal to Support Peace Talks Between Indians and the Nicaraguan Government: Legal Assistance and Support* 3 (Feb. 1985) (unpublished proposal, on file with the Indian Law Resource Center).

¹⁵⁷ *Id.*

¹⁵⁸ Bernard Nietschmann, *Inside and Outside the Indian Resistance in Nicaragua* 3 (April, 1984) (essay on file with the Indian Law Resource Center).

¹⁵⁹ *Id.* at 7.

¹⁶⁰ *Id.* at 5.

¹⁶¹ *Id.* at 5-6.

¹⁶² *Id.* at 17.

Unable to militarily defeat the indigenous people, the Sandinistas had to negotiate with MISURASATA to secure peace and end the war.

MISURASATA and another indigenous organization, YATAMA, carried out seven rounds of negotiations with the Sandinistas from 1984-1988.¹⁶³ The central feature of their position was “a delineation of a self-governing territory corresponding to the traditional lands of the Miskito, Sumo, and Rama.”¹⁶⁴ The Sandinista proposal was entirely different. It made no provision for true self-government, and included regional administrative structures with only limited powers of participation and consultation within the central government.¹⁶⁵ In the end, the Sandinista government changed course, rejected their previous assimilationist policy and came to support at least nominal autonomy for this traditionally indigenous region.¹⁶⁶

In 1987, the Sandinista government signed the Atlantic Coast Regional Autonomy Law, establishing two separate autonomous regions: the Northern Atlantic Autonomous Region and the Southern Atlantic Autonomous Region, each with its own multi-ethnic government. The government also formally recognized collective property rights over the “lands, waters and forests that traditionally belonged to the communities.”¹⁶⁷ According to the new law, these lands could not be sold, seized, or taxed, and the communities had the right to religious freedom and the right to be educated in their own languages, which were also recognized as official languages.¹⁶⁸ The law recognized the indigenous peoples’ right to “use and enjoy the waters, forests, and communal lands for their own benefit.”¹⁶⁹ In addition, a new constitution was drafted at this time that further strengthened the legal principles of autonomy and indigenous peoples’ communal land rights.

The Autonomy Law of 1987 never lived up to the indigenous peoples’ expectations. It was gradually reneged on by successive governments and has had limited practical effect. Following the Sandinista and Contra wars the agricultural frontier was expanded, and lands close to what is now the Bosawas Biosphere Reserve were offered up to ex-combatants for settlement and farming. In the years after the civil wars and the establishment of the Reserve, the Chamorro administration systematically tried to undermine the Autonomy Law by failing to establish any mechanisms to implement it, and also by cutting funding to the regional governments in order to reduce their effectiveness. The Nicaraguan government failed to perform even the basic task of demarcating and titling indigenous territories until 1996 when pressure from the Swedish

¹⁶³ Bernard Nietschmann, *Negotiating with the Sandinistas, The Wall and the Club* 1 (Sept. 1, 1988) (essay on file with the Indian Law Resource Center).

¹⁶⁴ *Id.* at 3.

¹⁶⁵ *Id.* at 4.

¹⁶⁶ Armstrong Wiggins, Statement before the United Nations Working Group on Indigenous Populations: Indian Autonomy in Nicaragua 1-2 (Aug. 6, 1987) (statement, on file with the Indian Law Resource Center).

¹⁶⁷ CHARLES R. HALE, RESISTANCE AND CONTRADICTION, MISKITU INDIANS AND THE NICARAGUAN STATE, 1894-1987, 231 (1994).

¹⁶⁸ Sandra Brunnegger, *From Conflict to Autonomy in Nicaragua: Lessons Learnt*, Minority Rights Group International 4 (2007), <http://www.minorityrights.org/download.php?id=105>.

¹⁶⁹ CHARLES R. HALE, RESISTANCE AND CONTRADICTION, MISKITU INDIANS AND THE NICARAGUAN STATE, 1894-1987, 238 (1994).

government and the Northern Atlantic Autonomous Region finally compelled the government to establish the National Commission to Demarcate Indigenous Lands.¹⁷⁰

d. Overlap With Indigenous Lands and Indigenous Peoples' Social and Political Organizations and Land Use Practices

The Bosawas Biosphere Reserve is some 7,400 square kilometers. About half of the area is in the jurisdiction of three Northern Atlantic Autonomous Region municipalities;¹⁷¹ the other half falls under the jurisdiction of municipalities in the department of Jinotega,¹⁷² a department that is historically and culturally a part of Nicaragua's predominantly mestizo interior region.¹⁷³ Indigenous peoples living in the area include the Miskito and the Mayagna, as well as a smaller number of Garifuna inhabitants.

The majority of Miskito individuals speak Miskito, but Spanish and Creole English are widely used as second languages.¹⁷⁴ Historically, the Miskito have had a mixed subsistence economy of fishing, hunting, gathering, and gardening.¹⁷⁵ Presently, women often manage the village's agricultural work, while the men provide individualized economic support as hunters, fishermen, soldiers, or wage laborers.¹⁷⁶

The Mayagna and Miskito have property regimes and land use patterns that differ significantly from those of the non-indigenous settlers; indigenous peoples in Bosawas hold land in common, while the settlers hold their lands as individual private property.¹⁷⁷ At a more fundamental level, indigenous and settler worldviews differ in substantial ways. Mayagna thought "interweaves the empirical and the symbolic, nature and culture into a unified indigenous vision of the world."¹⁷⁸ For example, to the Mayagna, knowledge of the aquatic world is connected with knowledge of *liwa mairin*, the spirit of the aquatic world. *Liwa mairin* is a female guardian of the waters and is closely linked to marine resources, such as fish and

¹⁷⁰ David Kaimowitz, Angelica Faune, and Rene Mendoza, *Your Biosphere is My Backyard: The Story of Bosawas in Nicaragua*, Center for International Forestry Research 10 (April 2003), <http://www.bio-nica.info/biblioteca/Kaimowitz2003.pdf>.

¹⁷¹ The municipalities are Bonanza, Siuna, and Waspmam. *Id.* at 4.

¹⁷² The municipalities are Cua-Bocay and Wiwili. *Id.*

¹⁷³ *Id.*

¹⁷⁴ Anthony Stocks, Benjamin McMahan, Peter Taber, *Indigenous, Colonist, and Government Impacts on Nicaragua's Bosawás Reserve*, 21 CONSERVATION BIOLOGY 1495, 1498 (2007); on multilingualism among the Miskito in Nicaragua see LAURA HOBSON HERLIHY, *THE MERMAID AND THE LOBSTER DIVER: GENDER AND ETHNIC IDENTITIES AMONG THE RÍO PLÁTANO MISKITO PEOPLES*, 14 (May, 19, 2002) (published Ph.D. dissertation, University of Kansas).

¹⁷⁵ David Kaimowitz, Angelica Faune, and Rene Mendoza, *Your Biosphere is My Backyard: The Story of Bosawas in Nicaragua*, Center for International Forestry Research 4 (April 2003), <http://www.bio-nica.info/biblioteca/Kaimowitz2003.pdf>.

¹⁷⁶ Laura Hobson Herlihy, *Matrilocality and Women's Power*, *Ethnology* 46(2) 133, 146 (2008).

¹⁷⁷ Anthony Stocks, Benjamin McMahan, Peter Taber, *Indigenous, Colonist, and Government Impacts on Nicaragua's Bosawás Reserve*, CONSERVATION BIOLOGY 21(6) 1495, 1498 (2007).

¹⁷⁸ Paul Gros and Douglas Nakashima, *Mayagna Knowledge Deep in the Heart of Mesoamerica*, 6 (3) A WORLD OF SCIENCE 17, 19 (2008), http://www.unesco.org/csi/LINKS/Mayangna_AWOSoct-dec08.pdf.

turtles.¹⁷⁹ This spirit and the resources she watches over must be treated with respect or illness and hardship can result. This is why the Mayagna are taught to take only as many fish as one needs.¹⁸⁰ *Duende*, another guardian, “protects the wild animals of the forest and can punish hunters if they have hunted too many deer.”¹⁸¹ Mayagna customary laws governing the use of natural resources, such as those regarding the sustainable harvest of fish and deer, are deeply rooted in their indigenous worldview and their relationship to the natural world.

Non-indigenous settlers typically live and farm their own individual parcels of land, which average about 50 hectares each.¹⁸² Indigenous families, by contrast, tend to farm areas of less than 15 hectares.¹⁸³ Indigenous families often only crop their land for as little as a year before allowing it to return to forest, thereby creating a rich variety of forest succession stages and habitats.¹⁸⁴ The settlers often cause irreversible impacts on the land, clearing land to plant monoculture cash crops and then planting the land as pasture for grazing livestock.¹⁸⁵ This kind of so-called land improvement can be a lucrative activity in itself, with many people clearing land for pasture and then selling it to larger ranchers who may purchase and consolidate multiple lots into an extensive holding.¹⁸⁶

e. Conservation Initiatives’ Impact on Indigenous Peoples

Although the Autonomy Law supposedly recognized indigenous peoples’ rights to the lands they traditionally occupied and gave the Northern Atlantic Autonomous Region rights to manage the natural resources in the territory, the communities were not consulted before the establishment of the Reserve in 1991.¹⁸⁷ People were only informed after the fact that they lived on or near a national reserve. Understandably, this left many indigenous people feeling that the “designation . . . was a violation of their historical rights to their land.”¹⁸⁸

¹⁷⁹ Johan Wedel, *Bridging the Gap between Western and Indigenous Medicine in Eastern Nicaragua*, 15 (1) ANTHROPOLOGICAL NOTEBOOKS 49, 51 (2009), http://www.drustvo-antropologov.si/AN/PDF/2009_1/Anthropological_Notebooks_XV_1_Wedel.pdf.

¹⁸⁰ Paul Gros and Douglas Nakashima, *Mayagna Knowledge Deep in the Heart of Mesoamerica*, 6 (3) A WORLD OF SCIENCE 17, 19 (2008), http://www.unesco.org/csi/LINKS/Mayangna_AWOSoct-dec08.pdf.

¹⁸¹ Johan Wedel, *Bridging the Gap between Western and Indigenous Medicine in Eastern Nicaragua*, 15 (1) ANTHROPOLOGICAL NOTEBOOKS 49, 51 (2009), http://www.drustvo-antropologov.si/AN/PDF/2009_1/Anthropological_Notebooks_XV_1_Wedel.pdf.

¹⁸² Anthony Stocks, Benjamin McMahan, Peter Taber, *Indigenous, Colonist, and Government Impacts on Nicaragua’s Bosawás Reserve*, 21 CONSERVATION BIOLOGY 1495, 1497 (2007).

¹⁸³ *Id.* at 1498.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Carlos Salina Maldonado, *The Decay of the Bosawas*, CONFIDENCIAL, June 6, 2014, <http://www.confidencial.com.ni/articulo/17863/the-decay-of-bosawas>.

¹⁸⁷ David Kaimowitz, Angelica Faune, and Rene Mendoza, *Your Biosphere is My Backyard: The Story of Bosawas in Nicaragua*, Center for International Forestry Research 13 (April 2003), <http://www.bio-nica.info/biblioteca/Kaimowitz2003.pdf>.

¹⁸⁸ S. Howard, *Autonomia y derechos territoriales de los Sumos en Bosawás, El caso de Sikilta*, in David Kaimowitz, Angelica Faune, and Rene Mendoza, *Your Biosphere is My Backyard: The Story of Bosawas in Nicaragua*, Center for International Forestry Research 13 (April 2003), <http://www.bio-nica.info/biblioteca/Kaimowitz2003.pdf>.

Moreover, the original plan was based on “restrictive land-use policies that were poorly thought-out, poorly communicated, and totally unenforced.”¹⁸⁹ Indigenous peoples were not recognized in the original plan at all, which envisaged the whole area as a core zone reserved for strict conservation.¹⁹⁰ A year after the designation of the reserve, The Nature Conservancy (TNC) and Cultural Survival International visited Bosawas. A report by TNC made the following observations:

[A] trip down the Bocay and upper Coco Rivers revealed profound insecurity of Sumo [Mayagna] and Miskito people regarding the intentions of [Nicaragua] toward their traditional lands. It became apparent, in fact, that to carry on activities within the “protected area” without addressing the land concerns of the indigenous communities would be to condemn the conservation effort to almost certain failure. . . . [A]n alliance seems impossible unless the needs of the communities are taken into account in the conservation effort.¹⁹¹

TNC and others have long understood that without meaningful steps to respect indigenous land rights, conservation efforts in indigenous communities such as the Bosawas Reserve would likely fail. In 1993, TNC carried out workshops with affected indigenous communities in the Northern Atlantic Autonomous Region and found that:

The land legalization issue in Bosawas is so critical that it tends to bleed over into all other issues. People want it dealt with and they want it dealt with now. Demarcation, accompanied by land-use studies of indigenous claims is viewed as a first step.¹⁹²

Based on these workshops TNC recommended that an indigenous law,

[S]hould probably contemplate either community or multi-community titles depending on the nature of the application . . . or a presidential decree granting indigenous communities titles once the paperwork, surveys, etc., are completed.¹⁹³

Although indigenous peoples were not recognized in the original plans, subsequent actions by those managing the reserve have had positive effects by creating greater recognition of indigenous rights and encouraging cooperation with the communities on an equal basis. For example, support from TNC and a grant from USAID in 1994 facilitated the organization of indigenous resistance to the land invaders.¹⁹⁴ Six indigenous societies were formed that conducted studies and cadastral surveys in order to demarcate and zone six contiguous territorial

¹⁸⁹ *Id.* quoting Anthony Stocks, Land Tenure, Conservation, and Native Peoples: Critical Development Issues in Nicaragua.

¹⁹⁰ Anthony Stocks, Indigenous and Mestizo Settlements in Nicaragua’s Bosawas Reserve: The Prospects for Sustainability, Paper Presented at the 1998 Annual Meeting of the Latin American Studies Association 3 (Sept. 24-26, 1998).

¹⁹¹ Anthony Stocks, Report on Advances in Indian Land Tenure in the BOSAWAS Region on Nicaragua, The Nature Conservancy 1 (June, 1993) (report on file with the Indian Law Resource Center).

¹⁹² Anthony Stocks, Notes on Land Tenure Workshop, The Nature Conservancy 6 (Dec. 13, 1993) (notes, on file with the Indian Law Resource Center).

¹⁹³ Anthony Stocks, Policy Barriers to Indigenous Land Titling in Nicaragua, The Nature Conservancy 3 (June, 1993) (notes, on file with the Indian Law Resource Center).

¹⁹⁴ Anthony Stocks, Benjamin McMahan, Peter Taber, *Indigenous, Colonist, and Government Impacts on Nicaragua’s Bosawás Reserve*, 21 CONSERVATION BIOLOGY 1495, 1496 (2007).

land claims.¹⁹⁵ The societies' work methods favored cooperation with neighboring settlers in order to draw boundaries that were agreed upon by both parties. This work meant that the boundaries of indigenous territories were demarcated, patrolled, and subject to agreement. "By 1997, the indigenous peoples had established de facto governing rights over their territories," and in May 2005, the Nicaraguan government granted common property land titles to the territorial organizations of five indigenous communities.¹⁹⁶

While Nicaragua has passed new laws to protect Mayagna communal territories, including Law 445, the Communal Property Regime for indigenous villages, Bosawas continues to suffer from ongoing violations of these laws and the near complete absence of state authorities.¹⁹⁷ Recent delegations to the region have stated that "all the positive work of the demarcation and titling under Law 445 is being threatened by invasion of colonizers from other parts of Nicaragua."¹⁹⁸

The Nicaraguan Ministry of Natural Resources has refused to legalize settler tenure and has not allowed the construction of new roads into the area; it has also blocked banks from extending credit for farming or ranching in the reserve.¹⁹⁹ But the ministry lacks the resources to adequately protect the borders of the reserve, and it is unclear what long-term effect these policies will have in halting the immigration.

To date, these efforts have not been enough to protect Bosawas. Corruption, evidenced by illegal land sales and false documents, is a huge problem, and local reports implicate high ranking political officials in these illegal land sales.²⁰⁰

The land grabbers state that they have titling agreements with the central government. They are thus ignoring the landmark judgment of the Inter-American Court of Human Rights passed in 2001 in the case of *Awas Tingni versus the State of Nicaragua*. This situation deteriorated further following the events of 2011 when [the Ministry of Natural Resources] imposed a negligible fine on [a] logging company for opening up a landing strip and a permanent road to extract timber within the boundaries of their titled territory.²⁰¹

Conflicting and shifting land policies have exacerbated the sense of the land being up for grabs. As discussed, after the end of the wars of the 1980s, land in the area was actively

¹⁹⁵ *Id.*

¹⁹⁶ Tanya M. Hayes, *Forest Governance in a Frontier: An Analysis of the Dynamic Interplay Between Property Rights, Land-use Norms, and Agricultural Expansion in the Mosquitia Forest Corridor of Honduras and Nicaragua* 10 (Feb. 2007) (Ph.D. dissertation, Indiana University).

¹⁹⁷ Carlos Salina Maldonado, *The Decay of the Bosawas*, CONFIDENCIAL, June 6, 2014, <http://www.confidencial.com.ni/articulo/17863/the-decay-of-bosawas>.

¹⁹⁸ Nicaraguan Solidarity Campaign, *Bosawas, the Second Largest Rainforest in the Americas, Threatened* (June 18, 2014) <http://www.nicaraguasc.org.uk/news/article/70/bosawas-the-second-largest-rainforest-in-the-americas-threatened>.

¹⁹⁹ Anthony Stocks, Benjamin McMahan, Peter Taber, *Indigenous, Colonist, and Government Impacts on Nicaragua's Bosawás Reserve*, 21 CONSERVATION BIOLOGY 1495, 1503 (2007).

²⁰⁰ Carlos Salina Maldonado, *The Decay of the Bosawas*, CONFIDENCIAL, June 6, 2014, <http://www.confidencial.com.ni/articulo/17863/the-decay-of-bosawas>.

²⁰¹ International Working Group for Indigenous Affairs, *THE INDIGENOUS WORLD* 92 (2013), http://www.iwgia.org/iwgia_files_publications_files/0613_EB-THE_INDIGENOUS_ORLD_2013.pdf.

assigned to demobilized insurgents who were resettled in a number of development poles and security zones. Tens of thousands of officers and enlisted men also found themselves at a loss at the end of the war and were resettled by the government in the frontier areas in a move that aimed to minimize civil unrest and compensate them for their services.²⁰² The mestizo population subsequently exploded. In 1990, there were 167 colonist families in the southern portion of the soon-to-be reserve; by 1996 there were 1,977.²⁰³ As early as 1998, mestizo farmers occupied about one-quarter of Bosawas, with more entering every day.²⁰⁴

The Zero Hunger Program, initiated by President Ortega after his election in 2007, is aimed at helping Nicaragua achieve the UN Millennium Development Goals of poverty reduction.²⁰⁵ It provides rural women with animals, seeds, materials, technical training, and a savings program. As of 2009, the Ministry of Agriculture reported that 32,000 women and their families had benefited from the program.²⁰⁶ According to settlers in Bosawas who were interviewed as part of a study conducted in 2010, much of the livestock being raised within the reserve was originally distributed as part of the Zero Hunger Program.²⁰⁷ Implementation of the state-sanctioned Zero Hunger program contradicts conservation policies:

[The program sends] cows, pigs and chickens deep into the Mayagna territories to develop ‘model farms’ there. Aside from the . . . incompatibility of these farm animals with life in a tropical rainforest . . . the programme encourages tree-felling in the core zone of the biosphere reserve and heart of the Mesoamerican Corridor to provide pasture for these animals.²⁰⁸

Similarly, land is promised in election campaigns by members of both of Nicaragua’s main political parties even though the land they are promising is not, legally speaking, theirs to give.²⁰⁹ Nicaragua has not yet demonstrated a real commitment to reducing the number of settlers moving to the area or to consolidating the boundaries of the reserve.

Initially, little of the funding for management of the reserve actually reached the communities themselves; it went mostly toward contracting for foreign technical assistance, commissioning studies, and drawing up a series of management plans. Although USAID and

²⁰² David Kaimowitz, Angelica Faune, and Rene Mendoza, *Your Biosphere is My Backyard: The Story of Bosawas in Nicaragua*, Center for International Forestry Research 9 (April 2003), <http://www.bio-nica.info/biblioteca/Kaimowitz2003.pdf>.

²⁰³ Anthony Stocks, Benjamin McMahan, Peter Taber, *Indigenous, Colonist, and Government Impacts on Nicaragua’s Bosawás Reserve*, 21 CONSERVATION BIOLOGY 1495, 1496 (2007).

²⁰⁴ David Kaimowitz, Angelica Faune, and Rene Mendoza, *Your Biosphere is My Backyard: The Story of Bosawas in Nicaragua*, Center for International Forestry Research 16 (April 2003), <http://www.bio-nica.info/biblioteca/Kaimowitz2003.pdf>.

²⁰⁵ Katherine Hoyt, *Report from a fact finding trip to Nicaragua: Anti-Poverty Programs Make a Difference*, North American Congress on Latin America (Dec. 12, 2009), <https://nacla.org/news/report-fact-finding-trip-nicaragua-anti-poverty-programs-make-difference>.

²⁰⁶ *Id.*

²⁰⁷ Carlos Salina Maldonado, *The Decay of the Bosawas*, CONFIDENCIAL, June 6, 2014, <http://www.confidencial.com.ni/articulo/17863/the-decay-of-bosawas>.

²⁰⁸ W. Erdelen, *One Size Does Not Fit All*, 6(4) NAT. SCI. Q. NEWSL. 1 (2008), http://www.unesco.org/science/document/AWOS_Vol6_4web.pdf.

²⁰⁹ Carlos Salina Maldonado, *The Decay of the Bosawas*, CONFIDENCIAL, June 6, 2014, <http://www.confidencial.com.ni/articulo/17863/the-decay-of-bosawas>.

TNC contributed \$2.5 million (USD) in 1993, and a German development bank put \$3.8 million (USD) towards its Bosawas project in 1994, the projects provided little money to maintain a visible government presence on the ground and practically none for assisting the local population.²¹⁰ The lack of government presence has resulted in a vacuum of authority that is easily exploited by land speculators. The boundaries of the reserve are not patrolled at all, while the boundaries of indigenous lands within the reserve are guarded only by indigenous volunteers.

In part, the absence of authorities in the area has to do with security concerns, concerns which have also kept conservation organizations away from those areas of the reserve that are most troubled by mestizo immigration.²¹¹ As important as it is to protect personnel from dangerous situations, the lack of conservation operations in these areas means that no one is on the ground to confront or solve problems directly. Thus, the areas of the reserve most at risk of environmental degradation are abandoned by those purporting to protect it.

f. Conclusion

Even though indigenous peoples' rights are recognized in international law and in Nicaragua's domestic law, violations continue. A recent study by The World Resources Institute, *Securing Rights, Combating Climate Change, How Strengthening Community Forest Rights Mitigates Climate Change*, found that in places where states have secured indigenous peoples' land rights, deforestation has either ceased or has been drastically reduced.²¹² The study notes that because indigenous peoples manage and have the capacity to restore damaged lands and forests better than states, securing their land rights is critical to halting deforestation and mitigating climate change.²¹³ This study provides strong support for the position that securing the rights of indigenous peoples to lands and territories is essential to the success of conservation projects and protecting the world's biodiversity. Where nations provide recognition, legal protection, and resources for implementing those rights, conservation goals are more likely to be reached.

III. Río Plátano Biosphere Reserve Honduras

The Río Plátano Biosphere Reserve was created in 1980, yet the reserve and the indigenous peoples who call this area home are under a continual threat of violence from settlers, ranchers, and narcotics traffickers who seek their land and resources. Despite the titling of

²¹⁰ David Kaimowitz, Angelica Faune, and Rene Mendoza, *Your Biosphere is My Backyard: The Story of Bosawas in Nicaragua*, Center for International Forestry Research 13 (April 2003), <http://www.bio-nica.info/biblioteca/Kaimowitz2003.pdf>.

²¹¹ Carlos Salina Maldonado, *The Decay of the Bosawas*, CONFIDENCIAL, June 6, 2014, <http://www.confidencial.com.ni/articulo/17863/the-decay-of-bosawas>.

²¹² Caleb Steven, Robert Winterbottom, Jenny Springer, Katie Reytar, *Securing Rights, Combating Climate Change, How Strengthening Community Forest Rights Mitigates Climate Change*, World Resources Institute 3 (2014), <http://www.wri.org/securingrights>.

²¹³ *Id.* at 9. See also David Kaimowitz, *What do Forest Rights Have to do With Climate Change?* Ford Foundation (July 24, 2014), <http://www.fordfoundation.org/equals-change/post/how-community-forest-rights-help-curb-climate-change>.

indigenous lands, those titles are proving ineffective in protecting the Río Plátano and securing indigenous peoples' lands and livelihoods from powerful outside interests.

a. Conservation Initiative's Location and Goals

The 850,000 hectare Río Plátano Biosphere Reserve was established as the first biosphere reserve in Central America. The management plan “dictates that sustainable use and resource management be established through participation of local inhabitants and in accordance with local traditions and customs.”²¹⁴ The biosphere reserve model organizes the protected area into three zones: nucleus, buffer, and cultural. These zones determine the type of activities permitted in each area.

In the reserve, the nucleus is reserved for strict conservation only. That is, it excludes human use and resource extraction, although research and scientific monitoring are permitted. The buffer zone lies to the south and west of the nucleus and is reserved for small-scale agriculture and resource extraction projects. It also serves as an experimental land management area. This is the most easily accessible area of the reserve, and as a result it is being populated by increasing numbers of ladino settlers seeking land for farming and ranching. The majority of the indigenous inhabitants, along with a small ladino population, live in the cultural zone which flanks the northern and eastern sides of the nucleus.²¹⁵ Human settlements are permitted in this area, and the goal is for conservationists to work together with these communities towards long-term conservation and sustainability goals.²¹⁶

Large international conservation organizations, including World Wildlife Fund and TNC, and at least two development agencies, German Society for Technical Cooperation and the German Bank for Reconstruction and Development, operate in the reserve.²¹⁷ Still, the sheer scale of the reserve and its great distance from Tegucigalpa present significant governance challenges.

A rapidly advancing agricultural frontier, ranching, uncontrolled logging, illegal land sales, and a recent upsurge in drug trafficking in the region, are some of the current threats to the reserve. Entire communities within the reserve have abandoned their lands after being threatened by narcotics traffickers.²¹⁸ Recent studies have also shown strong correlations in

²¹⁴ CHRISTINA FRIEDLE, THESIS: FOREST RESOURCE USE, LAND-USE, AND ECOTOURISM IN THE RÍO PLÁTANO BIOSPHERE RESERVE, HONDURAS 21 (2005) (published thesis, Portland State University), citing AFE_COHDEFOR et al., Plan de Manejo: Reserva del hombre y Biosfera del Río Plátano.

²¹⁵ *Id.* at 22.

²¹⁶ *Id.* at 23.

²¹⁷ The Encyclopedia of Earth, Río Plátano Biosphere Reserve (July 25, 2008), <http://www.eoearth.org/view/article/155810>; The Nature Conservancy, Natural Light (February 2009), <http://www.nature.org/photos-and-video/naturallight/natural-light-february-2009.xml>.

²¹⁸ Kendra McSweeney and Zoe Pearson, *Prying Native People from Native Lands: Narco Business in Honduras*, NACLA REPORT ON THE AMERICAS (Winter 2013), <https://nacla.org/news/2014/2/4/prying-native-people-native-lands-narco-business-honduras>.

Honduras between the rise in drug trafficking and large-scale deforestation.²¹⁹ As a result of these sorts of ongoing problems, UNESCO placed the reserve on its Danger List in 1996. It was removed from the list in 2007 after some improvement, but put back on the Danger List in 2011.²²⁰

b. Physical and Biological Characteristics of Land

The Río Plátano Biosphere Reserve makes up the Honduran part of the Moskitia Forest corridor; five million acres of contiguous tropical forest that stretches from Northeastern Honduras down into Northern Nicaragua.²²¹ It is the largest surviving area of tropical rainforest in Honduras, and it encompasses almost the entire watershed of the 100 km long Plátano River.²²² Its borders are roughly formed by portions of the Tinto, Paulaya, Wampu, Pau, Tuskruwas and lower Sikri rivers and the Caribbean Sea.²²³ The reserve contains a variety of different habitats, from tropical rainforests and mangroves to mountains and savannahs.²²⁴ It is home to an enormous variety of plants, as well as many endangered and rare species of animals such as the green sea turtle, jaguar, Central American tapir, great curassow, Caribbean manatee, and a number of macaws.²²⁵

The reserve includes the Ciudad Blanca, one of the most important archeological sites of Mayan civilization, as well as the *Piedras Pintadas* petroglyphs on the bed of the Plátano River, believed to be from a pre-Columbian culture.²²⁶

c. Brief History of Colonization

La Moskitia has always been somewhat set apart from the rest of Honduras and Nicaragua. At the beginning of the 17th century, the region was a British protectorate, and the British retained indirect control until the 1850s when Britain signed treaties that handed the land to the new countries emerging from the Spanish Empire.²²⁷ Following the creation of the

²¹⁹ Matt McGrath, *Drug Trafficking is Speeding up Deforestation in Central America*, BBC News (Jan. 31, 2014), <http://www.bbc.com/news/science-environment-25960481> (“In Honduras, the level of large-scale deforestation per year more than quadrupled between 2007 and 2011, at the same time as cocaine movements in the country also showed a significant rise.... A baseline deforestation rate in this region was 20 square kilometers per year”).

²²⁰ UNESCO, World Heritage Committee Puts Río Plátano Back on Danger List at the Request of Honduras (June 22, 2011), <http://whc.unesco.org/en/news/763>.

²²¹ Tanya Marie Hayes, *Does Tenure Matter? A Comparative Analysis of Agricultural Expansion in the Mosquitia Forest Corridor*, 35 HUMAN ECOLOGY 733, 733 (2007).

²²² UNESCO, Río Plátano Biosphere Reserve, <http://whc.unesco.org/en/list/196>.

²²³ Smithsonian Institution, North-east Honduras and Río Plátano Biosphere Reserve, <http://botany.si.edu/projects/cpd/ma/ma15.htm> (last visited Jan. 5, 2015).

²²⁴ UNESCO, Río Plátano Biosphere Reserve, <http://whc.unesco.org/en/list/196>.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ David Kaimowitz, Angelica Faune, and Rene Mendoza, *Your Biosphere is My Backyard: The Story of Bosawas in Nicaragua*, Center for International Forestry Research 5 (April 2003), <http://www.bio-nica.info/biblioteca/Kaimowitz2003.pdf>.

Nicaraguan and Honduran states, two-thirds of Moskitia territory remained in Nicaragua.²²⁸ In 1860, La Moskitia was incorporated into Honduras.²²⁹ Not much changed in La Moskitia after that, and people continued to travel freely along the Coco River between the two states until the 1960s when the official border was declared between Honduras and Nicaragua.²³⁰

d. Overlap With Indigenous Lands and Indigenous Peoples' Social and Political Organization and Land Use Practices

The reserve's boundaries fall within the traditional territories of four distinct indigenous groups: Miskito, Tawahka Sumu, Pech, and Garifuna. The Tawahka occupy the west side of the Río Patuca while the Miskito people have traditionally lived along the Caribbean coast with a territory that stretches from Laguna Ibans to the Río San Juan in southeast Nicaragua.²³¹ The Garifuna live along the coast, and are the majority in the village of Plaplaya.²³² There is a small Pech population that is centered around Las Marias, a town on the Río Plátano.²³³ They speak a Macro-Chibcha language related to certain languages originating in South America.²³⁴ The Miskito, with a population of nearly 18,000, are the largest group in the reserve.²³⁵

Economically, the area has experienced a number of boom and bust cycles as commodities, such as rubber, mahogany, gold, silver, bananas, and pine, have gone up and down in value, and various industries such as sea turtle and lobster fishing, and now ecotourism, have risen and fallen.²³⁶ In general, most inhabitants today rely on subsistence activities as well as swidden agriculture, although livestock production is becoming increasingly important among many Belen Miskito.²³⁷

e. Conservation Initiative Impacts on Indigenous Peoples

UNESCO's biosphere program was an important innovation in natural resource management. It was the first institutional recognition of the importance of indigenous

²²⁸ LAURA HOBSON HERLIHY, *THE MERMAID AND THE LOBSTER DIVER: GENDER AND ETHNIC IDENTITIES AMONG THE RÍO PLÁTANO MISKITO PEOPLES* 7 (May, 19, 2002) (published Ph.D. dissertation, University of Kansas).

²²⁹ *Id.* at 82.

²³⁰ Pieter Bekker and Ana Stanic, *The ICJ Awards Sovereignty over Four Caribbean Sea Islands to Honduras and Fixes a Single Boundary between Nicaragua and Honduras*, 11(26) ASIL INSIGHTS (Oct. 10, 2007), <http://www.asil.org/insights/volume/11/issue/26/icj-awards-sovereignty-over-four-caribbean-sea-islands-honduras-and>.

²³¹ Derek A. Parent, Río Plátano UNESCO Biosphere Reserve, http://members.tripod.com/d_parent/aboutres.html (last visited Dec. 19, 2014).

²³² CHRISTINA FRIEDLE, *THESIS: FOREST RESOURCE USE, LAND-USE, AND ECOTOURISM IN THE RÍO PLÁTANO BIOSPHERE RESERVE, HONDURAS* 42 (2005) (published thesis, Portland State University).

²³³ *Id.* at 42.

²³⁴ UNESCO, Honduras, Pueblo Pech, <http://www.unesco.org/uy/phi/aguaycultura/es/paises/honduras/pueblo-pech.html>.

²³⁵ LAURA HOBSON HERLIHY, *THE MERMAID AND THE LOBSTER DIVER: GENDER AND ETHNIC IDENTITIES AMONG THE RÍO PLÁTANO MISKITO PEOPLES* 132 (May, 19, 2002) (published Ph.D. dissertation, University of Kansas).

²³⁶ CHRISTINA FRIEDLE, *THESIS: FOREST RESOURCE USE, LAND-USE, AND ECOTOURISM IN THE RÍO PLÁTANO BIOSPHERE RESERVE, HONDURAS* 33 (2005) (published thesis, Portland State University).

²³⁷ WILLIAM D. COLEMAN, *PROPERTY, TERRITORY, GLOBALIZATION: STRUGGLES OVER AUTONOMY* 114 (2011).

communities in the conservation landscape, and it provides at least the beginning of a framework for indigenous peoples' participation in the decision-making and management process affecting their lands, natural resources, and development.²³⁸

Nevertheless, the biosphere model does not go far enough in recognizing indigenous peoples' land rights. For example, the zoning of the Río Plátano Biosphere Reserve limits communities in the cultural zone to specified subsistence activities but supports the mestizo settlers in the buffer zone in a range of commercial activities such as coffee production, timber exploitation, and cattle ranching. These regulations limit indigenous behavior on their own lands to certain stereotypical and state-sanctioned norms and reinforce a racialized model that sees indigenous peoples as anti-development and unproductive.²³⁹

In fact, the reserve itself was little more than a line drawn on a map until about 1991. One study commented:

During the first decade the reserve was established, [the Honduran Natural Resource Management Institute] managed the reserve. A director and small number of park rangers worked in the region. [The Natural Resource Management Institute] however, suffered from poor administration, exacerbated by the remote region's poor transportation and communication networks. At this time, the reserve seemed to exist only on paper and most of the residents did not even know they lived in a reserve.²⁴⁰

In 1991, Honduras passed legislation that took management of the land away from the Honduran Natural Resource Management Institute and gave legal title to the land to the Honduran Corporation for Forestry Development.²⁴¹ It was argued that this transfer of title would better protect biodiversity, yet the establishment of state ownership of reserve lands was necessarily also a rejection of Miskito and other indigenous peoples' land claims. Settlers soon took advantage of this new status and began to claim indigenous lands. In 2007, the Corporation for Forestry Development was implicated in a number of corruption cases and ultimately dissolved. It was replaced by the newly created National Institute for the Conservation and Development of Forests, Protected Areas and Wildlife. This administrative change also marked a change in the management philosophy of the reserve away from resource exploitation and towards conservation. This resulted in improvements in the administration of the reserve, but of course much of the damage was already done.

One of the biggest challenges today is relocating people who are illegally settled in the reserve. Honduras has previously made widely publicized compensation payments to families

²³⁸ Brian Houseal, Craig MacFarland, Guillermo Archibold, Aurelia Chiaria, *Indigenous Cultures and Protected Areas in Central America*, CULTURAL SURVIVAL (1985), <https://www.culturalsurvival.org/ourpublications/csq/article/indigenous-cultures-and-protected-areas-central-america>.

²³⁹ WILLIAM D. COLEMAN, PROPERTY, TERRITORY, GLOBALIZATION: STRUGGLES OVER AUTONOMY 114 (2011).

²⁴⁰ LAURA HOBSON HERLIHY, THE MERMAID AND THE LOBSTER DIVER: GENDER AND ETHNIC IDENTITIES AMONG THE RÍO PLÁTANO MISKITO PEOPLES 131 (May, 19, 2002) (published Ph.D. dissertation, University of Kansas).

²⁴¹ CHRISTINA FRIEDLE, THESIS: FOREST RESOURCE USE, LAND-USE, AND ECOTOURISM IN THE RÍO PLÁTANO BIOSPHERE RESERVE, HONDURAS 45 (2005) (published thesis, Portland State University). The legislation is Honduran Law 74-91.

displaced from the core zone.²⁴² Some settlers have indicated that they too would accept similar offers.²⁴³ While some settlers may be willing to accept such compensation packages, others are likely to refuse and may invoke Honduras' constitutional provisions regarding freedom of movement and settlement to support their position.²⁴⁴

Indigenous peoples have been living sustainably in the area for hundreds of years. The Miskito worldview has an ingrained appreciation for conservation; taking too many resources is understood to cause illness and death. This belief system acts as a check on greed. It also shows the relationship of reciprocity with the environment that Miskito have built into their belief system.²⁴⁵

On the other hand, settler livelihood strategies are frequently environmentally damaging. For example, fishing using dynamite is a common practice. This practice decimates the fish population, unnecessarily kills other water organisms, and pollutes the water. Indigenous communities have reported that their children get sick as a result of the dynamite residue in the water.²⁴⁶

Likewise, the agricultural methods used by indigenous peoples and colonists differ in ways that demonstrate starkly different attitudes to the land and resources. While indigenous inhabitants of the reserve clear only a small plot of land at a time and then plant a variety of trees and plants on it, colonists tend to deforest large areas that they then plant a monoculture crop or use the area as pasture for livestock. The indigenous communities have known for a long time that their survival depends on maintaining and respecting the delicate balance between humans and nature. To the new inhabitants, however, the land is often seen as a commodity to be immediately exploited to the maximum regardless of long-term impacts.

Honduras' management policies were often contradictory and often detrimental to the protection of the reserve. Illegal logging actually increased under the Honduran Corporation for Forestry Development's watch as the agency implemented policies that effectively legalized the logging of mahogany without any consultation or any independent oversight. In addition, the lack of enforcement power meant that any vagueness in the law was exploited by loggers. For example, the agency allowed the retrieval of so called "abandoned timber," but lack of a monitoring presence in the area meant that trees could be illegally felled and then claimed and legalized as abandoned timber.²⁴⁷

²⁴² The Encyclopedia of Earth, Río Plátano Biosphere Reserve (July 25, 2008), <http://www.eoearth.org/view/article/155810>.

²⁴³ *Id.*

²⁴⁴ Honduras Constitution of 1982, c.2, art 81.

²⁴⁵ See LAURA HOBSON HERLIHY, *THE MERMAID AND THE LOBSTER DIVER: GENDER AND ETHNIC IDENTITIES AMONG THE RÍO PLÁTANO MISKITO PEOPLES* 277-280 (May 19, 2002) (published Ph.D. dissertation, University of Kansas).

²⁴⁶ *Paradise In Peril* (Skyship Films, 2011), <http://pensive.aeortiz.com/2011/09/07/the-plight-of-the-rio-platano-biosphere-reserve>.

²⁴⁷ See Global Witness Report, *Illegal logging in the Río Plátano Biosphere A Farce in Three Acts* (2009), http://www.globalwitness.org/sites/default/files/pdfs/illegal_logging_in_rio_platano_final_en_low_res.pdf.

Commercial interests have further thwarted conservation efforts in the reserve. Land is being cleared for the planting of African palm trees.²⁴⁸ This is a lucrative business and land sales are made easy by the falsification of existing held land titles, despite the protected status of the area. People who get in the way of those exploiting the reserve's resources can face serious risks. In May 2014, José Alexander González Cerros, 33, a government forester working in the Río Plátano Biosphere Reserve was fatally shot in La Ceiba getting off a bus. He had recently reported illegal logging in the area.²⁴⁹

Indigenous peoples' physical security remains acutely vulnerable to settlers' and drug traffickers' threats of violence. The lack of resources to ensure public safety, enforce existing laws, and adequately manage the reserve is a significant ongoing problem. Beyond drug traffickers' threats, "Narco-deforestation enables cartels to occupy territory to the detriment of their competitors. If that continues, the entire Mesoamerican biological corridor, which stretches from Panama to Mexico, will be affected by tree felling."²⁵⁰ Addressing the problems of drug production and trafficking is key to protecting indigenous peoples' rights and securing the desired conservation outcomes in the reserve and throughout Mesoamerica.

There are numerous problems in the administration of the Río Plátano Biosphere Reserve. One is the insistence on implementing top-down management plans that do not build upon already existing governance frameworks. Another is the failure to provide adequate resources to effectively manage and enforce those plans that are put in place. The boundaries of the reserve are a third area of concern; borders between the various zones are not clearly demarcated nor consistently enforced. As a result, people cannot tell when they are passing from a zone in which they are authorized to be into one to which access is forbidden.

Another problem is attempts to impose new structures where effective governance methods already exist. The governing boards that were set up by the Honduran Corporation for Forestry Development to resolve land disputes are an example of this problem. The boards are made up of the local mayor, three or four selected citizens, an NGO representative, a local police officer, a local teacher, and a representative of a local cooperative or enterprise. They meet three times a year to assess the local situation, resolve disputes, and prevent unauthorized immigration. These boards, however, are largely seen as ineffectual, and immigration to the reserve has actually increased since they were introduced to replace informal methods of dispute resolution.²⁵¹

²⁴⁸ Kendra McSweeney and Zoe Pearson, *Prying Native People from Native Lands: Narco Business in Honduras*, NACLA REPORT ON THE AMERICAS (Winter 2013), <https://nacla.org/news/2014/2/4/prying-native-people-native-lands-narco-business-honduras>.

²⁴⁹ Elisabeth Malkin, *Lawmakers Ask State Dept. to Review Support for Honduras*, NEW YORK TIMES (May 29, 2014), http://www.nytimes.com/2014/05/29/world/americas/lawmakers-ask-state-dept-to-review-support-for-honduras.html?_r=0.

²⁵⁰ Frederic Sabiba, *Deforestation of Central America Rises as Mexico's War on Drugs Moves South*, GUARDIAN WEEKLY (April 15, 2014), <http://www.theguardian.com/environment/2014/apr/15/central-america-deforestation-mexico-drugs-war>.

²⁵¹ World Wildlife Fund, *Quarrels in a Crowded Reserve: The Río Plátano Biosphere Reserve Project in Honduras* 20 (2001), http://www.education-for-conservation.org/WWF-Crowded_Reserve_RPMBR.pdf.

Recently, additional steps have been taken to protect the reserve. For example, Honduras has formed an Inter-institutional Law Group to give legal support to the process of land tenure regularization in the reserve. The stated aim is to return to the rightful indigenous owners property titles that were wrongfully taken by the National Agrarian Institute.²⁵² This constitutes a positive development and recognition of indigenous rights to their lands.

In addition, in September 2013, Honduras granted the Miskito title to over 760,000 hectares of their traditional land in the Gracias a Dios region and has promised an additional 800,000 hectares in and around the Río Plátano Biosphere Reserve. The hope is that this will make it easier for indigenous communities to defend and protect their land and the area's natural resources against invaders. However, while title has recently been given to Miskito communities, the state retains sub-surface rights.²⁵³

f. Conclusion

More than thirty years after its creation, the Río Plátano Biosphere Reserve has not yet lived up to its original promise. Early years of mismanagement and miscommunication created a vacuum of authority that allowed land speculators, ranchers, and loggers to operate in the area with impunity. Weak and unsupported indigenous land titles enabled non-indigenous settlers to immigrate to the area despite its status as a protected area. Recently, there has been increased recognition that many of the most significant obstacles to sustainable conservation in the reserve are created by unstable and weakly enforced indigenous land rights in the area. This realization has led to a greater focus on resolving indigenous land claims, granting indigenous communities their land titles, and recognizing their rights to self-determination and self-government.

IV. Sierra Santa Cruz: A Protected Area to be Established in Guatemala

Our third case study examines a protected area that has not yet been formally created. Nevertheless, this project exhibits many of the same issues and potential problems that have so seriously damaged and diminished the effectiveness of the Bosawas and Río Plátano protected areas. Some of the problems we identify below are fundamental problems with the law in Guatemala, legal problems more severe than those in Nicaragua and Honduras. In this study, we find that the affected indigenous peoples are actively opposing the protected area and proposing alternatives that would preserve their rights. Such advance opposition has been possible in this case, because the indigenous peoples have had at least some advance notice of the project plans – an advantage that the affected indigenous communities did not have in Nicaragua and Honduras. It remains to be seen whether this opportunity will be actually used to improve the project and protect indigenous rights.

²⁵² UNESCO, Recognizing and Rewarding Best Practices in Management of World Heritage Properties-Honduras Río Plátano 3 (2011), whc.unesco.org/document/116513.

²⁵³ Kendra McSweeney and Zoe Pearson, *Prying Native People from Native Lands: Narco Business in Honduras*, NACLA REPORT ON THE AMERICAS (Winter 2013), <https://nacla.org/news/2014/2/4/prying-native-people-native-lands-narco-business-honduras>.

The proposed Sierra Santa Cruz Protected Area embraces a small mountain range and covers an area of 106,974.26 hectares. It is located in the municipalities of Livingston and El Estor and lies north of Lake Izabal, the largest lake in Guatemala. Apart from having a rich diversity of flora and fauna, it is an important source of fresh water.

The proposed Sierra Santa Cruz Protected Area has not yet been established, but the process has begun. Enlistment in the Protected Areas Law is the first step, and that has been taken. At the time of this *Guide*, the process had not yet moved beyond this stage. According to the Protected Areas Law, the remaining steps in the procedure are (1) a technical study approved by the National Council of Protected Areas;²⁵⁴ (2) the National Council's submission of a bill to Congress;²⁵⁵ and (3) approval by Congress.²⁵⁶

The proposed Sierra Santa Cruz protected area would be divided into five different zones (see table below). The affected Q'eqchi' Maya communities will be allowed access only to the Multiple Use Zone, which is just 27.50% of the area. These communities have not been consulted about the proposed zoning of the area.

Zones	Hectares	Percentage
Damping Zone	31,409.83	29.36
Use of Natural Resources Zone	25,682.37	24.01
Ecotourism Development Zone	7,398.65	6.92
Multiple Use Zone	29,419.41	27.50
Core Zone	13,064.00	12.21
Total	106,974.26	100

Many governmental bodies and agencies are providing support for the establishment of this protected area,²⁵⁷ as is the Foundation for Eco-Development and Conservation (Fundaeo), an IUCN NGO-member.²⁵⁸ The Maya communities whose lands are overlapped by the proposed protected area, however, oppose establishment of the area as planned, as we discuss below.

²⁵⁴ Decree No. 4-89, Protected Areas Law, Feb. 7, 1989, art. 11.

²⁵⁵ *Id.* at art. 12.

²⁵⁶ *Id.*

²⁵⁷ These include National Council of Protected Areas, the National Forests Institute, the National Anthropology and History Institute, the San Carlos University's Center for Conservation Studies, and the municipalities of Livingston and El Estor. AEPDI/Defensoría Q'eqchi', Report filed with the Inter-American Commission on Human Rights in Thematic Hearing: *Indigenous territories and protected areas in Guatemala*, Inter-Am. C.H.R. 131st Ordinary Sessions Period 10 (Mar. 10, 2008) (on file with the Indian Law Resource Center).

²⁵⁸ Gerold Schmidt, *Territorios Indígenas y áreas protegidas: Tres casos y sus conclusiones* 10 [Indigenous Territories and Protected Areas: Three Cases and Its Conclusions] (Evangelischer Entwicklungsdienst e.V. ed. 2010), http://www.simas.org.ni/files/publicacion/1310501449_EED Territorios indígenas y áreas protegidas_3 casos.pdf.

a. Brief History of Colonization and Indigenous Peoples

A majority of the population of Guatemala is indigenous. According to unofficial figures, indigenous peoples make up 65% of Guatemala's total population.²⁵⁹ Dramatic cultural diversity exists within Guatemala's indigenous nations. For example, twenty-two distinct linguistic communities exist within the Maya Nation alone.²⁶⁰

In Latin America, Guatemala has one of the highest levels of economic inequality and ranks the second lowest in human development measures.²⁶¹ Indigenous peoples are the poorest of Guatemala's poor and are socially excluded and discriminated against. According to the Inter-American Commission, "Approximately 40% of indigenous individuals live in conditions of extreme poverty and nearly 80% of them are poor, having the lowest literacy rates and the lowest income of all groups in Guatemalan society."²⁶² Approximately 67% of indigenous boys and girls in Guatemala suffer from chronic malnutrition.²⁶³

In 2003, Special Rapporteur Stavenhagen pointed out the link between colonization and the devastating levels of extreme poverty that indigenous peoples in Guatemala continue to endure. He wrote that:

[T]he present condition of the Indigenous populations in Guatemala is the result of the long colonial oppression process against the Mayan people as of the [16th] Century, consolidated under the liberal national Government during the [21st] Century, upon the constitution of a governing class that based its power on large rural land property and the exploitation of Indigenous labor, within the framework of authoritarian and patrimonial regimes.²⁶⁴

Civil war wracked Guatemala from 1960 to 1996; 83% of the victims were Mayans. Guatemala's Commission for Historical Clarification concluded that racism:

[C]onstitute[d] a fundamental factor in explaining the special rage and indiscrimination with which military operations were carried out against hundreds of Mayan communities in the Western and Northwestern sections of the country. This was particularly true between the years

²⁵⁹ AEPDI/Defensoría Q'eqchi', Report filed with the Inter-American Commission on Human Rights in Thematic Hearing: *Indigenous territories and protected areas in Guatemala*, Inter-Am. C.H.R. 131st Ordinary Sessions Period 1 (Mar. 10, 2008) (on file with the Indian Law Resource Center).

²⁶⁰ The linguistic communities are: Achi', Akateko, Awakateko, Ch'orti', Chuj, Ixil, Itza', Kaqchikel, K'iche', Mam, Mopan, Poqomam, Poqomchi', Popti', Q'anjob'al, Q'eqchi', Sakapulteko, Sipakapense, Tektiteko, Tz'utujil y Uspanteko. *Id.* at 1.

²⁶¹ UN Office of the High Commissioner for Human Rights, *2007 Report on Activities and Results*, 112, http://www.ohchr.org/Documents/Press/OHCHR_Report_07_Full.pdf.

²⁶² *Justice and Social Inclusion: The Challenges of Democracy in Guatemala*, Inter-Am C.H.R. Guatemala Country Report, OEA/Ser. L/V/II.118, Doc. 5 rev. 1, para. 214 (Dec. 29, 2003), <http://www.cidh.oas.org/countryrep/Guatemala2003eng/Chapter-IV.htm>.

²⁶³ *Id.* at para. 215.

²⁶⁴ *Human Rights and Indigenous Issues*, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen submitted to the Commission on Human Rights: Addendum Mission to Guatemala, E/CN.4/2003/90/Add.2, para. 5 (Feb. 24, 2003).

1981 and 1983, when more than half of the massacres and actions of leveled land [“acciones de tierra arrasada”] were conducted against the Mayans.²⁶⁵

In 1996, at the end of the civil war, twelve Peace Agreements were signed, including the Agreement on Identity and the Rights of Indigenous Peoples. Yet, seven years later, the Inter-American Commission found that implementation of this agreement lagged, despite its obvious importance for Guatemala.²⁶⁶ That same year, Special Rapporteur Stavenhagen wrote that

[T]he machinery set up so far to implement the commitments enumerated in the Agreement on Identity and Rights, such as the Land Trust Fund and the programmes for the resettlement of displaced and returning groups, has proved inadequate to the task of modifying the existing situation . . . settl[ing] disputes and rectify[ing] inequalities in land distribution.²⁶⁷

In 2004, the Commission concluded that of the twelve Peace Agreements, the Agreement on Identity and Rights had the lowest level of compliance.²⁶⁸

In Guatemala, the taking of collectively held indigenous lands for both extractive industry and conservation projects is a major human rights issue. According to Special Rapporteur Stavenhagen:

[N]ew developments have worsened the situation in recent years: the establishment of protected areas or forest reserves, and the granting of mining and forestry rights. As a rule these measures exclude the indigenous groups who have settled in or near such areas from exploiting the resources, fail to take into account their impact on the needs of the communities, make no provision to address such impacts and have been drawn up without consultation with those concerned.²⁶⁹

These recent developments are simply a new chapter in a much longer history of expropriation of indigenous lands. The UN Office of the High Commissioner for Human Rights has identified three distinct historical periods during which the state used different legal pretexts and strategies to seize Q’eqchi Mayan lands. First, during the colonial period, lands were registered in favor of the Spanish Crown. Later, during the liberal period, lands were awarded to non-Indians and foreign individuals. Finally, during the military counterrevolution, during which the lands were registered in favor of individuals connected to the local political power.²⁷⁰

²⁶⁵ GUATEMALA: MEMORY OF SILENCE, Commission for Historical Clarification, para. 33 (1999), as translated in *Human Rights and Indigenous Issues: Mission to Guatemala*, Report of the Special Rapporteur, Rodolfo Stavenhagen submitted to the Commission on Human Rights, E/CN.4/2003/90/Add.2, para. 8 (Feb. 10, 2003).

²⁶⁶ *Justice and Social Inclusion: The Challenges of Democracy in Guatemala*, Inter-Am C.H.R. Guatemala Country Report, OEA/Ser.L/V/II.118, Doc. 5 rev. 1, para. 219 (Dec. 29, 2003), <http://www.cidh.oas.org/countryrep/Guatemala2003eng/Chapter-IV.htm>.

²⁶⁷ *Human Rights and Indigenous Issues*, Report of the Special Rapporteur, Rodolfo Stavenhagen submitted to the Commission on Human Rights: Addendum Mission to Guatemala, E/CN.4/2003/90/Add.2, para. 27 (Feb. 24, 2003).

²⁶⁸ *Justice and Social Inclusion: The Challenges of Democracy in Guatemala*, Inter-Am C.H.R. Guatemala Country Report, OEA/Ser.L/V/II.118, Doc. 5 rev. 1, para. 219 (Dec. 29, 2003), <http://www.cidh.oas.org/countryrep/Guatemala2003eng/Chapter-IV.htm>.

²⁶⁹ *Human Rights and Indigenous Issues*, Report of the Special Rapporteur, Rodolfo Stavenhagen submitted to the Commission on Human Rights: Addendum Mission to Guatemala, E/CN.4/2003/90/Add.2, para. 27 (Feb. 24, 2003).

²⁷⁰ Oficina del Alto Comisionado de Naciones Unidas para los Derechos Humanos, Los desalojos en el Valle del Polochic—Una mirada a la problemática agraria y a la defensa de los derechos humanos de las comunidades

According to the Inter-American Commission, this history of expropriation has led to the current situation where “The percentage of land held in Indigenous hands is less than half of what it should be in relation to the number of Indigenous inhabitants.”²⁷¹

Guatemala’s legacy of colonialism severely harms indigenous peoples today. Indigenous peoples suffer from structural discrimination that is deeply rooted in the Guatemalan state and is present in all sectors of society. Efforts to obscure this history and the ongoing discrimination indigenous peoples suffer merely reduce the likelihood of the structural changes that are necessary to create a just and equitable society.

b. Overlap with Indigenous Lands and the Q’eqchi’ Maya People’s Opposition

The vast majority of the population affected by the proposed protected area is indigenous. According to official figures, 90% of the population is Q’eqchi’ Maya, and 10% is non-indigenous.²⁷² Some 68% of the total population lives in rural areas.²⁷³

There are approximately 725,000 Q’eqchi’ Mayans in Guatemala, most of whom live in the departments of Izabal, Alta Verapaz, and Petén.²⁷⁴ In all of Guatemala, around 230 Q’eqchi’ Maya communities are located in rural areas, and most are monolingual, speaking only Q’eqchi’. Forty-three Q’eqchi’ Maya communities are located within the proposed Sierra Santa Cruz protected area.²⁷⁵

According to the Q’eqchi’ Maya concept of *Ralch’och’*, all Q’eqchi’ Maya communities are daughters of the land and they consider the land to be their mother.²⁷⁶ The Q’eqchi’ Maya hold the land and conserve the natural resources in their communities in accordance with these traditional values and practices.

The majority of these Q’eqchi’ Maya communities lack state-issued land titles recognizing full collective ownership of the lands under their traditional possession. An

q’eqchi’s [The Evictions in the Polochic Valley: A Perspective on the Agrarian Issue and the Defense of the Q’eqchi’ Communities’ Human Rights], 35 (2013), <http://www.ohchr.org.gt/informes.asp>

²⁷¹ Only 23.6% of total land is in Indigenous hands. “This is not then surprising in a society that has been historically one that excludes, especially due to ethnic and gender reasons.” *Justice and Social Inclusion: The Challenges of Democracy in Guatemala*, Inter-Am C.H.R. Guatemala Country Report, OEA/Ser. L/V/II.118, Doc. 5 rev. 1, para. 259 (Dec. 29, 2003) <http://www.cidh.oas.org/countryrep/Guatemala2003eng/Chapter-IV.htm>.

²⁷² AEPDI/Defensoría Q’eqchi’, Report filed with the Inter-American Commission on Human Rights in Thematic Hearing: *Indigenous territories and protected areas in Guatemala*, Inter-Am. C.H.R. 131st Ordinary Sessions Period 1 (Mar. 10, 2008) (citing data provided in 2003 by the Planning Office of the Municipalities of El Estor and Livingston, Department of Izabal) (on file with the Indian Law Resource Center).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ AEPDI/Defensoría Q’eqchi’, *Report on the Case of Sierra Santa Cruz: Land Tenure Conflicts Facing the Communities in Protected Areas* 8 (Dec. 14, 2007) (on file with the Indian Law Resource Center).

²⁷⁶ AEPDI/Defensoría Q’eqchi’, Report filed with the Inter-American Commission on Human Rights in Thematic Hearing: *Indigenous territories and protected areas in Guatemala*, Inter-Am. C.H.R. 131st Ordinary Sessions Period 11 (Mar. 10, 2008) (on file with the Indian Law Resource Center).

assessment of thirty-seven of the Q'eqchi' Maya communities found that twenty-one, 49%, have land titles, fourteen, 32%, are in the process of getting land titles, and eight, 19%, are located in "private farms."²⁷⁷ The proposed zoning of the protected area will seriously affect the ability of all these communities to keep or obtain land titles and to use and manage their lands, territory, and natural resources.

In 1985, Guatemala's National Constitution recognized for the first time the existence of different ethnic groups.²⁷⁸ While this constitutional reform was a breakthrough in both political and legal terms, Guatemala still lacks a law that recognizes indigenous peoples' collective rights as distinct peoples within the nation-state, such as the right of self-determination, the right of self-government, and collective ownership of lands and natural resources. For this reason, indigenous peoples in Guatemala are either ignored as subjects of the law or treated as "peasant" or "agrarian" communities throughout land-titling procedures.²⁷⁹

In Guatemala, consideration of indigenous peoples' rights to lands, territories, and resources is largely absent from domestic laws, especially those related to conservation. For example, the Guatemalan Congress passed the Protected Areas Law in 1989 without any consultation with the indigenous peoples who own the land in the targeted areas. As a result, the law lists various indigenous territories, including the territory of the forty-three Q'eqchi' Maya communities located in Sierra Santa Cruz in the Department of Izabal, as areas to be declared as protected areas for conservation purposes.²⁸⁰ Neither the Protected Area Law nor the applicable municipal codes include the concerned Q'eqchi' Maya communities as legal entities entitled to participate in the planning and consideration of the protected area.

The taking of indigenous lands is a major issue in Sierra Santa Cruz. A local Q'eqchi' Maya organization documented the case of one individual's property, because it illustrates how the current land titling and registration system allows the taking of indigenous lands in Guatemala.²⁸¹ In 1925, the individual, a non-indigenous man, acquired a large farm *for free* at a public auction. This farm consisted of lands belonging to three Q'eqchi' Maya communities

²⁷⁷ AEPDI/Defensoria Q'eqchi', *Report on the Case of Sierra Santa Cruz: Land Tenure Conflicts Facing the Communities in Protected Areas* 33 (Dec. 14, 2007) (on file with the Indian Law Resource Center).

²⁷⁸ Article 66, *Protection of Ethnic Groups*, states that "Guatemala is made up of various ethnic groups among which are native groups of Mayan descent. The State recognizes, respects, and promotes their form of life, customs, traditions, forms of social organization, the wearing of Indian dress by men and women, their languages, and dialects."

²⁷⁹ See, e.g., Decree 24-99, Land Trust Fund Law, May 13, 1999, art. 3(c) (indicating that one of the goals of the Land Trust Fund agency created by this law is to ensure that "peasants", either in their individual or collective capacity, access the land and use the natural resources located therein). See also, Decree 1551-62, Agrarian Reform Law, Oct. 17, 1962, art. 77 (stating that "collective agrarian patrimony" can be established in favor of the "peasants" when, among other factors, their social conditions and lifestyle suggest so). None of these land-related laws acknowledge the existence of indigenous peoples or address their particular nature as distinct peoples.

²⁸⁰ Decree No. 4-89, Protected Areas Law, Feb. 7, 1989, art. 90 (identifying specific sites or regions in the country's interior as "areas of special protection" for conservation, including but not limited to Sierra de Santa Cruz, in the Department of Izabal).

²⁸¹ AEPDI/Defensoria Q'eqchi', *Report on the Case of Sierra Santa Cruz: Land Tenure Conflicts Facing the Communities in Protected Areas* 20-28 (Dec. 14, 2007) (on file with the Indian Law Resource Center).

located in part of Sierra Santa Cruz. This man was able to register his title, even though the registration was not lawful. The affected Q'eqchi' Maya communities on the other hand, were not able to get their lands titled and registered. In 1987, the three communities in question asked the National Institute for Agrarian Reform to survey their lands. The Institute completed the task and requested Guatemala's Real Estate Registry to register it. Their registration was refused, due to the man's prior unlawful land registration.²⁸²

According to one case-study, Guatemala's land titling agency processing of indigenous peoples' land claims has *de facto* stopped land titling procedures because the Protected Areas Law prevents such titling.²⁸³ The study also points out that, in most cases, either Guatemala's Protected Area National Counsel or Fundaeco have been awarded the lands that indigenous peoples claim in protected areas.²⁸⁴

Three years ago, a few municipalities in Guatemala began to officially recognize indigenous communities as subjects of law. For example, in 2012, the Municipality of El Estor in the department of Izabal began to register the legal personality of indigenous communities within its jurisdiction, so that they can be acknowledged as legal entities by all state agencies.²⁸⁵ In the view of some indigenous NGOs, such as AEPDI/Defensoría Q'eqchi', this is a step in the right direction, towards securing state-issued land titles for the indigenous communities located within protected areas.²⁸⁶ In early 2014, four communities within the Sierra de Las Minas Biosphere Reserve' buffer zone received such titles.²⁸⁷ According to the head of the Land Trust Fund, Guatemala's land titling agency, these "Are the first four communities in Guatemala's history that are provided with titles in spite of being located in a protected area; with these communities a new era breaking old schemes has started."²⁸⁸

However, indigenous peoples remain skeptical about the measure taken by the Municipality of Estor mentioned above. In part this is because they believe it falls short of actually recognizing either indigenous peoples' status as *peoples* or their collective rights. In addition, they contend that further reforms are needed to change existing laws affecting indigenous peoples' lands and resources rights, including the Protected Areas Law and the Mining Code. They are also skeptical because land titles issued under this legal framework allow the protected area regulations to take precedence over the communities' customary law and deny the communities' full exercise of their ownership, use and usufruct rights. Instead,

²⁸² *Id.* at 20-28.

²⁸³ Gerold Schmidt, *Territorios Indígenas y áreas protegidas: Tres casos y sus conclusiones* 6 [Indigenous Territories and Protected Areas: Three Cases and Its Conclusions], (Evangelischer Entwicklungsdienst e.V. ed. 2010), [http://www.simas.org.ni/files/publicacion/1310501449_EED_Territorios indígenas y áreas protegidas_3 casos.pdf](http://www.simas.org.ni/files/publicacion/1310501449_EED_Territorios_indígenas_y_áreas_protegidas_3_casos.pdf).

²⁸⁴ *Id.*

²⁸⁵ See Municipality of El Estor's Minute No. 24-2012, July 2012 (on file with the Indian Law Resource Center).

²⁸⁶ See AEPDI/Defensoría Q'eqchi', Manual para su Reconocimiento e Inscripción en el Registro Municipal: Comunidades Indígenas del Pueblo Maya y Xinca [Handbook for Recognition and Registry in the Municipality's Registry: Indigenous Communities of the Maya and Xinca People] (2014) (on file with the Indian Law Resource Center).

²⁸⁷ *Id.* at 49.

²⁸⁸ *Id.* quoting Mario Eddy Diaz, Manager of the Land Trust Fund, Remarks at a Meeting with Indigenous Communities located in the Sierra de Las Minas Biosphere Reserve (Jan. 24, 2014).

indigenous peoples are only able to exercise their rights within the limitations imposed by the management plans designed for each zone.²⁸⁹

Not all the problems with protected areas and indigenous peoples are a consequence of inadequacies and faults in Guatemalan law. Lack of due diligence on the part of conservationists and government officials to identify potentially affected indigenous peoples and their lands, to consult with affected indigenous peoples, and to gather information about their land and resource rights prior to the establishment of protected areas on indigenous lands can also threaten governance of the area and lead to violations of indigenous peoples' rights. According to a joint study conducted by IUCN and AEPDI/Defensoría Q'eqchi', four factors contribute to conflicts arising out of overlaps between protected areas and indigenous territories: (1) lack of assessment of right-holders and the rights in question prior to the declaration of protected areas; (2) lack of prior consultation with indigenous peoples about the protected areas' boundaries, zoning, and management plan; (3) conflicts between the protected areas' managers and indigenous peoples because of lack of clarity about land rights; and (4) bureaucratic obstacles for indigenous peoples to acquire land titles, especially delaying or refusing titles on the ground that the Protected Areas Law prevents granting them.²⁹⁰

It can be no surprise that the Q'eqchi' Maya communities do not agree with the establishment of the Sierra Santa Cruz protected area. As a result of a two-year consultation process carried out by AEPDI/Defensoría Q'eqchi', these communities decided to oppose this state-promoted conservation initiative.²⁹¹ This opposition is based on the failure of the Guatemalan government to issue land titles recognizing the communities' full collective ownership of the lands and natural resources under their traditional possession and use.²⁹² Opposition is also based on the fact that the protected area concept is not part of the communities' worldview or legal system.²⁹³

The Q'eqchi' Maya communities have proposed alternative actions, which would be consistent with their worldview and their rights as a distinct people. They have called on the government of Guatemala to issue land titles recognizing their full ownership of their lands and natural resources, not merely use rights.²⁹⁴ They have also proposed that Sierra Santa Cruz be

²⁸⁹ See e.g., Guatemala's General Registry of Property, Public Instrument (Feb. 4, 2014) (transferring property to the Buena Vista II Indigenous Community but limiting its use because it was declared to be part of a protected area in accordance with Legislative Decree No. 49-90 that declares the Sierra de Las Minas Biosphere Reserve to be a protected area) (on file with the Indian Law Resource Center).

²⁹⁰ IUCN & AEPDI/Defensoría Q'eqchi', *Áreas Protegidas, extrativismo y derechos colectivos: La territorialidad Q'eqchi' en el Polochic-Sarstun* [Protected Areas, Extraction, and Collective Rights: The Q'eqchi' Territoriality in Polochi-Sarstun, Guatemala], Guatemala, Mar. 2014, p. 39 (on file with the Indian Law Resource Center).

²⁹¹ AEPDI/Defensoría Q'eqchi', Report filed with the Inter-American Commission on Human Rights in Thematic Hearing: *Indigenous territories and protected areas in Guatemala*, Inter-Am. C.H.R. 131st Ordinary Sessions Period 11 (Mar. 10, 2008) (on file with the Indian Law Resource Center).

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* See also Video of Thematic Hearing: Indigenous Territories and Protected Areas in Guatemala, held at the Inter-American Commission on Human Rights, Mar. 10, 2008, <http://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=En&Session=12>.

declared a “Communal Land and Natural Resources Area” instead of a protected area.²⁹⁵ A Communal Land and Natural Resources Area, or *Xkolb’al*, is a Q’eqchi’ Maya concept that refers to an indigenous territory where lands and natural resources are used, managed and preserved by the Q’eqchi’ Maya communities themselves.²⁹⁶ The Q’eqchi’ Maya communities consider that the land, the air, the rivers, and natural resources are part of a comprehensive entity to which the communities belong. The concept of a protected area existing outside of that unity is alien.²⁹⁷

c. Impacts on the Q’eqchi’ Maya People

In view of the problems and issues described above, it appears to be a practical certainty that the establishment of Sierra Santa Cruz as a protected area will lead to serious human rights violations against the forty-three Q’eqchi’ Maya communities. It will violate their right of self-determination, because a non-governmental conservation organization will be given authority to manage their traditional lands and authorize the use of their natural resources. This organization does not represent the Q’eqchi’ Maya communities that own the lands, nor is it the communities’ legitimate decision-making body. This conservation organization will, however, undermine the authority of the communities’ democratically elected governing institutions and traditional authorities. The communities’ customary law governing internal affairs and regulating relations within the community will be displaced by foreign rules and procedures imposed by a non-Q’eqchi’ Maya organization.

Establishing the Sierra Santa Cruz protected area will also deprive the Q’eqchi’ Maya communities of full ownership of their lands and natural resources. It will violate their ownership rights based on the traditional possession of lands, and will also overrule the communities’ land claims that are now being processed by the Land Trust Fund, Guatemala’s land-titling agency. The protected area will seriously affect the communities’ special relationship to their lands and natural resources, because it will prevent the communities from accessing sacred sites located in the core zones where humans are not allowed and prevent or restrict their traditional use of their natural resources for medicinal and spiritual purposes.

d. Conclusion

In sum, the proposed Sierra Santa Cruz protected area illustrates a serious failure to respect indigenous peoples’ self-determination and collective ownership rights. This failure appears very likely to interfere with or prevent the establishment of the protected area or to be an obstacle to achieving the conservation goals of the area. These risks could be reduced by recognizing and actively protecting indigenous rights in the planning and management of the protected area. Better still, domestic law could be changed to give legal recognition to indigenous self-determination and land and resource rights, and conservation organizations could

²⁹⁵ AEPDI/Defensoría Q’eqchi’, Report filed with the Inter-American Commission on Human Rights in Thematic Hearing: *Indigenous territories and protected areas in Guatemala*, Inter-Am. C.H.R. 131st Ordinary Sessions Period 11 (Mar. 10, 2008) (on file with the Indian Law Resource Center).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

support and help implement protected areas that are planned, led and managed by indigenous peoples or communities.

PART FOUR: OBSERVATIONS

This *Guide* is intended as a starting point for conservation actors and all those planning and implementing conservation initiatives – a way to urge careful thinking and positive consideration of indigenous peoples' rights under international human rights law, including the UN Declaration, and other legal standards including indigenous peoples' customary law.

While there are many examples in Mesoamerica, the *Guide* and these observations take into account our three case studies to highlight not only missed opportunities for collaborations with indigenous peoples, but also some of indigenous peoples' deepest concerns, strengths and abilities, and their collective rights to the conservation and protection of the environment and their lands, territories, and resources. These observations also draw from lessons learned in our three decades of work with indigenous peoples in Mesoamerica, which cannot be fully discussed here. Again, as a start, these observations reflect an initial short list of key reflections and suggestions for moving forward.

It is hoped that the *Guide* and these observations will help conservation actors to develop better collaborative conservation initiatives, including goals and processes that recognize and respect the rights of indigenous peoples and their traditional knowledge, as well as the considerable contributions that indigenous peoples can make as partners to achieve lasting advances in the conservation of Mesoamerica.

Indigenous Peoples in Mesoamerica

Indigenous Peoples as Conservation Partners. To advance accountability and achieve the greatest success throughout all phases of conservation initiatives, indigenous peoples' governments should be included as conservation partners. Identifying and distinguishing between indigenous peoples' governments and representative bodies on the one hand, and various forms of civil society organizations on the other is a prerequisite to such inclusiveness. This is so because indigenous peoples' governments, unlike NGOs, are rights holders within international law and have the authority and legal capacity to enter into agreements that will affect their communities. While there may be good reasons to include NGOs in project development and decision making, these reasons are distinct and largely separate from the legal obligations to indigenous peoples.

International Law as a Measuring Stick for Conservation Design. In designing and implementing conservation initiatives and projects, measuring domestic law against indigenous peoples' rights affirmed in international law can be an effective way to ensure respect for indigenous peoples' collective ownership of lands and their right to self-determination. Towards that end, a human rights impact assessment can be very useful in designing conservation initiatives and projects that will respect indigenous peoples' rights. Such an assessment can identify indigenous rights-holders and human rights risks, with particular attention to risks to indigenous peoples' primary rights to self-determination, collective ownership of lands, and permanent sovereignty over natural resources, and it can be shared with the indigenous peoples' government or representative body as part of the process of seeking free, prior, and informed consent.

Ownership of Lands and Resources in Indigenous Territories

Sustainability, Governance and In Situ Conservation. To ensure that sustainability strategies, governance, and *in situ* conservation initiatives in indigenous territories are successful, it is decisive that indigenous peoples' full collective ownership of lands and governmental authority over natural resources are clearly recognized by law and respected by state agencies and third parties. In guaranteeing indigenous peoples' full exercise of these rights, it is becoming absolutely necessary that conservation actors, in consultation with indigenous peoples, work together to prevent encroachment and drug trafficking in indigenous territories.

Indigenous Land Titles and Resource Management and Uses. The most effective conservation initiatives are mindful of indigenous land titles and resource management. Proposed protected area plans or other conservation measures should proceed cautiously after indigenous peoples' lands are demarcated, titled, and registered and must ensure that indigenous peoples will not be relocated from their territories. Conservation measures can be analyzed and vetted early on to ensure that they will not impede or alter indigenous peoples' management and use of their natural resources, including their ancestral agricultural, fishing, gathering, and hunting practices, and access to cultural and sacred sites.

Redress. If indigenous peoples' lands, territories, and resources have been confiscated, taken, occupied, used, or damaged, reasonable redress should be available, such as providing for a right of return of land, if that is possible, or if return is not possible, compensation in lands, territories, and resources equal in quality, size, and legal status to what was taken, unless the indigenous peoples concerned freely agree on monetary compensation or other appropriate redress.

Participatory Project Design. The best conservation and protected area project design employs participatory methodology at all phases. Early and ongoing involvement of indigenous peoples as partners can better accommodate indigenous peoples' decision making and often avoid unilateral decisions subject to later challenges. Initially, it is critical to consider whether indigenous peoples already have conservation initiatives, designated areas, or practices in place that, in consultation with indigenous peoples, should be recognized and strengthened by improving indigenous peoples' management skills, respecting their traditional knowledge, and acknowledging their sovereignty over their natural resources. It is also critical to assess the relevant rules of customary and/or positive law of the indigenous peoples concerned and identify their governmental authorities. Environmental management capacity building for indigenous peoples can include trainings in environmental diagnosis, planning, administration, monitoring, and evaluation.

Authority Over Lands and Resources in Indigenous Territories

Indigenous Peoples' Conservation Projects. When envisioning the creation of a protected area or the implementation of a conservation initiative with similar implications in indigenous territories, indigenous peoples' self-determined conservation institutions, practices, zoning, and related decisions should be fully supported and be given precedence over externally imposed decisions.

Conservation Project Benefits Derived from Resources. In evaluating and monitoring the distribution or sharing of benefits from conservation projects, it is useful to keep in mind that indigenous peoples, as rights-holders and owners of their lands, territories, and natural resources, should receive benefits derived from these resources and participate in monitoring the distribution or sharing of these benefits.

Conservation Project Non-Monetary Benefits. Indigenous peoples are uniquely situated to be extremely effective partners in maximizing a conservation project's non-monetary benefits, which may include improved local livelihoods; secure, state-issued land titles recognizing indigenous peoples' collective ownership; strengthened capacity of indigenous peoples' forest governance institutions; improved access to sacred sites; and conservation of existing biological diversity and ecosystems.

Relationship Between Indigenous Peoples and the State. By including an analysis of the relationship between indigenous peoples and the state in conservation project design, any gaps in domestic law or in the state's implementation of international law relating to indigenous peoples' self-determination or other rights can be identified early. This allows and encourages conservation actors and indigenous peoples to work together to ensure that the project complies with international legal standards.

Annex 1: Selected References

This short selection of works used in preparing the *Guide* lists items likely to be of general interest.

Part One

S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 Arizona Journal of International & Comparative Law 1 (2002).

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Part Two

Robert T. Coulter, *The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples*, 15 UCLA Journal of International Law & Foreign Affairs 1 (2010).

Erica-Irene A. Daes, UN Special Rapporteur, *Indigenous Peoples' Permanent Sovereignty over Natural Resources* (2004) http://ap.ohchr.org/documents/alldocs.aspx?doc_id=9700.

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<http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf>.

Part Three

David Kaimowitz, Angelica Faune, and Rene Mendoza, *Your Biosphere is My Backyard: The Story of Bosawas in Nicaragua*, Center for International Forestry Research (April 2003)
<http://www.bio-nica.info/biblioteca/Kaimowitz2003.pdf>.

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Caleb Steven, Robert Winterbottom, Jenny Springer, Katie Reytar, *Securing Rights, Combating Climate Change, How Strengthening Community Forest Rights Mitigates Climate Change*, World Resources Institute (2014)
http://www.wri.org/sites/default/files/securingrights_report_0.pdf.

Annex 2: Glossary

Customary law: Law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of social and economic system that they are treated as if they were laws.

Domestic law: Law that regulates the domestic affairs of a state, including laws at the national, provincial, regional or local levels. International law scholars also call it “municipal law.”

International law: “The legal system governing the relationship between nations; more modernly, the law of international relations, embracing not only nations but also such participants as international organizations and individuals (such as those who invoke their human rights or commit war crimes).” BLACK’S LAW DICTIONARY 835 (8th ed., West Group 2004).

Nation: “A large group of people having a common origin, language, and tradition and usually constituting a political entity.” BLACK’S LAW DICTIONARY 1050 (8th ed., West Group 2004).

Payment for ecosystem services: Incentives offered to landowners in exchange for managing their land to provide an ecological or environmental service, such as carbon sequestration or preservation of biodiversity.

Positive law: “A system of law promulgated and implemented within a particular political community by political superiors, as distinct from moral law or law existing in an ideal community or in some nonpolitical community.” BLACK’S LAW DICTIONARY 1200 (8th ed., West Group 2004).

State: “The political system of a body of people who are politically organized; the system of rules by which jurisdiction and authority are exercised over such a body of people.” BLACK’S LAW DICTIONARY 1443 (8th ed., West Group 2004).

Treaty: “[A]n international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Vienna Convention on the Law of Treaties Art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

Annex 3: Acronyms and Terms

AEPDI	Asociación Estoreña para el Desarrollo Integral
CSOs	Civil Society Organizations
CEESP	Commission on Environmental, Economic and Social Policy
Fundaeco	Foundation for Eco-Development and Conservation
Inter-American Commission	Inter-American Commission on Human Rights
Inter-American Court	Inter-American Court of Human Rights
ILO	International Labor Organization
IUCN	International Union for the Conservation of Nature
MASTA	Moskitia Asla Takanka of Honduras
MISURASATA	Miskitos, Sumos and Ramas working together with the Sandinistas
MOPAWI	Mosquitia Pawisa Apiska
NGOs	Non-Governmental Organizations
NRGF	Natural Resource Governance Framework
ORMAC	Mesoamerica and the Caribbean Regional Office
SATIIM	Sarstoon Temash Institute for Indigenous Management
SPICEH	Specialist Group on Indigenous Peoples, Customary & Environmental Laws & Human Rights
TGER	The Theme on Governance, Equity and Rights
TNC	The Nature Conservancy
UN	United Nations
UN Declaration	UN Declaration on the Rights of Indigenous Peoples
UNESCO	UN Educational, Scientific and Cultural Organization
US	United States
USAID	US Agency for International Development