

VIOLATIONS OF INDIGENOUS PEOPLES' TERRITORIAL RIGHTS:

The example of Costa Rica



VIOLATIONS OF INDIGENOUS PEOPLES' TERRITORIAL RIGHTS:

The example of Costa Rica

January 2014

Authors: Fergus MacKay and Alancay Morales Garro (Senior Counsel, Forest Peoples Programme, and Project Officer, Forest Peoples Programme, respectively)

With special thanks to Vanessa Jimenez and Marcus Colchester for their comments; any errors are the authors' alone.

Published by: Forest Peoples Programme (FPP)

Design and layout: Gemma Humphrys

Cover photos:

Large photo: Brunka Territory. Photo by: Alancay Morales Garro

Smaller photos (left-right): a) Teribe Children; b) Pedro Bejarano - Ngöbe-Buglé Chief; c) Ngöbe-Buglé woman. Photos by: Alancay Morales Garro



Forest Peoples Programme

1c Fosseway Business Park, Moreton-in-Marsh, GL56 9NQ, UK

Web: www.forestpeoples.org

UK-registered Charity No. 1082158

Contents

Tables and figures	2
Acronyms	3
1. Introduction	4
2. Massive, Persistent and Illegal Occupation of Titled Indigenous Territories in Costa Rica	8
A. Persistent Denial of Indigenous Property and Related Rights in Costa Rica	15
B. Documented Illegal Occupation and Dispossession of Titled Indigenous Territories	17
C. Ineffective Domestic Laws and Remedies	19
D. The Situation of the Teribe People of the Térraba Territory	22
E. The Situation of the Indigenous Territory of China Kichá	27
F. The Situation of the Bribri of Salitre	29
G. Illegal Occupation Violates the Right to Cultural Integrity and other rights in addition to Property Rights, and Threatens Indigenous Peoples' Integrity and Survival	32
3. Violation of Indigenous Peoples' Rights to Autonomous Self-Governance, Self Representation, Effective Participation and Juridical Personality	35
4. The Autonomy Bill: A Long-Awaited Solution?	43
5. Conclusion	46

Tables and figures

Tables:

Table 1: Land tenure in titled indigenous territories in Costa Rica	13
Table 2: Land tenure in the Central, Central Pacific and Northern Huetar Regions	16
Table 3: Land tenure in the Atlantic Coast	18
Table 4: Land tenure in the South Pacific Coast	25

Figures:

Figure 1: Illegal occupation of indigenous territories in Costa Rica	14
Figure 2: Land ownership in the Térraba indigenous territory 1964-1999	26
Figure 3: Percentage of land occupied by indigenous peoples in their titled lands	28

Acronyms

ADI	Asociación de Desarrollo Integral (Integral Development Association)
CONAI	Comisión Nacional de Asuntos Indígenas (National Commission on Indigenous Affairs)
IACHR	Inter-American Commission on Human Rights
ICE	Instituto Costarricense de Electricidad (Costa Rican Institute of Electricity)
IDA	Instituto de Desarrollo Agrario (Agrarian Development Institute)
ILO	International Labour Organisation
UN	United Nations
UNCERD	United Nations Committee on the Elimination of Racial Discrimination
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

1.

INTRODUCTION

The multifaceted and fundamental nature of indigenous peoples' relationships to their traditional territories is well recognised by international human rights bodies and many governments.¹ Without secure and enforceable guarantees for their traditionally owned lands, territories and resources, including the right to control internal and external activities affecting them through their own institutions, indigenous peoples' means of subsistence, their identity and survival, and their socio-cultural integrity and economic security are permanently threatened. There is therefore a complex of interdependent human rights² converging on and inherent to indigenous peoples' various relationships with their traditional lands and territories as well as their interrelated status as self-determining entities, all of which necessitates a high standard of affirmative protection.³

¹ For instance, the former UN Rapporteur on indigenous land rights, Erica-Irene Daes, explains that: "(i) a profound relationship exists between indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the intergenerational aspect of such a relationship is also crucial to indigenous peoples' identity, survival and cultural viability." *Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/2001/21 (11 June 2001), at para. 20.

² See Helen Quane, *A Further Dimension to the Interdependence and Indivisibility of Human Rights?: Recent Developments Concerning the Rights of Indigenous Peoples*, 25 HARVARD HUMAN RIGHTS J. 49, at 51 (2012) (analyzing United Nations' treaty body practice "concerning the rights of indigenous peoples, which suggest[s] a further dimension to the interdependence and indivisibility of human rights. These developments suggest that human rights are interdependent and indivisible not only in terms of mutual reinforcement and equal importance, but also in terms of the actual content of these rights") (footnote omitted). See also e.g., *Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs*, Judgment, 2010 Inter-Am. Ct. H.R. (ser. C) No. 214, at para. 263 (29 March 2006) (relating territorial rights to the rights of the child as guaranteed by Article 19 of the American Convention on Human Rights and Article 30 of the Convention on the Rights of the Child; and stating that "the Court finds that the loss of traditional practices like male and female initiation ceremonies and the Community's languages, as well as the damage from the lack of territory, have a particularly negative effect on the development and cultural identity of the Community's children, who will never be able to develop a special relationship with their traditional territory and the way of life unique to their culture if the measures necessary to guarantee the enjoyment of these rights are not implemented"); and *Case of the Río Negro Massacres v. Guatemala Merits, Reparations and Costs*, Judgment, 2012 Inter-Am. Ct. H.R. (ser. C) No. 250, at para. 143-44 (4 Sept. 2012) (holding that the "Court considers it important to indicate that the special measures of protection that the States must adopt in favor of indigenous children include the promotion and protection of their right to live according to their own culture, their own religion and their own language ... and that this right 'is an important recognition of the collective traditions and values in indigenous cultures'" and; "[f]or the full and harmonious development of their personality, indigenous children, in keeping with their cosmovision, need to grow and develop preferably within their own natural and cultural environment, because they possess a distinctive identity that connects them to their land, culture, religion, and language"); and *in accord Chitay Nech et al. v. Guatemala, Merits, Reparations and Costs*, Judgment, 2010 Inter-Am. Ct. H.R. (ser. C) No. 212, at para. 169 (25 May 2010).

³ See *inter alia* IACHR, *Report No. 96/03, Maya Indigenous Communities and their Members (Case 12.053 (Belize))* (24 October 2003), para. 111-19, 141; *Concluding observations of the Human Rights Committee: Australia*, CCPR/CO/69/AUS, at para. 10-11 (28 July 2000) (where the Human Rights Committee explains that Article 27 of the International Covenant on Civil and Political Rights requires that "necessary steps should be taken to restore and protect the

Despite this recognition, in 2012, the UN Special Rapporteur on the Rights of Indigenous Peoples observed, in the context of extractive industries, that “[m]ajor legislative and administrative reforms are needed in virtually all countries in which indigenous peoples live to adequately define and protect their rights over lands and resources....”⁴ Additionally, the UN Committee on the Elimination of Racial Discrimination (“UNCERD”) explained that one of the reasons it adopted a General Recommendation on indigenous peoples in 1997 is because

*of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.*⁵

Abundant evidence of widespread and persistent violations of indigenous peoples’ internationally guaranteed human rights, especially with respect to rights to lands and territories, can be found in the jurisprudence of international human rights protection organs.⁶ These violations occur regularly in developed and less developed countries alike and in countries regarded as having relatively good and bad general human rights records. For example, UN treaty bodies routinely express serious concern about the treatment of indigenous peoples and the maintenance or adoption of discriminatory laws or laws that otherwise negate or hinder indigenous peoples’ rights in New Zealand and Canada, both of which are regarded as having relatively good general human rights records and score high on development indices.⁷ These bodies are also just as likely

titles and interests of indigenous persons in their native lands ...” and; “securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities ... must be protected under article 27...” and; Gunther Handl, *Indigenous Peoples’ Subsistence Lifestyle as an Environmental Valuation Problem*, in *Environmental Damage in International and Comparative Law. Problems of Definition and Valuation* (M. Bowman and A. Boyle eds., 2002), p. 85-110, at p. 95 (asserting “there can be little room for doubt that there exists today a general consensus among states that the cultural identity of traditional indigenous peoples and local communities warrants affirmative protective measures by states, and that such measures be extended to all those elements of the natural environment whose preservation or protection is essential for the groups’ survival as culturally distinct peoples and communities”).

⁴ *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya*, UN Doc. A/HRC/21/47 (6 July 2012), at para. 58.

⁵ UNCERD, *General Recommendation XXIII (51) concerning Indigenous Peoples*, UN Doc. CERD/C/51/Misc.13/Rev.4 (18 August 1997), at para. 3.

⁶ United Nations treaty body jurisprudence concerning indigenous peoples for the years 1993-2012 is compiled in *Indigenous Peoples and United Nations Treaty Bodies: A Compilation of United Nations Treaty Body Jurisprudence*, Volumes I-V (F. MacKay ed.), <www.forestpeoples.org/topics/un-human-rights-system/publication/2013/indigenous-peoples-and-united-nations-human-rights-bo>. See also Helen Quane, *A Further Dimension to the Interdependence and Indivisibility of Human Rights?*, *supra*, note 3. For Inter-American jurisprudence: see *Jurisprudencia sobre Derechos de los Pueblos Indígenas en el Sistema Interamericano de Derechos Humanos*, OEA/Ser.L/V/II.120, Doc. 43 (9 September 2004) and; *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources*, OEA/Ser.L/V/II. Doc. 56/09 (30 December 2009) (hereinafter “IACHR Indigenous Lands”). In Africa: see *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities* (Afr. Comm’n on Hum. and Peoples’ Rts., 28th ordinary session) and; *Centre for Minority Rts. Dev. (Kenya) v. Kenya*, Comm. No. 276/2003 (Afr. Comm’n on Hum. & Peoples’ Rts. Feb. 4, 2010), <www.minorityrights.org/9587/press-releases/landmark-decision-rules-kenyas-removal-of-indigenous-people-from-ancestral-land-illegal.html>.

⁷ See *inter alia*, UNCERD, *Decision 1 (66), New Zealand, (Early Warning & Urgent Action Procedure)*. CERD/C/DEC/NZL/1 (27 April 2005) (finding that the 2004 Foreshore and Seabed Act discriminates against indigenous peoples); *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen. Mission to New Zealand*. UN Doc. E/CN.4/2006/78/Add.3, at para. 13 (observing that “the underlying legal and political fragility of Maori rights translates into a human rights protection gap that seems not to be sufficiently covered by existing legislation”); *Concluding observations of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5 (20 April 2006), at para. 8 and 9 (explaining that it remains concerned about practices that “amount to extinguishment of aboriginal rights (arts. 1 and 27);” recommending that Canada “re-examine its policy and practices to ensure they do not result in extinguishment of inherent aboriginal rights;” and expressing concern “about information that the land of the [Lake Lubicon] Band continues to be compromised by logging and large-scale oil and gas extraction ...

to find violations of indigenous peoples' rights, including basic due process rights, the right to judicial protection, and the right to equal protection of the law, in Scandinavian countries or the United States as they are in the poorest countries in the world.⁸ A state's relative wealth, its governance capacity and the effectiveness of its judicial system, or other rule of law indicators, therefore, are not necessarily the most pertinent factors in whether indigenous peoples' rights are respected or violated.⁹

**Almost all
states in which
indigenous
peoples live
maintain
discriminatory
laws, policies
and practices**

Indeed, almost all states in which indigenous peoples live maintain discriminatory laws, policies and practices – some have adopted such laws in the very recent past – that negate or impede the exercise and enjoyment of indigenous peoples' rights.¹⁰ Many states also continue to apply a presumption against the existence of indigenous peoples' right to own their traditional territories and resources and, often with the support of their domestic courts, have rejected indigenous land and resource rights by applying, inter alia, rigid evidentiary requirements based on colonial norms that exclude indigenous peoples' perspectives and traditions.¹¹ For example, the UNCERD has expressed concern about "the difficulties which may be encountered by Aboriginal peoples before the courts in establishing Aboriginal title over land" in Canada, and noted that "to date no Aboriginal group has proven Aboriginal title."¹² Similarly, almost all states invoke the public or

(arts. 1 and 27"); and, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen. Mission to Canada*. UN Doc. E/CN.4/2005/88/Add.3.

⁸ *Concluding observations of the Committee on the Elimination of Racial Discrimination: Denmark*, CERD/C/DEN/CO/17 (18 August 2006), para. 20 (finding that Denmark is denying indigenous peoples' right to identity); *Concluding observations of the Committee on the Elimination of Racial Discrimination: Norway*, CERD/C/NOR/CO/18 (18 August 2006), at para. 11 (recommending that Norway "adopt special and concrete measures" to ensure indigenous peoples the full and equal enjoyment of human rights and fundamental freedoms); UNCERD, *Decision 1(68), United States of America, (Early Warning & Urgent Action Procedure)*, CERD/C/USA/DEC/1 (11 April 2006) (finding "that past and new actions taken by the State party on Western Shoshone ancestral lands lead to a situation where, today, the obligations of the State party under the Convention are not respected, in particular the obligation to guarantee the right of everyone to equality before the law in the enjoyment of civil, political, economic, social and cultural rights, without discrimination based on race, colour, or national or ethnic origin; [and,] express[ing] particular concern about: (a) Reported legislative efforts to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers. (b) Information according to which destructive activities are conducted and/or planned on areas of spiritual and cultural significance to the Western Shoshone peoples, who are denied access to, and use of, such areas. It notes in particular the reinvigorated federal efforts to open a nuclear waste repository at the Yucca Mountain; the alleged use of explosives and open pit gold mining activities ... (d) The conduct and / or planning of all such activities without consultation with and despite protests of the Western Shoshone peoples").

⁹ *See in this respect* the view of the former United Nations Secretary General's Special Representative on the issue of human rights and transnational corporations and other business enterprises that many of the worst human rights abuses by transnational corporations occur in low to middle income countries characterized by weak governance, for instance, as classified on the World Bank's rule of law scale. *Interim Report of the Secretary General's Special Representative on the issue of human rights and transnational and other business enterprises*. UN Doc. E/CN.4/2006/97 (22 February 2006), para. 27 & 30.

¹⁰ *See e.g., Concluding observations of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5 (20 April 2006), at para. 22 (expressing "concern that the Canadian Human Rights Act cannot affect any provision of the Indian Act or any provision made under or pursuant to that Act, thus allowing discrimination to be practised as long as it can be justified under the Indian Act;" and, *Concluding observations of the Human Rights Committee: United States of America*, CCPR/C/USA/Q/3/CRP.4 (27 July 2006), at para. 27 (recommending that the "State party should review its policy towards indigenous peoples as regards the extinguishment of aboriginal rights on the basis of the plenary power of Congress regarding Indian affairs and grant them the same degree of judicial protection that is available to the non-indigenous population"). *See also Indigenous Peoples and United Nations Treaty Bodies*, *supra* note 7.

¹¹ *See inter alia*, R. Williams, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (2005) and; *Indigenous people and their relationship to land*, *supra* note 2.

¹² *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, 01/11/2002, UN Doc. A/57/18, para. 315-343, 330 (recommending that Canada "examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts"). *See also Yorta Yorta v. Victoria*, 194 ALR 538 (2002) (an Australian case giving preference to the written accounts of white settlers over the oral history of aboriginal

general interest in relation to extractive or other operations on indigenous lands, despite the fact that this is essentially a 'majority rules test' that is inherently biased against minority indigenous peoples and is generally not subject to judicial review. In relation to one such provision, the Inter-American Commission on Human Rights ("IACHR") has observed that the public interest doctrine

*substantially limit[s] the fundamental rights of the indigenous and Maroon peoples to their land ab initio, in favor of an eventual interest of the State that might compete with those rights. What is more, according to Suriname's laws, mining, forestry, and other activities classified as being in the general interest are exempted from the requirement to respect customary rights. In practice, the classification of an activity as being in the "general interest" is not actionable and constitutes a political issue that cannot be challenged in the Courts. What this does in effect is to remove land issues from the domain of judicial protection.*¹³

Costa Rica, the subject of this article, is an upper middle income country that is widely regarded as having a generally positive human rights record. It has also avoided the violent conflicts and political instability that have characterised most of its closest neighbours in the last decades of the 20th century. However, as with almost all other countries considered to have good track records on human rights, the situation of indigenous peoples stands out as a major blemish. This is especially the case when the complex of rights that are interdependent with indigenous peoples' territorial rights is considered. This article details the history, legal background and current status of this situation in Costa Rica as well as the relevant international human rights law. Particular attention is paid to the jurisprudence of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.



Ngöbe Buglé people of Coto Brus. Photo by: Alancay Morales Garro

peoples in denying the existence of native title rights).

¹³ IACHR, *Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans (Suriname)* (2 March 2006), at para. 241-42.

2.

MASSIVE, PERSISTENT AND ILLEGAL OCCUPATION OF TITLED INDIGENOUS TERRITORIES IN COSTA RICA

According to the information received by the Special Rapporteur during his visit, one of the main priorities of the country's indigenous peoples is to recover their lands. The Special Rapporteur believes that decisive steps need to be taken urgently to find solutions that would allow indigenous peoples to recover the land in their territories.¹⁴

There are eight indigenous peoples in Costa Rica with a population of 104,143 persons, comprising approximately 2.4 percent of the national population.¹⁵ Many of them live in 24 legally recognised and titled indigenous territories as well as in lands traditionally occupied but presently not included in these titled territories.¹⁶ The legal recognition of indigenous territories commenced in the 1930s in the south Pacific region while others were recognised as late as 2001. These 24 territories are ostensibly protected by the 1977 *Ley Indígena*¹⁷ and the law implementing International Labour Organisation Convention No. 169 ("ILO 169"), ratified by Costa Rica in 1993.¹⁸ Contrary to the majority of other American states, there are no constitutional guarantees for indigenous property or cultural rights, the only exception being the constitutional recognition of indigenous linguistic rights in 1999.¹⁹

Indigenous peoples are currently facing a series of substantial, discriminatory and debilitating obstacles to the exercise and enjoyment of their rights to own, possess and control

¹⁴ *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya. The situation of the indigenous peoples affected by the El Diquís hydroelectric project in Costa Rica.* UN Doc. A/HRC/18/35/Add.8 (11 July 2011) (hereinafter "SRIP Report on El Diquís"), at para. 44, (in Spanish) <www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35-Add8_sp.pdf> (in English) <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/146/67/PDF/G1114667.pdf?OpenElement>>.

¹⁵ *Instituto Nacional de Estadística y Censos* (2011), <www.inec.go.cr/cgi-bin/RpWebEngine.exe/EasyCross?&BASE=2011&ITEM=CRUCEPOB&MAIN=WebServerMain.inl>, visited on 21 November 2012.

¹⁶ According to information submitted by Costa Rica, the ILO Committee of Experts on the Application of Conventions and Recommendations observes that of the total indigenous population, "42 percent live in indigenous lands, 18 percent live on the periphery of these lands and 40 percent in the rest of the country...". ILO CEACR, *Costa Rica: Observation*, adopted 2003, published 92nd ILC session (2004).

¹⁷ *Ley Indígena*, N° 6172, 29 November 1977.

¹⁸ Ley N° 7316, 12 October 1992 and; International Labour Organisation, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Preamble, June 27, 1989, 72 ILO Official Bulletin 59, 1650 U.N.T.S. 383 (hereinafter "ILO Convention No. 169").

¹⁹ Human rights instruments ratified by Costa Rica have constitutional status and, thus, Inter-American and universal human rights norms are incorporated into domestic law. See Article 48 and Article 7 of the Constitution, the latter providing that "Public treaties, international agreements and concordats duly approved by the Legislative Assembly shall have a higher authority than the laws upon their enactment or from the day that they designate." The Constitutional Chamber of the Supreme Court of Costa Rica has recognised that international human rights treaties in some cases have supra-constitutional status placing them above constitutional norms. See Judgment No. 3435-92 and its Clarification No. 5759-93, and Judgment No. 2313-95.

their territories caused by Costa Rica's acts and omissions.²⁰ In particular, the vast majority of titled indigenous territories are massively and illegally occupied and this has been the case for many decades. In fact, studies document that almost three-quarters of these territories are at least 40 percent illegally occupied and a quarter of them are 80 to 98 percent illegally occupied.²¹ Costa Rica itself informed the UN that its 2000 census revealed that "in the indigenous territories only 1 out of every 10 hectares is in conformity with the law..."²² These figures only account for the lands that have been titled to indigenous peoples and do not include areas of traditionally owned and presently occupied lands that were left out of these territories when they were delimited and titled and which currently have no legal protection under domestic law.

Illegal occupation of indigenous territories has been a serious problem since at least the 1960s. It is well known in Costa Rica, yet has not been, and is not now, the subject of any meaningful remedial action. Indeed, the state tacitly approves of this illegal occupation despite the fact that a draft law that is intended to correct this situation has been pending before the legislature since 1995.²³ This persistent and pervasive denial of indigenous peoples' property rights also has serious consequences for the exercise and enjoyment of a wide range of other interrelated rights and is extremely detrimental to indigenous peoples' well-being and integrity.²⁴ In this respect, the IACHR has observed that the special relationship between indigenous peoples and their territories means that "the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly."²⁵ The Inter-American Court of Human Rights has held that this includes non-

²⁰ See *Saramaka People v. Suriname, Merits and Reparations*, Judgment, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, at para. 194 (28 November 2007) (ordering that recognition of the Saramaka people's territorial rights must include recognition of "their right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system"). See also *Kichwa Indigenous People of Sarayaku. Merits and reparations*, Judgment, 2012 Inter-Am. Ct. H.R. (ser. C) No. 245, at para. 145 & 171 (June 27, 2012) (observing, respectively, that "[a]mong indigenous peoples there exists a communitarian tradition related to a form of collective land tenure, inasmuch as land is not owned by individuals but by the group and the community. This notion of land ownership and possession does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention" and; the "effective protection of indigenous communal property ... imposes an obligation on States to adopt special measures to ensure that members of indigenous and tribal peoples enjoy the full and equal exercise of their right to the land that they have traditionally used and occupied").

²¹ See *inter alia*, G. Berger, M. Vargas & J. Carlos, *Perfil de los Pueblos Indígenas de Costa Rica* (San José: Costa Rica, 2000); C. Borge Carvajal, *Consulta en los Territorios Indígenas del Pacífico de Costa Rica. Regularización de los derechos relacionados con la propiedad inmueble en áreas bajo regímenes especiales* (ABRE), Programa de Regularización del Catastro y Registro, September 2007 and; Asociación Regional Aborigen de la Región del Dikes, *Land Tenure in Indigenous Territories in Costa Rica* (1999) (on file with authors).

²² Reports submitted by States Parties: Costa Rica, UN Doc. CERD/C/CRI/18 (30 August 2006), at para. 278. <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/440/44/PDF/G0644044.pdf?OpenElement>>, visited on 20 November 2012.

²³ See Section IV *infra* discussing the *Proyecto de Ley de Desarrollo Autónomo de los Pueblos Indígenas* (the Bill for Autonomous Development of Indigenous Peoples), which was first submitted for debate in the Congress in 1995. It was subsequently modified and reconsidered by the Congress in 2002. The UNCERD observed in 2007 that "despite the recommendation contained in its final comments of 2002, the *Autonomous Development of Indigenous Peoples Bill* has not been adopted owing to legislative obstacles." It added that it was "disturbed to learn that the bill may once again be shelved" and recommended that Costa Rica "remove without delay the legislative obstacles preventing [its] adoption..." UNCERD, Costa Rica: CERD/C/CRI/CO/18 (17 August 2007), at para. 9. Most recently, the UNCERD expressed "its concern on information received about statements made by the State party on the situation of El Diquís hydroelectric dam as a reason for not adopting the Autonomy Bill of Indigenous Peoples, which has been waiting the approval in Congress for 16 years." See *Communication of the UNCERD to Costa Rica* (02 September 2011), <www2.ohchr.org/english/bodies/cerd/docs/early_warning/CostaRica02092011.pdf>, visited on 10 October 2012.

²⁴ See IACHR Indigenous Lands, *supra*, note 7, at p. 63-70 (and, at para. 153 explaining that "The lack of granting of title, delimitation, demarcation and possession of ancestral territory, hampering or preventing access to land and natural resources by indigenous and tribal peoples, is directly and causally linked to situations of poverty and extreme poverty among families, communities and peoples. In turn, the typical circumstances of poverty trigger cross-cutting violations of human rights, including violations of their rights to life, to personal integrity, to a dignified existence, to food, to water, to health, to education and the rights of children") (footnotes omitted). See also *Yakye Axa Indigenous Community. Merits, Reparations and Costs*, Judgment 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, para. 163 (17 June 2005).

²⁵ *Maya Indigenous Communities*, *supra* note 4, at para. 114.

derogable rights, stating that the right to live in ancestral territory is interconnected with the right to (a dignified) life.²⁶

Non-indigenous persons illegally occupy more than 43% of titled indigenous territories

The 1977 *Ley Indígena* prescribes that indigenous territories are “inalienable” and “exclusive” to indigenous peoples and that non-indigenous “persons cannot rent, lease, purchase or acquire by any other means” lands therein.²⁷ This has been a prominent principle of Costa Rican law since 1939.²⁸ In direct contravention of this law, studies reveal that 6,087 non-indigenous persons illegally occupy more than 43 percent of the total lands in the 24 titled indigenous territories.²⁹ In only two territories are indigenous peoples in possession of 100 percent of their lands.³⁰ In 20 percent of these territories, indigenous peoples are outnumbered by illegal

occupants and, nationwide, the latter on average hold four hectares of land to every one hectare held by indigenous persons in their territories. Domestic remedies to address illegal occupation are ill-defined, unfunded and demonstrably ineffective. In this respect, the fact that more than 6,000 non-indigenous persons continue to possess almost half of the area titled to indigenous peoples nationwide some 35 years after the *Ley Indígena* was adopted speaks for itself.

This massive and illegal occupation of indigenous lands has not escaped the attention of international human rights bodies. The UNCERD, for instance, has repeatedly expressed deep concern about the illegal occupation of indigenous lands in Costa Rica since 1999, most recently in 2010 and 2011 in connection with the situation of the Teribe people.³¹ As noted by the UNCERD in 2007, this includes the failure to implement decisions of the Constitutional Chamber of the Supreme Court upholding indigenous peoples’ property and associated rights.³² In 2002, 2007 and 2010, the UNCERD emphasized that urgent action was required to address this long-standing problem.³³ The

²⁶ Yakye Axa, *supra* note 25, para. 168; and Xákmok Kásek, *supra* note 3, at para. 187-217.

²⁷ *Ley Indígena* 1977, at Article 3, providing that “indigenous reserves are inalienable and imprescriptible, non-transferrable and exclusive for the indigenous communities that inhabit them. Non-indigenous persons may not rent, lease, purchase or acquire by any other means plots of land or estates on these reservations. Indigenous persons may only offer their land for sale to other indigenous persons. Any transfer, sale or bequest of land on indigenous reservations transacted between indigenous and non-indigenous persons shall be null and void, with all the legal consequences thereof.”

²⁸ *Ley de Terrenos Baldíos*, N° 13, 10 January 1939, Article 8 (which provided that “it is declared inalienable and of exclusive property of the indigenous, a prudential zone in the judgment of the Executive Power in the places where their tribes exist, with the aim of conserving our autochthonous roots and to free them of future injustice...” See also Executive Decree 45 of 1945, creating the Board for Protection of the Aboriginal Races, reaffirming Article 8 of the *Ley de Terrenos Baldíos*, and providing that the lands “that are awarded to the indigenous cannot be sold, mortgaged or leased or in anyway alienated without prior authorization of the Board, and only can be made to the members of their tribe.”

²⁹ *Perfil de los Pueblos Indígenas de Costa Rica*, *supra* note 22; *Consulta en los Territorios Indígenas del Pacífico de Costa Rica. Regularización de los derechos relacionados con la propiedad inmueble en áreas bajo regímenes especiales (ABRE)*, *supra* note 22.

³⁰ *Id.*

³¹ See *Communication of the UNCERD to Costa Rica* (27 August 2010), <www2.ohchr.org/english/bodies/cerd/docs/early_warning/CostaRica27082010.pdf>, visited on 11 October 2012 (expressing profound concern about the lack of guarantees for the Teribe in relation to the Diquís dam and reiterating prior recommendations that Costa Rica effectively secure and protect indigenous lands, and specifically mentioning the Teribe as requiring urgent attention in this respect).

³² UNCERD, Costa Rica, *supra* note 24, at para. 15 (recommending that “the State Party should take measures in order to carry out the ruling of the Constitutional Court (Vote N0. 3468-02) to delimit the lands of the Rey Curré, Térraba and Boruca communities, and to get back the indigenous lands wrongfully alienated”). See also *Concluding observations of the Human Rights Committee: Costa Rica. 08/04/99. CCPR/C/79/Add.107*, at para. 21 (stating that the Human Rights Committee “remains concerned at the lack of effective remedies for indigenous people in Costa Rica”).

³³ UNCERD, Costa Rica, *ibid.* at para. 15. See also UNCERD, Costa Rica: CERD/C/60/CO/3 (20 March 2002), at para. 11 and; *Communication of the UNCERD to Costa Rica*, *supra* note 32.

UN Special Rapporteur on the Rights of Indigenous Peoples has also highlighted the need for urgent action,³⁴ and observed that, although Costa Rica “has granted legal protection to the indigenous territories ... these territories are in their majority inhabited by non-indigenous persons.”³⁵ Likewise, the International Labour Organization, in its supervision of ILO 169, has repeatedly recommended that Costa Rica urgently addresses the illegal occupation of indigenous territories.³⁶

Despite clear and authoritative evidence that this situation constitutes a serious derogation of its international obligations, Costa Rica has done nothing to meaningfully address this situation and indigenous peoples continue to lose more lands each year and with it the enjoyment of related rights. For example, the indigenous territories of Boruca, (Rey) Curré and Térraba have on average lost an additional 40.5 percent of their titled lands to illegal occupation since 1964, when illegal occupation was already 37.2 percent.³⁷ The territory of China Kichá was 60 percent illegally occupied in 1964; today, it is between 97 and 98 percent illegally occupied. Costa Rica is well aware of this situation, yet indigenous peoples' rights continue to be violated with impunity and their cultural integrity continues to be undermined and threatened by the invasion and illegal alienation of their lands throughout the country.

Illegal occupation is also the cause of serious ethnic tension and violence and, in some cases, indigenous leaders have been subject to assassination attempts when they try to peacefully recover their lands or otherwise complain about encroachment thereon. Indigenous people have been killed in the Bribri and Cabécar peoples' Talamanca territories and there have been assassination attempts against a Teribe leader in 2012 for complaining about illegal logging in their territory.³⁸ This confirms the IACHR's observation that “the lack of resolution of indigenous communities' claims for territorial restitution puts the integrity of their members in danger.”³⁹ As discussed further below, the situation has so deteriorated that a Bribri indigenous leader from

³⁴ SRIP Report on El Diquís, *supra* note 15, at para. 24 (explaining that “the possession of large tracts of indigenous territories by non-indigenous persons is an underlying problem in Costa Rica and should be addressed by the Government as a matter of priority”).

³⁵ *Id.* at para. 43.

³⁶ See generally <<http://www.ilo.org/dyn/normlex/en>>. See also ILO CEACR, *Costa Rica: Observation*, adopted 1999, published 88th ILC session (2000) (requesting “the Government to indicate the progress made in returning lands to their indigenous owners in the light of the Government's statement in its previous report that there are large areas of indigenous lands in the hands of non-indigenous persons” and; “notes the Government's statement that provisions to prevent the penetration into indigenous lands by non-indigenous persons is laid down in Indigenous Act No. 6172 and other associated Acts. The Committee requests the Government to supply information on the manner in which this legislation has been applied in practice and on any measure taken to guarantee the safety of the peoples concerned, including examples of specific cases in which punishment has been imposed on non-indigenous persons who invade indigenous lands and reservations.” The same or very similar requests are made in each and every observation and direct request adopted by the CEACR between 1998 and 2010. See e.g., ILO CEACR, *Costa Rica: Observation, adopted 2009*, published 99th ILC session (2010) (reiterating the same concerns).

³⁷ See *infra* notes 76-79 and accompanying text.

³⁸ See IACHR, MC-321-12, *Costa Rica*, request for precautionary measures submitted on behalf of Pablo Sibas Sibas and Sergio Rojas, two indigenous leaders subject to assassination attempts in 2012. See also Costa Rica: CERD/C/304/Add.71. 07/04/99, at para. 10 (stating that the UNCERD “remains concerned at the situation with regard to the land rights of indigenous peoples in the State party. ... Of special concern have been confrontations arising over the ownership of property, in the course of which indigenous people were killed and vandalism occurred, as in the case of Talamanca”).

³⁹ See IACHR Indigenous Lands, *supra* note 7, at para. 134 (stating that “The Court and the Commission have actively promoted respect for traditional authorities, leaders and other individual members of indigenous and tribal peoples and communities who undertake and head the initiatives, processes and actions of reclamation and recovery of ancestral territories. On numerous occasions, the IACHR has adopted precautionary measures and the Inter-American Court has adopted provisional measures to protect these indigenous leaders and persons. In a high number of these cases, the threats against the life or personal integrity of the members of indigenous communities are closely linked to their activities in defense of these communities' territorial rights, particularly in relation to the exploitation of the natural resources that exist in their territory. The IACHR has also pointed out that the lack of resolution of indigenous communities' claims for territorial restitution puts the integrity of their members in danger”).

Salitre was even declared *persona non grata* in a formal resolution adopted in August 2012 by the Municipal Council of Buenos Aires, an official organ of the state of Costa Rica, because of his attempts to recover illegally occupied lands in his territory.⁴⁰ Empowered by this resolution, on the 17 September 2012, unknown assailants attempted to kill him, and, a few weeks later, riot police were deployed in Salitre to control a large and violent confrontation between indigenous people and illegal occupants.⁴¹

The massive, notorious and unmitigated occupation of indigenous lands in Costa Rica – contrary both to domestic law and Costa Rica's international obligations – undermines the foundations of indigenous territorial rights and is, by itself, reason enough for international human rights bodies to consider this an urgent situation. Indeed, the IACHR has explained that

*As part of the right to property protected under Inter-American human rights instruments, indigenous and tribal peoples have the right to possession, use, occupation and inhabitation of their ancestral territories. This right is, moreover, the ultimate objective of the protection of indigenous or tribal territorial property: for the IACHR, the guarantee of the right to territorial property is a means to allow members of indigenous communities to possess their lands.*⁴²

Articles 14(2) and 18, respectively, of ILO 169, in force for Costa Rica, also emphasize that states parties shall “guarantee effective protection of rights of ownership and possession;” and that “[a]dequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.” As noted above, the ILO has long observed that illegal occupation in Costa Rica raises serious issues in relation to these and other provisions of ILO 169. Costa Rica's tolerance and tacit approval of the massive and illegal occupation and dispossession of indigenous peoples' territories, therefore, nullifies indigenous property rights and causes grave and irreparable harm on multiple levels, all in contravention of its international obligations.⁴³

**Costa Rica has
done nothing
to meaningfully
address the
illegal occupation
of indigenous
territories**

⁴⁰ See ‘Resolution adopted at the 11 August 2012 session of the Buenos Aires Municipal Council, Re. Sergio Rojas Ortiz’, *Official Record of the Buenos Aires Municipal Council*, August 2012 (on file with authors).

⁴¹ See Section II(F) *infra*. See also *Lider indígena de Salitre recibe seis disparos*, <<http://coecoceiba.org/lider-indigena-de-salitre-recibe-seis-disparos/>>, visited 5 October 2012; *Intentan asesinar a líder indígena*, *Revista Amauta*, <<http://revista-amauta.org/2012/09/intentan-asesinar-a-lider-indigena-costarricense/>>, visited 5 October 2012; and *Indigenous leader survives assassination attempt in Costa Rica*, *Costa Rica Star*, <<http://news.co.cr/indigenous-leader-survives-assassination-attempt-in-costa-rica/14806/>>, visited 5 October 2012.

⁴² See IACHR *Indigenous Lands*, *supra* note 7, at para. 90 (footnotes omitted).

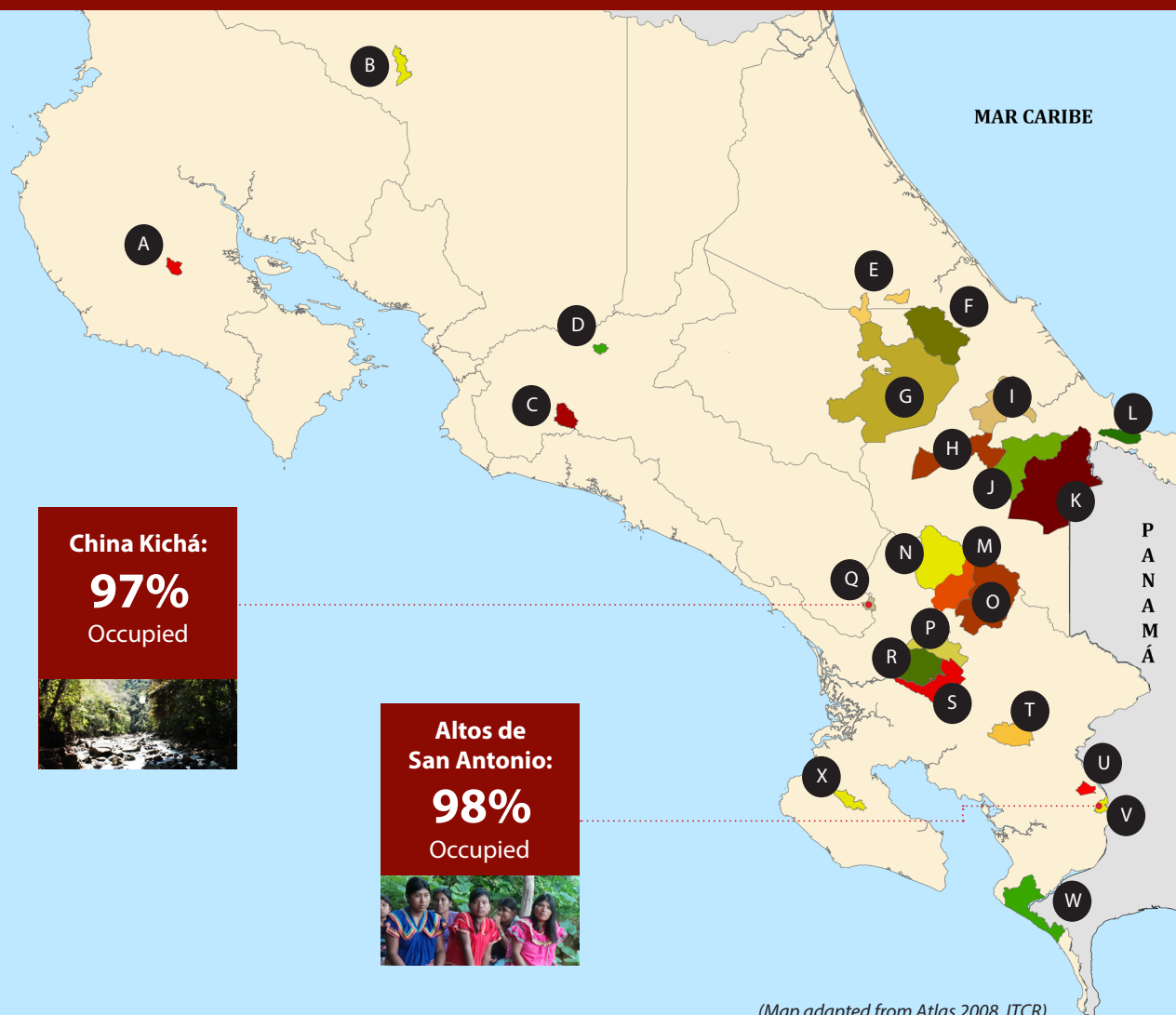
⁴³ See *Moiwana Village Case*, *Merits and Reparations*, Judgment, 2012 Inter-Am. Ct. H.R. (ser. C) No. 125, para. 101, 102-3 (15 June 2005) (observing that: “in order for the culture to preserve its very identity and integrity, [indigenous and tribal peoples] ... must maintain a fluid and multidimensional relationship with their ancestral lands”). See also *Yakye Axa*, *supra* note 26, at para. 146, (where the Court observes that “indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations”); and IACHR, *Report 75/02, Case 11.140. Mary and Carrie Dann (United States)* (27 December 2002), at para. 128 (observing that “continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective wellbeing, and indeed the survival of, indigenous peoples”).

Table 1: Land tenure in titled indigenous territories in Costa Rica

Indigenous group	Territory	Population in year 2000		Area (in hectares)					
				Total Ha.	In indigenous hands		In non indigenous hands	Hectares per person	
		Indigenous	Non indigenous		%	Ha.	Ha.	Indigenous	Non indigenous
Bribri	Talamanca Bribri	6467	399	43690	35	15291.5	28398.5	2.36	71.17
	Keköldi	210	230	3538	38	1344.44	2193.56	6.4	9.54
	Salitre	1285	118	11700	40	4680	7020	3.64	59.49
	Cabagra	1683	670	27860	59	16437.4	11422.6	9.77	17.05
Brunca or Boruca	Curré	631	351	10620	16	1699.2	8920.8	2.69	25.42
	Boruca	1386	1568	12470	39	4863.3	7606.7	3.51	4.85
Cabécar	Bajo Chirripó	363	9	18783	75	14087.25	4695.75	38.81	521.75
	Nairi-Awari	346	4	5038	89	4483.82	554.18	12.96	138.55
	Alto Chirripó	4619	82	77973	60	46783.8	31189.2	10.13	380.36
	Tayní	1807	10	16216	100	16216	0	8.97	0
	Telire	536	0	16260	100	16260	0	30.34	0
	Talamanca Cabécar	1335	34	22729	85	19319.65	3409.35	14.47	100.28
	Ujarrás	855	175	19040	32	6092.8	12947.2	7.13	73.98
	China Kichá	150	Nd	1100	3	33	1067	0.22	nd
Chorotega	Matambú	868	127	1710	58	991.8	718.2	1.14	5.66
Huetar	Quitirrisí	952	273	963	9	86.67	876.33	0.09	3.21
	Zapatón	54	412	2855	20	571	2284	10.57	5.54
Maleku	Maleku	460	655	2993	22	658.46	2334.54	1.43	3.56
Ngöbe or Guaymí	Conte Burica	971	140	11910	60	7146	4764	7.36	34.03
	Coto Brus	1091	3	7500	80	6000	1500	5.5	500
	Abrojos-Montezuma	387	19	1480	50	740	740	1.91	38.95
	Osa	114	4	2757	90	2481.3	275.7	21.77	68.93
	Altos de San Antonio	104	Nd	1262	2	25.24	1236.76	0.24	Nd
Térraba or Teribe	Térraba	621	804	9355	12	1122.6	8232.4	1.81	10.24
TOTAL		27226	6087	329802	56.83	187415.23	142386.77	6.88	23.39

Source: G. Berger, M. Vargas & J. Carlos, *Perfil de los Pueblos Indígenas De Costa Rica* (San José: Costa Rica, 2000)

Figure 1: Illegal occupation of indigenous territories in Costa Rica



**75%+
Occupied**



B - Maleku **78%**
 C - Zapatón **80%**
 D - Quitirrisí **91%**
 P - Térraba **88%**
 Q - China Kichá **97%**
 S - Rey Curré **84%**
 V - Altos de San Antonio **98%**

**50-75%
Occupied**



K - Talamanca Bribri **65%**
 L - Keköldi **62%**
 M - Salitre **60%**
 N - Ujarrás **68%**
 R - Boruca **61%**

**10-50%
Occupied**



A - Matambú **42%**
 E - Nairi-Awari **11%**
 F - Bajo Chirripó **25%**
 G - Alto Chirripó **40%**
 J - Talamanca Cabécar **15%**
 O - Cabagra **41%**
 T - Coto Brus **20%**
 U - Abrojos Montezuma **50%**
 W - Conte Burica **40%**
 X - Osa **10%**

**0%
Occupied**

H - Telire **0%**
 I - Tayní **0%**

A. Persistent Denial of Indigenous Property and Related Rights in Costa Rica

While noting that domestic legislation protects indigenous peoples' right to ownership of their lands, the Committee is concerned that this right is not guaranteed in practice. The Committee shares the State party's concern at the trend towards the concentration of indigenous land in the hands of non-indigenous settlers.⁴⁴

In the quote above, the UNCERD highlighted in 2007 that domestic legal guarantees for indigenous property rights in Costa Rica are ineffective and, in particular, that these rights are "not guaranteed in practice". These rights are rendered ineffective not by the extant legal framework, but, rather, by the increasing alienation of indigenous lands to non-indigenous persons. This is a situation that Costa Rica agreed was a matter of serious concern in 2007⁴⁵ and 2011⁴⁶ but, to date, has done next to nothing to correct it. In this respect, Costa Rica's Office of the Ombudsman unambiguously observed in 2005 that "no steps have been taken to recover land for indigenous communities, which is one of the principal, as yet, unmet obligations of the Costa Rican State."⁴⁷ The IACHR has emphasized similar considerations as the UNCERD, stating that

Ensuring the effective enjoyment of territorial property by indigenous or tribal peoples and their members is one of the ultimate objectives of this right's legal protection. ... States have the obligation to adopt special measures to secure the real and effective enjoyment of indigenous peoples' rights to territorial property. For this reason, the IACHR has emphasized that "demarcation and legal registry of the indigenous lands is in fact only the first step in the establishment and real defense of those areas," given that the ownership and effective possession are constantly being threatened, usurped or eroded by various de facto or legal acts.⁴⁸

While it is the issue that needs to be addressed most urgently, illegal occupation of indigenous lands is not the only matter of concern or the only cause of denying indigenous peoples' rights in Costa Rica. For example, indigenous property and other rights are severely undermined by laws that vest legal personality, self-governance powers and title to indigenous territories in local government bodies known as Integral Development Associations ("ADIs" in Spanish). The ADIs were created in the 1960s and operate throughout Costa Rica in indigenous and non-indigenous areas alike. They do not adequately represent indigenous peoples; they were not chosen by indigenous peoples as the means by which their rights and powers should be exercised; they are state-created bodies that often operate in non-transparent and unaccountable ways; and they have been

⁴⁴ UNCERD, Costa Rica, *supra* note 24, at para. 15.

⁴⁵ See also *Reports submitted by States Parties*, *supra* note 23, para. 278 (stating that "it was discovered that there are non-indigenous families who own more than 5,000 hectares, which reflects a disturbing trend towards the concentration of indigenous land in the hands of non-indigenous individuals").

⁴⁶ See *Note verbale dated 16 September 2011 addressed to the President of the Human Rights Council from the Permanent Mission of Costa Rica to the United Nations Office and other international organizations in Geneva*. UN Doc. A/HRC/18/G/8 (19 Sept 2011), at p.12 (stating that "The Government also has put on the table the need to seek joint solutions in an attempt to recover indigenous lands, as referred to by Mr. Anaya. For this purpose, the Government of Costa Rica is ready to enter into a process of dialogue with the country's indigenous communities so that jointly public institutions, and indigenous peoples may, together, build formulas to implement the recovery of the lands to which they aspire"), <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/160/54/PDF/G1116054.pdf?OpenElement>>, visited on 18 December 2012.

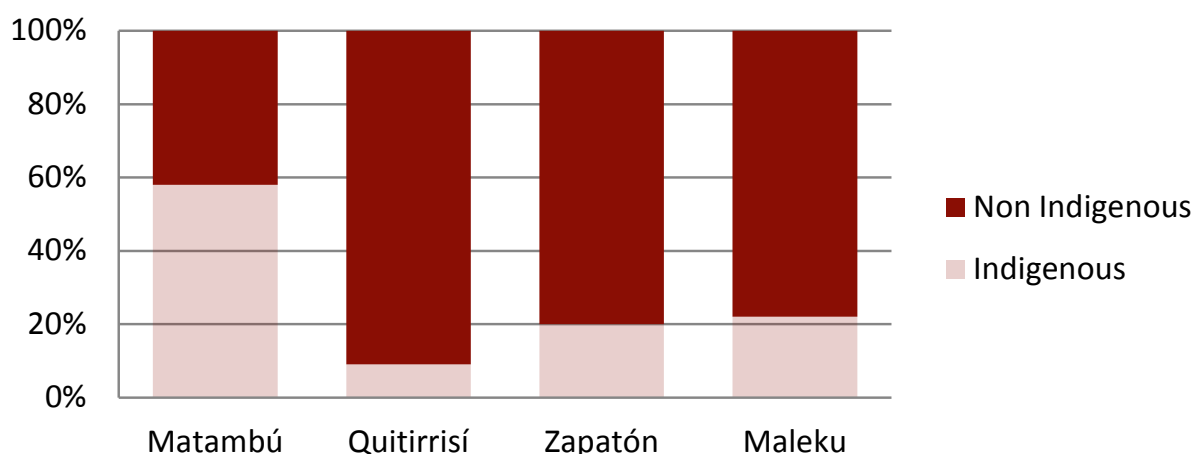
⁴⁷ *Reports submitted by States Parties*, *supra* note 23, at para. 279 (quoting the report of the Ombudsman and stating that "The Office of the Ombudsman has been very critical of the State institutions concerned by this issue and expressed this in no uncertain terms in its 2005 annual report...").

⁴⁸ IACHR Indigenous Lands, *supra* note 7, at para. 86 (footnotes omitted).

overwhelmingly rejected by indigenous peoples as inappropriate to their circumstances, rights, customs and traditions.⁴⁹

This section discusses the massive illegal occupation of indigenous territories and the applicable legal framework. To further illustrate the problem, it also provides more detailed information about three particular indigenous territories: Térraba, China Kichá and Salitre. The ADIs and associated issues are addressed in Section III below.

Table 2: Land tenure in the Central, Central Pacific and Northern Huétar Regions



⁴⁹ See *inter alia* *Swimming Against the Current: The Teribe Peoples and the El Diquís Hydroelectric Project in Costa Rica* (University of Texas Law School Human Rights Clinic, July 2010) (hereinafter “Swimming Against the Current”), at p. 19-20, <www.utexas.edu/law/clinics/humanrights/docs/swimming-english-report.pdf>, visited 11 November 2012.

B. Documented Illegal Occupation and Dispossession of Titled Indigenous Territories

The land tenure situation of indigenous peoples in their titled territories in Costa Rica has been documented in a number of studies, the results of which are summarised below. Very little information, however, has been gathered about the situation of indigenous communities' lands that lie outside of a titled territory and which are not presently recognised or protected by domestic law. Costa Rica has reported to the ILO that 18 percent of indigenous persons reside on the "periphery" of indigenous territories and this may provide some indication of the extent of this problem.⁵⁰ While not further discussed in detail herein, this issue is also fundamentally important to understanding the larger picture of indigenous property and related rights in Costa Rica.

In only 2 of the 24 indigenous territories do indigenous peoples possess 100% of their titled lands

Despite the provisions of the 1977 *Ley Indígena* prescribing that indigenous territories are inalienable and exclusive and cannot be occupied by or alienated in any way to non-indigenous persons, the available data demonstrates that some 6,087 non-indigenous persons illegally and notoriously occupy 142,386.77 hectares, or 43.17 percent, of the area that has been legally titled to indigenous peoples.⁵¹ This illegal occupation, whether in place before or after the indigenous title was recognized, is now repugnant to the underlying title affirmed to the indigenous peoples. In only two of the 24 indigenous territories are indigenous peoples in possession of 100 percent of their titled lands;⁵² in five (20.75 percent) they possess

between 75 and 90 percent;⁵³ in four (16.66 percent) they possess between 58 and 60 percent;⁵⁴ and in six (25 percent) they possess between 32 and 50 percent.⁵⁵ The remaining seven territories (29.16 percent) possess less than one-quarter of their titled lands, and three of these possess less than 10 percent.⁵⁶

Thus, in almost 30 percent of the indigenous territories in Costa Rica, indigenous peoples are in possession of a mere two to 22 percent of the lands legally titled to them and prescribed as inalienable and exclusive under extant Costa Rican law. The next 25 per cent possess between 32 and 50 percent of their titled lands while the next 16.66 percent possess between 58 and 60 percent of their titled territories. Consequently, 70.81 percent of the indigenous territories recognized by Costa Rica are, at the least, 40 percent illegally occupied.

⁵⁰ ILO CEACR, *Observation*, adopted 2003, *supra* note 17.

⁵¹ *Perfil de los Pueblos Indígenas de Costa Rica*, *supra* note 22; *Consulta en los Territorios Indígenas del Pacífico de Costa Rica. Regularización de los derechos relacionados con la propiedad inmueble en áreas bajo regímenes especiales (ABRE)*, *supra* note 22.

⁵² *Id.* (identifying Taynín and Telire).

⁵³ *Id.* (identifying the Ngöbe of Osa, Ngöbe of Coto Brus, Talamanca Cabécar, Cabécar of Nairi-Awari and Cabécar of Bajo Chirripó).

⁵⁴ *Id.* (identifying the Ngöbe of Abrojos-Montezuma, the Ngöbe of Conte Burica, the Chorotega of Matambú, the Cabécar of Alto Chirripó and the Bribri of Cabagra).

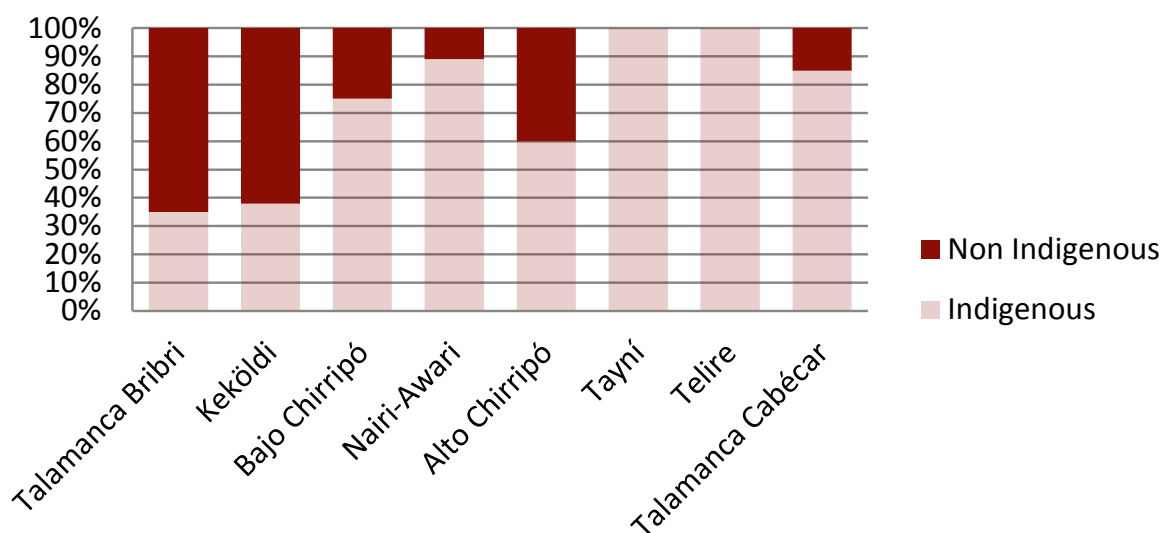
⁵⁵ *Id.* (the Ngöbe of Abrojos-Montezuma possess 50 percent; the Bribri of Salitre possess 40 percent; the Brunca of Boruca possess 39 percent; the Bribri of Keköldi have 38 percent; the Talamanca Bribri hold 35 percent; and the Cabécar of Ujarrás have 32 percent).

⁵⁶ *Id.* (the Maleku possess 22 percent; the Brunca of Curré possess 16 percent; the Teribe possess 12 percent; the Huetar of Zapatón and Quitirrisí possess 20 and nine percent, respectively; the Cabécar of China Kichá possess three percent and; the Ngöbe of Altos de San Antonio possess two percent).

This illegal occupation has drastically altered the demographics and traditional social systems in indigenous territories, undermined traditional institutions for governance and land management, and created substantial inequalities compared to the illegal occupants. In five territories (20.75 percent), indigenous peoples are outnumbered by illegal occupants, making them numerical minorities in their own lands. In five others, the non-indigenous population is between 10 and 50 percent of the total population. In the other 14 territories there are between 3 and 399 non-indigenous occupants, all of whom possess substantially more land per person than the indigenous owners. This disparity is not confined to these 14 territories however as, nationwide, the 6,087 illegal occupants hold on average 23.39 hectares per person compared to only 6.88 hectares for each of the indigenous persons residing in the territories, a ratio of almost 4:1. In some territories, the ratio is more than 90:1 in favour of the illegal occupants.

In the Coto Brus Ngöbe territory, for instance, three non-indigenous persons hold 500 hectares per person whereas 1,091 indigenous people hold a mere 5.5 hectares per person. For the Cabécar of Bajo Chirripó, nine illegal occupants hold 521.75 hectares per person while 363 indigenous persons possess 38.81 hectares per person; for the Cabécar of Alto Chirripó the number is 380.36 hectares for each of the 82 illegal occupants compared to 10.13 hectares for each of the 4,619 indigenous persons. This disparity in the amount of hectares per person is evident in all but three indigenous territories.⁵⁷ Two of these are 100 percent possessed by the indigenous title holders and in the third, the Huetar of Zapatón, the indigenous owners are outnumbered almost eight to one by the illegal occupants who possess 2,284 of the total of 2,855 hectares.

Table 3: Land tenure in the Atlantic Coast



⁵⁷ In two territories, there is no information available on this point.

C. Ineffective Domestic Laws and Remedies

When the *Ley Indígena* was adopted in 1977, Article 5 required the state to remove all persons in occupation of lands declared to be indigenous territories⁵⁸ whether they were 'good faith possessors' or otherwise.⁵⁹ The former were entitled to compensation from a fund established by the law.⁶⁰ The same article unambiguously states that "If afterwards there are invasions of non-indigenous persons in the reserves, the competent authorities immediately shall proceed with their eviction with no payment of compensation whatsoever." While a fund was established in 1977, Costa Rica has clearly failed to comply with these domestic legal requirements – and its corresponding international obligations – and the specified remedial process is ill-defined and ineffective. Discussing this situation, the UN Special Rapporteur on the Rights of Indigenous Peoples explains that

Some of these people hold title deeds in good faith, with the corresponding rights to compensation under the Indigenous Act of 1977; but according to information received by the Special Rapporteur, most of them do not have legal deeds and acquired land in indigenous territories by settling there or through irregular transfers, sometimes with the tacit consent of the Government. Under the Indigenous Act, the land in indigenous territories is inalienable and imprescriptible. However, the inflow of non-indigenous persons to indigenous territories has affected the territories' demographics and landholding patterns, with large farms being established by non-indigenous persons....

It is alleged that, in the vast majority of cases, no procedures have been followed to compensate those who occupy indigenous territories in good faith, nor have there been any efforts to recover land held by non-indigenous persons through settlements or irregular transfers. Although the Agrarian Development Institute, the Government agency responsible under domestic legislation for compensating non-indigenous persons who hold title deeds in good faith, has bought some land under procedures to recover indigenous lands, the Special Rapporteur was informed that these procedures are slow and suffer from irregularities.⁶¹

The procedure for addressing illegal occupation by 'good faith possessors' is outlined in the *Ley Indígena*, but has not been further elaborated on in subsidiary legislation, creating uncertainty and substantial delays. The procedure concerning 'bad faith possessors' (essentially an action for trespass (*usurpación* in Spanish)), who are not entitled to compensation, is contained in the Code of Criminal Procedure but is rarely invoked by the relevant authorities. Judicial remedies have also proved to be ineffective. The Bribri of Keköldi, for instance, sought relief in the Contentious Administrative Tribunal, which found in September 2012 that the state was required to compensate and remove good faith possessors, evict the bad-faith possessors, and return the lands to the indigenous owners.⁶² To date, Costa Rica has failed to comply with this ruling and

⁵⁸ *Ley Indígena*, Art. 5, provides, in relevant part, that "In the case of non-indigenous persons that are owners or good faith possessors within the indigenous reserves, IDA shall relocate them in other similar lands if they wish so; if it is not possible to relocate them or they do not accept the relocation, shall expropriate and compensate them in accordance with the procedures established in the Law of Expropriations. ..."

⁵⁹ The *Ley Indígena* defines 'good faith possessors' as non-indigenous persons that hold land in the reserves before they had any legal protection as such.

⁶⁰ Article 5 of the *Ley Indígena* provides, in relevant part, that "The expropriations and compensations shall be financed with a contribution of one-hundred million *colones* in cash, that shall be consigned through four annual quotas of twenty-five million *colones* each, starting the first one in the year of 1979; such quotas shall be included in the general budgets of the Republic of the years 1979, 1980, 1981 and 1982. ..."

⁶¹ SRIP Report on El Diquís, *supra* note 15, at para. 43-4.

⁶² Case N° 10-000275-01028-CA. *Asociación de Desarrollo Integral de la Reserva Indígena Bri Bri de Kekoldi contra El Estado y otros*, September 2012.

has given no indication that it is even considering compliance. The situation is so bad that the Agrarian Development Institute ("IDA"), the state agency responsible for compensating 'good faith possessors', even challenged the constitutionality of the *Ley Indígena* due to its inability to comply with its mandate because, it claimed, it lacked the funds required to compensate illegal occupants. It explained in the national press that it faces lawsuits with a potential liability of up to 35,000 million *colones* (approximately USD70 million) in relation to land repossession.⁶³ The action filed by the IDA was only withdrawn following protests by indigenous peoples and the intervention of the Office of the Vice-President. To make matters worse, there are no procedures at all to address the claims that indigenous peoples may have over traditionally owned and occupied lands that were excluded from the titled territories. Existing law would have to be modified to accommodate many of these claims. Among other reasons, this is the case because many territories have boundaries adjacent to national parks (e.g., Ujarrás, Salitre, Cabagra, Osa and the majority of territories on the Atlantic Coast), which can only be modified through legislative amendments.

**Costa Rica's
procedures for
addressing illegal
occupation are ill-
defined, unfunded
and demonstrably
ineffective**

Pursuant to, *inter alia*, Article 25 of the American Convention on Human Rights, which is closely related to the guarantees recognized in Articles 1 and 2 of the same,⁶⁴ indigenous peoples have the right to effective remedies for violations of their human rights, including effective domestic procedures for the recognition, restoration and protection of their property rights.⁶⁵ Moreover, "indigenous peoples who have been deprived of the possession of the territory they have traditionally occupied preserve their property rights, and have the right to restitution of their lands."⁶⁶ Costa Rica has the obligation to not only pass laws that provide a remedy for the violation of indigenous peoples' rights, but also to ensure their prompt application by state

authorities, including through the organization of the institutions responsible for administering justice.⁶⁷ This may include prompt due process and appropriate compensation to removed illegal

⁶³ See *Pago para Devolver Tierras a Indígenas: IDA enfrenta demandas por €35.000 millones*, La Nación, 18 May 2012, <www.nacion.com/2012-05-18/ElPais/ida-enfrenta-demandas-por--35-000-millones.aspx>, visited 14 October 2012.

⁶⁴ Velasquez Rodriguez, *Merits and Reparations*, Judgment, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (29 July 1988); Garbi and Solis Corrales and Godinez Cruz, *Preliminary Objections*, Judgment, 1987 Inter-Am. Ct. H.R. (ser. C) No. 2, para. 90-92 (26 June 1987).

⁶⁵ See *inter alia*, IACHR Indigenous Lands, *supra* note 7, at para. 86 (stating that "The right to legal certainty of territorial property requires the existence of special, prompt and effective mechanisms to resolve existing legal conflicts over the ownership of indigenous lands. States are, consequently, bound to adopt measures to establish such mechanisms including protection from attacks by third parties. Part of the legal certainty to which indigenous and tribal peoples are entitled consists in having their territorial claims receive a final solution. That is to say, once the claims procedures over their ancestral territories have been initiated, be it before administrative authorities or before the Courts, their claim should be given a final solution within a reasonable time, without unjustified delays") (footnotes omitted); and *Case of Tribunal Constitucional v. Perú*, *Merits, Reparations, and Costs*, Judgment, 2001 Inter-Am. Ct. H.R. (ser. C) No. 71, para. 90 (31 January 2001) (explaining that "effectiveness means that, in addition to their formal existence, the remedies must produce results or responses to violations of recognized rights, whether those rights are recognized by the Convention, the Constitution, or domestic law").

⁶⁶ *Sawhoyamaya Indigenous Community*, *Merits, Reparations and Costs*, Judgment, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, at para. 128 (29 March 2006) (observing that "possession is not a requisite conditioning the existence of indigenous land restitution rights"); and *Xákmok Kásek*, *supra* note 3, at para. 112 (summarizing its jurisprudence and stating that "[r]egarding the possibility of recovering traditional lands, on prior occasions the Court has established that the spiritual and physical foundation of the identities of indigenous peoples is based mainly on their unique relationship with their traditional lands. As long as that relationship exists, the right to recover those lands remains applicable"). See also IACHR Indigenous Lands, *supra* note 7, at para. 132 (explaining that "In relation to mechanisms for restitution, the IACHR has clarified that indigenous and tribal peoples have a right to legally established administrative mechanisms which are effective to solve definitively their territorial claims") (footnotes omitted).

⁶⁷ *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights), OC-9/87 of Oct. 6, 1987. Series A No. 9; *Tarcisco Madina Charry*, Report No. 3/98, *IACHR 1997 Annual Report*, OEA/Ser.L/V/II.98, Doc. 6 rev., 13 April 1998, p. 499, at para. 80; and, *Hector Felix Miranda*, Report No. 5/99, *IACHR 1998 Annual Report*, OEA/Ser.L/V/II.102 Doc.6 rev., 16 April 1999, p. 759, at para. 18.

occupiers as well as restitution and compensation to the offended indigenous communities.

In cases involving indigenous peoples' property rights, the Inter-American Court of Human Rights has examined both the existence of effective judicial remedies for the recognition, restoration and protection of indigenous property rights as well as whether the state has adopted a specific and effective legal or administrative procedure whereby indigenous peoples can seek restitution of their ancestral lands and/or have their communal lands identified, demarcated and titled.⁶⁸ Such a procedure must take into account indigenous peoples' specific characteristics, including their special relationship to their traditional territories.⁶⁹ With regard to the massive and persistent illegal occupation of indigenous territories, Costa Rica has failed to comply with these obligations. Its procedures for addressing illegal occupation are ill-defined, unfunded and demonstrably ineffective; the fact that more than 6,000 non-indigenous persons continue to possess almost half of the area titled to indigenous peoples nationwide, some 35 years after the *Ley Indígena* was adopted – in some cases, more than 50 years after the reserves were created – speaks for itself. Moreover, Costa Rica has no procedures for addressing the rights of indigenous peoples to lands that are not within a titled territory.



Savannah in Boruca - collecting materials for traditional house construction. Photo by: Alancay Morales Garro

⁶⁸ Mayagna (Sumo) Awas Tingni Case, Merits and Reparations, Judgment, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, para. 123-24 (31 August 2001); Yakye Axa, *supra* note 26, para. 65.

⁶⁹ Sawhoyamaxa, *supra* note 67, para. 104; Mayagna, *id.*

D. The Situation of the Teribe People of the Térraba Territory

Not only has Costa Rica allowed the massive illegal occupation of indigenous territories to continue unabated since the *Ley Indígena* was adopted in 1977 (in fact, non-indigenous occupation of indigenous lands was illegal under Costa Rican law as far back as 1939), the intervening years have seen a substantial increase in illegal occupation as more non-indigenous persons acquire lands even to this day.⁷⁰ Rather than curb and remedy this situation and protect the integrity of the lands it has titled, Costa Rica has also removed lands from indigenous territories by reclassifying parts thereof as 'state lands'. The situation of the Teribe people illustrates both of these points.

The Teribe people's traditional economy is subsistence-based, primarily drawing on the resources of its forests and waters. In the 1970s, Costa Rica began clearing forests for conversion to agricultural and pastoral lands and much of the Teribe's forest was lost. Their ability to practice their traditional economy was further and drastically reduced in the following years due to increased and overwhelming illegal occupation of their lands. Today, the Teribe are essentially denied their ability to practice and benefit from their traditional economy and they have been forced into the cash economy. In short, they have been denied any security over their means of subsistence, their cultural identity, and their right to freely pursue their own economic, social and cultural development.

88% of Térraba territory is illegally occupied

One consequence of the destruction of the Teribe's traditional economy and the illegal occupation of their lands is that their region has the highest incidence of poverty in the country. In 2007, for example, the percentage of households in this region in extreme poverty was 19.3 percent whereas nationally the figure was only 3.3 percent.⁷¹ In this respect, the UNCERD observed in 2007 that extreme poverty among indigenous peoples was a problem nationwide, stating "that only 7.6 percent of indigenous people in the territories have their basic needs met".⁷² It recommended (to date unimplemented) remedial measures to ensure that "indigenous people do not find themselves compelled to leave their ancestral lands" in search of employment and better living conditions.⁷³

The Teribe's territory of Térraba was recognised by Executive Decree 34 of 15 November 1956.⁷⁴ At that time, it was 9,355 hectares in size. For reasons that have never been explained, the Teribe community of Macho Montes was simply excluded from the territory and today enjoys no legal protection for its lands. When first created, the reserve comprised what are now three different territories, Térraba, Boruca and Rey Curré, and was 31,983 hectares.⁷⁵ In 1964, non-indigenous

⁷⁰ Programa Estado de la Nación, XVIII Informe. Estado de la Nación en Desarrollo Humano Sostenible – Capítulo Reconocimiento y exigibilidad de los derechos de los pueblos indígenas: su expresión en la Defensoría de los Habitantes, (Government of Costa Rica: San José, 2012). See also Report by the Office of the Ombudsman, page 8, <www.estadonacion.or.cr/index.php/biblioteca-virtual/costa-rica/estado-de-la-nacion/informe-actual/informe-por-capitulo/derechos-indigenas/1250-xviii-informe-reconocimiento-y-exigibilidad-de-los-derechos-de-los-pueblos-indigenas-su-expresion-en-la-defensoria-de-los-habitantes>, visited 3 November 2012.

⁷¹ Estado de la Nación, Estadísticas Sociales. Pobreza 2006-2007, <www.estadonacion.or.cr/Compendio/soc_pobreza06_07.html>, visited 12 November 2012.

⁷² UNCERD, Costa Rica, *supra* note 24, at para. 12.

⁷³ *Id.*

⁷⁴ Executive Decree 34 of November 15, 1956 "Declares and Demarcates Zones as Indigenous Reserves" identifying 3 lots: Lot 1 (comprising what currently are the territories of Boruca, Térraba and Rey Curré); Lot 2 (comprising what currently are the territories of Cabagra, Salitre and Ujarrás); and, Lot 3 comprising the territory of China Kichá.

⁷⁵ Instituto de Tierras y Colonización, *Study of Indigenous Communities. Zones: Boruca-Térraba and China Kichá*,

persons occupied 37.2 percent of the lands comprising this joint reserve.⁷⁶ Today, these three territories are illegally occupied as follows: Boruca, 61 percent; Curré, 84 percent; and Térraba, 88 percent.⁷⁷ On average then, in the past 48 years, these three territories have lost an additional 40.5 per cent of their total area to illegal occupation. Currently, the Teribe possess at the most 12 percent of their territory and they are a minority in their own lands.⁷⁸

Within the territory, 804 non-indigenous persons are in control of many house lots as well as a number of large landholdings (e.g., *fincas*). Therefore, some individuals hold a considerable amount of the land within Térraba. Some persons also have established bars that openly sell alcohol even though this is illegal under the *Ley Indígena*. This massive encroachment on titled (and untitled) Teribe land has generated conflict among its residents, sometimes violent.⁷⁹ There also have been assassination attempts against one Teribe leader while others have been threatened and harassed on a regular basis.⁸⁰ The situation has so deteriorated that many Teribe are simply afraid to even enter various areas of their territory for fear of being attacked by illegal occupants.

To make matters worse, in 2003, the Attorney General's Office determined that 'public domain goods' should be removed from the territory and registered as belonging to the state. This resulted in a considerable reduction in the size of the territory, which was fractured into a series of discrete blocks because roads, school buildings, water springs, rivers and creeks were removed from the title and declared property of the state.⁸¹ There was no discussion with the Teribe about excising these parts of their territory; it was done unilaterally by decree without any notice to, let alone consultation with, the Teribe.⁸² Neither was any compensation granted for these takings of indigenous lands in violation of basic non-discrimination norms.⁸³ For these reasons and against the backdrop of the overall situation in Costa Rica, the UNCERD specifically identified Térraba as one situation where urgent action was required to address illegal occupation in 2007,⁸⁴ and it reiterated

(Government of Costa Rica, July 1964), p. 7.

⁷⁶ *Id.* p.10.

⁷⁷ *Perfil de los Pueblos Indígenas de Costa Rica*, *supra* note 22; *Consulta en los Territorios Indígenas del Pacífico de Costa Rica. Regularización de los derechos relacionados con la propiedad inmueble en áreas bajo regímenes especiales (ABRE)*, *supra* note 22.

⁷⁸ The 2000 Census data showed that there were 804 non-indigenous persons and 621 indigenous persons in the territory of Térraba. See *Tomado del Cuadro N°6 24 Pueblos indígenas según población, tenencia de la tierra y porcentaje de idioma hablado*, in *Perfil de los Pueblos Indígenas de Costa Rica*, *id.*

⁷⁹ For example in February 2012, violent conflict erupted when a large number of illegal occupants attacked Teribe protesters who were demanding that the state comply with a 2009 agreement with the Teribe on adapting the education system to their culture. The illegal occupants attacked Teribe women, children, youth and men with rocks, wooden sticks embedded with nails, and barb-wire among other weapons. See *Indígenas manejarán Liceo de Térraba*, *La Nación*, 20 February 2012, <www.nacion.com/2012-02-22/ElPais/indigenas-manejaran--liceo--de-terraba.aspx>, visited 15 December 2012.

⁸⁰ See Inter-Am. C.H.R., *MC-321-12, Costa Rica* (2012), precautionary measures requested on behalf of Pablo Sibas Sibas, a Teribe leader subjected to assassination attempts in 2012. These attempts on Pablo Sibas' life came about because of a legal action he filed with the Ministry of Environment in relation to illegal logging in Térraba.

⁸¹ Procuraduría General de la República, *Dictamen C-395-2003*, 16 December 2003.

⁸² The IACHR has explained that "Legal certainty also requires that indigenous peoples' titles to property be protected against arbitrary extinction or reduction by the State, and against trumping by third parties' property rights." See IACHR Indigenous Lands, *supra* note 7, at para. 90 (footnotes omitted).

⁸³ *Id.* (explaining that the state must secure indigenous peoples "equality of treatment *vis-à-vis* non-indigenous persons, and comply with the general requirements established in international law for an expropriation, including fair compensation...") (footnotes omitted).

⁸⁴ UNCERD, Costa Rica, *supra* note 24, at para. 15 (recommending that "the State Party should redouble its efforts to ensure the right of indigenous peoples to land tenure. Also, the State Party should take measures in order to carry out the ruling of the Constitutional Court (Vote NO. 3468-02) to delimit the lands of the Rey Curré, Térraba and Boruca communities, and to get back the indigenous lands wrongfully alienated"). See also UNCERD, Costa Rica, *supra* note 34, at para. 11.

this call in 2010⁸⁵ and 2011,⁸⁶ as did the UN Special Rapporteur on the Rights of Indigenous Peoples in 2011.⁸⁷

Despite this international scrutiny, Costa Rica has failed to take any action to deal with this situation and, instead, is currently seeking to further reduce Teribe territory by constructing a hydroelectric dam that will flood at least ten per cent of the titled area, an area that also contains hundreds of sites of crucial importance to Teribe identity, culture and spirituality.⁸⁸ It also has failed to ensure their participation in decision making about this dam⁸⁹ and argued extensively that consultation with the Teribe is not yet required, a position until recently endorsed by the Constitutional Chamber of the Supreme Court.⁹⁰ Costa Rica has also ignored a September 2011 Constitutional Chamber decision (reversing a prior decision) requiring the state to consult with the Teribe about the proposed Diquís dam within a six month period after the judgment had been adopted, despite the fact that it is more than five years into the process of its design and construction.⁹¹ The Diquís dam situation was examined in 2010 and 2011 by the UNCERD,⁹² in a 2011 report by the Special Rapporteur on the Rights of Indigenous Peoples,⁹³ and by numerous independent observers,⁹⁴ and

⁸⁵ *Communication of the UNCERD*, *supra* note 32 (expressing profound concern about the lack of guarantees for the Teribe in relation to the Diquís dam and reiterating prior recommendations that Costa Rica effectively secure and protect indigenous lands, and specifically mentioning the Teribe as requiring urgent attention in this respect).

⁸⁶ *Communication of the UNCERD*, *supra* note 24.

⁸⁷ SRIP Report on El Diquís, *supra* note 15.

⁸⁸ The Diquís dam will be located on the main tributary of the *Rio Térraba*, the *Rio General*. The river itself is culturally and spiritually significant to the Teribe as are a number of caves along the river that will be flooded. Burial grounds and archaeological sites will also be inundated. See *Aproximaciones al Megaproyecto Hidroeléctrico El Diquís* (University of Costa Rica: San Jose, March 2012), p.155-179 (concluding, at p. 179 that, "[i]n sum, this project contravenes the whole defense of cultural and other rights"), <<http://kioscosambientales.ucr.ac.cr/documentos/EstudioDiquis.pdf>>, visited on 19 November 2012. See also Sarayaku, *supra* note 21, para. 220 (stating that "there is no doubt that the intervention and destruction of their cultural heritage implied a grave lack of respect for their social and cultural identity, their customs, traditions, worldview and way of life, which naturally caused great anguish, sadness and suffering among them").

⁸⁹ See *inter alia* SRIP Report on El Diquís, *supra* note 15, at para. 12 (concluding that "The design of the project is now at an advanced stage ... and the Government has taken various decisions which commit it to researching and developing the project, without adequate consultation beforehand. It is clear to the Special Rapporteur that, although the hydroelectric project has not yet received final approval, the ability of the indigenous peoples to exercise their right to self-determination and establish their own priorities for development has been infringed").

⁹⁰ See Judgment 06045 (file:09-001709-0007-CO), 22/04/2009, Constitutional Chamber of the Supreme Court of Justice (holding that the action filed against the Costa Rican Electricity Institute ("ICE") is premature because (in 2009) ICE was still carrying out the impact assessments to determine whether the project is feasible. See also *Swimming Against the Current*, *supra* note 50, at p. 4 (stating that "The Costa Rican *Sala IV*, the nation's constitutional court, has rendered decisions responding to indigenous individuals' legal actions that refer to the correctly applicable international law but misconstrue the requirements of both international human rights instruments and the Inter-American Court of Human Rights' interpretations of these instruments. Notwithstanding international law to the contrary, the *Sala IV* has concluded that consultation with the Teribe peoples about the PHED is unnecessary until a later phase, after ICE completes feasibility studies;" and, "ICE has moved forward with preliminary studies on the *El Diquís* project without the Teribe peoples' effective participation, operating under an incorrect and improper interpretation of international law's requirements. The *Sala IV* supplied ICE with this misinterpretation of international law in its conclusion that ICE has no obligation to consult with indigenous peoples during the feasibility studies").

⁹¹ Constitutional Court Judgment 12975-11, 23 September 2011 (requiring protection for Teribe lands and the completion of a consultation process within six months in relation to the Diquís dam project).

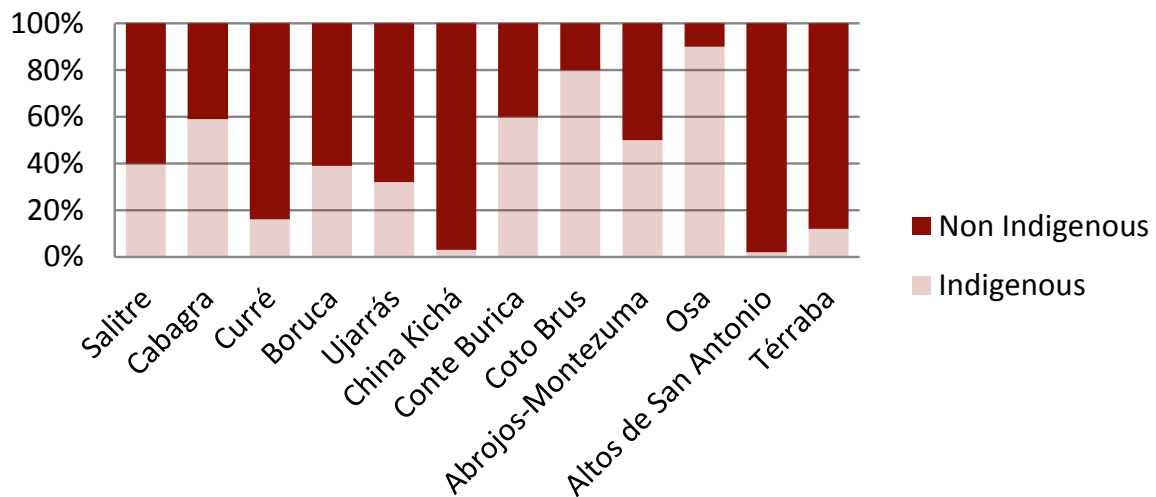
⁹² See *Communication of the UNCERD*, *supra* note 23; and *Communication of the UNCERD*, *supra* note 32.

⁹³ SRIP Report on El Diquís, *supra* note 15, at para. 23 (explaining that "[i]t is estimated that at least 80 per cent of the Térraba territory is occupied by non-indigenous persons. In building the reservoir, the El Diquís project could mean the loss of 10 per cent of the Térraba territory. It is therefore understandable that the Teribe people see the project as a threat and fear that instead of recovering more of their territory, they may lose even more of it").

⁹⁴ See H. Needleman, K. Patterson and S. Di Lucca, *The Proposed PH Diquís and its compliance with International Law*, 23 July 2009 (analysing international environmental laws and some human rights principles and concluding that the Diquís project has failed to comply with applicable norms to-date), <www.law.ufl.edu/conservation/costarica/spotlight/diquis.shtml>, visited 23 August 2012; *SWIMMING AGAINST THE CURRENT*, *supra* note 50, at p. 4 (explaining that "the state-created structures for indigenous governance have thwarted participation by indigenous peoples at a time when robust institutions have been most needed for the consideration and resolution of these issues [concerning

is currently the subject of a petition submitted to the IACHR in March 2012.⁹⁵

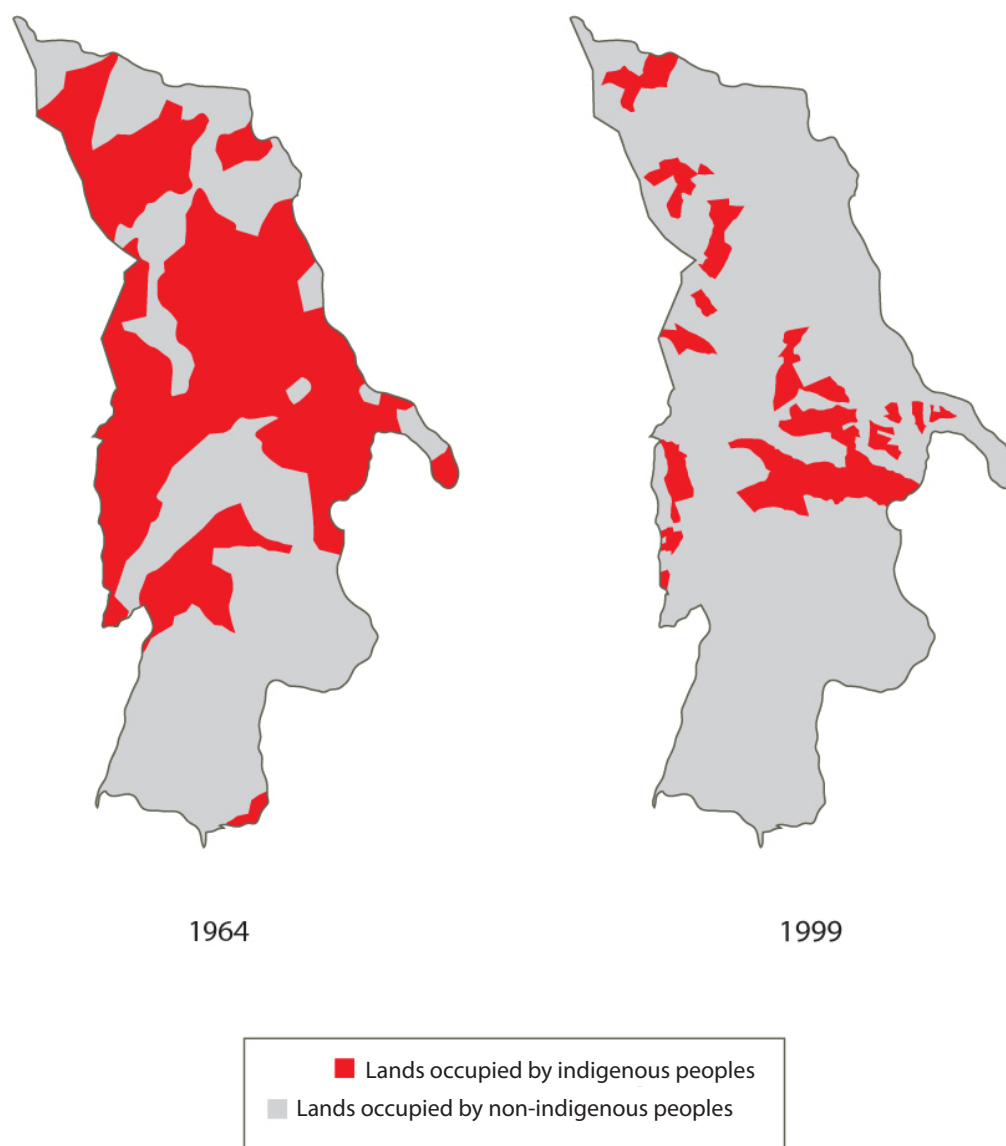
Table 4: Land tenure in the South Pacific Coast



the Diquís dam and lands]"); and D. Moscovici & C. Wenger, *Planning for Scale. Plan Puebla Panama and the Diquís Hydroelectric Project*, PANORAMA, (University of Pennsylvania, 2009), at p.63 (observing that the state-owned electricity company's (ICE) "social taskforce maintains that the indigenous groups have agreed to the newest plan; however, the natives have continued to hold numerous protests against the project. On another front, questions of corruption have surfaced during discussions of land acquisition. Many of the indigenous land holdings have changed hands illegally over the years and now non-native people have purchased the properties unlawfully. Therefore, much of the land ICE needs to purchase for the project is now claimed and owned by non-native persons; so, ICE sees no indigenous conflict"), <www.design.upenn.edu/files/panorama08-13_Moscovci.pdf>, visited 22 August 2012.

⁹⁵ Petition 448-12, submitted to the IACHR on 22 March 2012 by the Teribe Indigenous People.

Figure 2: Land ownership in the Térraba indigenous territory 1964-1999



Map created by Kus Kura S.C and Forest Peoples Programme

E. The Situation of the Indigenous Territory of China Kichá

The Cabécar indigenous territory of China Kichá is also affected by the Diquís dam and provides another example of the consequences of Costa Rica's disregard for indigenous peoples' rights.⁹⁶ The territory today comprises an area of 1,100 hectares and the indigenous owners possess, at the most, a mere three per cent (33 hectares).⁹⁷ In 1956, their territory was recognised by Decree⁹⁸ and was 4,230 hectares in size.⁹⁹ A study carried out in 1964 by a state agency, the Institute of Lands and Colonization, found that non-indigenous occupation is "accentuated, especially in the China Kichá Reserve, where the white group, which comprises 53.48 percent of the families, possesses 60.30 percent of the total area occupied."¹⁰⁰ In 1976, an Executive Decree was issued, which, *inter alia*, required that a study be made "on the possibility of suppressing the [China Kichá] reserve, as well as the feasibility of relocating the remaining indigenous inhabitants to other reserves of the country."¹⁰¹ Because of this study, the reserve was not inscribed in the *Ley Indígena* in 1977, a process which culminated in 1982 with the adoption of an Executive Decree entitled 'Derogation of the Indigenous Reserve of China Kichá'.¹⁰² In the years following the 'de-reserving' of the territory, non-indigenous occupation increased from 60 to 97 percent.

**97% of the
indigenous
territory of China
Kichá is illegally
occupied**

In 2001, following years of sustained protest by the Cabécar people of China Kichá, and after nineteen years of having no security of tenure over their traditional lands, Costa Rica issued Executive Decree 29447-G entitled, 'Re-establishment of the China Kichá Indigenous Reserve and redefinition of its boundaries'.¹⁰³ As its title states, the Decree also reconfigured the boundaries of the territory and made it smaller by some 3,300 hectares. This arbitrary diminishment of its territory was done without any notice or compensation to the Cabécar people, who continue to complain about it to this day, particularly as a number of its member families remain in occupation of lands that are now outside of the reserve. This same Decree also authorised state agencies to expropriate lands held by non-indigenous persons within the reserve, compensate them, and return the lands to the indigenous owners.¹⁰⁴ However, since 2001, no lands have been returned to the Cabécar and

⁹⁶ See SRIP Report on El Diquís, *supra* note 15, para. 2 (stating that "[t]he reservoir will also flood 97 hectares of the China Kichá indigenous territory of the Cabécar people").

⁹⁷ During a meeting with the Special Rapporteur on the Rights of Indigenous Peoples, held in 2012, members of the community stated that they hold as little as 25 hectares (2.2 percent) of their territory.

⁹⁸ Executive Decree 34 of 15 November 1956.

⁹⁹ *Study of Indigenous Communities*, *supra* note 76, at p. 7.

¹⁰⁰ *Id.*

¹⁰¹ Executive Decree 6037 of 26 May 1976.

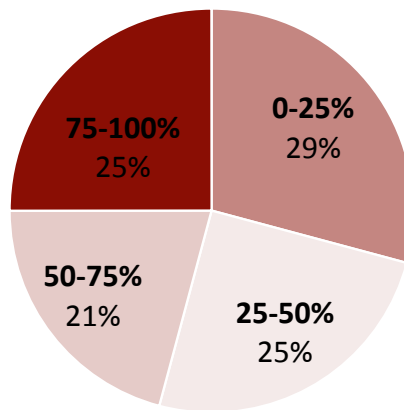
¹⁰² Executive Decree 13570 of 30 April 1982 (stating, in consideration 4, that "both the National Commission on Indigenous Affairs and the Institute of Lands and Colonisation (ITCO), agree that the indigenous Reserve of China Kichá no longer has an objective to exist, for the aforementioned reasons, and that, in these conditions, the Institute of Agrarian Development (IDA) requested the derogation of the Reserve of China Kichá, to include the respective terrains in their titling plan").

¹⁰³ Executive Decree 29447-G of 21 March 2001 (Consideration 2, states that "The decree of derogation of the Indigenous Reserve of China Kichá, did not consider the interests of an important nucleus of indigenous population of the Cabécar ethnic group which remained within the boundaries of the mentioned reserve, leaving them out of the statute of reserve unprotected of the benefits that the indigenous legislation provided them as community and in unequal conditions with respect to the rest of indigenous communities").

¹⁰⁴ The Decree states that "The National Commission on Indigenous Affairs, CONAI, is authorized to compensate, limiting terrains with the reserve, and include them within it, for their allotment to the indigenous community. Once they are compensated in accordance to the Indigenous Law 6172, the terrains located within the defined boundaries of article 2 of this Decree...."

they are now impoverished day labourers working on their own lands that are possessed by illegal occupants.¹⁰⁵ Their cultural integrity, traditional economy, social systems (such as their matrilineal clan system) have all been severely degraded. This situation was documented by a government agency in 2007, which bluntly states that “[t]hey have lost the material basis of reproduction of their cultural specificity, such as land, the forest and rivers. They live on donations by the State, working as labourers in cattle farms and coffee [plantations], and from small-scale subsistence farming.”¹⁰⁶

Figure 3: Percentage of land occupied by indigenous peoples in their titled lands



¹⁰⁵ In this respect, see Xákmok Kásek, *supra* note 3, at para. 215 (where, finding a violation of the right to a dignified life, the Inter-American Court observed that “the Community’s situation of social exclusion is closely tied to its loss of its traditional land. Because the Community members are not able to supply and support themselves using their ancestral traditions, they have to depend almost exclusively on the State’s actions and are forced to live not just in a way that is different from their cultural guidelines, but in misery”) and; Río Negro Massacres, *supra* note 3, para. 183 (explaining that the “Court has verified that the living conditions in Pacux have not allowed its inhabitants to return to their traditional economic activities. Instead, they have had to participate in economic activities that have not provided them with a stable income, and this has also contributed to the disintegration of the social structure and the cultural and spiritual life of the community. In addition, the facts of the case have proved that the inhabitants of Pacux live in very precarious conditions, and that their basic needs in the areas of health, education, electricity and water are not being fully met”).

¹⁰⁶ *Consulta en los Territorios Indígenas del Pacífico de Costa Rica. Regularización de los derechos relacionados con la propiedad inmueble en áreas bajo regímenes especiales (ABRE)*, *supra* note 22, at p. 8.

F. The Situation of the Bribri of Salitre

**60% of the Bribri
territory of
Salitre is illegally
occupied**

The Bribri territory of Salitre is located approximately 20 kilometers from Térraba and is 11,700 hectares in size. Of this area, some 118 illegal occupants possess 7,020 hectares or 60 per cent of the titled lands. They possess 59.49 hectares per person compared to 3.64 hectares for each indigenous owner. Given the ineffectiveness of domestic remedies for recovering indigenous lands and serious social and economic problems, the Bribri of Salitre began organising themselves in 2010 to peacefully recover lands in their territory. As

happened with the Teribe, they have been subjected to violence and assassination attempts against their leaders when doing so. As noted above and discussed further below, this violence was in part prompted by a formal resolution adopted by the Municipal Council of Buenos Aires, an organ of the Costa Rican state, in August 2012.

In July 2012, the Bribri of Salitre, led by one of their leaders, Sergio Rojas, organised a peaceful recovery of lands illegally occupied by non-indigenous persons in Cebzor, a location in their titled territory. This provoked a furious reaction by non-indigenous persons and resulted in a number of threats made against indigenous leaders. For example, the press reported that in a meeting held in Buenos Aires, a nearby town, on 9 September 2012, 500 mostly illegal occupants of lands in indigenous territories met with state authorities, including a Member of Congress. They angrily made statements explaining that violence and deaths would occur if the indigenous people persisted with the recovery of lands. One person, supported by many others, shouted that "the government must make a commission to deal with this emergency before blood is shed; some of the owners of the lands can't take it anymore...."¹⁰⁷

A few weeks earlier, the Buenos Aires Municipal Council, a local government body with jurisdiction over the canton (and six indigenous territories, including Salitre and Térraba), had inflamed the situation. In particular, the Municipal Council adopted an official resolution declaring Sergio Rojas *persona non grata* because of his leadership in the recovery of lands in Salitre. Among other things, the resolution declares "Sergio Rojas Ortiz, persona non grata in the Canton of Buenos Aires, for psychological aggression against the Costa Rican citizens born in our location...."¹⁰⁸ The resolution was widely disseminated in the local media. Leaving aside the legality and propriety of an official organ of the state formally declaring an indigenous citizen *persona non grata* for doing no more than asking that his people's rights, as guaranteed by both domestic and international law, be respected, this decision empowered persons hostile to indigenous peoples to undertake violent actions, including, as noted above, the attempted assassination of Sergio Rojas. The national authorities have done nothing to date to ameliorate this situation, nor to sanction the Municipal Council for its discriminatory resolution and the climate of hostility it engendered.

Notwithstanding the Municipal Council's action and the above described meeting, on 30 September 2012, the Bribri of Salitre hosted a meeting of indigenous leaders from southern Costa Rica in one of the properties that had been recovered from illegal occupants in July 2012. This meeting was quickly disrupted by a group of non-indigenous persons carrying tools and

¹⁰⁷ See *Meeting in relation to land tenure within indigenous territories*, InfoBaires, 10 September 2012, <www.infobaires.net/reunion-en-relacion-de-la-tenencia-de-tierras-en-territorios-indigenas/>, visited 25 September 2012.

¹⁰⁸ Resolution of the Municipal Council, *supra* note 41.

firearms. While the indigenous leaders were away viewing a number of other recovered properties, the non-indigenous persons constructed barbed-wire and cattle fencing around the property of the meeting venue. This was immediately reported to the authorities by the Bribri, including the local police in Buenos Aires. However, even with the police present, an indigenous person was attacked and sustained a serious head injury. The local police did nothing to intervene. This led to a three day-long conflict between indigenous people and illegal occupants, which required the presence of the head of the Office of the Ombudsman, the Minister of Security, the Attorney General Officer for Indigenous Issues, over 20 regular police officers and a detachment of the special anti-riot police to restore order.

In Salitre, illegal occupants possess 59.49 ha of land per person compared to 3.64 ha for each indigenous owner

A few days later, an agreement was reached between the Bribri and the state in which the former agreed to suspend land reclamation actions for one month, during which the state would propose a plan of action to address the situation. At the end of October, however, the state requested an extension until the end of January 2013 to present its plan of action. To-date, Costa Rica has not presented any plan of action or commitment to address this situation, nor has it explained why it failed to prepare the agreed plan.

Indigenous leaders from Térraba showed their solidarity with the Bribri people and were present during the period in question. They saw well-known persons who illegally hold land in Térraba attacking indigenous people in Salitre. This demonstrates that some of the illegal occupants hold lands in both territories. It also shows that the state's failure to investigate and hold accountable – ostensibly known - perpetrators of threats and violence against indigenous people have created a climate of impunity. The perpetrators believe that their actions will have no consequences and the state has done nothing to alter this view.

At present a coalescing of various elements hostile to indigenous peoples is generating profound concerns and deep fear among indigenous leaders and community members – fears the state of Costa Rica is not doing anything meaningful to address. This includes the increasingly vocal and hostile organisation of non-indigenous persons that illegally hold land within indigenous territories; their statements warning of violence and bloodshed in public meetings attended by state officials who make no comment on such threats; and the actions of state bodies, such as the Municipal Council, that vilify and *de facto* incite and endorse violence against indigenous leaders. The resolution adopted by the Municipal Council shows how government officials themselves are personally compromised. For instance, at least one of the members of the Municipal Council who voted in favour of declaring Sergio Rojas *persona non grata* in Buenos Aires illegally holds land in Teribe territory. The police also appear to support non-indigenous illegal occupants even when they are attacking indigenous persons.

Sergio Rojas and Pablo Sibas, the Teribe leader, both filed complaints about the threats and assassination attempts with the judicial authorities. The Tribunal of Pérez Zeledón, the court in a nearby town, offered them protection but only if the two leaders would relocate from their territories to Pérez Zeledón. The proposed solution therefore was to remove the victims from their ancestral lands rather than to remove the illegal occupants and/or perpetrators of the violence. Both leaders rejected these measures as ineffective: because they would be forced to leave their territory whereas the attackers may remain; they would be forced to live in non-indigenous areas, which they consider to be inherently more dangerous; they consider that the measures would disrupt their struggles to protect their territories; and that the measures fail to account for their cultural and spiritual relationships to their lands.

In January 2013, indigenous peoples' fears about further and increased violence were realised in Salitre. At midnight on 6 January, a band of non-indigenous illegal occupants attacked a group of unarmed and peaceful Bribri persons, resulting in severe injuries to three individuals. Marcos Obando Delgado was attacked with a machete and lost the use of three fingers; Mainor Ortiz Delgado was also severely injured with a machete, suffering a number of deep lacerations, and was tortured with a hot iron on his chest, resulting in severe physical and psychological trauma; and Wilbert Ortiz Delgado was shot in a leg and suffered a number of head wounds after being attacked with a machete.¹⁰⁹ This organised and planned attack was in retaliation for the victims' participation in actions held on 3 January 2013 to reclaim lands within their titled territory, specifically a property of approximately 30 hectares located in Río Azul, Salitre.¹¹⁰ The Costa Rican state's Office of the Ombudsman and the United Nations country office issued a joint press release condemning the acts of violence and urging the state to take all necessary measures to ensure the life and physical integrity of all people involved in the conflict. They called for "these situations to be solved by peaceful means, within the legal framework and guaranteeing the rights of indigenous persons to their territory."¹¹¹ There has been no official reaction by the Costa Rican state to date and none of the attacks has been formally investigated by state authorities.



Ngöbe Buglé people of Coto Brus. Photo by: Alancay Morales Garro

¹⁰⁹ *Finqueros Machetean y Plomean tres Indígenas*, *Diario la Extra*, 7 January 2013, <<http://diarioextra.com/2013/enero/07/sucesos4.php>>, visited 15 January 2013.

¹¹⁰ *Enfrentamiento por tierra deja a 3 indígenas bribri heridos*, *La Nación*, 7 January 2013, <www.nacion.com/2013-01-07/Enfrentamiento-por-tierra-deja-a-3-indigenas-bribri-heridos.aspx>, visited 15 January 2013.

¹¹¹ Press release issued by the United Nations Country Office in Costa Rica and the Office of the Ombudsman, 8 January 2013, <http://www.pnud.or.cr/index.php?option=com_content&view=article&id=1510:preocupacion-por-los-hechos-de-violencia-ocurridos-en-el-territorio-indigena-de-salitre&catid=49:reduccion-la-pobreza-desigualdad-y-exclusi&Itemid=101>, visited in 10 January 2013.

G. Illegal Occupation Violates the Right to Cultural Integrity and other rights in addition to Property Rights, and Threatens Indigenous Peoples' Integrity and Survival

Indigenous or tribal peoples who lose total or partial possession of their territories preserve their property rights over such territories, and have a preferential right to recover them, even when they are in hands of third parties. The IACHR has highlighted the need for States to adopt measures aimed at restoring the rights of indigenous peoples over their ancestral territories, and it has pointed out that restitution of lands is an essential right for cultural survival and to maintain community integrity.¹¹²

The above described situation in Costa Rica constitutes a gross and persistent pattern of violations, with impunity, of rights that are basic to indigenous peoples' survival. As noted above, the IACHR holds that "the guarantee of the right to territorial property is a means to allow members of indigenous communities to possess their lands."¹¹³ It further explains that the Inter-American human rights protection organs¹¹⁴ have affirmed that indigenous peoples "have the right to possession and control of their territory without any type of external interference, given that territorial control by indigenous and tribal peoples is a necessary condition for the maintenance of their culture."¹¹⁵

The organs of the Inter-American system thus affirm that indigenous peoples have the right to the effective possession, control and ownership of their territories and that, in order to freely determine, pursue and enjoy their own development, indigenous peoples have the right, effectuated through their own institutions, to make authoritative decisions about how best to use that territory.¹¹⁶ In Costa Rica, however, these rights are wholesale disregarded and nullified due to the massive illegal occupation of indigenous territories and, in some cases, the official diminishment of their territories, and the transfer of their effective control to state-created entities (see Section III on the ADIs below). Indigenous peoples' survival is consequently substantially threatened and this aggravates Costa Rica's international responsibility.

¹¹² IACHR Indigenous Lands, *supra* note 7, at para. 123 (footnotes omitted).

¹¹³ *Id.* at para. 90 (footnotes omitted).

¹¹⁴ See Saramaka People, *supra* note 21, at para. 115 (stating that "the State's legal framework merely grants the members of the Saramaka people a privilege to use land, which does not guarantee the right to effectively control their territory without outside interference"). See also UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (13 Sept., 2007), Art. 26(2) (providing that "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired").

¹¹⁵ IACHR Indigenous Lands, *supra* note 7, at para. 110 (footnotes omitted). See also Saramaka People, *supra* note 21, at para. 194 and 214(7) (where, consistent with its conjunctive reading of Article 21 and the right to self-determination, the Court ordered that legislative recognition of indigenous peoples' territorial rights must include recognition of "their right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system." Each of these terms has a specific meaning and describes rights and powers vested in indigenous peoples in relation to their territory. 'Control', for instance, can be defined as the power to 'exercise authoritative or dominating influence,' in this case over territory or specific traditionally owned resources within that territory).

¹¹⁶ See UNDRIP, *supra* note 115, Article 4 (providing that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions").

Not only is Costa Rica violating these basic guarantees on a daily basis, the scale of the dispossession of indigenous lands, their consequent displacement from their lands, and the state's willful disregard for this situation and its consequences, on aggregate, rises to violations of rights that are integral to the right to life and survival of peoples.¹¹⁷ This is reflected in Article 8 of the UN Declaration on the Rights of Indigenous Peoples, which provides that indigenous peoples "have the right not to be subjected to forced assimilation or destruction of their culture" and, in connection with this, that "states shall provide effective mechanisms for prevention of, and redress for: ... (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources...." In the same vein, the IACHR explained in 2009 that

*... disregard for the rights of the members of indigenous communities over their ancestral territories can affect ... other basic rights, such as the right to cultural identity, the collective right to cultural integrity, or the right to collective survival of communities and their members. The extreme living conditions borne by the members of indigenous communities that lack access to their ancestral territory cause them to suffer, and undermine the preservation of their way of life, customs and language.*¹¹⁸

In other words, Costa Rica's acts and omissions in relation to the vast majority of indigenous territories approach 'ethnoidal' conduct,¹¹⁹ and are prohibited by a range of international norms beyond those pertaining solely to property rights.¹²⁰ The Inter-American Court emphasized this point in its 2012 *Sarayaku* judgment, stating that, given the "intrinsic connection that indigenous and tribal peoples have with their territory, the protection of property rights and the use and enjoyment thereof is necessary to ensure their survival."¹²¹ Likewise, the Governing Body of the ILO holds that territorial rights "not only relate to ownership and occupation, but also to the survival

¹¹⁷ In its *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, Doc. 26 (1984), at p. 76 and 81, the IACHR held that "special legal protection" is recognized for indigenous languages, cultures, economies, ecosystems and natural resource base, religious practices, "ancestral and communal lands," and the establishment of an institutional order that facilitates indigenous participation through their freely chosen representatives. Two years later in its *Report on the Situation of Human Rights in the Republic of Guatemala*, OEA/Ser.L/V/II.67, Doc. 9 (1986), at p. 114, the IACHR characterized the preceding as "human rights also essential to the right to life of peoples." See also *Río Negro Massacres*, *supra* note 3, para. 162 & 177 (stating, respectively, that "the displacement of the members of the community of Río Negro ... led to the destruction of their social structure, the disintegration of the families, and the loss of their cultural and traditional practices, and the Maya Achi language" and; "in keeping with its consistent case law on indigenous matters, in which it has recognized that the relationship of the indigenous peoples with the land is essential for maintaining their cultural structures and for their ethnic and material survival, the Court considers that the forced displacement of indigenous peoples outside their community or away from its members, can place them in a situation of special vulnerability, which owing to its destructive effects on the ethnic and cultural fabric [...], generates a clear risk of the cultural or physical extinction of the indigenous peoples") (footnotes omitted); and *Chitay Nech*, *supra* note 3, para. 147 (stating that "the forced displacement of the indigenous peoples out of their community or from their members can place them in a special situation of vulnerability, that for its destructive consequences regarding their ethnic and cultural fabric, generates a clear risk of extinction and cultural or physical rootlessness of the indigenous groups, for which it is indispensable that the States adopt specific measures of protection...") (footnotes omitted).

¹¹⁸ IACHR *Indigenous Lands*, *supra* note 7, at para. 57 (footnotes omitted).

¹¹⁹ The term *ethnocide* refers to the destruction of the ethnic identity of a group and its members, in whole or in part. Charny refers to 'ethnocide' in cases of "major processes that prohibit or interfere with the natural cycles of reproduction and continuity of a culture or nation." See I. Charny, *Toward a Generic Definition of Genocide*, in *Genocide: Conceptual and Historical Dimensions*, (G. Andreopoulos ed., 1994).

¹²⁰ *Sarayaku*, *supra* note 21, at para. 171 (citing its judgments in *Saramaka People* and *Mayagna*, the Court observed that "Under international law, indigenous people cannot be denied the right to enjoy their own culture, which consists of a lifestyle that is strongly associated with their territory and the use of its natural resources").

¹²¹ *Id.* at para 146 & para. 147 (stating that "Moreover, lack of access to the territories and their natural resources may prevent indigenous communities from using and enjoying the natural resources necessary to ensure their survival, through their traditional activities; or having access to their traditional medicinal systems and other socio-cultural functions, thereby exposing them to poor or inhumane living conditions, to increased vulnerability to diseases and epidemics, and subjecting them to extreme situations of vulnerability that can lead to various human rights violations, as well as causing them suffering and harming the preservation of their way of life, customs and language").

Costa Rica is not only violating the rights of indigenous peoples to their lands but also their right to life

of indigenous peoples as such and their historical continuity.”¹²² In *Saramaka People*, the Court defined the term ‘survival’ to mean indigenous peoples’ “ability to ‘preserve, protect and guarantee the special relationship that they have with their territory’, so that ‘they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected.’”¹²³ Applying this definition to the situation in Costa Rica, it is no exaggeration to say that the vast majority of indigenous peoples’ ability to maintain their various relationships with their territories is denied or, at a minimum, substantially obstructed and,

thus, their distinct cultural identity is neither respected or protected, and their survival is, at the very least, jeopardized due to the illegal occupation of their territories.

The Court further explains in *Sarayaku* “that the close relationship between indigenous communities and their land is generally an essential component of their cultural identity ...” and “the right to cultural identity is a fundamental right - and one of a collective nature - of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society.”¹²⁴ The Court in particular cites the right to self-determination of indigenous peoples in this respect, noting that it protects, *inter alia*, the right “to freely pursue economic, social and cultural development.”¹²⁵ This right also protects indigenous peoples’ from state or private conduct that denies them their means of subsistence, including as derived from the use of the natural resources within their traditional territories.¹²⁶

Not only are indigenous peoples in Costa Rica presently being denied their right to cultural identity – and their survival is threatened – due to the illegal occupation of their lands, in most cases this illegal occupation has also denied them any security over their means of subsistence and their right to freely pursue their economic, social and cultural development, which in turn affects a range of other basic rights. Costa Rica persists in allowing these basic and mutually reinforcing rights to be violated with impunity and is even disregarding its own internal laws by doing so. As discussed below, it has also imposed alien and unaccountable governance institutions in indigenous territories that further frustrate, undermine and violate their rights. This problem is inseparably intertwined with the violations of indigenous property and related rights discussed above.

¹²² Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC) (GB.294/17/1):(GB.299/6/1) (2007), at para. 44.

¹²³ *Saramaka People, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment, 2008, Inter-Am. Ct. H.R. (ser. C) No. 185, at para. 37 (12 August 2008).

¹²⁴ *Sarayaku*, *supra* note 21, at para. 159 and 217.

¹²⁵ *Id.* at para. 159 and associated footnote and para. 305 (where the Court discusses measures to “repair the damage caused to the Sarayaku People, particularly through the violation of their rights to self-determination, cultural identity and prior consultation...”).

¹²⁶ *Inter alia*, *Sarayaku*, *supra* note 21, para. 146 (explaining that “the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their lifestyle. This connection between territory and natural resources that indigenous and tribal peoples have traditionally maintained, one that is necessary for their physical and cultural survival and the development and continuation of their worldview...”).

3.

VIOLATION OF INDIGENOUS PEOPLES' RIGHTS TO AUTONOMOUS SELF-GOVERNANCE, SELF REPRESENTATION, EFFECTIVE PARTICIPATION AND JURIDICAL PERSONALITY

The *Ley Indígena* nominally recognises and protects traditional indigenous governance institutions and procedures. However, less than one year after it was adopted, this protection was rendered null and void by Decree No. 8487 of 1978, which established ADIs in indigenous territories, the form of local government employed throughout the country.¹²⁷ The Special Rapporteur on the Rights of Indigenous Peoples observes that this Decree has “effectively deprived indigenous peoples’ traditional institutions of the authority to represent them in matters of sustainable development, establishing the ADIs for this purpose.”¹²⁸ ADIs are official government bodies and part of the Costa Rican state that, by law, “represent” and govern each indigenous territory and exercise legal personality on behalf of indigenous peoples.¹²⁹ The ADIs also hold title to indigenous territories. This is the case despite the fact that they are alien and imposed state-created structures that do not take into account indigenous peoples’ traditions and customs and are perceived to be discredited, unrepresentative and unaccountable entities by most indigenous peoples.¹³⁰ Moreover, the ADIs were overwhelmingly rejected by indigenous peoples as inappropriate to the indigenous context during the consultation process on the Autonomy Bill (see below).

As discussed below, the ADIs as currently constituted deny indigenous peoples’ their right to collective juridical personality; to determine their membership for the purposes of collective action; to freely choose their own representatives in order to participate in decision making; and greatly impede their rights to freely pursue their economic, social and cultural development and to effectively control their traditional territories through their own institutions – all rights upheld by the Inter-American Court in *Saramaka People* and *Sarayaku*. The Court also observed the inter-connectedness between the right of indigenous peoples to collective juridical personality, their territorial rights and the exercise of their right to self-determination in *Xákmok Kásek*.¹³¹ This same

¹²⁷ Article 3 of the Decree provides that “To exercise the rights and fulfil the obligations referred to in article 2 of the Indigenous Act, the indigenous communities shall adopt the organization ... of the Associations for Community Development.”

¹²⁸ SRIP Report on El Diquís, *supra* note 15, at para. 46.

¹²⁹ See Article 5 of Executive Decree 8487-G (providing that “the Associations for Development, once legally inscribed, will represent said communities judicially and extra-judicially”). The status of ADIs as the sole entity with juridical personality to represent the community in which it is located has been recognized in numerous sources of Costa Rican law. In addition to Executive Decree 8487-G, ADIs’ position was confirmed in Executive Decree 13568-C-G of 30 April 1982, Article 1 (providing that “[t]he Associations of Integral Development have the legal representation of the indigenous communities and will act as their local governments”). The validity of this arrangement has been upheld by the judiciary, including in Judgment 6433-96, (file number 96-006433-0007-CO), Constitutional Chamber of the Supreme Court of Justice (1997) and; Judgment 2007-016213 (file number 07-011520-0007-CO), Constitutional Chamber of the Supreme Court of Justice (2007).

¹³⁰ See *inter alia* *Indigenous Peoples Sidelined in Plans for Dam*, IPS 27 May 2009, <<http://ipsnews.net/news.asp?idnews=47000>>, visited 15 October 2012.

¹³¹ *Xákmok Kásek*, *supra* note 3, at para. 255 (ruling that “although said facts constitute obstacles to conveying title to the land, as well as having an a negative impact on the Xákmok Kásek Community’s abilities of self-determination, no one has presented evidence and reasoning sufficient to allow the Court to declare an autonomous violation of

conclusion was reached by the University of Texas Law School's Human Rights Clinic, which states that

circumstances unique to Costa Rica's systems for both indigenous self-governance and property rights present interdependent complications for the exercise of indigenous rights within the national system. ADI structural limitations undermine indigenous peoples' right to self-determination and create problems for indigenous redress of land issues, representation in the Costa Rican polity, and the effective participation of indigenous peoples in the decision-making processes regarding projects that directly affect them. Thus the [Diquís dam] highlights many structural problems that exist in Costa Rica, frustrating indigenous peoples' realization of their human rights and illustrating the Costa Rican state's non-compliance with its obligations under international law.¹³²

The preceding is further confirmed by the Special Rapporteur on the Rights of Indigenous Peoples, who observes that

the ADIs in Costa Rica's various indigenous communities are viewed as State agencies and not as institutions which truly represent indigenous people. It has been alleged that the ADIs were imposed on the communities and that they have weakened the traditional systems of representation. In both the Teribe territory and the other territories concerned, there are various organizations which represent the interests of the territories in some way and offer alternatives to the ADIs.¹³³

and,

[a]lmost all the indigenous representatives who met with the Special Rapporteur during his visit claimed that the ADIs did not adequately represent the indigenous peoples, adding that indigenous peoples see the presence of the ADIs in their territories as a denial of their right to self-government and their right to make decisions regarding their land and communities. The ADIs are apparently regarded as State institutions that regularly make decisions without notifying or consulting the indigenous communities they supposedly represent.¹³⁴

A crucial, although often unconsidered, element of the right to self-determination and the exercise thereof – as well as the collective right to juridical capacity – is the ability of indigenous peoples to autonomously¹³⁵ determine their membership for the purposes of collective action

Article 3 of the Convention ... with regard to the collective aspect of the right to recognition of juridical personality").

¹³² *Swimming Against the Current*, *supra* note 50, at p. 19-20.

¹³³ SRIP Report on El Diquís, *supra* note 15, at para. 26.

¹³⁴ *Id.* at para. 47.

¹³⁵ See Xákmok Kásek, *supra* note 3, at para. 37 (where "the Court highlights that neither the Court nor the State determines the Community's denomination or ethnic identity. ... The identity of the Community, from its name to its membership, is a historical and social fact that is part of its autonomy"); and note 157 *infra* and associated text (acknowledging that the manner by which indigenous peoples exercise their collective juridical capacity is also part of their 'autonomy'). See also Saramaka People, *supra* note 124, at para. 18 (holding that "[b]y declaring that the consultation must take place 'in conformity with their customs and tradition,' the Court recognized that it is the Saramaka people, not the State, who must decide which person or group of persons will represent the Saramaka people in each consultation process ordered by the Tribunal"), and at para. 26-7 (holding that "as to who can benefit from development projects, the Court observes that ... in the event that any internal conflict arises between members of the Saramaka community regarding this issue, it 'must be resolved by the Saramaka people in accordance with their own traditional customs and norms, not by the State or this Court in this particular case'" and; "the Tribunal reiterates that all issues related to the consultation process with the Saramaka people, as well as those concerning the beneficiaries of the 'just compensation' that must be shared, must be determined and resolved by the Saramaka people in accordance with their traditional customs and norms...").

(the *self* in self-determination), whether in relationship to internal governance decisions or participation in external decision-making that may affect them.¹³⁶ However, in Costa Rica, there is no legal requirement that indigenous peoples can determine the membership of the ADI or that all indigenous persons who are members of their people or territory can participate in the ADI. Indeed, the ADIs often operate with less than 20 percent of the population of the territory as members. To make matters worse, in some cases, including in the situation of the Teribe, non-indigenous persons have assumed positions of authority in the ADIs and have acted to the detriment of indigenous peoples, particularly by transferring lands to outsiders.

With one important exception, when the state consults with indigenous peoples it does so only through the ADIs, which is tantamount to the state consulting with itself given that the ADIs are local government bodies that were created by, report to and are responsible to the central government rather than the indigenous community over which they presume to preside.¹³⁷ It is known, for instance, that the state has made certain agreements with the ADI in the Teribe territory in relation to the Diquís dam, but the nature and scope of the agreement(s) are unknown and requests to access relevant documents, if any exist, have been ignored. Likewise, when presenting requests for funding to the World Bank's Forest Carbon Partnership Facility, which may have considerable impacts on indigenous peoples, the state is only consulting with the ADIs.¹³⁸ Again, this is basically the state consulting other state agencies and denying indigenous peoples their right to freely identify their own representatives, through their own procedures, in order to participate in and determine crucial decisions pertaining to their territories.¹³⁹

This has very serious and negative practical consequences for indigenous peoples. As the University of Texas Law School Human Rights Clinic explains with respect to the Teribe people, "[t]he legal antecedents and the practical operation of the ADI in Térraba renders it ineffectual to prevent further land loss, redress past losses, ensure the effective exercise of self-government, and enable the Teribe peoples to exercise their rights of effective participation, consultation, and consent on mega-projects such as the [Diquís dam]."¹⁴⁰ It further explains that the ADI "does not

¹³⁶ See also UNDRIP, *supra* note 115, arts. 9 & 33 (providing, respectively, that "Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right" and; "1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live. 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures").

¹³⁷ The exception is the process for the elaboration of the *Bill for Autonomous Development of Indigenous Peoples*. In this process, indigenous peoples participated in 'Assemblies' in each of the twenty four indigenous territories; and only indigenous persons could elect their representatives to elaborate and negotiate the text of the bill. The elections were monitored and verified by an indigenous organization and organized with representatives of the Office of the Ombudsman, the Legislative Power and the Supreme Elections Court. The members of each territory were previously informed about the election process and all members above 18 years could vote. This stands in stark contrast to the normal process of only consulting with the ADIs.

¹³⁸ *Readiness Preparation Proposal, Submitted to the World Bank FCPF*, Government of Costa Rica (June 2010), p. 15 (stating that consultations have taken place with the ADIs "representing the interests of the indigenous peoples"), <www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/Jun2010/ENGLISH-R-PP_Template_COSTA_RICA_14_June_2010.pdf>, visited 19 October 2012.

¹³⁹ UNDRIP, *supra* note 115, Article 18 (providing that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures as well as to maintain and develop their own indigenous decision-making institutions"). See also ILO 169, Arts. 6 & 7 and; Report of the Committee set up to examine the representation alleging non-observance by Argentina of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Education Workers Union of Río Negro (UNTER), local section affiliated to the Confederation of Education Workers of Argentina (CTERA) (GB.297/20/1):(GB.303/19/7), (2008), at para. 81 (stating that "all the representative organizations of peoples or communities should be able to participate and be consulted about legislative or administrative measures that may affect them directly").

¹⁴⁰ *Swimming Against the Current*, *supra* note 50, at p. 18.

provide an adequate and appropriate mechanism for indigenous representation in the territory. To the contrary: the Térraba ADI weakens indigenous representation by stifling dissent, allowing high levels of non-indigenous participation, and driving indigenous peoples into ad hoc, marginalized alternatives.”¹⁴¹

Indigenous peoples have legally challenged the imposition and operation of ADIs in their territories as a denial of their right to govern themselves through their own institutions and to control their lands and communities, and for failing to take “into account [their] particularities, their economic and social characteristics, as well as their especially vulnerable situation, their customary law, values, customs and mores.”¹⁴² This has included complaints by indigenous community members that they have been selectively denied membership in the ADI as well as legal challenges to the validity of the ADI system in relation to indigenous peoples’ rights in general.¹⁴³ The situation has been so bad that, with respect to the former, the Supreme Court has even had to order ADIs to admit indigenous persons as members. In the case of the latter however, complaints have been rejected by the Constitutional Chamber of the Supreme Court, which has held that, while the ADIs are far from ideal in the indigenous context, they are the only option available under existing law.¹⁴⁴

ADIs regularly make decisions without notifying or consulting the indigenous communities they supposedly represent

A case filed by members of the Teribe people that challenges the ADI for being incompatible with indigenous peoples’ rights was recently rejected by fourth chamber of the Supreme Court (responsible for *amparo* actions).¹⁴⁵ Among other things, the Court ruled that the ADIs were required because the electoral process employed to choose its officers guaranteed indigenous community members ample and organised participation.¹⁴⁶ It further rejected complaints that the ADI system violated the right to juridical personality of indigenous peoples. However, these rulings do not stand up to scrutiny in relation to norms of human rights law pertaining to indigenous peoples.

In this respect, the judgments of the Inter-American Court in *Yatama*, *Chitay Nech*, *Plan de Sanchez Massacre* and *Saramaka People* are particularly relevant. In *Yatama*, the Court highlighted that universal rights of equality and political participation give rise to an obligation on states to adopt affirmative and differentiated measures to guarantee the participation of indigenous groups.¹⁴⁷ It further stressed that states parties to the American Convention must guarantee that indigenous peoples “can participate, in conditions of equality, in decision-making on matters that affect or could affect their rights and the development of their communities ... and that they are able to do so through their own institutions and in accordance with their values, uses, customs and forms of organization....”¹⁴⁸ As the quotes above confirm, the ADIs are clearly not regarded by

¹⁴¹ *Id.* at p. 4.

¹⁴² Yakyé Axa, *supra* note 26, at para. 63.

¹⁴³ See *Swimming Against the Current*, *supra* note 50, p. 62.

¹⁴⁴ *Id.* p. 63-4.

¹⁴⁵ *Unconstitutionality action filed by Pablo Sibas Sibas*, 22 May 2009 (against articles 3, 4, 5, 6, 7 and 15 of the regulation of the Indigenous Law and the Executive Decree 13568-C-G). File: 09-7688-0007-CO.

¹⁴⁶ *Id.*

¹⁴⁷ *Yatama v. Nicaragua*, Merits and Reparations, Judgment 2005, Inter-Am. Ct. H.R. (ser. C) No. 127, para. 229 (23 June 2005).

¹⁴⁸ *Id.* at para. 225. See also *Sarayaku*, *supra* note 21, para. 202-03 (explaining that consultation “procedures must include, according to systematic and pre-established criteria, the various forms of indigenous organization, provided these respond to the internal processes of these peoples” and finding that Ecuador violated indigenous peoples’ rights because it was “proven that the oil company tried to negotiate directly with some members of the Sarayaku People, without respecting their forms of political organization. ... Accordingly, the Court considers that the actions carried out by

indigenous peoples in Costa Rica as their own institutions and they do not operate in accordance with their customs or forms of organization.

In *Chitay Nech*, a 2010 case revolving around the forced disappearance of a Maya indigenous leader, the Court explained that the community to which he belonged was deprived of “the full exercise of the direct participation of an indigenous leader in the structures of the State, where the representation of groups in situations of inequality becomes a necessary prerequisite for the self-determination and the development of the indigenous communities within a plural and democratic State.”¹⁴⁹ Observing that its jurisprudence confirms that indigenous peoples have a right to direct participation in decisions that may affect their rights and development, “in accordance with their values, traditions, customs and forms of organization,” the Court noted that indigenous leaders “exercise their charge by mandate or designation and in representation of a community. This duality is both the right of the individual to exercise the mandate or designation (direct participation) as well as the right of the community to be represented. In this sense, the violation of the first reverberates in the damage of the other right.”¹⁵⁰

Non-indigenous persons have positions of authority in ADIs and have acted to the detriment of indigenous peoples

Finding that the state had obstructed the indigenous leader in question from representing his community, who “according to their vision and tradition was elected to serve and contribute to the construction of their free development,”¹⁵¹ the Court ruled that he was denied “the exercise of the right to political participation in representation of his community, recognized in Article 23(1), subparagraph a) of the American Convention.”¹⁵² The Court thus recognizes that political participation and representation rights vest in both mandated indigenous leaders and collectively in the community or people to which they belong, which also has the collective right to be represented by persons or institutions of its choice. Violations of the former impair the collective right of the community and/or people. Moreover, the direct representation of indigenous peoples, through their mandated representatives and/or institutions, is “a necessary prerequisite” for the exercise of their right to self-determination and, by extension, their right to freely pursue their economic, social and cultural development “within a plural and democratic State.”

It may be inferred from this jurisprudence, first, that states that fail to guarantee and respect these rights may not be acting in accordance with democratic principles.¹⁵³ Second, that

the company in order to obtain the consent of the Sarayaku People cannot be construed as an appropriate and accessible consultation”) (footnote omitted).

¹⁴⁹ *Chitay Nech et al.*, *supra* note 3, at para. 113.

¹⁵⁰ *Id.* at para. 115.

¹⁵¹ *Id.* at para. 116.

¹⁵² *Id.* at para. 117.

¹⁵³ See in this respect, *Inter-American Democratic Charter* (11 Sept. 2001), arts. 6 & 9 (stating, respectively and in pertinent part, that, “[i]t is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy” and; “[t]he elimination of all forms of discrimination ... as well as ... the promotion and protection of human rights of indigenous peoples ... and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation”). See also *Río Negro Massacres*, *supra* note 3, para. 160 (citing the right to self-determination and explaining that indigenous peoples’ cultural identity or integrity “is a fundamental and collective right of the indigenous communities that must be respected in a multicultural, pluralist, and democratic society...”); and; UNCERD, *General Recommendation XXI on the right to self-determination*, para. 5 (23 August 1996) (recommending that states should be “sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens;” and that states vest “persons belonging to ethnic or linguistic groups comprised of their citizens

the Inter-American Court and other international human rights bodies could – and logically, should – interpret the collective aspect of indigenous peoples' political participation rights conjunctively with the right to self-determination, in the same way that they have interpreted indigenous property rights¹⁵⁴ and linguistic, religious and cultural rights together with the right to self-determination.¹⁵⁵ In practice this means recognizing indigenous peoples' autonomous forms of self-government and their collective right to direct participation in the affairs of the state on matters that may affect indigenous peoples' rights. This interpretation is supported by the jurisprudence of the Inter-American Court and other international human rights bodies and by reference to international instruments that explicitly recognize and guarantee the rights of indigenous peoples.

In this regard, the Court highlighted the importance of respect for and the preservation of indigenous peoples' communal structures and modes of self-governance in its judgment in *Plan de Sanchez*,¹⁵⁶ rights also affirmed in the UN Declaration on the Rights of Indigenous Peoples¹⁵⁷

... with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups").

¹⁵⁴ See *inter alia* *Sarayaku* *supra* note 21, para. 171 and footnote 223 & 288; and *Saramaka People* *supra* note 21, para. 93 (explaining that "by virtue of the right of indigenous peoples to self-determination recognized under said Article 1 [of the international Covenants], they may 'freely pursue their economic, social and cultural development', and may 'freely dispose of their natural wealth and resources' so as not to be 'deprived of [their] own means of subsistence.' Pursuant to Article 29(b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants") (footnote omitted); and *Río Negro Massacres*, *supra* note 3, para. 160 (citing the right to self-determination and other international standards and stating that the "Court has already indicated that the special relationship of the indigenous peoples with their ancestral lands is not merely because they constitute their main means of subsistence, but also because they are an integral part of their cosmovision, religious beliefs and, consequently, their cultural identity or integrity, which is a fundamental and collective right of the indigenous communities that must be respected in a multicultural, pluralist, and democratic society...") (footnotes omitted).

¹⁵⁵ See *Apirana Mahuika et al. vs. New Zealand*, (Communication No. 547/1993, 15/11/2000), UN Doc. CCPR/C/70/D/547/1993 (2000), at para. 9.2 (where the "Committee observes that the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27"). See also *J G A Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, Communication No. 760/1997. UN Doc. CCPR/C/69/D/760/1997 (2000), at para. 10.3 ("the provisions of Article 1 may be relevant to the interpretation of other rights protected by the Covenant, in particular Article 25, 26 and 27"); *UN Human Rights Committee, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)*, CCPR/C/21/Rev.1/Add.7, para. 1-2 (7 December 1996) (explaining that "Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant" and "[t]he rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1(1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government"); and; Report of the African Commission's Working Group of Experts on Indigenous Populations, *supra* note 7, at p. 78 (concluding that, because Article 1 of the International Covenants is part of international law, ratified by many African states, "there is an obligation on African states to honour rights granted to indigenous peoples under common Article 1 of the ICCPR and the ICESR as well as Article 27 of the ICCPR"). For an extensive discussion on this issue by a former member of the Human Rights Committee, see M. Scheinin, *The Right to Self-Determination under the Covenant on Civil and Political Rights, in, Operationalizing the Right of Indigenous Peoples to Self-Determination* (P. Aikio and M. Scheinin eds., 2000).

¹⁵⁶ *Plan de Sánchez Massacre, Reparations, Judgment*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 105, para. 85 (19 November 2004).

¹⁵⁷ UNDRIP, *supra* note 115, *inter alia*, Article 4 (providing that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions"); Article 33 (providing that "1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live. 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures"); and Article 34 (providing that "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices

and ILO 169.¹⁵⁸ The latter both uphold that these rights shall be exercised through indigenous peoples' freely identified representatives or institutions. For instance, the Governing Body of the ILO has repeatedly held that "indigenous peoples have the right to elect their own representative institutions;" and that, while ILO 169 "does not impose a model of what a representative institution should involve, the important thing is that they should be the result of a process carried out by the indigenous peoples themselves;" and that "it is essential to ensure that the consultations are held with the institutions that are truly representative of the peoples concerned."¹⁵⁹

In *Saramaka People*, the Court directly related the right to self-determination to indigenous peoples' property rights and ordered that recognition of the Saramaka people's territorial rights must include recognition of "their right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system."¹⁶⁰ The right to effective control of traditional territory is a wide-ranging and substantial power, and presupposes that indigenous peoples are able to exercise it through their own freely identified institutions, and that these institutions are established consistent with the customs and traditions of the indigenous peoples themselves, not those of the national government. These and the rights enunciated above recognize that indigenous peoples have rights to autonomous self-government and effective participation in external decision making through institutions of their choice and in accordance with their own customs and traditions, and that this right is integral to respect for their right to self-determination and the principles that delineate legitimate democratic governance. Costa Rica, however, persists with its imposition of the ADIs in indigenous territories in violation of these rights and principles and in direct opposition to the stated wishes of the vast majority of indigenous peoples.

The same considerations also apply with regard to the right to juridical personality guaranteed in, *inter alia*, Article 3 of the American Convention.¹⁶¹ This right is highly significant given that the enjoyment and enforcement of domestic legal protections (including those that are required to give effect to international obligations) depend on legal personality.¹⁶² In *Sawhoyamaya*, the Court explained that states have to use all means at their disposal, including legal and administrative measures, to ensure that the right to juridical personality is respected, and

and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards").

¹⁵⁸ ILO 169, Article 7(1) provides that "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."

¹⁵⁹ Report of the Committee set up to examine the representation alleging non-observance by Argentina of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), *supra* note 140, at para. 75.

¹⁶⁰ *Saramaka People*, *supra* note 21, at para. 194. See also *Concluding observations of the Committee on the Elimination of Racial Discrimination: Guyana*, CERD/C/GUY/CO/14, at para. 15 (4 April 2006) (rejecting a legislative scheme providing that "decisions taken by the Village Councils of indigenous communities concerning, *inter alia*, scientific research and large scale mining on their lands, as well as taxation, are subject to approval and/or gazetting by the competent Minister..." and; recommending that Guyana recognize and support indigenous councils that are "vested with the powers necessary for the self-administration and the control of the use, management and conservation of traditional lands and resources").

¹⁶¹ See e.g., *Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname*, CERD/C/64/CO/9, at para. 14 (12 March 2004) (observing that "indigenous and tribal peoples cannot as such seek recognition of their traditional rights before the courts because they are not recognized legally as juridical persons").

¹⁶² *Yakye Axa*, *supra* note 26, para. 78-83 (where the Court observed, at para. 82-3, that "juridical personality, for its part, is the legal mechanism that confers on [indigenous peoples] the necessary status to enjoy certain fundamental rights, as for example the rights to communal property and to demand protection each time they are vulnerable"). The Court clarified that recognition of juridical personality only makes operative the pre-existing rights that indigenous peoples have exercised historically; indigenous peoples' political, social, economic, cultural and religious rights and forms of organisation, as well as the right to reclaim their traditional lands, belong to the people themselves irrespective of whether the state formally recognizes their personality before the law.

that states have special obligations to ensure respect for this right in connection with persons in situations of vulnerability, marginalization and discrimination, and with due regard for the principle of equality before the law.¹⁶³

In *Saramaka People*, the Court extended this right to the Saramaka people, as a people (i.e., not just to an individual indigenous member and not to an entity created in addition to, and outside of the people itself, like the ADI). It ruled that the right to collective juridical personality is "one of the special measures owed to indigenous and tribal groups in order to ensure that they are able to use and enjoy their territory in accordance with their own traditions."¹⁶⁴ It further explicated and ordered that the state must recognize the Saramaka people's collective legal personality in law and through judicial and administrative measures, all of which guarantee them "the use and enjoyment of their territory in accordance with their communal property system, as well as the rights to access to justice and equality before the law."¹⁶⁵ With respect to how the collective juridical personality of indigenous peoples is to be exercised, the Court explained that this "is a question that must be resolved by the [people concerned] in accordance with their own traditional customs and norms, not by the State or this Court in this particular case."¹⁶⁶ In *Sarayaku*, the Court stressed that international law recognizes indigenous peoples and their rights "as collective subjects," and that they "exercise certain rights recognized by the [American] Convention on a collective basis," including the right to legal personality.¹⁶⁷ The IACHR has also emphasized this point.¹⁶⁸

Read conjunctively, the preceding jurisprudence affirmatively obligates Costa Rica to recognize, through differentiated measures, the collective juridical personality of indigenous peoples, as peoples, and to ensure that they can make authoritative decisions, through their own autonomous institutions and in accordance with their own customs and traditions, about their territories, populations and development. Disregarding this authoritative jurisprudence, and continuing to support and utilize the ADIs, Costa Rica has failed to effectively recognize indigenous peoples' collective juridical personality and the associated right to freely choose the means and modalities by which it is exercised, and by extension their right to freely pursue their economic, social and cultural development. Under extant Costa Rican law, only the ADI, a state agency that in no way accounts for indigenous particularities, may exercise legal personality and governance powers on behalf of indigenous peoples even for the purpose of holding title to their territories. The imposed rules and practices of the ADI system do not allow them any meaningful say in how their juridical personality is exercised and their traditions in this respect have been wholesale disregarded as has their right to freely determine their own membership for the purposes of collective action.

¹⁶³ Sawhoyamaya, *supra* note 67, at para. 189.

¹⁶⁴ Saramaka People, *supra* note 21, at para. 172. See also Saramaka People, Interpretation of the Judgment, *supra* note 124, para. 54.

¹⁶⁵ Saramaka People, *id.* at para. 174.

¹⁶⁶ *Id.* at para. 164.

¹⁶⁷ Sarayaku, *supra* note 21, at para. 231.

¹⁶⁸ IACHR Indigenous Lands, *supra* note 7, at para. 66 (stating that the "collective nature of indigenous and tribal peoples' right to territorial property bears a direct incidence upon the content of other rights ..., giving them a collective dimension. Such is the case of the right to juridical personality or of the right to effective judicial protection") (footnotes omitted).

4.

THE AUTONOMY BILL: A LONG AWAITED SOLUTION?

*For more than a decade, indigenous leaders have been promoting a bill to guarantee the rights of the country's indigenous peoples. ... The Special Rapporteur understands that the debate on the bill is at a standstill. More recently, in August 2010, 30 indigenous persons were expelled from the legislative chamber, where they had been protesting to urge legislators to discuss the bill.*¹⁶⁹

Given the absence of effective judicial and other remedies to address the imposition of the ADIs and the invasion and expropriation of their lands, indigenous peoples have sought to correct this situation through the legislature. This led to the drafting, over a seven year-long period, of the *Proyecto de Ley de Desarrollo Autónomo de los Pueblos Indígenas* (the Bill for Autonomous Development of Indigenous Peoples ("Autonomy Bill")), which was first submitted for debate in the Congress in 1995. It was subsequently modified and reconsidered by the Congress in 2002 after an extensive round of consultations during which indigenous peoples' freely chosen representatives overwhelmingly supported the Bill.¹⁷⁰ As the UNCERD observed, the Autonomy Bill is "aimed at granting full autonomy to indigenous peoples and recognizing their right to enjoy their own cultures, as well as the right to administer their territories."¹⁷¹ If adopted and effectively implemented, this law could go far towards correcting the long-standing problems affecting indigenous peoples in Costa Rica, including those highlighted herein. Costa Rica itself has described the Bill as setting out

*a series of regulations and actions to be implemented in the areas of public administration, a special education system, health, environmental protection, infrastructure and housing programmes, management of land tenure, establishment of credit systems and recognition of a system of political organization based on territorial councils elected directly by the indigenous communities for the purpose of managing the indigenous territories. The bill also recognizes their autonomy and their right to their own culture.*¹⁷²

However, the UNCERD additionally observed in 2007 that "despite the recommendation contained in its final comments of 2002, the *Autonomous Development of Indigenous Peoples Bill* has not been adopted owing to legislative obstacles."¹⁷³ It added that it was "disturbed to learn

¹⁶⁹ SRIP Report on El Diquís, *supra* note 15, at para. 45.

¹⁷⁰ See *Ley de desarrollo autónomo de los pueblos indígenas*, File number 14.352, *Asamblea Legislativa de la República de Costa Rica*, at p. 3-4 (describing the consultation process and affirming, at p. 4, that the "members of the Standing Committee on Social Affairs concluded and certified that participation was within the parameters expected for electoral processes. They recall, moreover, that the proposals and concerns of the indigenous communities expressed during the consultation of the eight indigenous peoples were incorporated into the substantive text of the Bill"), <www.cicaregional.org/archivos/download/14gd38200.pdf>, visited on 21 November 2012.

¹⁷¹ UNCERD, Costa Rica, *supra* note 24, at para. 9.

¹⁷² *Reports submitted by States Parties*, *supra* note 23, at para. 35.

¹⁷³ UNCERD, Costa Rica, *supra* note 24, at para. 9.

that the bill may once again be shelved” and recommended that Costa Rica “remove without delay the legislative obstacles preventing [its] adoption...”¹⁷⁴ The ILO has made similar comments on more than one occasion,¹⁷⁵ as has the Special Rapporteur on the Rights of Indigenous Peoples, who, quoting the UNCERD’s recommendation that Costa Rica remove legislative obstacles preventing the adoption of the Autonomy Bill, states that there “is a need to address concerns about the representativeness of the ADIs; doing so could boost progress towards the adoption of the Autonomous Development of Indigenous Peoples Bill.”¹⁷⁶ Nonetheless, this Bill continues to languish in the legislature in early 2013, and the state has recently explained that it will not present the Bill for adoption as its requirement that indigenous peoples’ consent be obtained may threaten the Diquís dam or other projects,¹⁷⁷ a statement that was further criticized by the UNCERD in September 2011.¹⁷⁸

If adopted and effectively implemented, the Bill could go far towards correcting the long-standing problems affecting indigenous peoples in Costa Rica

It is important to recall that indigenous peoples overwhelmingly rejected the continuance of the ADIs in their territories during the consultation process on the Autonomy Bill and that, for this reason, the Bill includes provision for indigenous peoples to freely determine their own forms of governance institutions in their territories.¹⁷⁹ Indeed, one of the main aims of the Bill is to modify existing institutions for the representation of indigenous peoples in the Costa Rican polity with the aim of retaining and revitalizing traditional structures of representation and promoting the self-governance of indigenous peoples.¹⁸⁰ To give effect to this aim, the replacement of ADIs with ‘indigenous territorial councils’ is specifically provided for in the Autonomy Bill.¹⁸¹

The Bill also establishes new procedures and a fund for the expropriation of illegally occupied lands in indigenous territories,¹⁸² as well as a fund for indigenous self-development.¹⁸³ According to the ILO’s Committee of Experts on the Application of Conventions and Recommendations, this procedure entails the following:

sections 5, 6, 11, 12, 13 and 14 of Bill No. 14352 ... govern a summary procedure for the reclaiming of lands. It notes that these sections provide that: (i) within this rapid procedure,

¹⁷⁴ *Id.*

¹⁷⁵ See *Reports submitted by States Parties*, *supra* note 23, at para. 36 (noting that the ILO had, in connection with Costa Rica’s 2004 report on ILO 169, “regretted the shelving of the Autonomous Development of Indigenous Peoples Bill and recalled the importance of dealing with the problem of the presence of non-indigenous persons in indigenous communities and the implications of this situation for land tenure”).

¹⁷⁶ SRIP Report on El Diquís, *supra* note 15, at para. 48.

¹⁷⁷ See *Government stopped indigenous law for conflicting with hydroelectric plan*, El Nacion, 15 August 2010, <www.nacion.com/2010-08-16/ElPais/NotasSecundarias/ElPais2481419.aspx>, visited 15 October 2012.

¹⁷⁸ See *Communication of the UNCERD*, *supra* note 24, (where the UNCERD expressed “its concern on information received about statements made by the State party on the situation of El Diquís hydroelectric dam as a reason for not adopting the Autonomy Bill of Indigenous Peoples, which has been waiting the approval in Congress for 16 years”).

¹⁷⁹ *Swimming Against the Current*, *supra* note 50, at p. 4 (stating that “A proposed legal reform provides in its abolition of CONAI and ADIs as indigenous governance structures a potential remedy for Costa Rica’s violation of indigenous peoples’ rights to representation, but the bill’s progress towards passage has been lengthy and remains stalled”).

¹⁸⁰ See E. Ramírez Flores, *Insisten en que se apruebe proyecto de ley: indígenas consideran vital el desarrollo autónomo*, *Semanario Universidad*, 28 April – 4 May 2010, <www.semanario.ucr.ac.cr/index.php/mainmenu-pais/1295-insisten-en-que-se-apruebe-proyecto-de-leyindigenas-consideran-vital-el-desarrollo-autonomo-.html>, visited on 19 October 2012.

¹⁸¹ See *Ley de desarrollo autónomo de los pueblos indígenas*, File Number 14.352, *Asamblea Legislativa de la República de Costa Rica*, *supra* note 171, Article 4(d).

¹⁸² *Id.* Articles 6 and 11-14.

¹⁸³ *Id.* Chapter VI.

*if the lands being reclaimed were occupied by a party purchasing indigenous lands in good faith, the State will finance the recovery of such lands (section 12); (ii) as regards the possession of lands by indigenous peoples since time immemorial, the prevailing criterion will be that the burden of proof regarding legitimate possession will fall exclusively on non-indigenous parties claiming possession, who will be entitled to the payments to be made by the State (section 13(d)); and (iii) the corresponding Indigenous Territorial Council may participate and become involved at any time in the procedure, and the requirements regarding identification and written documentation are simplified, these being acceptable even in handwritten form.*¹⁸⁴

The Autonomy Bill, therefore, represents a positive and long overdue step toward addressing the pervasive violations of indigenous peoples' rights in Costa Rica. It has not been adopted by the Congress due to opposition from powerful vested interests, some of whom illegally occupy lands in indigenous territories, as well as from the current government, which perceives the Bill to be a threat to its national development initiatives.¹⁸⁵ This has essentially paralyzed the legislative process for the past 17 years and today the Bill is in danger of being completely withdrawn from consideration. In the meantime, indigenous peoples' rights continue to be violated with impunity and their cultural and territorial integrity and survival continues to be undermined and threatened by the invasion and illegal alienation of their lands; by the imposition of unwanted and unaccountable state institutions like the ADIs; by national parks that fail to adequately respect their rights; and by resource extraction and infrastructure projects that take place without regard for their rights and without their free, prior and informed consent.

¹⁸⁴ ILO CEACR, *Costa Rica: Observation*, *supra* note 37.

¹⁸⁵ Various statements by government officials have been made about the *Autonomy Bill*. The current President of Costa Rica, Laura Chinchilla, stated that "that the law for the minorities is important but they must analyze which elements would affect the development of an entire country, therefore they will not submit the Bill until they clarify their doubts"; <www.prensalibre.cr/pl/nacional/30125-chinchilla-no-convocara-ley-de-autonomia-indigena.htm>, visited on 28 November 2012; the former head of the governing party in the Congress stated that "[t]he National Liberation Party (PLN) removed their support from the autonomy bill of indigenous peoples because it jeopardized the Diquís Hydroelectric project in the Southern Region"; <www.nacion.com/2010-08-16/EIPais/NotasSecundarias/EIPais2481419.aspx>, visited on 29 November 2012; and the Minister of Environment (currently the Executive President of ICE) stated that "if the autonomy plan is approved for the 22 indigenous territories, the previous consultations become more rigid ... which could eventually mean the loss of this valuable resource for the country", <www.nacion.com/2010-08-16/EIPais/NotasSecundarias/EIPais2481419.aspx>, visited on 29 November 2012.

5.

CONCLUSION

Costa Rica rightly prides itself on its long tradition of peaceful democratic change, respect for human rights and the rule of law, and its leadership on environmental and biodiversity issues. It has ratified all of the major human rights instruments, which have been held by the judiciary to have constitutional or supra-constitutional status, as well as both of the ILO conventions pertaining to indigenous peoples.¹⁸⁶ Coupled with the abolition of the military in 1948, these factors have greatly assisted in avoiding the violent conflicts and instability that have characterised many of its neighbours as well as contributing to its status as an 'upper middle income' country that has been ranked as the "happiest" country in the world in both 2011 and 2012.¹⁸⁷ This ranking however does not measure most human rights issues or the infringement of rights when determining happiness, well-being or sustainability.

While a variety of human rights issues are of concern in Costa Rica, the treatment of the indigenous peoples who now find themselves within its borders stands out as one of the major problems, if not *the* major human rights problem. This is the case notwithstanding the fact that Costa Rica adopted laws that are intended to secure indigenous peoples' rights as early as the 1930s, well in advance of most of the other countries in Latin America and elsewhere (albeit the rights recognised therein have yet to be elevated to the constitutional level as they have been in many of the countries in the Americas). This includes recognising indigenous ownership of 24 titled reserves that cover seven percent of Costa Rica's land mass and are mandated as inalienable and exclusive to indigenous peoples under domestic law.

The treatment of indigenous peoples is one of, if not the major human rights issues in Costa Rica

However, indigenous peoples in Costa Rica fall at the bottom of all social and economic indices, have access to state services that are quantitatively and qualitatively worse than those enjoyed by all other Costa Ricans, and their rights – and the rule of law more generally¹⁸⁸ – continue

¹⁸⁶ See *supra* note 20 (citing judgments on the supra-constitutional status of ratified human rights instruments) and; Constitutional Chamber of the Supreme Court of Justice of Costa Rica, *Judgment No. 2011-1768, 11 February 2011, Amparo Proceedings*, at Considering III (holding that "because of the normative status granted by Article 7 of the Constitution, the ILO Convention No. 169 supersedes the laws and therefore, its protection falls within the scope of constitutional jurisdiction").

¹⁸⁷ See The New Economics Foundation, *Happy Planet Index Report 2012: A Global Index of Sustainable Well-Being*, p. 13 (ranking Costa Rica first on the 'happy planet index'; a measure of "data on experienced well-being, life expectancy, and Ecological Footprint to generate an index revealing which countries are most efficient at producing long, happy lives for their inhabitants, whilst maintaining the conditions for future generations to do the same"), <www.happyplanetindex.org/assets/happy-planet-index-report.pdf>, visited 05 January 2013.

¹⁸⁸ See e.g., Sarayaku, *supra* note 21, para. 262 (explaining that "the Court has reiterated that the right of all persons to simple and prompt recourse or any other effective remedy before a competent judge or tribunal for protection

to be violated with impunity, a long-standing condition that the Costa Rican state is well aware of and which has been raised numerous times by international human rights bodies. As discussed herein, these violations are especially pronounced in relation to the complex of rights that converge on and are interdependent with indigenous peoples' territorial rights. Violations of territorial rights in the narrowest sense may be broken down into two categories: first, the inadequate delimitation and demarcation of traditionally-owned lands and territories with respect to the existing system of reserves; and second, the massive and persistent pattern of illegal occupation of these reserves and the abject failure of the state to correct this situation.

Most indigenous reserves in Costa Rica were delimited without indigenous participation and without reference to traditional tenure systems and customary norms

Regarding the first point, most of the reserves as presently constituted in Costa Rica were delimited on the basis of studies undertaken without indigenous participation and without reference to the traditional tenure systems and customary norms that underlie and give rise to indigenous property rights in international law.¹⁸⁹ It is highly unlikely therefore that their current boundaries would withstand challenges based on contemporary human rights law and they would have to be revised accordingly should a challenge be brought and succeed. The boundaries of the Teribe people's reserve, for instance, excluded at least one Teribe community when they were established – despite the fact that this community's lands were and are contiguous to the boundary of the reserve – and it presently remains without any legal protection for its lands. Its exclusion from the reserve continues to lack any factual or legal justification today. Although no definitive study has been

undertaken about traditional tenure outside of the existing reserve system, this situation is not unique to the Teribe and it is expected that significant modifications would need to be made to these reserves to account for traditional tenure and present-day occupation and use by indigenous peoples.

Massive illegal occupation, the second point, has reached alarming proportions that both invite and compel international oversight and action: all the more so as domestic remedies have, for a variety of reasons discussed above, proved to be ineffective. This includes wholesale disregard for the extant domestic legal regime that applies to these reserves; failure to comply with decisions of the Supreme Court; judicial decisions that misinterpret international legal protections to indigenous peoples' detriment; and the prolonged and politically motivated inaction with respect to the enactment of the Autonomy Bill, a proposed law that was overwhelming supported by indigenous peoples and which is intended to correct illegal occupation and other long-standing concerns. Indigenous peoples are now forced to seek protection in international fora – the Teribe, for instance, filed a petition with the IACHR in 2012 about the Diquís dam and land tenure and other rights. The Inter-American Court of Human Rights, which sits in Costa Rica's capitol city, may eventually have to reach a decision on this or other cases.

Illegal occupation of indigenous lands not only deprives the indigenous owners of the possession, use, benefit and enjoyment thereof, it also fatally strikes at the heart of a range of rights that are integral to indigenous peoples' self-determined development, security over their

against acts that violate their fundamental rights 'constitutes one of the basic pillars, not only of the American Convention, but also of the Rule of Law itself in a democratic society, within the meaning of the Convention').

¹⁸⁹ See Sawhoyamaya, *supra* note 67, para. 248 (summarising the Court's jurisprudence); and Maya Indigenous Communities, *supra* note 4, at para. 117 (where the IACHR observed that "the jurisprudence of the system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a State's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition").

means of subsistence, and their identity and survival as distinct territorial, cultural and political entities.¹⁹⁰ For example, lacking possession of or control over their lands and resources, in most cases, indigenous peoples are no longer able to benefit from their traditional economy, which is also fundamentally interconnected with their culture and identity. Costa Rica's tolerance and tacit approval of this situation therefore transcends simple violations of property rights and, instead, threatens indigenous peoples' survival in violation of a series of interrelated and basic rights. In short, its acts and omissions in this respect negate and quash not only the exercise and enjoyment of those rights, but also their very rationale. This persistent and pervasive pattern of discrimination against indigenous peoples has also led to a climate of racial tension and hostility that is becoming increasingly violent. This includes assassination attempts against indigenous leaders and racially discriminatory – and likely otherwise illegal – resolutions adopted by state bodies that vilify indigenous leaders for doing no more than seeking respect for their rights. As with illegal occupation, this (unprecedented in Costa Rica) violence and hostility is taking place with impunity.

**Illegal
occupation
of their lands
threatens
indigenous
peoples'
survival**

Likewise, the imposition of the ADI system in indigenous territories amounts to a *de jure* annexation of indigenous governance institutions and powers that denies indigenous peoples' collective legal personality, their right to effectively determine and control their internal affairs and development through their own institutions and in accordance with their customs and traditions, as well as their right to effective participation through their own representatives in external decision making that may affect them.¹⁹¹ They are unable to collectively control, manage and benefit from their territories and resources in accordance with their customs and traditions and are unable to freely pursue their economic, social and cultural development. It is no coincidence that extreme poverty among indigenous peoples is more than six times higher than it is among the national population and no coincidence that indigenous peoples suffer from loss of culture and language and disproportionate and serious social and other problems. This is all attributable in large part to Costa Rica's disregard for their rights; as the former UN rapporteur on indigenous lands observes: "[i]ndigenous societies in a number of countries are in a state of rapid deterioration and change due in large part to the denial of the rights of the indigenous peoples to lands, territories and resources...."¹⁹²

¹⁹⁰ See *inter alia* IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc 59 rev., (2000), at Ch. X, para. 16 (where the IACHR explains explained that "Land, for the indigenous peoples, is a condition of individual security and liaison with the group. The recovery, recognition, demarcation and registration of the lands represent essential rights for cultural survival and for maintaining the community's integrity") and; *in accord*, IACHR, *Third Report on the Human Rights Situation of Human Rights in Paraguay*, OEA/Ser.L/V/II.110 Doc.52 (2001), Ch. IX, para. 47

¹⁹¹ See e.g., EMRIP, *Final report of the study on indigenous peoples and the right to participate in decision-making*, Report of the Expert Mechanism on the Rights of Indigenous Peoples, UN Doc. A/HRC//18/42 (17 August 2011), Annex: 'Expert Mechanism advice No. 2 (2011): Indigenous peoples and the right to participate in decision-making', at para. 17-18 (advising that "With regard to the right to self-determination, the Declaration on the Rights of Indigenous Peoples affirms that indigenous peoples, in exercising their right to self-determination, have the right to develop and maintain their own decision-making institutions and authority parallel to their right to participate in external decision-making processes that affect them. This is crucial to their ability to maintain and develop their identities, languages, cultures and religions within the framework of the State in which they live"; and "Article 3 of the Declaration on the Rights of Indigenous Peoples mirrors common article 1, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Consequently, indigenous peoples have the right to determine their own economic, social and cultural development and to manage, for their own benefit, their own natural resources. The duties to consult with indigenous peoples and to obtain their free, prior and informed consent are crucial elements of the right to self-determination").

¹⁹² Indigenous people and their relationship to land, *supra* note 2, at para. 123.

Massive illegal occupation of indigenous territories has reached alarming proportions that compel international oversight and action

While indigenous peoples have suffered, and continue to suffer, serious and long-term harm that requires urgent remediation and redress, the situation in Costa Rica is not irredeemable. Many of the illegal occupants in indigenous territories are far from being poor migrants and individually hold large areas of land.¹⁹³ Consequently, in most territories, the recovery and restoration to indigenous peoples of these large land holdings would involve the expropriation of a limited number of properties. Compensation will be required in some cases, but in many cases the illegal occupants are not entitled to compensation and may be evicted and relocated elsewhere at little or no cost to the state. In the Ngöbe Coto Brus territory, for instance, three non-indigenous persons possess 1,500 hectares (20 percent of the territory) and in the Cabécar Bajo Chirripó territory nine illegal occupants hold 4,696 hectares (about 25 percent of the territory). In the Ngöbe Osa and the Cabécar

Nairi-Awari territories there are a total eight illegal occupants in possession of 10 and 11 percent, respectively, of the indigenous lands. To resolve illegal occupation in these four territories would thus require compensating or removing a mere 20 persons and would immediately treble the number of territories 100 percent possessed by their indigenous owners. In other words, dealing with illegal occupation by 20 persons would remedy this problem in one-quarter of the indigenous territories.

A national survey of unresolved – and presently unresolvable due to the absence of domestic legal provisions – indigenous land rights outside of the boundaries of the reserves is also an option that would not involve considerable amounts of funds, funds at any rate that would likely be readily available from a variety of donors if so desired. Correction of the boundaries and any associated compensation in relation to expropriations will be more costly, but is nevertheless required to complete the process of bringing Costa Rica into compliance with its international obligations. However, a significant number of these modifications would be to the boundaries of Costa Rica's large array of national parks and would require little more than legislative amendments. Last, but not least, enactment of the Autonomy Bill *and* its implementation would for the most part adequately address and establish the means to fund many of these issues.

Policing violent confrontations between indigenous peoples and illegal occupants, the costs associated with escalating judicial proceedings (national and international), delays in projects due to indigenous opposition, and the damage to Costa Rica's international reputation are likely equally costly. Irrespective, Costa Rica cannot plead poverty in this situation; it has the resources to deal with the problem and simply needs to make space in its annual budget to fund the necessary remedial measures. To put this into perspective, the most expansive estimate of the costs of addressing all compensation claims in relation to illegal occupation (USD70 million) is dwarfed many times over by even the most conservative and out-dated estimate of the USD2.05 billion needed to construct the Diquís dam alone.

Additionally, rather than frustrate indigenous development, as it has done for decades, Costa Rica may instead give concerted support for indigenous peoples to pursue their own development initiatives, which, in turn, will greatly enhance the pursuit and attainment of its national development objectives. Indigenous peoples are after all the owners of a considerable amount of some of the most pristine lands in Costa Rica and the Autonomy Bill provides for a

¹⁹³ *Perfil de los Pueblos Indígenas de Costa Rica*, *supra* note 22 (finding that in 14 indigenous territories, almost 60 percent of the 24 territories, the number of illegal occupants range from 3 and 399 persons. In five other territories the numbers are more daunting, ranging from 412 to 1,568 illegal occupants. In two, one of which is 97 to 98 per cent illegally occupied, there is no data on the number of illegal occupants).

fund for indigenous development that can be supplemented with funds from the international donor community. Put another way, rather than see indigenous peoples as a hindrance to national development – as it currently does – Costa Rica can view indigenous development, as determined by indigenous peoples' themselves, as part of its overall national development.¹⁹⁴ Experience from other countries shows that this is best achieved where indigenous peoples are able to exercise their right to self-determination through accountable and culturally appropriate governance institutions vested with authoritative and practical decision-making powers as well as the ways and means to give effect to their decisions.¹⁹⁵

As most illegal occupants hold large areas of land, recovery and restoration to indigenous peoples of these lands would only involve the expropriation of a limited number of properties

As noted above, the Autonomy Bill provides for the reconfiguration of governance institutions in indigenous territories and the vesting of substantial powers in institutions to be freely chosen by indigenous peoples themselves, rather than perpetuating the discredited ADI system. However, this, by itself, is not enough. First, elevating indigenous rights to the constitutional level would provide indigenous peoples with greater leverage and security in domestic judicial and other venues as well as demonstrate a greater commitment to those rights by the state. This should be accompanied by dedicated training programmes for the judiciary, civil service and indigenous peoples themselves about indigenous rights and the measures required to respect, protect and fulfil those rights in the Costa Rican context. The Inter-American Institute for Human Rights and the Inter-American Court are both based in Costa Rica and can be of invaluable assistance in this respect. Costa Rica may also request intensified technical support from the UN Special Rapporteur on the Rights of Indigenous Peoples, as proposed in his 2011 report on the Teribe and the Diquís dam.

Second, indigenous peoples are a tiny minority of Costa Rica's population and largely invisible in the electoral and political systems.¹⁹⁶ This invisibility, together with opposition from powerful competing interests, has in large part contributed to the current situation. In order to further address and safeguard indigenous peoples' rights additional forms of indigenous representation are therefore required to ensure that indigenous peoples are adequately represented in both the legislative and executive branches of government. A number of countries – Colombia, New Zealand and Burundi, for example – employ specific indigenous electoral roles that may be used as

¹⁹⁴ See in this regard, UNDRIP, *supra* note 115, Art. 20(1) (providing that "Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities"); and Art. 32(1) (providing that "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources"). See also IACHR, *Report on the Human Rights Situation in Mexico*. OEA/Ser.L/V/II.100 Doc. 7 rev. 1 (1998), at para. 577 (stating that "[i]t is the obligation of the State of Mexico, based on its constitutional principles and on internationally recognized principles, to respect indigenous cultures and their organizations and to ensure their maximum development in accordance with their traditions, interests, and priorities").

¹⁹⁵ See S. Cornell and J. Kalt, *Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't in Resources for Nation Building: Strategies for Governance and Development* (M. Jorgensen ed., 2007).

¹⁹⁶ For instance, in October 2008, the Costa Rican Congress passed a new biodiversity law without any prior consultation with indigenous peoples, despite the fact that this law directly affects their rights and interests. It also did so with disregard for a decision of the Constitutional Chamber of the Supreme Court requiring that a consultation process be designed and executed with indigenous peoples. See *COSTA RICA: Indigenous People Still Largely Invisible*, IPS, 29 October 2008 (observing that "In Costa Rica, the most advanced country in Central America in terms of human development, indigenous people tend to be neglected and forgotten. The country's native peoples have the highest poverty rates and lowest levels of human development, and their views and interests receive little attention from the government"), < <http://www.ipsnews.net/2008/10/costa-rica-indigenous-people-still-largely-invisible/>>, visited on 29 November 2012.

models and which serve to ensure that indigenous peoples have designated seats in the legislature, separate from political party affiliations and loyalties, to raise concerns about indigenous rights when necessary.¹⁹⁷ While not capable of fixing all problems, indigenous concerns could at least be aired and debated prior to the adoption of measures that may affect them and measures for their benefit could be independently proposed within the legislative process.

With regard to participation in the executive branch of government, Costa Rica already has an institution, the National Commission on Indigenous Affairs ("CONAI" in its Spanish acronym) that is supposed to represent indigenous interests. For example, one of its fundamental objectives is ensuring "the respect of the rights of indigenous minorities, stimulating the action of the State in order to guarantee the Indian the individual and collective property of the land...."¹⁹⁸ As currently constituted, however – in particular, being composed of the chairpersons of the ADIs in indigenous territories – it has failed to fulfil its mandate, a fact abundantly attested to, *inter alia*, by the present level of illegal occupation of indigenous territories. The government itself explained to the UNCERD in 2007 that CONAI has "failed to represent the interests of the indigenous peoples and ... as the State party recognizes, it has in the past strayed from its functions and responsibilities."¹⁹⁹ For

these reasons, the Autonomy Bill abolishes CONAI and replaces it with a body to be composed of the representatives of the 'indigenous territorial councils' that will be chosen and established by indigenous peoples in their territories to exercise their autonomous self-governance powers and to replace the ADIs. This new institution, assuming that its representatives are sufficiently accountable to indigenous peoples and its enabling laws provide it adequate independence, funding and authority, would hopefully assume the role that CONAI was intended to play when it was first established, namely to represent indigenous issues within the executive.

Enactment and implementation of the Autonomy Bill would adequately address and establish the means to fund issues of illegal occupation

Finally, any sustainable resolution of the current urgent situation facing indigenous peoples and their rights in Costa Rica is ultimately a matter of political will. Costa Rica has the legislative tools at hand and sufficient resources, financial, human and technical, to fully address this substantial blemish on its otherwise largely positive human rights record. However, it has yet to show the will to correct this major problem despite substantial and sustained international criticism. Indigenous peoples have made numerous good faith efforts to work with the state without result and have been forced to seek redress outside of the country. The case filed by the Teribe with the IACHR may provide a catalyst for generating political will in the power centers of the state, either through some form of negotiated friendly settlement process that could go beyond the specifics of the complaints raised by the Teribe or through implementation of an eventual decision of the IACHR or judgment of the Inter-American Court. Either way, it is high time that indigenous Costa Ricans can join their fellow citizens in actually enjoying being part of the 'happiest' country in the world.

¹⁹⁷ See EMRIP, *Final report of the study on indigenous peoples and the right to participate in decision-making*, *supra* note 192, para. 40-47 (containing examples of direct and differentiated indigenous representation in legislative bodies).

¹⁹⁸ *Law on Creation of CONAI*, N° 5251 of 11 July 1973, Article 4(e).

¹⁹⁹ UNCERD, Costa Rica, *supra* note 24, at para. 10.

VIOLATIONS OF INDIGENOUS PEOPLES' TERRITORIAL RIGHTS:

The example of Costa Rica

Fergus MacKay and Alancay Morales Garro

January 2014

This study explores the issues of widespread illegal occupation of indigenous lands on a national scale. Approximately 6000 non-indigenous persons are occupying at least 43% of the areas belonging exclusively to indigenous peoples.

The study presents a comprehensive analysis of the multidimensional nature of the law regarding indigenous peoples' lands, territories and resources, along with its relationship to their cultural integrity and survival. This is explored in detail with reference to three particular territories: China Kichá, Térraba and Salitre. In addition, the relationship between territorial rights and the right to self-government, self-representation, effective participation in decision-making and the legal personality of indigenous peoples is explained.

The authors examine the issues in the light of Costa Rica's obligations under national legislation, as well as the country's obligations under international law. Special attention is given to the case law of the Inter-American Commission and the Inter-American Court of Human Rights.

The study identifies specific actions for working towards a solution to the illegal occupation of indigenous lands in Costa Rica, and for allowing indigenous peoples full and effective enjoyment of their territories. Such actions are dependent on the willingness of the Costa Rican state.

