

Indigenous Land Rights
Are Human Rights
Domestic & International Jurisprudence

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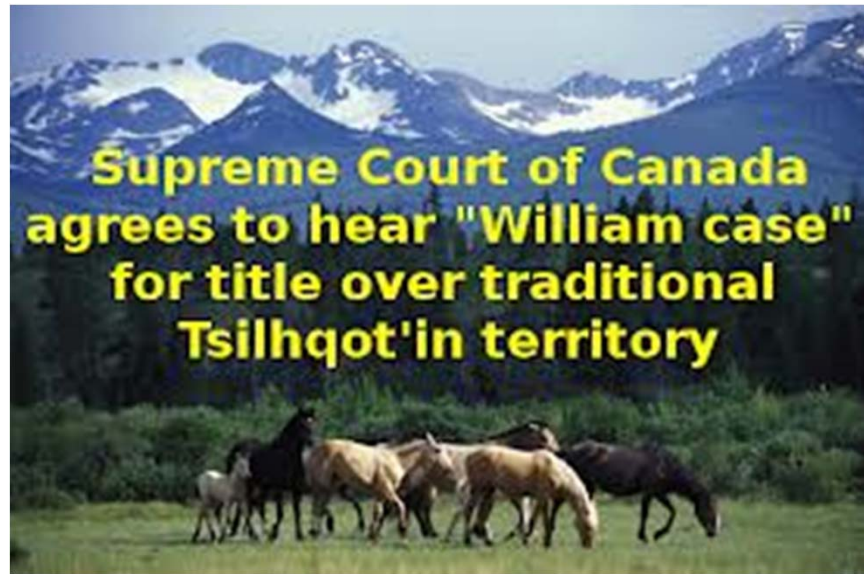
Domestic law

- Constitutional protection under s. 35
- The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- However no legislative implementation framework
- Have to rely Common law

Common law Aboriginal Rights

- A common law freedom is not like a human rights type claim
- Common law freedom is built up as general principle established by individual cases
- Calder SCC
- Delgamuukw SCC
- Williams SCC

Tsilhqot'in William v. Canada



BCCA Decision

- “Aboriginal nations were not recognized as nation states by the European nations colonizing North America”. European explorers considered that by virtue of the “principle of discovery” they were at liberty to claim territory in North America on behalf of their sovereigns. While it is difficult to rationalize that view from a modern perspective, the history is clear.
- ... there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.

- Exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law.
- It supports the views that title must be claimed on a site-specific basis, and that a certain regularity and intensity of presence is needed before it will count as “occupancy”.

- The problem for the Tsilhqot'in is that mere occupancy of land does not necessarily establish aboriginal title. If an aboriginal group has used lands only for certain limited activities and not intensively, the group might have an aboriginal right to carry on those activities, but it doesn't have title.

- Case law does not support the idea that title can be proven based on a limited presence in a broad territory.
- Rather, Aboriginal title must be proven on a site-specific basis. A title site may be defined by a particular occupancy of the land (e.g., village sites, enclosed or cultivated fields) or on the basis that definite tracts of land were the subject of intensive use (specific hunting, fishing, gathering, or spiritual sites).
- In all cases, however, Aboriginal title can only be proven over a definite tract of land the boundaries of which are reasonably capable of definition

BCCA

- This view of Aboriginal title and Aboriginal rights is fully consistent with the case law. It is also consistent with broader goals of reconciliation.
- There is a need to search out a practical compromise that can protect Aboriginal traditions without unnecessarily interfering with Crown sovereignty and with the well-being of all Canadians.
- An overly-broad recognition of Aboriginal title is not conducive to these goals.

International framework

- Hul'qumi'num Treaty Group and Amnesty International intervened at SCC
- Both argued that SCC should begin to incorporate international law into domestic aboriginal law
- HTG submitted that there is an **implementation gap** of domestic and international law respecting aboriginal rights; as evidenced in the admissibility report of the IACHR in the HTG case; being satisfied that there were **no effective domestic remedies** to address the resolution of the aboriginal land issues HTG raised.

- It was submitted that current land claim litigation and treaty negotiation processes are too lengthy, too costly, too complicated, too inflexible and uncertain and if the BCCA opinion is upheld, it will become even more so.
- HTG lastly submitted that the only acceptable **practical compromise** is to construct a new paradigm, based on the promotion and protection of human rights by integrating the framework of international law principles dealing with indigenous human rights into the fabric of the domestic aboriginal rights law to provide a way forward to achieving reconciliation through more effective processes.

International law Human Rights

Charter of the United Nations:

Commits Member States, including Canada, to “the principle of equal rights and self-determination of peoples” and to promote respect “for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”

Universal Declaration of Human Rights:

Article 17 – Everyone has the right to own property alone as well as in association with others



The International Covenant on Civil and Political Rights (ICCPR)

Article 1:

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

Article 27:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to those minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”



Right to property

ILO Convention No. 169 - Article 14

- 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.**
- 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.**
- 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.**

Inter-American Human Rights System (OAS)

American Convention on Human Rights

Article 2: The Right to Equality Before the Law

“[A]ll persons are equal before the law and have the rights and duties established in the Declaration, without distinction as to race, creed, sex, language, creed or any other factor.”



Article 21: The Right to Property

“Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.”



- IAHRIS is taking a progressive and active approach to indigenous human right to property
- Linked indigenous rights over traditional lands to established notion of property
- Central to this approach is the principle that possession of land *per se* qualifies for international legal recognition notwithstanding the communities lack of real title under domestic law

The Case of Awas Tingni vs. Nicaragua



- Nicaragua violated the right to property (article 21) by granting concessions to conduct logging on Awas Tingni traditional lands and by not titling and demarcating those lands in favor of the community. The right to property includes the collective right of indigenous peoples to the enjoyment of their traditional lands and natural resources.
- Nicaragua violated the right to an effective remedy (articles 25, together with articles 1 and 2) by failing to ensure enjoyment of the indigenous land rights that are affirmed in the Nicaraguan Constitution and Laws.
- “...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.”

- Nicaragua must cease acts which could cause agents of the State, or third parties, to affect the existence, value, use or enjoyment of the property of the Awas Tingni community.
- The State of Nicaragua must adopt measures of legislative, administrative, and whatever other character for the effective delimitation, demarcation, and titling of indigenous lands
- The land titling process must be in accordance with the customary law, values, usage, and customs of the communities and with their full participation.



The Case of Dann vs. the United States

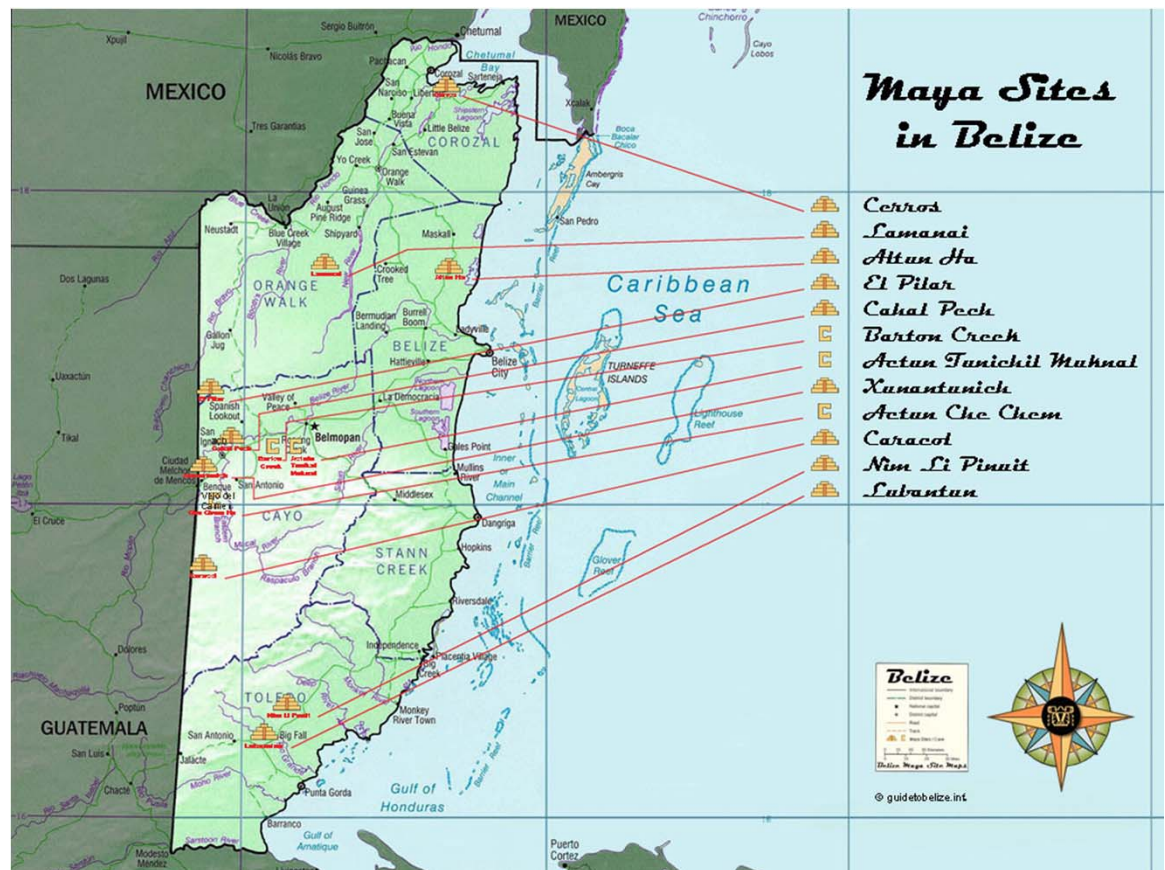


- For more than two decades the Dann sisters have asserted aboriginal title rights to Western Shoshone ancestral lands that the United States considers to be extinguished by “gradual encroachment” of non-Indians, including large-scale gold mining and other environmentally damaging activity on lands still used by the Western Shoshone.
- After losing an appeal to the U.S. Supreme Court, the Dann sisters filed a petition with the Inter-American Commission, which responded with a favorable decision on admissibility, stating that the “Danns had invoked and exhausted domestic remedies of the United States.”
- The Commission concluded that the violations complained of are “continuing,” “on going,” and are a *prima facie* violation of rights protected by the inter-American system. On this reasoning, the Commission declared the Danns’ case admissible.

- United States failed to adequately address Western Shoshone claims to ancestral lands through administrative and judicial proceedings, “contrary to articles 2 (right to equality), 18 (right to fair trial) and 23 (right to property) of the American Declaration.”
- The Commission used an “evolutive approach” in interpreting the obligations of the United States under the American Declaration by applying the entire spectrum of international human rights legal developments relevant to indigenous peoples, including rights under UN and other international instruments.

“Where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, [indigenous peoples have the right to] recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.”

Maya Indigenous Communities of the Toledo District vs. Belize





- Filed on behalf of thirty-seven indigenous Maya communities, the petition alleged that the State's grant of logging and oil concessions to over 700,000 acres of rain forest in Maya traditional territories failed to recognize and protect Maya traditional land and resource tenure rights.
- In alleging that that Belize had violated the human rights of the Maya indigenous communities, the petitioners cited article 23 of the American Declaration, protecting indigenous peoples' right to property, and argued that Belize had failed to take effective measures to recognize the communal property rights to the lands traditionally occupied and used by the Maya.

- Belize was found to have violated article 23 by failing to take effective measures to recognize the communal property rights to the lands traditionally occupied and used by the Maya.
- Belize specifically violated article 23 by granting concessions to third parties to utilize the traditional property and resources of the Maya people without obtaining “effective consultations” and by granting concessions to “lands that must be delimited, demarcated and titled or otherwise clarified and protected...”.
- “[T]he right to use and enjoy property may be impeded when the State itself, or third parties acting with the acquiescence or tolerance of the State, affect the existence, value, use or enjoyment of that property.”

116. Accordingly, the organs of the inter-American human rights system have recognized that the property rights protected by the system are not limited to those property interests that are already recognized by states or that are defined by domestic law, but rather that the right to property has an autonomous meaning in international human rights law. In this sense, the jurisprudence of the system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition....

- While the Commission has considered the legislation and jurisprudence of certain domestic legal systems in identifying international legal developments relating to the status and treatment of indigenous people, the communal property right of the Maya people is not dependent upon particular interpretations of domestic judicial decisions concerning the possible existence of aboriginal rights under common law.

131. Accompanying the existence of the Maya people's communal right to property under Article XXIII is a correspondent obligation on the State to recognize and guarantee the enjoyment of this right. In this regard, the Commission shares the view of the Inter-American Court of Human Rights that this obligation necessarily requires the State to effectively delimit and demarcate the territory to which the Maya people's property right extends and to take the appropriate measures to protect the right of the Maya people in their territory, including official recognition of that right. In the Commission's view, this necessarily includes engaging in effective and informed consultations with the Maya people concerning the boundaries of their territory, and that the traditional land use practices and customary land tenure system be taken into account in this process.

Saramaka People v. Suriname



“ongoing and continuous effects” associated with the construction of the Afobaka dam

- “[d]uring the 1960s, the flooding derived from the construction of a hydroelectric dam displaced Saramakas and created the so-called ‘transmigration’ villages”.
- The lack of consent by the Saramaka people for said construction; the number of displaced Saramakas from the area; the painful effect the construction had on the community; the reduction of the Saramaka people’s subsistence resources; the destruction of Saramaka sacred sites; the lack of respect for the interred remains of deceased Saramakas; the environmental degradation caused by foreign companies that have received mining concessions in the area, and the State’s plan to increase the level of the dam to increase power supplies, which will presumably cause the forcible displacement of more Saramakas and which has been the object of a complaint filed by the Saramakas before domestic authorities in the year 2003.



- 105. The Court observes that although so-called judge-made law may certainly be a means for the recognition of the rights of individuals, particularly under common-law legal systems, the availability of such a procedure does not, in and of itself, comply with the State's obligation to give legal effect to the rights recognized in the American Convention.
- That is, the mere possibility of recognition of rights through a certain judicial process is no substitute for the actual recognition of such rights. In any case, the right of the members of the Saramaka people in particular, or members of indigenous and tribal communities in general, to collectively own their territory has not, as of yet, been recognized by any domestic court in Suriname.

- The State's obligation to provide judicial recourse is not simply met by the mere existence of courts or formal procedures, or even by the possibility of resorting to the courts.
- Rather, the State has to adopt affirmative measures to guarantee that the recourses it provides through the justice system are "really effective for determining the existence of a human rights violation and providing the corresponding compensation."

Sawhoyamaxe Indigenous Community v. Paraguay



Paraguay restituirá sus tierras
ancestrales a una comunidad indígena

- The members of the Sawhoyamaya Community “are not by the road because they like to, but because they are near the area they are claiming,” which they cannot “enter without permission,” as “they say those lands are private property.”
- Formerly, “when [the landowners] were not such a nuisance for [them], [they] could practice their rites and customs,” but currently this is very difficult, as they live alongside the highway.

- The following conclusions are drawn from the foregoing:
- 1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title;
- 2) traditional possession entitles indigenous people to demand official recognition and registration of property title;
- 3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and

Cont.

- 4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights.

Yakaye Axa v Paraguay



- Complaint alleging the State's failure to acknowledge indigenous communities property rights over ancestral land.
- Years ago, private landowners moved in and took over their lands. Indigenous families were dispersed among privately owned cattle ranches, where many were mistreated and exploited.

- **To guarantee the right of indigenous peoples to communal property, it is necessary to take into account that the land is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values. In connection with their milieu, their integration with nature and their history, the members of the indigenous communities transmit this non-material cultural heritage from one generation to the next, and it is constantly recreated by the members of the indigenous groups and communities.**
- **While Paraguay recognizes the right to communal property in its own legal order, it has not taken the necessary domestic legal steps to ensure effective use and enjoyment by the members of the Yakye Axa Community of their traditional lands, and this has threatened the free development and transmission of their traditional practices and culture, in the terms set forth in the previous paragraph**

- Article 64 of the Paraguayan Constitution establishes that
- [i]ndigenous peoples have the right to communal ownership of the land, of a sufficient extent and of sufficient quality for conservation and development of their own manner of life. The State will provide these lands to them free of cost, and these will be non-encumberable, untransferable, inextinguishable, and they cannot serve as guarantees for contractual obligations or be rented; also, they will not be subject to taxation.
- Indigenous peoples may not be moved or removed from their habitat without their explicit consent.

- **Previously this Court as well as the European Court of Human Rights have asserted that human rights are live instruments, whose interpretation must go hand in hand with evolution of the times and of current living conditions. Said evolutionary interpretation is consistent with the general rules of interpretation embodied in Article 29 of the American Convention, as well as those set forth in the Vienna Convention on Treaty Law.**
- **In this regard, this Court has stated that interpretation of a treaty should take into account not only the agreements and documents directly related to it (paragraph two of Article 31 of the Vienna Convention), but also the system of which it is a part (paragraph three of Article 31 of said Convention).**
- **In the instant case, in its analysis of the scope of Article 21 of the Convention, mentioned above, the Court deems it useful and appropriate to resort to other international treaties, aside from the American Convention, such as ILO Convention No. 169, to interpret its provisions in accordance with the evolution of the inter-American system, taking into account related developments in International Human Rights Law.**

- In this regard, the Court has pointed out that:
- The *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law.

Endorois v. Kenya



In the early 1970s
Kenya's pastoralist
Endorois community
was forcibly displaced
from their ancestral land.



- The Complainants argue that the Endorois have always been the *bona fide* owners of the land around Lake Bogoria. They argue that the Endorois' concept of land did not conceive the loss of land without conquest. They argue that as a pastoralist community, the Endorois' concept of "ownership" of their land has not been one of ownership by paper. The Complainants state that the Endorois community have always understood the land in question to be "Endorois" land, belonging to the community as a whole and used by it for habitation, cattle, beekeeping, and religious and cultural practices.

209. In the view of the African Commission, the following conclusions could be drawn: (1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title;

(3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith;

and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights. The instant case of the Endorois is categorised under this last conclusion.

The African Commission thus agrees that the land of the Endorois has been encroached upon.

Hul'qumi'num Treaty Group v. Canada



Admissibility ruling

- In this ruling, the IACHR found that “by failing to resolve the HTG claims with regard to their ancestral lands, the BCTC process has demonstrated that it is not an effective mechanism to protect the right [to property] alleged by the HTG”.
- Indeed, examining the government’s position that if a First Nation does not wish to accept its terms negotiating, that it can litigate, the IACHR noted that “there is no due process of law to protect the property rights of the HTG to its ancestral lands”

Admissibility ruling

- The IACHR observed that “the legal proceedings mentioned above [the Canadian court cases on aboriginal title] do not seem to provide any reasonable expectations of success, because Canadian jurisprudence has not obligated the State to set boundaries, demarcate, and record title deeds to lands of indigenous peoples, and, therefore, in the case of HTG, those remedies would not be effective under recognized general principles of international law.”

IACHR admissibility ruling

- IACHR has found on an examination of *prima facie* evidence and legal arguments put forward by HTG, that they tend to characterize alleged violations of Articles II (right to equality before the law), III (right to profess, manifest and practice a religious faith), XIII, (right to culture) and XXIII (right to property) of the American Declaration of the Rights and Duties of Man by Canada against the Hul'qumi'num peoples.