LAND RIGHTS OF THE GARIFUNA OF BELIZE: A PRELIMINARY ANALYSIS UNDER DOMESTIC AND INTERNATIONAL LAW

prepared for the

NATIONAL GARIFUNA COUNCIL

by

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I. EXECUTIVE SUMMARY

This report is intended to provide the National Garifuna Council ("NGC") with information that may be used to develop a legal strategy for the assertion of Garifuna land rights in Belize. That said, it should be acknowledged from the outset that the resolution of any such land rights claim would most likely be achieved through negotiations with the Government of Belize ("GOB"), rather than through domestic litigation or any international procedure. Generally speaking, a negotiated resolution would be preferable for both the Garifuna people and the Government, as it has the potential to be concluded more quickly, at less expense, and in a manner customized to address the particular needs and desires of the parties, as well as the political, economic and social realities of present-day Belize. The primary purpose then of this report is to provide the NGC with sound legal arguments that can be used to strengthen the position of the NGC when it sits down at the bargaining table with the Government. Obviously, if the Government of Belize knows that the NGC is in a position to seriously pursue domestic litigation or internationally available procedures, this may encourage it to work with the NGC to reach an equitable resolution. Of course, if the Government is unwilling to actively pursue good faith negotiations with the NGC, the NGC may find that it has no alternative but to take formal legal action.

Although this report is focused on domestic and international law, the existence of Garifuna land rights depends not only on matters of law, but also on matters of fact. Should the NGC decide to pursue a land claim on behalf of the Garifuna people, it will be necessary for the NGC to compile a great deal of factual evidence in order to support the claim. The evidence will need to include information about the Garifuna people's traditional customs and way of life, their occupation and use of particular lands, and their attachment to these lands. The mapping project undertaken by the Maya of the Toledo District of Belize provides one example of how to go about compiling this type of evidence.[1] It will also be necessary to obtain the testimony of expert witnesses, such as anthropologists and historians. Oral history in the form of stories, songs and the personal recollections of Garifuna individuals may also be an important source of evidence.[2]

While the precise nature and scope of Garifuna land rights cannot be determined until additional factual research has been conducted, it is the conclusion of this report that there is a strong legal argument that the Garifuna do possess some form of land rights which are entitled to protection under domestic and international law. Therefore, further actions to develop the land claim and to seek negotiation of a settlement thereof with the Government of Belize are recommended.

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[1] *See* TOLEDO MAYA CULTURAL COUNCIL & TOLEDO ALCALDES ASSOCIATION, MAYA ATLAS: THE STRUGGLE TO PRESERVE MAYA LAND IN SOUTHERN BELIZE (1997).

[2] *See Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 (Canada), para. 82 (hereinafter "*Delgamuukw*") (holding that due to difficulty of proving aboriginal rights originating in distant times before there were written historical records, such claims "demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples" as expressed in their oral history).

SPECIFIC RECOMMENDATIONS FOR THE SHORT TERM

- More historical/anthropological research regarding the traditional use and occupancy of lands in Belize by the Garifuna

- NGC participation in the design and implementation of the IDB-funded land registration program being undertaken in Belize (see Part VI.A of this report)

- Workshops to educate the Garifuna people about indigenous and minority rights and to build support among the people for the land claim

- Seek to have GOB agree that no Garifuna person will be required to move off the lands they currently occupy pending resolution of the Garifuna land claim

- Notify the Inter-American Human Rights Commission that the Garifuna are asserting rights to lands and resources in Belize, so that the Commission is aware of this when they are assisting the Maya in the negotiation of their settlement with the GOB

- Seek agreement from the GOB that any agreement negotiated with the Maya in the settlement of the Toledo Maya land claim will only apply to the Maya and will not impact any indigenous rights of the Garifuna, unless the Garifuna are allowed to have input in that process

- Educate UNESCO about the land claim with a view to possibly enlisting UNESCO's assistance in the negotiations with the GOB

II. INTRODUCTION

The purpose of this report is to summarize and evaluate the various domestic and international law provisions which provide support for a claim to land rights by the Garifuna people of Belize. The report begins by setting out some of the factual background that is pertinent to the Garifuna land claim, including the history of the Garifuna's dispossession of their St. Vincent homeland by the British, their forced relocation to Central America and their subsequent migration into Belize. Next, the report considers the rights to land that the Garifuna may possess under the domestic laws of Belize. Following consideration of domestic law issues, the report then turns to the international law arena and outlines the land rights of the Garifuna under the growing body of international human rights law. In addition to an analysis of the international and regional treaties which are binding upon Belize, the report also considers binding and emerging principles of customary law, as well as the non-legal, but highly influential, requirements of international financial institutions.

III. FACTUAL BACKGROUND

A. GARIFUNA ORIGINS

The Garifuna (formerly known as the "Black Caribs") are a people of African and Amerindian descent who peacefully inhabited the beautiful and fertile Caribbean island of St. Vincent until the island was colonized by the British in the 1700s. The Garifuna people fiercely resisted colonization, insisting that they would rather die than give up their lands.[3] As a result of their resistance, many of the Garifuna were killed by the British,[4] over 1,000 of their homes and 200 of their canoes were burned, their crops were destroyed and their food stores were confiscated.[5] In addition, 4,195 of the Garifuna survivors were forcibly removed from St. Vincent in 1796 and sent to a prison camp on the island of Baliceaux.[6] Some 2,400 of these died during their five months of internment, as a result of disease and malnutrition.[7] In 1797, the remaining Garifuna on Baliceaux were relocated by the British to the Honduran island of Roatan.[8] Reduced in number by as much as 75%, suffering from illness, in unfamiliar territory and left with inadequate supplies, the Garifuna nevertheless managed to survive and began migrating from Roatan into other parts of Central America.[9]

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3 NANCIE L. GONZALEZ, SOJOURNERS OF THE CARIBBEAN: EHTNOGENESIS AND ETHNOHISTORY OF THE GARIFUNA 21 (1988).

4 Although estimates of the pre-colonization Garifuna population on St. Vincent vary widely, Gonzalez indicates that a range of from 7,000 to 8,000 is reasonable. *Id*. at 17. The number of Garifuna deported from the island in 1796 was only 4,195. *Id*. at 21.

5 *Id*.

6 *Id*.

7 *Id*.

8 *Id*. at 22-23, 39.

9 *Id*. at 34, 41.

B. GARIFUNA SETTLEMENT IN BELIZE

While a full history of Garifuna settlement in Belize is beyond the scope of this report (and the expertise of this author), the following is an outline of some of the historical events of relevance to the Garifuna land claim:

- Some Garifuna may have begun migrating into what is now Belize as early as 1799.[10]

- By 1802, an estimated 150 Garifuna had settled in Belize.[11]

- An 1809 British Honduras census listed 15 Garifuna (Carib) males.[12]

- The Garifuna were undoubtedly visiting Belize Town (now Belize City) by at least 1811, as a Magistrate's meeting in that year imposed the requirement that all Garifuna arriving there had to obtain a permit from the Superintendent in order to stay for more than 48 hours.[13]

- Some 105 Garifuna were reported to be present in the Stann Creek (now called Dangriga) area prior to the arrival of the European "Poyais" settlers in 1823.[14]

- By 1828, Stann Creek (Dangriga) was generally referred to as "Carib Town."[15]

- In 1832, most of the Garifuna residing in Central America fled to Belize after fighting on the losing side in a failed revolt against the president of the Federation of Central American States.[16]

- In 1835, approximately 500 Garifuna were reported to be settled in the southern part of Belize. They were said to be "carrying on a constant traffic by sea with [Belize Town], in plantains, maize, poultry, etc." It was also reported that "[t]he men in great part hire themselves by the year to Mahogany cutters."[17]

- In 1841, Stann Creek (Dangriga) was described as follows: "[a] flourishing village . . . which now probably contains one half of the entire tribe [of Garifuna]. This village is now their largest settlement, and is rapidly increasing, both from natural causes and immigration."[18]

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[10] *Id*. at 54.

[11] 2 JOHN A. BURDON, ARCHIVES OF HONDURAS 40, 146 (1934).

[12] *See* Dr. Nancie L. Gonzalez, *Garifuna Traditions in Historical Perspective*, 14(2) Belizean Studies 11, 17 (1986).

[13] O. NIGEL BOLLAND, THE FORMATION OF A COLONIAL SOCIETY: BELIZE, FROM CONQUEST TO CROWN COLONY 132 (1977).

[14] Letter from Superintendent to Sec. of State (Sept. 24, 1823) (Belize Archives R.4c, 75-76).

[15] Gonzalez, *supra* note 12, at 18.

[16] GONZALEZ, *supra* note 3, at 57-58.

[17] BOLLAND, *supra* note 13, at 132 (quoting Letter from Thomas Miller to Under Sec. Gladstone (Feb. 13, 1835) (Belize Archives R.11, 75-102)).

[18] *Id*. (quoting Capt. Bird Allen, *Sketch of the Eastern Coast of Central America*, 2 Journal of the Royal Geographical Society of London 86-87 (1841)).

- In 1841, the Garifuna population of Belize was estimated at 1,000, of whom 300 were reported to be employed as woodcutters and 70 as fishermen.[19]

- In an 1842 publication, an American traveler estimated the Garifuna population of Punta Gorda at about 500 inhabitants. These Garifuna were reported to cultivate cotton and rice, among other products.[20]

- The Laws in Force Act of 1855 recognized legal ownership by settlers of lands that had been registered by them under regulations known as "location laws" prior to 1817. The Act also provided that any person who had been in quiet and undisturbed possession of a location since January 1, 1840 had the lawful right of possession thereof.[21]

- In 1857, the Crown Surveyor issued the following notice in Stann Creek:

> Leases for the town lots in Standing Creek and plantation ground on the neighboring Crown lands will be issued at the Colonial Secretary's Office in Belize.
>
> The leases will be for the term of seven[,] fourteen[,] or twenty-one years at the annual rate of one dollar.
>
> It is not compulsory for the present inhabitants of Standing Creek to take out a lease—but in the event of their leaving this place without having obtained one, they will forfeit their right to the houses or other buildings they may have erected, and the constable has received instructions to take possession of said buildings and keep them at the disposal of the Crown.[22]

  In explaining the notice the Crown Surveyor stated, "[I]t is generally known that the Caribs are of a very erratic and nomadic disposition & for the slightest reason they will immediately emigrate to another part of the coast & there form the nucleus of another settlement." The Crown Surveyor's stated intention was "to give . . . to each householder such document as will ensure him a peaceable enjoyment of his house and plantation on our territory, and that for the small stipend of one dollar paid yearly."[23]

- By 1858, the number of Garifuna in Belize was estimated to be about 2,200, or one-tenth of the entire population. According to one report, there were approximately

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[19] *Id*. at 132.

[20] *Id*. at 132-133 (citing JOHN L. STEPHENS, INCIDENTS OF TRAVEL IN CENTRAL AMERICA, CHIAPAS AND YUCATAN 1:28 (1842)).

[21] *Id*. at 133. The location laws were adopted by the settlers in 1765, acting in a rudimentary and unauthorized form of government called the Public Meeting. Although the location laws only governed the rights to use lands, settlers claiming under the laws soon came to regard their interests as being complete ownership. *See* Curtis Berkey, Maya Land Rights in Belize and the History of Indian Reservations 10 (1994) (unpublished manuscript available at Belize Archives).

[22] Notice of Oct. 16, 1857 (Belize Archives R.58).

[23] Letter from J. H. Faber to Seymour (Oct. 21, 1857) (Belize Archives R.58).

1,100 Garifuna in Stann Creek and 400 in Punta Gorda. A number of villages, such as Sibun Creek, Seven Hills, Lower Stann Creek and Jonathan Point, were said to have from 100 to150 Garifuna each.[24]

- According to 1861 census data, the total number of Caribs in Belize in that year was 1,825. An additional 127 persons were listed as being of mixed Carib race.[25]

- In an 1868 report, the Lieutenant Governor expressed his support for the creation of reserves for the Garifuna and the Maya as follows:

> [W]henever [Indian villages] are situate on Crown Lands I think the villages and a sufficient surrounding space should be reserved *in the hands of the Crown* for the use of the Indians,—no marketable titles being issued to them to dispose of such lands, —but the land being divided amongst them, from time to time, as may be most convenient. I include among the Indians the descendants of the Charibs (a very mixed race) who were transported from St. Vincent to Honduras in the early part of the Century.[26]

- The Crown Lands Ordinance of 1872 provided that Crown lands already occupied by the Garifuna could be reserved to them under Crown jurisdiction, title and control. The Ordinance stated:

> Wherever, before the passing of this Ordinance, an Indian village or settlement has been made or established upon any Crown Land, or wherever any Charib village or settlement has been so made or established, it shall be lawful for the Lieutenant Governor to reserve such land for the use and enjoyment of such Indians or Charibs, as the case may be, so long as it may be required for the purpose.[27]

- In 1878, the imposition of rents for house plots in Stann Creek "caused serious disturbances" because the Garifuna "do not know why they are to pay rent as Stann Creek is their place, that long ago the land was given to them and they settled the place."[28]

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[24] Letter from Seymour to Gov. Darling (Mar. 1858)(Belize Archives R.55).

[25] Carla Barnett, The Political Economy of Land in Belize 284 (1991) (unpublished Ph.D. thesis, UWI available at Belize Archives).

[26] Letter from Lt. Gov. Longden to Grant (Mar. 6, 1868) (Belize Archives R.98) (emphasis in original) (quoted in NIGEL BOLLAND & ASSAD SHOMAN, LAND IN BELIZE 1765-1871, 90 (1975)).

[27] ORDINANCE NO. 35 (1872).

[28] Letter from Acting Gov. Henry Fowler to Lord Derby (May 27, 1884) (Colonial Records Office 123/172) (quoted in O. Nigel Bolland, *Alcaldes and Reservations: British Policy Towards the Maya in Late Nineteenth Century Belize*, 47 América Indígena 33, 70 n.57 (1987)).

- The Crown Lands Ordinance of 1879 withdrew the authority to create Garifuna and Indian reserves.[29]

- An 1883 report described the Garifuna men of Belize as "admirable sailors . . . of essential service in navigating the numerous waterways of the country and in carrying produce to [Belize Town]." The report stated that the Garifuna women "supply the local markets with yams and starch." The report quoted Governor Fowler as observing that the Garifuna "ambition is to be left alone, and live as their forefathers have lived before them; if disturbed or annoyed they simply move to another place."[30]

- In 1884, Acting Governor Henry Fowler stated that he was "strongly in favour of forming Carib and Indian reserves as a mere act of justice on the grounds of former recognitions of the claims of these natives."[31] He did not specify in what manner the claims of the Caribs and Mayas had been recognized, and no records of such recognition have been located to date.[32]

- The Crown Lands Ordinance of 1886 reinstated the authority to create reservations for the Mayas and the Garifuna. Unlike the 1872 act, the 1886 act permitted the establishment of reservations on any Crown lands, not just those where the Maya and Garifuna had already settled.[33]

- In 1888, rules to regulate the use and occupancy of Carib and Indian reserves were published. These rules were amended in 1890 and completely rewritten in 1924.[34]

- A 1913 Ordinance provided for the surrender and abolition of rights of cultivation on the Carib Reserve at Stann Creek. The Ordinance authorized the issuance of free grants or free leases to persons surrendering such rights. Any reserve lands not so appropriated were to be treated as ordinary Crown lands. No records relating to the original creation of the reserve have been located to date.[35]

- A 1922 Ordinance provided for the surrender and abolition of rights of cultivation on the Carib Reserve at Punta Gorda. The Ordinance authorized the issuance of free grants or free leases to persons surrendering such rights. Any reserve lands not so appropriated were to be treated as ordinary Crown lands. No records relating to the original creation of the reserve have been located to date.[36]

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[29] ORDINANCE NO. 8 (1879).

[30] D. MORRIS, THE COLONY OF BRITISH HONDURAS: ITS RESOURCES AND PROSPECTS 118 (1883) (available at Belize Archives).

[31] Berkey, *supra* note 21, at 19 (quoting Letter from Acting Governor Fowler to Lord Derby (May 27, 1884) (Colonial Records Office 123/172)).

[32] *Id*.

[33] CONSOLIDATED LAWS OF THE COLONY OF BRITISH HONDURAS, ch. CIII (1887).

[34] *See* Berkey, *supra* note 21, at 20.

[35] ORDINANCE NO. 19 (1913).

[36] ORDINANCE NO. 28 (1922).

C. CUSTOMARY LAND TENURE PATTERNS

Also relevant to the Garifuna land claim are the following descriptions of Garifuna customary land tenure patterns:

- The customary system of land tenure of the Garifuna while they were living on St. Vincent has been described as follows:

> Apparently, the Black Caribs' system of tenure was a communal one. Each "family" or more accurately clan of Caribs had its own territory, the boundaries of a particular territory being delineated by the island's numerous rivers. . . . Each territory had its own chief and a chief of chiefs appears only to emerge when the Caribs were on the war path.[37]

- Garifuna customary land tenure patterns in Honduras were reported in 1852 as follows:

> [I]t is customary among the Caribs for the whole population of the village to cut down and clear conjointly a portion of Land, which is afterwards subdivided by their chief, and . . . this subdivision is of annual recurrence including any further amount of landed property that they may have acquired in the interim.[38]

  According to one anthropologist, "until recently the group [of Garifuna] was small and fairly coherent, so that regional differences were few and relatively minor."[39] Thus, it can be assumed that the Garifuna in Belize likely engaged in similar or identical land tenure practices during this time period.

- Land tenure among the Garifuna in Central America has been described in general terms as follows:

> A good bit of attention has been given to trying to establish the exact dates of the founding of this or that settlement, both in Belize and elsewhere. Much of this is a futile exercise, for Caribs in Central America seem not to have lived in towns or villages in the earliest days. There were very few people then, and their habitations tended to consist of only three or four houses, scattered here and there all along the coastline, and sometimes a short way up the more navigable rivers, such as the Queheuche. They sought the obvious advantages such as a good water supply, fertile, well-drained soil for their gardens, and some protection from the elements, as well as from suspicious

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[37] I.E. KIRBY & C.I. MARTIN, THE RISE AND FALL OF THE BLACK CARIBS 18 (1995).

[38] Letter of Oct. 8, 1852 (Belize Archives R.44, 33-36).

[39] Gonzalez, *supra* note 12, at 19.

> authorities. Finally, they preferred sites near enough to wage-paying jobs that they could get back and forth in their dories within a few hours, if possible. In time, the latter sites drew more numbers, and as they came to depend more and more upon wage labor, they gradually became concentrated in the towns and villages where they live today, although a few still live in the old manner . . . .[40]

D. ASPECTS OF GARIFUNA CULTURE

A very few of the aspects of Garifuna culture that are relevant to the land claim are outlined below. These are provided merely for purposes of illustration; additional information regarding Garifuna culture and the Garifuna connection to the land and natural resources will need to be gathered from anthropologists, Garifuna individuals and other sources.

- The strong connection between the Garifuna and the sea is illustrated in the following observation reported in 1951: "[D]espite all changes of physical environment [as compared with St. Vincent], the Black Carib in Central America has everywhere clung to his traditions, and retained his attachment to the sea, far from which he never consents to make a home."[41]

- The Garifuna have been widely recognized as excellent seamen.[42]

- Traditional subsistence practices of the Garifuna include fishing, hunting, gathering and cultivation of the land.[43]

- Garifuna religious practices involve the use of the sea, cayes and mainland beaches.

- The Garifuna consider birthplace to be a fundamental aspect of social identity.[44] According to one source, "No matter if a man left his home community several decades ago, he still claims to 'belong' to it . . . ."[45]

E. CURRENT GARIFUNA POPULATION DATA

The most current Belize population data available by ethnicity is from April 1999.[46] According to this information, the total population of Belize as of April 1999 was 243,390, with a total Garifuna population of 15,685, or 6.4%.[47]

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[40] *Id*. at 17.

[41] DOUGLAS TAYLOR, THE BLACK CARIB OF BRITISH HONDURAS 38 (1951).

[42] *Id*. at 55.

[43] *Id*. at 56-61.

[44] VIRGINIA KERNS, WOMEN AND THE ANCESTORS: BLACK CARIB KINSHIP AND RITUAL 56 (2d ed. 1997).

[45] *Id*.

[46] Belize Central Statistical Office, 1999 Labor Force Survey. Although a census was conducted in 2000, results by ethnicity were not available at the time of this report.

[47] *Id*.

The Garifuna population is concentrated in six communities: Dangriga, Punta Gorda, Seine Bight, Hopkins, Georgetown and Barranco.[48] All of these settlements are on the coast except for Georgetown, which was established as a result of a government relocation project after Seine Bight suffered hurricane damage in 1961.

IV. GARIFUNA LAND RIGHTS UNDER THE DOMESTIC LAW OF BELIZE

A. COMMON LAW ABORIGINAL LAND RIGHTS

One legal option that the NGC could pursue is to seek recognition of the common law aboriginal land rights of the Garifuna people in the courts of Belize.[49] Although Belizean courts have not yet addressed the issue of the aboriginal land rights of indigenous peoples,[50] these types of claims have been successfully asserted in the courts of other countries, most notably the United States, Canada and Australia. These U.S., Canadian and Australian cases have recognized aboriginal rights to land ranging from a legal entitlement in the nature of exclusive ownership (referred to as "aboriginal title" or "native title"), to the right merely to use particular lands for purposes such as hunting, fishing and gathering.

Because Belizean courts have not yet addressed the issue of aboriginal land rights, it is unclear what legal standards would govern a claim based on the assertion of such rights under Belizean law. However, it can be expected that the principles set out in the U.S., Canadian and Australian aboriginal rights cases, together with relevant principles of international human rights law, would likely serve as the reference points for any such analysis by the courts of Belize.[51]

The following is a discussion of some of the relevant principles that can be derived from the leading U.S., Canadian and Australian cases addressing the issue of aboriginal land rights.

1. Establishing the Existence of Aboriginal Title

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[48] As of 1991, Garifuna made up 70.3% of the population of Dangriga and 44.0% of the population of Punta Gorda. Abstract of Statistics, September 1999, Central Statistical Office, Ministry of Finance, Belize, Table 1.17: Percent Population by District, Subdivision and Ethnicity, 1991 Census, at 16. Population data for the other Garifuna communities has not been obtained to date.

[49] While the International Human Rights Advocacy Center could provide legal research and other support, such a legal action would also require the assistance of local counsel licensed to practice law in Belize.

[50] The Toledo Maya Cultural Council ("TMCC") filed a motion in the Supreme Court of Belize in 1996 seeking an order declaring, among other things, that the aboriginal rights of the Maya to their traditional lands constitute a form of property protected by the Constitution of Belize (*see* Notice of Motion for Constitutional Redress, TMCC v. Attorney Gen. of Belize, No. 510 [1996] (Belize)). However, the substance of the motion has not, to date, been addressed by the Court and the TMCC claim has been voluntarily suspended pending the outcome of negotiations between the TMCC and the Government of Belize being mediated by the Inter-American Human Rights Commission.

[51] Like the United States, Canada and Australia, Belize is a common law jurisdiction, with a legal system derived from the British legal tradition. Past practice indicates that Belizean courts frequently look to the precedents of other common law jurisdictions, particularly in the absence of binding Belizean precedent. *See* S. James Anaya, *Maya Aboriginal Land and Resource Rights and the Conflict Over Logging in Southern Belize*, 1 Yale Hum. Rts. & Dev. L.J. 17, 22 (1998) (and sources cited therein). International human rights law would also be relevant to the Belize court's consideration of aboriginal rights, as one function of international law is to inform the interpretation of domestic law. *See, e.g., Mabo v. Queensland* (No. 2) (1992) 175 C.L.R. 1 (Australia), para. 42 (hereinafter "*Mabo* (No. 2)") (discussing the influence of international law on Australian common law).

Under U.S. law, proof of the existence of aboriginal title requires three elements: (i) actual continuous use and occupancy of lands; (ii) which was exclusive; (iii) and which lasted for a long time.[52] The Canadian test for aboriginal title, as set out in the leading opinion in the case of *Delgamuukw v. British Columbia*, is as follows: (i) the lands must have been occupied prior to the assertion of sovereignty by the Crown; (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation; and (iii) at sovereignty, occupation must have been exclusive.[53] Based on the leading opinion in the case of *Mabo v. Queensland* (No. 2), the Australian test for aboriginal title appears to also require exclusive occupation of the subject lands at the time of acquisition of sovereignty.[54]

a. Occupancy

The jurisprudence of the United States, Canada and Australia is thus in agreement that proof of aboriginal title requires proof of occupancy of the claimed lands by the indigenous group. Furthermore, the cases appear to be in agreement that the determination of whether an indigenous group has satisfied the occupancy requirement must be made with reference to the particular circumstances, including such factors as the habits and modes of life of the indigenous group, the population of the group, their technological capabilities and material resources, and the character of the lands claimed.[55] Importantly, under this standard, actual occupation of every portion of a claimed territory is not necessary in order to establish aboriginal title. In fact, the cases indicate that even a nomadic lifestyle can support a finding of occupancy.[56]

One recent U.S. case concluded that an Indian tribe consisting of only approximately 350 men and their families occupied a territory of some 6.4 million acres, even though the tribe did not maintain villages in every portion of the area throughout the relevant period.[57] The following activities were held to be sufficient to constitute the required occupancy: (i) the creation of extensive settlements in the claimed area; (ii) the extensive use of resources within the claimed area; (iii) hunting by the tribe throughout and beyond the claimed area; (iv) the use of hunting methods that required the use of large portions of land; (v) travel of far distances throughout the claimed area, by way of trails and rivers; (vi) engaging in trade with the Spanish at locations outside of the claimed area; and (vii) the creation of temporary homes within the claimed area as the tribe migrated, over a period of years, from Louisiana to their permanent settlements.[58]

Similarly, in *United States v. Seminole Indians*, a U.S. court held that a tribe consisting of only 2,500 members had established aboriginal title to the entire Florida peninsula, even though

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52 *See Alabama-Coushatta Tribe of Texas v. United States*, 2000 WL 1013532, at *10 (Fed. Cl. June 19, 2000) (hereinafter "*Alabama-Coushatta* (No. 2)") and cases cited therein.

53 *Delgamuukw*, *supra* note 2, para. 143.

54 *Mabo* (No. 2), *supra* note 51, para. 53.

55 *See Alabama-Coushatta* (No. 2), *supra* note 52, at *11; *Delgamuukw, supra* note 2, para. 149.

56 *See, e.g., Mabo (No. 2)*, *supra* note 51, para. 42 (Toohey, J.); *Baker Lake v. Minister of Indian Affairs*, [1980] 1 F.C. 518 (Trial Division) (Canada).

57 28 Fed. Cl. 95, 109 (1993), *aff'd in part as modified and rev'd in part*, 2000 WL 1013532, at *10 (Fed. Cl. June 19, 2000) (hereinafter "*Alabama-Coushatta* (No. 1)").

58 *Id*.

the tribe's permanent settlements were all located in the northern part of the peninsula and the tribe used the southern part of the peninsula solely for hunting.[59] The court stated that "the 'use and occupancy' essential to the recognition of Indian title does not demand *actual* possession of the land, but may derive through intermittent contacts which define some general boundaries of the occupied land."[60]

In the Canadian case *Baker Lake v. Minister of Indian Affairs*, Justice Mahoney concluded that the occupancy requirement had been met by the Inuit with respect to their traditional lands in a portion of Canada's Northwest Territories, despite the fact that they were nomadic hunters, few in number, who wandered over a large area.[61] In evaluating the sparse, wide-ranging presence of the Inuit in the claimed lands, Justice Mahoney stated:

> The nature, extent or degree of the aborigines' physical presence on the land they occupied, required by the law as an essential element of their aboriginal title is to be determined in each case by a subjective test. To the extent human beings were capable of surviving on the barren lands, the Inuit were there; to the extent the barrens lent themselves to human occupation, the Inuit occupied them.[62]

The Canadian Supreme Court has identified a variety of means of proving occupation, including evidence of the construction of dwellings, cultivation of fields or regular use of particular tracts for hunting, fishing or resource exploitation.[63] Furthermore, because conclusive evidence of pre-sovereignty occupation "may be difficult to come by," the Canadian Supreme Court has held that evidence of present occupation may be used to prove pre-sovereignty occupation, provided that there is a continuity between the present and pre-sovereignty occupation.[64] Importantly, this continuity need not be "an unbroken chain of continuity."[65] Disruptions in occupation, for example as a result the lack of recognition of the aboriginal title by the colonizers, do not destroy the required continuity, so long as there has been a "substantial maintenance of the connection" between the people and the land.[66] In addition, a change in the nature of the occupation by the group over time does not preclude a claim for aboriginal title, provided a substantial connection between the people and the land had been maintained.[67] The only limitation is that the change in the nature of the group's occupation must not be inconsistent with continued use of the land by future generations of the group.[68]

While additional research needs to be conducted regarding the extent, character and timing of the Garifuna occupation of lands in Belize, there can be no doubt that such occupation has taken place. The Garifuna have lived in Belize, constructing dwellings, cultivating the land

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59 *United States v. Seminole Indians*, 180 Ct. Cl. 375 (1967).
60 *Id*. (emphasis in original) (citations omitted).
61 *Baker Lake, supra* note 56.
62 *Id*. at 561.
63 *Delgamuukw, supra* note 2, para. 149.
64 *Id*. para. 152.
65 *Id*. para. 153.
66 *Id*. This standard was adopted from that set out by the High Court of Australia in *Mabo* (No.2).
67 *Id*. para. 154.
68 *Id*.

and using its various natural resources, since at least 1802. The Garifuna have traveled within Belize and beyond for purposes such as engaging in trade and seeking wage labor.

b. Exclusivity

A second requirement for proving aboriginal title that is common throughout U.S., Canadian and Australian case law is that the occupation of the claimed lands by the indigenous group must have been exclusive. According to the U.S. case law, exclusivity means that the claimant tribe "must have behaved as an owner of the land by exercising dominion and control."[69] Justice Brennan observed in *Mabo* (No.2) that "[t]he ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership, and there are no other owners."[70] Chief Justice Lamer stated in *Delgamuukw* that "[w]ere it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it."[71]

There are three exceptions to the exclusivity requirement, however. These exceptions have been identified in the U.S. case law as: (i) the joint and amicable use exception; (ii) the dominated use exception; and (iii) the permissive use exception.[72] Under the joint and amicable use exception, two or more indigenous groups possessing a "close and intimate alliance" may be found to have shared exclusive occupancy, with the result that the tribes together obtained joint title to the occupied lands.[73] Under the dominated use exception, the presence of other tribes on the claimed lands will not prevent a finding of exclusivity, so long as the claimant tribe was so dominant that it could have excluded these other tribes had it chosen to do so.[74] The permissive use exception provides that exclusivity will not be defeated if other indigenous groups were present on the lands with the claimant group's explicit or inferred permission.[75]

It is important to note that a claimant group may have used some lands exclusively and other lands only non-exclusively. In this situation, the claimant group could be found to have aboriginal title to the area of exclusive use and aboriginal rights short of aboriginal title (such as hunting or fishing rights) to the area of non-exclusive use.[76]

When more extensive evidence of the areas of historical occupation of the Garifuna in Belize has been compiled, it will be possible to analyze in which of these particular areas the Garifuna have satisfied the exclusivity requirement. Areas of actual Garifuna settlement would likely be considered to have been exclusively occupied, even if other non-Garifuna settled there also, so long as the non-Garifuna were present with the permission of the Garifuna or it is shown that the Garifuna were so dominant that they could have excluded the non-Garifuna had they

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69 *Alabama-Coushatta* (No. 2), *supra* note 52, at *12.
70 *Mabo* (No. 2), *supra* note 51, para. 53.
71 *Delgamuukw*, *supra* note 2, para. 155.
72 *Alabama-Coushatta* (No. 2), *supra* note 52, at *12.
73 *See id.*; *Delgamuukw, supra* note 2, para. 158.
74 *Alabama-Coushatta* (No. 2), *supra* note 52, at *13.
75 *Id*. at *13-14. *See also, Delgamuukw, supra* note 2, paras. 156-157.
76 *See Delgamuukw, supra* note 2, para. 159.

chosen to do so. Importantly, the Garifuna may have aboriginal rights (but not aboriginal title) to use lands historically used by the Garifuna, even if such use has not been exclusive.

c. The Relevant Time Frame

It is well established in U.S. case law that aboriginal title may arise from occupation that commences after sovereignty has been asserted by a colonizing country.[77] For example, *Alabama-Coushatta* (No. 1) held that the fact that Spain had already asserted sovereignty over Texas at the time the Alabama-Coushatta tribe first began to migrate into the area did not prevent the tribe from thereafter establishing aboriginal title to the lands it came to occupy.[78] Furthermore, under U.S. law, aboriginal title is not necessarily precluded by a sovereign's issuance of land grants for the claimed lands, only by actual settlement of such lands before aboriginal title becomes established.[79]

The critical timing requirement for the establishment of aboriginal title under U.S. common law is that the occupation must have occurred "for a long time" prior to any loss of the lands by the indigenous group.[80] What constitutes "a long time" depends on the particular facts and circumstances.[81] There is no fixed minimum period of occupancy.[82] Instead, the requirement is that the length of occupancy must be "long enough for the [indigenous group] to 'transform the area into domestic territory.'"[83] In actuality, the period of occupancy necessary to constitute a "long time" can be relatively short. For example, a period of occupancy of only thirty years has been found to satisfy the "long time" requirement.[84]

In contrast to the U.S. common law, Canadian and Australian common law requires that in order to establish aboriginal title to certain lands, an indigenous group must have been in occupation of such lands prior to the assertion of sovereignty by a European colonizer.[85] Nevertheless there is some support, at least under Canadian law, for a limited exception to the pre-sovereignty occupation requirement in the case of relocation. Writing for himself and for one other of the seven justices in *Delgamuukw*, Justice La Forest discussed the impact of post-sovereignty relocation on an aboriginal title claim as follows:

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77 *See, e.g., Alabama-Coushatta* (No. 1), *supra* note 57, at 114, n.28; *Turtle Mountain Band of Chippewa Indians v. United States*, 203 Ct. Cl. 426, 438 (1974).

78 *Alabama-Coushatta* (No. 1), *supra* note 57, at 114, n.28.

79 *See Alabama-Coushatta* (No. 2), *supra* note 52, at *28-29 (in this case, however, the Review Panel found that the claimant tribe had failed to present evidence showing the granted lands had not been settled).

80 *Id.* at *30. While the original standard for aboriginal title required occupancy from "time immemorial," this standard was relaxed by the Indian Claims Commission and the Court of Claims in cases decided under the Indian Claims Commission Act. *Alabama-Coushatta* (No. 1), *supra* note 57, at 114-115 (and cases cited therein).

81 *Alabama-Coushatta* (No. 2), *supra* note 52, at *30.

82 *Id*.

83 *Id*. (quoting *Confederated Tribes of Warm Springs v. United States*, 177 Ct. Cl. 184, 194 (1966)).

84 *Alabama-Coushatta* (No. 1), *supra* note 57, at 115.

85 *Delgamuukw, supra* note 2, paras. 144-145; *Mabo* (No. 2), *supra* note 51, para. 53. Furthermore, under Canadian law, the establishment of aboriginal rights short of aboriginal title requires that such rights have originated prior to the time of first European contact. *Delgamuukw, supra* note 2, para. 144. In addition to the different time frame requirement, proof of aboriginal rights under Canadian law also differs from proof of aboriginal title in that it includes the additional requirement that "the land be integral to the distinctive culture of the claimants." *Id*. paras. 142, 145.

> There may have been aboriginal settlements in one area of the province but, after the assertion of sovereignty, the aboriginal peoples may have all moved to another area where they remained from the date of sovereignty until the present. This relocation may have been due to natural causes, such as the flooding of villages, or to clashes with European settlers. In these circumstances, I would not deny the existence of "aboriginal title" in that area merely because the relocation occurred post-sovereignty. In other words, continuity may still exist where the present occupation of one area is connected to the pre-sovereignty occupation of another area.[86]

Similarly, Chief Justice Lamer, writing in the leading opinion in *Delgamuukw*, stated that the requirement of pre-sovereignty occupation does not mean that circumstances subsequent to the assertion of sovereignty may never be relevant to title or compensation claims. Specifically, the Chief Justice indicated that post-sovereignty events might be relevant in cases where indigenous groups were subsequently dispossessed of their traditional lands.[87]

Under U.S. law, it is not necessary that an indigenous group be in current occupation of claimed lands in order to establish a claim of aboriginal title. This is due to the fact that once aboriginal title is established it remains in effect until it is either extinguished by the sovereign[88] or until the subject lands have been voluntarily abandoned.[89] Importantly, the forcible removal of an indigenous group from its aboriginal title lands by government action or by the encroachment of non-Indian settlers generally will not be found to constitute voluntary abandonment.[90] Under Australian law, aboriginal title is deemed to be automatically "extinguished," once an indigenous group "loses its connexion with the land."[91] It is not entirely clear whether under Australian law an indigenous group could be held to have existing aboriginal title to traditional lands from which the group has been dispossessed.

With respect to the potential land claim of the Garifuna, if the Belize courts adopt the U.S. standards for establishing aboriginal title, the fact that the Garifuna first occupied certain lands only after European sovereignty was asserted over those lands would not be an obstacle to the establishment of aboriginal title. Rather, the critical timing issue would be whether the Garifuna occupied such lands for a "long time." In addition, the Garifuna would have to prove that any traditional lands claimed but no longer occupied by them have not been voluntarily abandoned.

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86 *Id*. para. 197.

87 *Id.* para. 145.

88 *See* discussion *infra* Part IV.A.3.

89 *Williams v. City of Chicago*, 242 U.S. 434 (1917).

90 *See, e.g., Alabama-Coushatta* (No. 2), *supra* note 52, at *52.

91 *Mabo* (No. 2), *supra* note 51, para. 66. Justice Brennan stated:

> Of course, since European settlement of Australia, many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it. . . . Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence.

If, however, the Belize courts adopt the pre-sovereignty occupation standard of Canada and Australia, it will be necessary to establish that the Garifuna were in occupation of the claimed lands at the time sovereignty was asserted, although it may suffice to show that the Garifuna relocated to the claimed lands after the assertion of sovereignty. Importantly, an 1880 Privy Council decision determined that between 1798 (when the British repulsed Spain from what is now Belize) and 1817 (by which time the Crown was deemed to have asserted sovereignty), there was a gap in European sovereignty over Belize.[92] Under this ruling, any Garifuna occupation which occurred prior to 1817 would almost certainly be considered pre-sovereignty occupation. In addition, with further research it might be possible to develop a legal argument that the proper date for the assertion of Crown sovereignty was actually much later, for example in 1862, the year in which British Honduras was formally declared to be a British colony.[93]

2. The Character and Scope of Aboriginal Rights

The common law courts are generally in agreement that aboriginal title encompasses the right to the exclusive use and occupation of aboriginal lands for a variety of activities, including activities which are unrelated to the customs and traditions of the aboriginal society. For example, aboriginal title includes mineral rights, even though mineral development is not a traditional aboriginal activity.[94]

Another characteristic of aboriginal title is that aboriginal title rights are not lost merely because of a change in the customs and traditions of the indigenous group over time. For example, Justice Brennan concluded in his opinion in *Mabo* (No. 2) that:

> [I]n time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.[95]

Justice Brennan pointed out that the critical element is not that the laws and customs remain static, but that the people maintain their connection with the land: "It is immaterial that the laws and customs [of the indigenous group] have undergone some change since the Crown

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92 *Attorney-General for British Honduras v. Bristowe*, (1880) 6 App. Cas. 143.

93 The determination that British sovereignty over Belize had commenced by 1817 overturned a holding of the British Honduras Supreme Court that British sovereignty was not acquired until British Honduras was formally declared to be a British colony, in 1862. *Id*. at 148.

94 *See, e.g., Delgamuukw*, *supra* note 2, para. 122. *See also* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 491 (1982 ed.).

95 *Mabo* (No. 2), *supra* note 51, para. 68. However, Justice Brennan also stated: "[W]hen the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition." *Id*. para. 66.

acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains."[96] Justices Deane and Gaudron expressed their view in *Mabo* (No. 2) that where the indigenous group continues to occupy or use the land, the group's rights in the land will not be lost by the abandonment of the group's traditional customs and ways.[97] On this point, Justice Toohey stated:

> There is no question that indigenous society can and will change on contact with European culture. . . . But modification of traditional society in itself does not mean traditional title no longer exists. . . . Traditional title arises from the fact of occupation, not the occupation of a particular kind of society or way of life. So long as occupation by a traditional society is established now and at the time of annexation, traditional rights exist. An indigenous society cannot, as it were, surrender its rights by modifying its way of life.[98]

Another generally accepted characteristic of aboriginal rights is that aboriginal title lands are inalienable. They may not be transferred, sold or surrendered to anyone but the sovereign that asserts authority over the territory.[99]

A final characteristic of note is that the rights held under an aboriginal title are generally considered to be communal rights.[100]

3. Extinguishment of Aboriginal Title

The jurisprudence of the U.S., Canada and Australia has held that aboriginal title is subject to unilateral extinguishment by the sovereign. However, with the recent developments in domestic and international law prohibiting discrimination, a solid argument can now be made that, at least in some circumstances, extinguishment of aboriginal title is a form of prohibited discrimination against the property rights of indigenous peoples. This type of argument was successful in *Mabo v. Queensland* (No. 1),[101] in which a majority of the High Court of Australia held that legislation passed for the purpose of extinguishing native title claims discriminated on the basis of race in relation to the human rights to own property and to not be arbitrarily deprived of property, and was therefore inconsistent with Australia's Racial Discrimination Act. As discussed in Parts IV.B and V. hereof, the Belize Constitution, as well international instruments which are legally binding on Belize, provide for the protection of property rights and prohibit discrimination on the basis of race.

Although the ability of a sovereign to extinguish aboriginal title in modern times may be restrained on principles of non-discrimination, these principles are only of relatively recent origin. Thus it is unclear whether, or how, such principles would influence any analysis by the courts of Belize of sovereign actions taken in historical times. However, an argument could

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96 *Id*. para. 83(6).
97 *Id*. para. 59 (Deane and Gaudron JJ.).
98 *Id*. paras. 50-51 (Toohey J.).
99 *See Delgamuukw*, *supra* note 2, para. 113; *Mabo* (No. 2), *supra* note 51, para. 67; *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 353-54 (1941).
100 *See, e.g., Delgamuukw, supra* note 2, para. 115.
101 [1988] 166 CLR 186 (Canada).

certainly be made that a court should take these contemporary legal considerations into account in analyzing the continuing effects of past historical acts.

Even apart from consideration of modern day principles of non-discrimination, the burden of proving extinguishment of aboriginal title, which rests on the sovereign, has been described as "a heavy one."[102] The sovereign must show a valid, affirmative, formal act, clearly and plainly intended to extinguish aboriginal title.[103] Aboriginal title has been held not to have been extinguished by laws of "general application"[104] and laws that: (i) merely regulate the enjoyment of aboriginal title; (ii) create a regime of control that is consistent with the continued enjoyment of aboriginal title; or (iii) set aside lands as an indigenous reserve.[105]

Under U.S. law, even a grant of fee simple title to lands does not extinguish any aboriginal title rights in the lands, unless the grant is accompanied by explicit language to that effect.[106] Under Canadian and Australian law, however, a valid grant that is inconsistent with the continuing right to enjoy the aboriginal title, extinguishes the aboriginal title to the extent of the inconsistency, without the need for any explicit language evidencing the intent to extinguish.[107]

Applying the foregoing to the Garifuna land claim, once the Garifuna have established a *prima facie* case of aboriginal title, the burden of proof would shift to the Government of Belize to prove any extinguishment of such title. Although reservations were created in Belize for the benefit of the Garifuna, there is ample support for the position that the creation of such reservations had no impact on any aboriginal title rights that might have been possessed by the Garifuna at that time. In addition, the issuance of land grants may be deemed not to have extinguished aboriginal title if the Belize court either (i) chooses to apply the U.S. rule (that there needs to be an explicit declaration of an intent to extinguish); or (ii) finds that the grants were not inconsistent with the aboriginal title rights (for example, because the grantees never actually occupied the granted lands).[108]

4. The Impact of International Law on Aboriginal Title Claims

The common law is an evolving body of law susceptible to influence from international law. This principle was clearly acknowledged by Justice Brennan in *Mabo* (No. 2), in which he stated: "If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be

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102 *Alabama-Coushatta* (No. 2), *supra* note 52, at *34.

103 *See, e.g., id.*; *Mabo* (No. 2), *supra* note 51, para. 75.

104 *Delgamuukw, supra* note 2, para. 180.

105 *See Mabo* (No. 2), *supra* note 51, para. 76 (and cases cited therein). *See also United States v. Pueblo of San Ildefonso*, 513 F. 2d 1383, 1388 (Ct. Cl. 1975) (holding that the establishment of Indian reservations did not manifest Congressional intent to extinguish aboriginal title).

106 *Buttz v. Northern Pacific Railroad Company*, 119 U.S. 55, 66 (1886).

107 *Mabo* (No. 2), para. 83(4), (5).

108 According to the information provided by the Government of Belize in the TMCC aboriginal title case, the major private land grants in the Toledo District of Belize were made "to wealthy foreign or foreign born individuals who sought to control vast areas of land principally for logging, rather than to individuals or families who were seeking to build their homes on the land." Anaya, *supra* note 51, at 45. The TMCC argues that upon the expiration of any of such private land rights, the Maya's aboriginal title rights with respect thereto should be deemed to have been revived. *Id*.

seen to be frozen in an age of racial discrimination."[109] In this same vein, Justice Brennan went on to observe that:

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[110]

Thus, an argument can be made that a Belizean court considering the issue of common law aboriginal title should take into account generally accepted principles of international human rights law which support the recognition of aboriginal title rights.

B. CONSTITUTIONAL RIGHTS

In addition to asserting common law aboriginal rights in the courts of Belize, the NGC could also make the argument that the failure by the Government of Belize to recognize and protect the historical and customary land tenure patterns of the Garifuna violates the Belize Constitution. Specific sections of the Belize Constitution that are relevant for this argument are those which:

(i) require protection of the identity, dignity and social and cultural values of Belizeans, including Belize's indigenous people;[111]
(ii) provide for racial and ethnic equality;[112]
(iii) prohibit discrimination on the basis of racial or ethnic characteristics;[113]
(iv) prohibit arbitrary deprivation of property;[114]
(v) prescribe certain procedures for the taking of property by the government;[115] and
(vi) guarantee reasonable compensation for any taking of property by the government.[116]

The NGC could argue that if the Garifuna have property rights that derive from their own traditional land tenure system, this is a form of property that is entitled to protection under the

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109 *Mabo* (No. 2), *supra* note 51, para. 41.
110 *Id*.
111 Belize Constitution (1981), as updated, preamble para. (e).
112 *Id*. § 3.
113 *Id*. § 16.
114 *Id*. §§ 3, 17.
115 *Id.* § 17.
116 *Id*.

Constitution. The Constitution explicitly refers to "property of any description,"[117] and should therefore be interpreted to include traditional Garifuna property rights. Failure by the government to recognize and protect the property rights of the Garifuna constitutes discrimination against such property rights, denying the Garifuna the equal protection of the law, discriminating against them, and taking their property without compensation and in the absence of the required procedures. Furthermore, Preamble paragraph (e) of the Constitution states that the people of Belize require policies which protect the identity, dignity and social and cultural values of Belize's indigenous people. If the Garifuna are able to demonstrate that protection of their land rights is critical to their cultural survival, then the failure of the government to recognize and protect the traditional land rights of the Garifuna would clearly contravene the spirit of this provision.

Another avenue that the NGC could consider is instituting a Constitutional reform campaign. Many constitutions of Latin American countries now contain specific provisions recognizing and protecting the rights of indigenous peoples.[118] Should the NGC decide to adopt this strategy, the International Human Rights Advocacy Center could provide the NGC with a survey of other countries' constitutional provisions. However, given that Belize has only recently gone through a constitutional reform process, in which the effort to secure special mention of indigenous peoples faced vigorous opposition,[119] this strategy is unlikely to achieve success in the short term.

C. RIGHTS UNDER THE REGISTERED LAND ACT

In addition to communal property rights arising from the Garifuna's traditional use and occupancy of lands in Belize, individual Garifuna persons may have land rights under the Registered Land Act of Belize,[120] which provides that land ownership may be acquired by prescription. To claim ownership based on prescription, the claimant must show "open, peaceful and uninterrupted possession" of the land, without the permission of the person legally entitled to

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117 *Id*. § 17.

118 *See* INTER-AMERICAN HUMAN RIGHTS COMMISSION, THIRD REPORT ON THE SITUATION OF HUMAN RIGHTS IN PARAGUAY (ch. IX) (Mar. 9, 2001) (citing the constitutions of Brazil (1988), Colombia (1991), Mexico (1992), Peru (1993), Panama (1994), Argentina (1994), Bolivia (1994), Nicaragua (1995), Ecuador (1998) and Venezuela (1999) as being part of the recent "constitutional trend" among countries in Latin America to include provisions to recognize the rights of indigenous peoples).

119 *See* FINAL REPORT OF THE POLITICAL REFORM COMMISSION (Jan. 2000), available at http://www.belize.gov.bz/library/political_reform/welcome.html. Recommendation 5 of the Commission stated:

> [T]he majority of the Commission expressed concern about the inclusion of a statement in the Preamble or other part of the Constitution specifically acknowledging the presence of indigenous peoples. In a pluralistic society that celebrates its multi-ethnicity, the majority of the Commission is of the view that such a statement would imply special treatment for particular ethnic groups and could have a divisive effect in the society. . . . Additionally, the majority of the Commission believes that such a statement in the Constitution raises the complex question as to what special rights or treatment would be implied for the selected ethnic groups.

Contrary to the recommendation of the Commission, the Preamble to the Constitution was amended to include a reference to indigenous people, as follows: "the People of Belize . . . *require* policies of state . . . which protect the identity, dignity and social and cultural values of Belizeans, including Belize's indigenous people . . . ." Belize Const., preamble para. (e) (emphasis in original).

120 REGISTERED LAND ACT, Laws of Belize, Revised Ed., 1980-1990, CAP 157.

possession thereof, for a period of twelve years.[121] In addition to privately-owned lands, national lands may also be acquired by prescription, but in this case the period of possession is increased to 30 years.[122] However, prescription cannot be used to acquire national land that is shoreline land.[123]

In addition to full land ownership, it is also possible to acquire lesser rights (easements and profits) by prescription. The elements for such a claim are: (1) peaceful, open and uninterrupted enjoyment of the easement or profit; (2) for a period of 20 years; (3) where the proprietor of the land burdened by the easement is, or by reasonable diligence might have been, aware of such enjoyment and might by his own efforts have prevented it.[124]

The NGC could undertake an investigation of whether any Garifuna individuals are entitled to land rights based on prescription. If so, the NGC could help to educate these individuals as to how to register these rights under the Registered Land Act, so that such rights are recognized and protected under national law. While such a strategy would not address the issue of Garifuna communal land rights, it could serve to increase overall Garifuna land ownership in Belize.

V. GARIFUNA LAND RIGHTS UNDER INTERNATIONAL LAW

Under international law, Belize is obligated to comply with all international treaties and conventions which it has ratified. Belize is also obligated to comply with all rules of customary international law, which are norms that have become legally binding on all countries as a result of their widespread practice and acceptance by countries as being legally binding. As will be detailed in the following discussion, Belize has ratified treaties and is subject to customary international law norms which require that it recognize and protect the land rights of the Garifuna people in Belize. Thus, the NGC could consider invoking available international procedures to attempt to have the Government of Belize abide by its obligations under international law.

Some of the international law protections discussed below refer specifically to the rights of "indigenous" peoples. It is highly likely that the rights of the Garifuna would be interpreted under international law using the standards applicable to indigenous peoples. In fact, the Inter-American Human Rights Commission has already analyzed Garifuna rights as indigenous rights in the case of the Garifuna of Guatemala.[125] While there is no single precise definition of the term that is accepted in international law, under International Labour Organisation Convention

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121 *Id*. § 138(1).

122 *Id*. § 138(2).

123 *Id*.

124 *Id*. § 141(1).

125 Inter-American Human Rights Commission, *Fifth Report on the Situation of Human Rights in Guatemala*, OEA/Ser.L/V/II.111, doc. 21 rev. (6 April 2001). In addition, the Commission has also evaluated the rights of "black communities," such as the Afro-Colombians, Afro-Ecuadorians, the Maroons of Suriname and Jamaica and the Quilombos of Brazil under the rubric of "indigenous rights." *See, e.g.,* Inter-American Human Rights Commission, *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102, doc. 9, rev.1 (26 Feb. 1999); Inter-American Human Rights Commission, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96 doc. 10, rev. 1 (24 April 1997).

(No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, "indigenous peoples" are defined as peoples

> 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. [126]

Anthropological and historical data indicates that the Garifuna are descended from people who inhabited the Caribbean region prior to the time of European contact and colonization. Historically, the Garifuna were treated by the colonial government as "Indians," for example with respect to the creation of special Garifuna reserves, like those created for the Maya. The Garifuna possessed and have maintained a distinctive culture with pre-colonial roots. The particular characteristics of "indigenous peoples" that entitle them to special protections, such as a strong connection with the land and the struggle to preserve their cultural identity, are shared by the Garifuna.

A. THE UNITED NATIONS HUMAN RIGHTS SYSTEM

The following United Nations instruments containing provisions relevant to the land rights of the Garifuna have been ratified by, and are therefore binding upon, Belize: (1) the International Covenant on Civil and Political Rights (hereinafter "CCPR");[127] (2) the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD")[128]; and (3) the Convention on the Rights of the Child (hereinafter "CRC").[129] As a member of the United Nations, Belize is also legally bound to comply with the Universal Declaration of Human Rights (hereinafter "Universal Declaration").[130] The following is a summary of the relevant substantive provisions of each of these instruments, as well as a discussion of the available enforcement mechanisms.

1. The International Covenant on Civil and Political Rights ("CCPR")

The CCPR was ratified by the United Kingdom while Belize was still a British colony. Following its independence, Belize officially acceded to the CCPR on June 10, 1996.

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[126] ILO Convention Concerning Indigneous and Tribal Peoples in Independent Countries (No. 169), 27 June 1989, art. 1(1)(a), 28 ILM 1382 (1989). "Tribal peoples," defined as peoples "whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations," are treated the same as indigenous peoples under the Convention. ILO Convention No. 169, art. 1(1)(a). Furthermore, the Convention states that "[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply." ILO Convention No. 169, art. 1(2).

[127] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (hereinafter "CCPR").

[128] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

[129] Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, 44 UN GAOR, Supp. (No. 49), UN Doc. A/44/49, at 166 (1989).

[130] Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), UN Doc. A/810, at 71 (1948).

a. Substantive protections

o The right of self-determination

Article 1of the CCPR provides, in pertinent part, as follows:

> 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*.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources . . . . *In no case may a people be deprived of its own means of subsistence*.
> 3. The State Parties . . . shall promote the right of self-determination . . . .[131]

The protection of lands and natural resources is a necessary element to support a peoples' right to self-determination.[132] In addition to the importance of land and natural resources for the cultural survival of indigenous peoples, indigenous peoples also rely on land and natural resources "to ensure the economic viability and development of their communities."[133] It can be argued that under CCPR Article 1, Belize has an affirmative obligation to protect the lands and natural resources of the Garifuna people in order to allow the Garifuna to realize their right of self-determination.

o The right to be free from discrimination

Articles 2 and 26 of the CCPR uphold general principles of nondiscrimination and equal protection of the law. An argument can be made that the failure by the Government of Belize to recognize the traditional property rights of the Garifuna people constitutes discrimination against them in violation of these provisions. The Human Rights Committee (the body established pursuant to Article 28 of the CCPR to supervise the CCPR's implementation) has interpreted Article 26 broadly, stating that "the application of the principle of non-discrimination contained in Article 26 is not limited to those rights provided for in the Covenant."[134] This interpretation is important, because the CCPR does not itself contain a provision explicitly protecting the right to property.

The Human Rights Committee has also interpreted Article 26 to impose upon states an obligation to take affirmative action to rectify past discrimination and has determined that such acts of affirmative action are not themselves discriminatory:

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131 CCPR, *supra* note 127, art. 1(1)-(3)(emphasis added).

132 *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 104 (1996).

133 *Id*. at 105.

134 General Comment No. 18(37)(Art. 26), paras 12, 10 (quoted in Sarah Pritchard, *The International Covenant on Civil and Political Rights and Indigneous Peoples*, in INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS 184, 193-94 (Sarah Pritchard ed., 1998)).

> [I]n a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to a part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.[135]

- The right to freedom of religion

Article 18 of the CCPR contains a guarantee of freedom of religion. This provision could be used to argue that the Garifuna people have a right to use certain lands, such as the cayes, in their religious ceremonies.

- The rights of minorities to cultural integrity

Perhaps the most important provision of the CCPR for the Garifuna people is Article 27, which provides as follows:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[136]

The Human Rights Committee has specifically interpreted Article 27 as protecting land and resource rights, stating:

> [O]ne or other aspects of the rights of individuals protected [under Article 27]—for example to enjoy a particular culture—may consist in a way of life which is closely associated with a territory and its use of resources. This may be particularly true of members of indigenous communities constituting a minority . . . . With regard to the exercise of the cultural rights protected under Article 27, the committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.

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135 *Id*.

136 CCPR, *supra* note 127, art. 27.

> The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[137]

The Human Rights Committee has also made it clear that Article 27 not only requires states to refrain from interfering with the cultural rights of minorities, but that it also imposes upon states an affirmative obligation to take measures to ensure cultural survival and development:

> Article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole . . . .[138]

b. Enforcement mechanisms

Article 2(2) of the CCPR imposes upon states an obligation "to adopt such laws or other measures as may be necessary to give effect to the rights recognized in [the CCPR]." If Belize has complied with its obligation under this provision, there should be legislation in place in Belize which could be used to enforce CCPR-mandated protections in a Belizean court. In addition, even if specific legislation has not been adopted a Belizean court might nonetheless apply the CCPR by: (1) deeming the CCPR to be self-executing (such that it creates immediately enforceable rights in the domestic courts); (2) interpreting existing legislation or constitutional provisions in light of the CCPR; or (3) determining that the pertinent provisions of the CCPR are customary international law.

At the international level, complaints can be made by individuals to the Human Rights Committee alleging state violations of the provisions of the CCPR, but such complaints can only be made against states that have ratified the First Optional Protocol to the CCPR.[139] As Belize has not yet ratified the Optional Protocol, the Garifuna currently do not have the option of filing an individual complaint with the Human Rights Committee.

One strategy that the NGC may consider is lobbying the Government of Belize to ratify the Optional Protocol. This strategy would likely take a significant amount of time, and there is certainly no guarantee of success. It should be noted that even if Belize were to ratify the Optional Protocol, the right to self-determination cannot be the subject of a complaint under the protocol, because that is a right conferred on peoples as opposed to individuals, and the Optional Protocol only allows complaints by individuals.[140] Other points that bear noting are: (1) all

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137 United Nations Human Rights Committee, *General Comment No. 23(50)(art. 27*), UN Doc. CCPR/C/21/Rev.1/Add.5 (1994).
138 *Id*.
139 First Optional Protocol to the International Convenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 302.
140 Sian Lewis-Anthony, *Treaty-Based Procedures for Making Human Rights Complaints within the UN System*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 41, 44 (3d ed., Hurst Hannum ed., 1999).

domestic available remedies must be exhausted before the Human Rights Committee will consider a complaint;[141] (2) the Committee cannot consider a complaint about a matter which is simultaneously being examined under another international procedure;[142] and (3) the Committee does not possess the power to issue binding judgments.[143]

Another alternative that the NGC could consider is to file a complaint based on violations of the CCPR with the United Nations Educational, Scientific and Cultural Organization ("UNESCO").[144] UNESCO accepts complaints from individuals and non-governmental organizations that concern human rights falling within UNESCO's fields of competence, one of which is culture. UNESCO cases commonly deal with human rights contained in the CCPR.

UNESCO's procedures emphasize friendly settlement, with UNESCO working to gather information and reach resolution through cooperation with the subject government. The admissibility requirements for complaints to UNESCO are less stringent than those of some other international procedures. For example, although exhaustion of domestic remedies is a requirement, it is not required that such remedies be exhausted prior to the filing of the complaint with UNESCO.

Given that the Garifuna culture was proclaimed by UNESCO as a "Masterpiece of the Oral and Intangible Heritage of Humanity" earlier this year,[145] and that the relationship between cultural preservation and land rights is widely accepted in international law, it can be expected that UNESCO would be receptive to the task of investigating the land claim of the Garifuna and working with the Government of Belize to ensure the protection of the Garifuna land rights and Garifuna culture.

2. The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD")

The Government of Belize signed an Instrument of Ratification with respect to CERD on August 23, 2001, shortly before the World Conference Against Racism. As of October 2, 2001, the Instrument of Ratification was in the process of being deposited with the U.N. Secretary General.

a. Substantive provisions

- Definition of "racial discrimination"

  Article 1(1) of CERD defines "racial discrimination" broadly, to mean the following:

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141 Optional Protocol, *supra* note 139, art. 5(2)(b).

142 *Id*. art. 5(2)(a).

143 *See* Lewis-Anthony, *supra* note 140, at 48-50.

144 *See* Stephen P. Marks, *The Complaint Procedure of the United Nations Educational, Scientific and Cultural Organization*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 103 (3d ed., Hurst Hannum ed., 1999).

145 *See* Press Office, Government of Belize, *Garifuna Culture proclaimed as "Masterpiece of the Oral and Intangible Heritage of Humanity"* (May 18, 2001) (hereinafter "UNESCO Proclamation Press Release").

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

- Obligation to eradicate racial discrimination

Under Article 2(1), state parties "condemn racial discrimination and undertake to pursue by all means and without delay a policy of eliminating racial discrimination in all its forms . . . ." One of the specific undertakings of states under Article 2(1)(a) is to "engage in no act or practice of racial discrimination against persons [or] groups of persons . . . ."

- Obligation to take affirmative action

Under Article 2(2), "when the circumstances so warrant," states are required to

> take, in the social, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.

Article 1(4) clarifies that such affirmative action measures shall not be deemed to be racial discrimination.

- Equality of the law with respect to property rights

Article 5(d)(v) requires states to guarantee equality before the law with respect to the right to own property alone or in association with others. This provision has been interpreted to include a requirement of recognition of indigenous land rights based on historical use and occupancy. Specifically, the Committee on the Elimination of Racial Discrimination, which is the body established to supervise implementation of CERD, has called upon states to

> recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or

> otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories.[146]

b. Enforcement Mechanisms

In the event that Belize passes specific legislation to implement its obligations under CERD, the NGC could use this legislation to challenge particular actions of the Government of Belize in a domestic court. As discussed above with respect to the CCPR, a Belizean court might also apply CERD by: (1) deeming it to be self-executing; (2) interpreting existing legislation or constitutional provisions in light of CERD; or (3) determining that the pertinent provisions of CERD are customary international law.

At the international level, a state party to CERD must make an optional declaration under Article 14 to enable the Committee on the Elimination of Racial Discrimination to consider individual communications related to alleged violations of the Convention. To date, it could not be determined whether Belize has, or is planning to, make such a declaration. If Belize does make such a declaration, the NGC could consider filing a complaint with the Committee. Before such a complaint could be filed, all domestic remedies would have to be exhausted. Also, it is important to note that, as is true with other international treaty-based procedures, any Committee opinion or recommendations addressing the situation of the Garifuna in Belize would have no binding legal force.

3. Convention on the Rights of the Child

The Convention on the Rights of the Child was ratified by Belize on May 2, 1990.

a. Substantive Provisions

Article 30 of the Convention on the Rights of the Child parallels Article 27 of the International Covenant on Civil and Political Rights ("CCPR"), discussed in Part V.A.1 above. Article 30 provides as follows:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

Because of the nearly identical wording, Article 30 should be interpreted consistently with CCPR Article 27 so that it also imposes on states an affirmative obligation to recognize, respect and enforce rights to land and natural resources.

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[146] Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, adopted 18 August 1997, U.N. Doc. CERD/C/51/Misc.13/Rev.4.

b. Enforcement Mechanisms

Article 4 of the Convention on the Rights of the Child requires state parties to pass appropriate legislation to implement the rights recognized in the Convention. If Belize has passed such legislation, it might be possible for the NGC to seek to enforce the obligations imposed by Article 30 in a Belizean court. A Belizean court might also apply Article 30 of the Convention by: (1) deeming it to be self-executing; (2) interpreting existing legislation or constitutional provisions in light of Article 30; or (3) determining that Article 30 constitutes customary international law.

While there is no mechanism for submitting individual complaints under the Convention on the Rights of the Child, the Committee on the Rights of the Child, established under Article 43 of the Convention, permits non-governmental organizations such as the NGC to participate in the Committee's monitoring activities. Thus, for example, it would be possible for the NGC to submit a written report to the Committee, to inform the Committee about the situation of Garifuna children in Belize.[147]

4. The Universal Declaration of Human Rights

Belize is bound by the Universal Declaration of Human Rights by virtue of its membership in the United Nations.

a. Substantive Provisions

The Universal Declaration contains the following human rights provisions of general applicability which could support a land claim by the Garifuna in Belize: the right to be free from discrimination (Article 2); the right to life (Article 3); the right to equal protection before the law (Article 7); the right to protection of the family (Articles 12 and 16); the right to own property and to not be arbitrarily deprived of property (Article 17); freedom of religion and association (Articles 18 and 20); the right to health and well-being (Article 25); and the right to participate in cultural life (Article 27).

b. Enforcement Mechanisms

The NGC might be able to pursue a claim in the domestic courts of Belize based on the argument that the provisions of the Universal Declaration constitute customary international law.

There is no specific enforcement mechanism within the United Nations system for obligations arising under the Universal Declaration. In addition, the two non-treaty based procedures adopted by the United Nations Economic and Social Council (ECOSOC) to handle human rights complaints (the so-called Resolution 1235 procedure and the 1503 procedure)

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147 *See* Sandra Coliver & Alice M. Miller, *International Reporting Procedures*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 177, 186-187, 194-195 (3d ed., Hurst Hannum ed., 1999).

would most likely not apply to a claim by the NGC on behalf of the Garifuna of Belize.[148] This is due to the fact that these mechanisms are limited to instances constituting "gross violations" of human rights, such as torture, disappearances, and extra-legal executions.[149] However, it should be possible for the NGC to file a complaint based on violations of the Universal Declaration with UNESCO. UNESCO cases frequently deal with rights contained in the Universal Declaration. The UNESCO complaint procedure was discussed above in Part V.A.1.b, in connection with the CCPR.

B. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

1. Overview of the Inter-American Human Rights System

The Inter-American human rights system protects and promotes human rights in those countries that are members of the Organization of American States ("OAS"). The principle normative instruments of the Inter-American system are the American Declaration on the Rights and Duties of Man[150] ("American Declaration") and the American Convention on Human Rights[151] ("American Convention"). The supervisory institutions charged with investigating, monitoring and remedying human rights violations under the Inter-American system are the Inter-American Commission on Human Rights ("Inter-American Commission") and the Inter-American Court of Human Rights ("Inter-American Court").

2. Substantive Legal Protections

a. The American Declaration

All members of the OAS, such as Belize, are legally obligated to comply with the American Declaration.[152] The rights protected by the American Declaration that are particularly relevant to the situation of the Garifuna in Belize are the rights to property, physical well-being and cultural integrity, and the right to be free from discrimination.

- The Right to Property

  Article XXIII of the American Declaration affirms the right of every person "to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and the home."[153]

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148 For more details on the Resolution 1235 procedure and the 1503 procedure, see Nigel S. Rodley, *United Nations Non-Treaty Procedures for Dealing with Human Rights Violations*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 61, 62-70 (3d ed., Hurst Hannum ed., 1999).

149 *Id*.

150 American Declaration of the Rights and Duties of Man, adopted 1948, Ninth International Conference of American States, O.A.S. Res. XXX, reprinted in OAS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, at 17, OEA/Ser.L/V.II.82, doc. 6 rev. 1(1992).

151 American Convention on Human Rights, adopted 22 Nov. 1969, entered into force 18 July 1978, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6.

152 The Inter-American Court has declared that the rights set out in the American Declaration are the minimum human rights that the OAS member states are bound to uphold. *See* Interpretation of the American Declaration of the Rights and Duties of Man in the Framework of Article 64 of the American Opinion, OC-10/90 (Ser. A) no. 10 (1989), paras. 42-43.

153 American Declaration, *supra* note 148, art. XXIII.

- The Rights to Physical Well-Being and Culture

The following rights included in the American Declaration protect the right to physical well-being and the right to the enjoyment of culture: the right to life (Article I); the right to preservation of health and well-being (Article XI); the right to religious freedom and worship (Article III); the right to family and the protection thereof (Articles V-VI); the rights to freedom of movement and residence (Article VIII); the right to the benefits of culture (Article XIII); and the right of assembly (Article XXI).

Emphasizing the importance of culture, the preamble to the American Declaration states:

> Since culture is the highest social and historical expression of . . . spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power.[154]

- The Right to Be Free From Discrimination

The right to be free from discrimination is set out in Articles II and XVII, which provide as follows:

> Article II: All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.[155]

> Article XVII: Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.[156]

b. The American Convention

The American Convention is only binding on those OAS member states that have ratified it. As of October 2001, Belize had not ratified the American Convention. However, the lack of ratification of the American Convention by Belize should not greatly impact the interpretation of any rights that the Garifuna may have under the Inter-American system, as the differences between the substantive provisions of the American Declaration and the American Convention are actually minimal.[157] Furthermore, any decisions of the Commission interpreting the

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154 American Declaration, *supra* note 150, preamble.

155 *Id*. art. II.

156 *Id*. art. XVII.

157 FERGUS MACKAY, BRIEFING PAPER ON THE RIGHTS OF INDIGNEOUS PEOPLES IN INTERNATIONAL LAW 8 (undated manuscript), at http://www.sdnp.org.gy/apa/topic3.htm.

American Convention are relevant for understanding Belize's obligations under the comparable provisions of the American Declaration, as the American Convention has been held by the Inter-American Commission to be an authoritative source with regard to interpreting state obligations under the American Declaration.[158]

c. Other International Instruments

In interpreting the obligations of states under the American Declaration and/or the American Convention, the Inter-American Human Rights Commission frequently looks to obligations arising under other international instruments, such as the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination.[159]

d. Customary International Law

The growing body of customary international law relating to the rights of indigenous peoples should inform any assessment within the Inter-American system of indigenous peoples' rights over lands and natural resources.

3. Enforcement Mechanisms

As stated above, the two supervisory bodies charged with monitoring and enforcing compliance with the Inter-American human rights system are the Inter-American Commission and the Inter-American Court. The enforcement mechanisms provided by these bodies are discussed below. In addition, the NGC might be able to pursue a claim in the domestic courts of Belize based on the argument that the provisions of the American Declaration constitute customary international law.

a. The Inter-American Commission

The Inter-American Commission has the authority to process individual petitions relating to cases of alleged violations of the human rights of persons or groups.[160] While the Commission does not have the authority to issue legally binding decisions, it can facilitate friendly settlement of disputes between member states and petitioners and, failing such settlement, can issue final decisions with recommendations that state parties pay compensation or take other remedial action.[161] The Commission also has the capacity to request that a state

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158 Inter-American Commission on Human Rights, *Report on the Status of Human Rights in Chile*, OEA/Ser.L/V/II.34 doc. 21 corr. 1 (1974).

159 S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 Harv. Hum. Rts. J. 33, 42 (2001). The basis for this approach is found in Articles 29(b) and 64 of the American Convention and in Advisory Opinion 10/89 of the Inter-American Court, *supra* note 152. Anaya and Williams also note that interpretation of the American Declaration and the American Convention by reference to other applicable international treaties is supported by the *pro homine* principle, "which favors integrating the meaning of related human rights obligations that derive from diverse sources."

160 Regulations of the Inter-American Human Rights Commission, art. 26.

161 For example, the Commission can assist friendly settlement efforts by arranging meetings, transmitting communications and otherwise mediating negotiations.

take precautionary or provisional measures on an urgent basis, where necessary to avoid irreparable damage.[162]

Any person or group can file a petition with the Inter-American Commission alleging the violation of the American Declaration or American Convention.[163] However, in order for a petition to be considered by the Inter-American Commission, certain admissibility requirements must be satisfied.[164] Most importantly, the party alleging the violation must have exhausted all available remedies under domestic law.[165] In other words, the petitioner must have attempted to resolve the dispute within the domestic legal system of the OAS member state prior to resorting to the Inter-American human rights system. Exceptions to this requirement are recognized where: (1) the legislation of the state concerned does not afford due process to protect the rights violated; (2) access to remedies has been denied or exhaustion has been prevented; or (3) there has been an unwarranted delay in reaching a final judgment.[166] Another important admissibility requirement is that the Commission will not consider a petition which essentially duplicates a petition pending or previously settled by the Commission or by another international governmental organization.[167]

In processing a petition, the Commission will contact the state concerned to request information on the facts alleged. The state has ninety days in which to respond. Upon receipt of the government's response, the Commission forwards the pertinent parts of the response to the petitioner for observations. The petitioner has forty-five days in which to supply its written observations. In addition, the petitioner may request a hearing in order to present oral testimony. The government then has thirty days in which to comment on the petitioner's observations. Once the government's comments have been received, the Commission considers admissibility, friendly settlement and the merits of the case. In the course of this process, the Commission is authorized to hold a hearing, at which the parties may present oral and written testimony. In addition, the Commission may undertake an on-site investigation in the country.[168]

If a friendly settlement is not reached, the Commission prepares an initial report of its findings, including any proposals and recommendations it wishes to make, and transmits the report to the concerned state for compliance and/or observations. After the government's observations have been received, the Commission prepares its final report. According to the

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[162] Regulations of the Inter-American Human Rights Commission, art. 29. As an example, the Commission issued precautionary measures in the TMCC case requesting that Belize "take all appropriate measures to suspend all permits, licenses, and concessions for logging, oil exploration, and other natural resource development activity on lands used and occupied by the Maya communities in the Toledo District" pending investigation by the Commission of the substantive claims raised in the case. Letter from Jorge E. Taiana, Executive Secretary, Inter-American Commission on Human Rights, to Deborah J. Schaaf et al., Attorneys, Indian Law Resource Center (Oct. 25, 2000).

[163] Regulations of the Inter-American Human Rights Commission, art. 26.

[164] For a detailed discussion of the Commission's admissibility requirements, see Dinah L. Shelton, *The Inter-American Human Rights* System, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 121, 124-127 (3rd ed., Hurst Hannum ed., 1999).

[165] Regulations of the Inter-American Human Rights Commission, art. 37(1).

[166] *Id*. art. 37(2). As an example, in its Admissibility Report No. 78/00, Case 12.053, regarding the Maya Indigenous Communities and Their Members in Belize, the Commission held that there had been an unwarranted delay by the Supreme Court of Belize in rendering a final decision on the lawsuit filed by the petitioners seeking redress under the Constitution of Belize, which excused the petitioners from exhausting domestic remedies. *Id*. at paras. 54 – 56.

[167] Regulations of the Inter-American Human Rights Commission, art. 39(1).

[168] An on-site investigation was conducted by the Commission in Belize earlier this year in connection with the Maya case.

Commission's Regulations, the report remains confidential unless the state fails to adopt the measures recommended by the Commission within the specified deadline, in which case the Commission may publish the report in the Commission's Annual Report to the OAS General Assembly. As stated above, the Commission does not have the authority to issue legally-binding decisions.

In addition to reviewing and processing individual petitions, the Inter-American Commission also has the authority to monitor and report on the general situation of human rights in member states.

b. The Inter-American Court

The Inter-American Court is a powerful enforcement mechanism, because it has the authority to enter binding judgments against states which may be enforced in the states' domestic courts. However, in order for the Court to have jurisdiction over a case, the concerned state must be a party to the American Convention and must have accepted the optional jurisdiction of the Court in accordance with Article 62 of the Convention.[169] The primary significance of Belize's failure to ratify the American Convention is that judgments may not be entered against Belize in the Inter-American Court. Therefore, any protection of the human rights of the Garifuna under the Inter-American system would have to come through the procedures of the Inter-American Commission.

4. The Inter-American System and the Rights of Indigenous Peoples

a. Background and Scope of Applicability

The human rights set out in the American Declaration are rights of general applicability, in that they apply to all inhabitants of OAS member states. However, the OAS has long worked to promote special legal protection for indigenous peoples. For example, the non-binding Inter-American Charter on Social Guarantees, adopted in 1948 at the same time as the American Declaration, called on states to create institutions or services "to ensure respect for [indigenous peoples'] lands, to legalize their ownership thereof, and to prevent invasion of such lands by outsiders."[170] In 1972, the Commission held that "for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states."[171]

Over the past thirty years, in the course of processing hundreds of petitions concerning situations affecting indigenous peoples,[172] and in preparing individual country reports including

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169 In addition, for a case to come before the Inter-American Court, proceedings before the Inter-American Commission must first be completed and the case must be referred by either the Commission or the state party. Individual petitioners cannot bring cases in the Inter-American Court.

170 Inter-American Charter of Social Guarantees, art. 39 (1948), reprinted in ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 432, 433 (Edmund Jan Osmanczyk ed., 1990).

171 Resolution on the problem of "Special Protection for Indigenous Populations: Action to Combat Racism and Racial Discrimination," transcribed in Report 12/85 (Yanomami Case).

172 OAS Report on the Human Rights Situation of the Indigenous People in the Americas, Chap. I.1 at p. 1.

special sections dealing with the concerns of indigenous peoples,[173] the Inter-American Commission has contextualized the rights and protections set out in the American Declaration and the American Convention so as to address the particular circumstances of indigenous peoples. A watershed in this process occurred in 1997, with the adoption by the Commission of the Proposed American Declaration on the Rights of Indigenous Peoples.[174]

As discussed in Part V above, it is highly likely that the Inter-American Human Rights Commission would analyze the rights of the Garifuna in the same manner as indigenous rights.

b. Important Indigenous Rights Cases Within the Inter-American System

The following is a brief survey of some of the most important indigenous rights cases that have been addressed within the Inter-American human rights system. These cases illustrate that there is ample support within the Inter-American system for land claims such as that of the Garifuna of Belize.

i. The Mayagna (Sumo) Awas Tingni Community Case (2001)

On August 31, 2001 the Inter-American Court delivered its landmark opinion in the Awas Tingni Community case, finding that Nicaragua had violated the American Convention by failing to protect the property rights of its indigenous peoples.[175] Because this case was heard and ruled on by the Inter-American Court, and is in fact the first case in which the Court has addressed the rights of indigenous peoples, it establishes a powerful precedent affirming indigenous land rights in the Americas.[176] According to one authority associated with the Awas Tingni case, "This ruling requires every country in the Americas to rethink the way it deals with indigenous peoples within its borders."[177]

In its historic holding, the Court first affirmed the existence of indigenous peoples' collective rights to their lands and natural resources, stating that

> [b]y virtue of the fact of their very existence, indigenous communities have the right to live freely on their own territories; the close relationship that the

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[173] *See, e.g.,* Inter-Am. C.H.R., Second Report on the Situation of Human Rights in Peru, OEA/Ser.L./V./II.106, doc. 59 (2000); Inter-Am. C.H.R., Third Report on the Human Rights Situation in Colombia, OEA/Ser.L./V./II.102, doc 9 rev. 1 (1999); Inter-Am. C.H.R., Report on the Situation of Human Rights in Mexico, OEA/Ser.L./V./II.106, doc. 7 rev. 1 (1998); Inter-Am. C.H.R., Report on the Situation of Human Rights in Brazil, OEA/Ser.L/V./II.97, doc. 29 rev. 1 (1997); Inter-Am. C.H.R., Report on the Human Rights Situation in Ecuador, OEA/Ser.L./V./II.96, doc. 10 rev. 1 (1997).

[174] Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights at its 133rd session on February 26, 1997, in OEA/Ser L/V/II.95.doc.7, rev. 1997 (hereinafter "Proposed American Declaration").

[175] The Inter-American Court held that Nicaragua had violated the following provisions of the American Convention: (1) the right to property (Article 21); and (2) the right to judicial protection (Article 25).

[176] As discussed above, judgments of the Inter-American Court are legally binding on OAS member states that are parties to the American Convention and that have voluntarily accepted the jurisdiction of the Court.

[177] INDIAN LAW RESOURCE CENTER, *Landmark Victory for Indians in International Human Rights Case Against Nicaragua* (Sept. 18, 2001), at http://www.indianlaw.org/body_iacj_decision.htm (quoting Armstrong Wiggins of the Indian Law Resource Center).

> communities have with the land must be recognized and understood as a foundation for their cultures, spiritual life, cultural integrity and economic survival. For indigenous communities, the relationship with the land is not merely one of possession and production, but also a material and spiritual element that they should fully enjoy, as well as a means through which to preserve their cultural heritage and pass it on to future generations.[178]

The Court emphasized the obligation of the state to protect the property rights of indigenous peoples. The Court stated that in the case of the Awas Tingni Community, the government of Nicaragua's failure to demarcate the Community's territory

> has created a climate of permanent uncertainty among the members of the Awas Tingni Community inasmuch as they do not know with certainty the geographic extension of their right of communal property, and consequently they do not know up to what point they may freely use and enjoy the corresponding resources.[179]

Perhaps most significantly, the Court interpreted the right to property *expansively*, to include the right to have the state: (1) delimit, demarcate and issue titles for communal property; and (2) refrain from granting third party concessions for the exploitation of natural resources on lands claimed by indigenous peoples, pending such delimiting, demarcating and titling.

Finding that Nicaragua's legal protections for indigenous lands were "illusory and ineffective," the Court ordered Nicaragua to establish legal procedures for the official delimitation, demarcation and titling of the traditional lands of all indigenous communities within Nicaragua. The Court also required the government to submit a report to the Court every six months on measures taken by the government to comply with the Court's decision. As reparations for moral damages, the Court determined that the government should invest US $50,000 in public works and services for the benefit of the Awas Tingni Community, within the following twelve months. Finally, the Court ordered an award of US $30,000 to be paid to the Community by the government for attorneys' fees and costs.

Although the Awas Tingni case was based on the right to property protected in the American Convention, there is every reason to expect that the Inter-American Court and the Inter-American Commission would interpret the property right protected in the American Declaration in the same manner.[180] Furthermore, although the Court in its Awas Tingni opinion made reference to Nicaragua's domestic law recognizing the communal property rights of its Atlantic Coast Communities, the Court's opinion does not appear to hinge on the presence of any such domestic law. Rather, it seems more likely that the Court viewed the existence of the domestic law as an explicit acknowledgement, or admission, by Nicaragua of the property rights under international law of its indigenous peoples. For example, the Court stated:

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[178] INDIAN LAW RESOURCE CENTER, *Unofficial English Translation of Selected Paragraphs of the Judgment of the Inter-American Court of Human Rights In the Case of the Mayagna(Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua* (Issued Aug. 31, 2001), at http://www.indianlaw.org/body_awas_tingni_decision_excerpt.htm (hereinafter "Awas Tingni Translation").

[179] *Id*.

[180] *See supra* text accompanying notes 157-158.

> [T]his Court deems that article 21 of the Convention protects the right to property in the sense that it comprises, among other things, the rights of members of indigenous communities within the framework of communal possession, *a form of property also recognized by Nicaragua's Political Constitution*.[181]

Based on the decision in the Awas Tingni case, there is a very strong argument that Belize has an obligation under international law to delimit, demarcate and title the traditional lands of its indigenous peoples.

ii. Inter-American Commission Report on the Rights of Indigenous Peoples in Paraguay (2001)

In 1996, the Lamenxay and Riachito (Kayleyphapopyet) communities filed a petition with the Inter-American Commission alleging that, between the years 1885 and 1950, the government of Paraguay had sold all of the communities' traditional lands to foreigners. With the mediation assistance of the Commission, a friendly settlement agreement was reached in which the government of Paraguay acquired an area of 21,884 hectares which was conveyed and titled to the indigenous communities as reparations for the loss of the communities' traditional lands.[182]

In its 2001 follow-up report on the situation of indigenous peoples in Paraguay, the Commission further expanded upon the obligation to resolve territorial claims of indigenous communities, stating that this obligation "is not met only by distributing lands."[183] The Commission declared that "[w]hile the territory is fundamental for development of the indigenous populations in community, it must be accompanied by health, education, and sanitary services, and the protection of their labor and social security rights, and, especially, the protection of their habitat." Thus, it appears that the interpretation of the Commission is that the bundle of rights recognized as belonging to indigenous peoples, including the right to property and the rights to physical well-being and cultural integrity, impose upon states the affirmative obligation to ensure that indigenous people not only have land, but have the additional social support that may be needed for the successful utilization and enjoyment thereof.

iii. Inter-American Commission Report on the Rights of Indigenous Communities in Peru (2000)

In this report, the Commission made the following strong statement of the connection between land rights and the right of cultural integrity:

> Land, for the indigenous peoples, is a condition of individual security and liaison with the group. The recovery, recognition, demarcation, and registration of the

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181 Awas Tingni Translation, *supra* note 178.

182 Inter-American Human Rights Commission, *Report No. 90/99,* Case 11.713 (1999).

183 Inter-American Human Rights Commission, *Third Report on the Situation of Human Rights in Paraguay*, OEA/Ser.L/V/II.110, doc. 52 (9 March 2001).

lands represent essential rights for cultural survival and for maintaining the community's integrity.[184]

iv. Inter-American Commission Report on the Situation of Human Rights in Ecuador (1997)

This special report resulted from the filing of a petition by the Huaorani people of Ecuador with the Inter-American Commission.[185] The petition alleged the imminent threat of serious human rights violations due to planned oil exploration activities within the Huaorani's traditional lands.

In its analysis of the allegations of the Huaorani people, the Inter-American Commission repeatedly emphasized the nexus between land rights and the rights to physical well-being and cultural integrity. For example, the Commission observed that "[c]ertain indigenous peoples maintain special ties with their traditional lands, and a close dependence upon the natural resources provided therein—respect for which is essential to their physical and cultural survival." The Commission went on to state:

> For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers both to its capacity for providing the resources which sustain live, and to 'the geographical space necessary for the culture and social reproduction of the group.'[186]

The Commission not only recognized the land rights and other human rights of the Huaorani, but also specifically affirmed the need for special protection for these rights, stating:

> Within international law generally, and inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival—a right protected in a range of international instruments and conventions.

Foreshadowing the judgment of the Inter-American Court in the Awas Tingni case, the Commission recommended that Ecuador "take the steps necessary to resolve pending claims over the title, use and control of traditionally indigenous territory, including those required to complete any pending demarcation projects."

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184 Inter-American Human Rights Commission, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, doc. 59 (2 June 2000).

185 Inter-American Human Rights Commission, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10, rev.1 (24 April 1997).

186 *Id*. at 115 (quoting R. Stavenhagen, *Indigenous Peoples: Emerging Actors in Latin America*, in ETHNIC CONFLICT AND GOVERNANCE IN COMPARATIVE PERSPECTIVE, Working Paper 215 at 11 (Latin American Program, Woodrow Wilson Center 1995)).

v. Inter-American Commission Decision Concerning the Yanomami Indians of Brazil (1985)

This case arose from the filing of a petition with the Inter-American Commission on behalf of the Yanomami people, alleging human rights violations arising from the construction of the Trans-Amazonia highway and the exploitation of mineral resources within the Yanomami's territories.[187]

In its evaluation of the Yanomami petition, the Inter-American Commission placed heavy emphasis on the international legal obligation to protect indigenous peoples' cultural and related rights. Citing Article 27 of the United Nations' International Covenant on Civil and Political Rights, the Commission asserted that "international law in its present state . . . recognizes the right of ethnic groups to special protection in the use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity." With respect to the protections afforded by the Inter-American system, the Commission noted that the OAS has established "preservation and strengthening" of the cultural heritage of indigenous groups as an action of priority for the member states.

The Commission concluded that Brazil's failure to protect the Yanomami from penetrations into their traditional lands by outsiders threatened the Yanomami's physical well-being and cultural heritage, in violation of international law. To remedy this situation, the Commission recommended that Brazil set and demarcate the boundaries of a reserve for the protection of the Yanomami. Brazil did establish such a reserve and in 1988 amended its constitution to provide increased protections to indigenous peoples and their lands. Thus, this case is a good illustration of the fact that although Commission reports and decisions are not legally binding upon states, they can have an impact on the creation of legal obligations that are binding at the domestic level.[188]

vi. Inter-American Commission Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin (1983)

This report arose out of a petition filed on behalf of the indigenous peoples of Nicaragua's Atlantic Coast alleging that human rights abuses were committed against them during Nicaragua's civil war.[189]

With regard to the rights of indigenous peoples, including their land rights, the Commission stated:

> [S]pecial legal protection is recognized for the use of their language, the observance of their religion, and in general, all those aspects related to the

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187 Inter-American Human Rights Commission, *Resolution No. 12/85*, Case No. 7615 (5 March 1985).

188 Of course, domestic legislation alone is insufficient to protect the rights of indigenous peoples in the absence of effective enforcement. In its 1997 Report on the Situation of Human Rights In Brazil, the Commission stated that while the Yanomami people had obtained full recognition of their ownership of their lands, the lands continued to be invaded and polluted by prospectors, with only "irregular and feeble" state protection.

189 Inter-American Human Rights Commission, *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97, doc. 29, rev.1 (29 Sept. 1997).

> preservation of their cultural identity. To this should be added the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands. Non-observance of those rights and cultural values leads to a forced assimilation with results that can be disastrous.

The Commission concluded that in order to preserve and guarantee protection of such rights, the government of Nicaragua should "establish an adequate institutional order as part of the structure of the Nicaraguan state" to be "designed in the context of broad consultation and carried out with the direct participation of the ethnic minorities of Nicaragua . . . ." According to one source, the Commission's recommendations in this case "were instrumental in leading the government to the negotiating table with indigenous community leaders," and resulted in the enactment of constitutional provisions and legislation affirming indigenous peoples' land rights and establishing regional governments for the Atlantic Coast Communities.[190] Therefore, like the case of the Yanomami of Brazil, this case is also a good example of the impact that the Commission can have on the creation of binding legal obligations for states at the domestic level.[191]

C. THE CARIBBEAN COMMUNITY ("CARICOM")

Belize is a member of CARICOM. Thus it is bound by CARICOM's Charter of Civil Society.[192] In Article XI of the Charter, the member states commit to "undertake to continue to protect [the] historical rights [of indigenous peoples] and respect the culture and way of life of these peoples." The historical rights of indigenous peoples should include rights to lands historically used and occupied.

Under Article XXV of the Charter, Belize is required to set up a national committee or designate another body to monitor and ensure Belize's implementation of the Charter. Under the terms of Article XXV, individuals and entities should be able to make reports of any non-compliance by Belize with the provisions of the Charter to such committee or other body. Thus, one strategy that the NGC could consider is to determine what committee or body is responsible for receiving complaints related to the Charter and make a report to that entity regarding the land claim of the Garifuna in Belize.

D. EMERGING NORMS OF CUSTOMARY INTERNATIONAL LAW

In addition to the international treaties and conventions discussed above, Belize is also obligated to comply with customary international law norms. Norms become customary international law "when a preponderance of states and other authoritative actors converge upon a common understanding of the norms' content and generally expect future behavior in conformity with the norms."[193] Customary international law is generally binding on all states. Although it is often difficult to determine whether a principle has risen to customary international law status,

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190 Anaya & Williams, *supra* note 159, at 53.

191 Of course, it bears noting that Nicaragua's subsequent failure to satisfy the constitutional and legislative requirements related to indigenous peoples' rights resulted in the Awas Tingni case, discussed *supra* in text accompanying notes 175-181.

192 Available at http://www.caricom.org/CHARTER.html.

193 Anaya & Williams, *supra* note 159, at 54.

repetition of principles in various non-binding instruments, coupled with practice of those principles by states, provides a foundation for arguing that customary international law has been created. One commentator has noted that with respect to the development of customary international law relating to the rights of indigenous peoples:

> As demonstrated by an expanding body of literature, it is evident that indigenous peoples have achieved a substantial level of international concern for their interests, and there is a substantial movement toward a convergence of international opinion on the content of indigenous peoples' rights, including rights over lands and natural resources. Developments toward consensus about the content of indigenous rights simultaneously give rise to expectations that the rights will be upheld, regardless of any formal act of assent to the articulated norms.[194]

The following is a brief discussion of some of the international law principles relating to the rights of indigenous peoples that arguably have become, or are on their way to becoming, binding principles of customary international law. It should be noted that even if such principles have not yet risen to the status of customary law, they are still likely to be influential in the deliberations of international human rights bodies in analyzing particular cases involving indigenous peoples.

1. ILO Convention No. 169

ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries[195] is undoubtedly the most important international treaty to date addressing the rights of indigenous peoples. It is a legally binding treaty for those countries that have ratified it. Although Belize has not ratified ILO Convention No. 169, it did sign the treaty in 1991. Under Article 18 of the Vienna Convention on the Law of Treaties, once a state signs a treaty, it is obligated "to refrain from acts which would defeat the object and purpose" of the treaty.[196] Thus, in addition to being bound by any provisions of the ILO Convention that have become customary international law, Belize also has the obligation to refrain from acts that would defeat the object or purpose of the Convention. As discussed below, one of the major purposes of ILO Convention No. 169 is to protect the land rights of indigenous peoples. Therefore, any action undertaken by the Government of Belize that would have the effect of impairing the land rights of the Garifuna would defeat this purpose and would be in violation of Belize's obligation as a signatory to the Convention

Article 1 of the Convention defines the groups to which it applies as "indigenous" and "tribal" peoples. As discussed in Part V above, it is highly likely that the Garifuna of Belize would be considered to be "indigenous" as that term is defined in the Convention.[197]

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194 *Id*.

195 *Supra* note 126.

196 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331. The Vienna Convention is considered to be customary international law on the interpretation and enforcement of treaties, therefore all countries are bound by its provisions.

197 *See supra* text accompanying note 126. Even if the Garifuna do not meet the definition of "indigenous peoples" under the ILO Convention, they would likely meet the definition of "tribal peoples." In either case, the protections afforded by the Convention are the same. *See* ILO Convention No. 169, *supra* note 126, art. 1(1).

An entire section of ILO Convention No. 169, Part II, is devoted to the issue of land rights. Article 13(1) sets out the context for the protection of indigenous peoples' land rights as follows: "In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship." The most important provision of the Convention with respect to a land claim by the Garifuna is Article 14, which requires states: (i) to recognize indigenous peoples' rights of ownership and possession over the lands which they traditionally occupy;[198] (ii) to recognize use rights in lands which indigenous peoples have traditionally accessed for subsistence and traditional activities;[199] (iii) to take necessary steps to identify the lands that have been traditionally occupied;[200] (iv) to guarantee effective protection of indigenous peoples rights of ownership and protection;[201] and (v) to establish adequate procedures to resolve land claims by indigenous peoples.[202]

2. The United Nations Draft Declaration on the Rights of Indigenous Peoples

While ILO Convention No.169 is the most important international treaty to date dealing with the rights of indigenous peoples, the United Nations Draft Declaration on the Rights of Indigenous Peoples,[203] once it is adopted by the U.N. General Assembly, will go even farther. Under Article 26 of the U. N. Draft Declaration:

> Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.[204]

Article 27 of the Draft Declaration specifically addresses the situation where an indigenous group has been dispossessed of its traditional lands, as follows:

> Indigenous peoples have the right to restitution of the land, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair

198 ILO Convention No. 169, *supra* note 126, art. 14(1).

199 *Id*.

200 *Id*. art. 14(2).

201 *Id*.

202 *Id*. art. 14(3).

203 United Nations Draft Declaration on the Rights of Indigenous Peoples, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 46th Sess., U.N. Doc. E/CN.4/Sub.2/1994/45 (1994) (hereinafter "U.N. Draft Declaration").

204 *Id*. art. 26.

compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.[205]

Article 7 of the Draft Declaration classifies future dispossession of indigenous peoples' lands or resources as a form of ethnocide or cultural genocide, which is expressly prohibited by the Declaration.[206]

3. Proposed American Declaration on the Rights of Indigenous Peoples

The Proposed American Declaration on the Rights of Indigenous Peoples was approved by the Inter-American Commission on Human Rights in 1997.[207] Although the Proposed American Declaration has not yet been adopted by the OAS General Assembly, it is already extremely influential because it is used by the Inter-American Commission to interpret state obligations under the American Declaration and the American Convention. As discussed in Part V.B.2 above, Belize is bound by the provisions of the American Declaration as a result of its membership in the OAS.

Article XVIII of the Proposed American Declaration deals with the land rights of indigenous peoples. Article XVIII(2) provides as follows: "Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood."[208] Article XVIII(3) states: "where property and user rights of indigenous peoples arise from rights existing prior to the creation of . . . states, the states shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptible and indefeasible."[209] The effect of this provision is to require recognition of land rights that were in existence prior to the creation of the state, regardless of whether the indigenous group has subsequently been dispossessed of its lands.[210]

VI. INTERNATIONAL FINANCIAL ORGANIZATIONS

As part of its effort to obtain recognition of the traditional land rights of the Garifuna in Belize, the NGC could consider seeking the support of international financial organizations ("IFOs"). Although IFOs do not have legal authority, the economic influence they wield is substantial. As discussed below, one IFO, the Inter-American Development Bank ("IDB"), has recently approved a program in Belize with the potential to either positively or negatively affect

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205 *Id*. art 27.

206 *Id*. art 7(b).

207 Proposed American Declaration, *supra* note 174.

208 *Id*. art. XVIII(2).

209 *Id*. art. XVIII(3).

210 E-mail from Osvaldo Kreimer, Principal Specialist, Inter-American Commission on Human Rights, to Susan Noé (Sept. 17, 2001) ("[T]he article refers not to the presently owned or occupied lands, but ownership and use of any land or resource that may originate in the existence of the people as such before the existence of the present State, and all the rights that stem from such existence in national and international law".).

the land rights of the Garifuna. It is highly recommended that the NGC adopt a strategy to become actively involved in the design and implementation of this program.

A. INTER-AMERICAN DEVELOPMENT BANK ("IDB")

On June 6, 2001, the IDB announced its approval of a $7 million loan to Belize to consolidate the country's land registration system.[211] According to the IDB, the program "is designed to secure property rights, expand land administration services . . . and improve land use planning and environmental protection *using an approach adapted to Belize's multicultural context*."[212] Partial funding from the loan will be used to support a land policy reform to be headed by the National Land Advisory Committee.[213]

The impact on indigenous populations of land titling programs such as that now being funded in Belize was the subject of a report by two IDB consultants that was published by the IDB in August 2001.[214] The consultants were specifically directed by the IDB "to recommend actions that would minimize risk and ensure that land projects are tailored to the aspirations and needs of indigenous peoples."[215] The consultants did not limit their review solely to "indigenous peoples," however, but also considered the land claims of other ethnic minority groups, such as the black communities of Colombia and Ecuador. The consultants' view was that a study restricted solely to the indigenous perspective would be too narrow.[216]

The consultants' report indicates that the IDB should be concerned with the land claims of the Garifuna people. In fact, the report made specific mention of the Garifuna people, stating:

> Blacks, as well as Garifuna and other indigenous populations, reside in many . . . coastal areas of Central and South America. These once-remote areas include riverine regions, mangrove swamps and other fragile natural ecosystems that are now recognized as an important part of the Caribbean or Pacific biospheres. *Such areas, and their traditional occupants, are increasingly becoming candidates for special titling programs.*[217]

Additional indication of the IDB's concern with potential land claims such as those of the Garifuna—and the specific need to take such claims into account in land titling programs—is reflected in the IDB's recently-published "Guidelines for Socio-cultural Analysis."[218] These Guidelines are "designed to pose questions, and to help Bank staff and consultants think

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211 Inter-American Development Bank, *IDB Approves $7 Million for Belize to Consolidate Land Registration* (June 6, 2001), at http://www.iadb.org/exr/PRENSA/2001/cp9301e.htm.

212 *Id*. (emphasis added).

213 *Id*.

214 ROGER PLANT & SOREN HVALKOF, INTER-AMERICAN DEVELOPMENT BANK, TECHNICAL STUDY NO. IND-109, LAND TITLING AND INDIGENOUS PEOPLES (2001).

215 *Id*. at 1.

216 *Id*. at 6. The consultants specifically urged the IDB that "[n]ow is the time . . . to undertake a technical study of the potential for special systems of land and resource management by black and other ethnic minority communities." *Id*.

217 *Id*. at 24 (emphasis added).

218 JONATHAN RENSHAW, ET AL., INTER-AMERICAN DEVELOPMENT BANK, GUIDELINES FOR SOCIO-CULTURAL ANALYSIS: PRELIMINARY DRAFT (2001).

through the social and cultural issues raised by the main kinds of operations financed by the Bank."[219] Land titling programs are specifically covered in the Guidelines. Significantly, the Guidelines include a "Rural, Land Titling and Environment Checklist," which lists as factors for consideration: (1) traditional and customary rights to land; and (2) the potential for a project to cause some sectors or groups to lose their rights to land.[220]

Because the IDB land registration program in Belize could affect the potential land claims of the Garifuna people, the NGC should seriously consider initiating a dialogue with the IDB with the aim of becoming an active participant in the design and implementation of the land registration program. If the IDB truly does have a commitment to addressing the land claims of indigenous peoples and other ethnic minority groups,[221] and really means what it has said about developing an approach adapted to Belize's multicultural context, the Bank should welcome participation by the NGC. The International Human Rights Advocacy Center at the University of Denver could work with the NGC to draft a letter to the IDB to initiate this process, and could provide on-going legal support for the participation of the NGC in the design and implementation of the land registration program.

B. THE WORLD BANK

The World Bank has adopted specific guidelines and policies relating to indigenous peoples.[222] If any projects financed by the World Bank in Belize have the potential to impact the traditional land rights of the Garifuna, the NGC could consider making a review of these policies and guidelines to determine how they might be helpful. As one example of this type of strategy, the Miskito and Mayagna communities of Nicaragua were able to work with the World Bank to have a financial aid package set for Nicaragua be conditioned on the development by the goverment of a specific plan to demarcate the communities' traditional lands.[223]

VII. CONCLUSION

Although further factual research is needed to determine the scope and nature of the Garifuna land rights, there is a strong legal argument that the Garifuna do possess some form of land rights which are entitled to recognition and protection under domestic and international law. The various alternative legal strategies discussed herein for obtaining the recognition and protection of such rights include: (i) a common law aboriginal title claim in Belize court; (ii) a Constitutional claim in Belize court; (iii) assertion of prescriptive rights under Belize's Registered Land Act; (iv) a claim within the United Nations Human Rights system; and/or (v) a claim within the Inter-American Human Rights System. The extra-legal strategy of enlisting the assistance of pertinent international financial organizations was also discussed.

The Government of Belize has signed a Memorandum of Understanding with the NGC in which it has agreed "to conduct serious good faith negotiations with the NGC with regard to

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219 *Id*. at iii.

220 *Id*. at 67.

221 *See* PLANT & HVALKOF, *supra* note 214, at 4 (citing the IDB's Darien project in Panama as one example of "the Bank's commitment to addressing the land claims of indigenous peoples and other ethnic minority groups").

222 *See, e.g.,* World Bank Operational Directive 4.20 on Indigenous Peoples (1991).

223 Anaya & Williams, *supra* note 159, at 38.

communal rights of the Garinagu to certain lands." On September 7, 2001, in its official statement to the World Conference Against Racism, Belize touted the fact that it has signed an agreement with the Garifuna recognizing them as a people. Furthermore, the Government of Belize has specifically stated its intent to work with UNESCO to protect the Garifuna culture.[224] Should the NGC decide to move forward with the Garifuna land claim, the legal analysis provided in this report should assist the NGC in developing a strategy to translate the words, commitments, and legal obligations of Belize into realities that can improve the lives of the Garifuna people.

[224] UNESCO Proclamation Press Release, *supra* note 145.