

Reparations for Neglect of Indigenous Land Rights at the Intersection of Domestic and International Law—The *Maya* Cases in the Supreme Court of Belize

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1. Introduction

Reparations for entire groups of people are usually called for because of wrongs committed in the past—often the distant past. Practically as a matter of definition, indigenous peoples are groups that have suffered historical wrongs; but also characteristic of them are the present-day manifestations of those wrongs and related ongoing patterns of oppression. As states born of colonial forces grew up around them, indigenous peoples were dispossessed of vast landholdings and deprived of access to life-sustaining resources. This loss of land and resources was typically facilitated by colonial and state policies and laws that accorded diminished or no value to the presence of indigenous peoples and their pre-existing land tenure. The legacies of such policies and laws continue today in state legal systems and administrative practices regarding land, even as normative trends, internationally and domestically, have shifted in recent years. Despite historical forces, many indigenous peoples today remain in possession of lands in accordance with their own traditions and customary laws. Yet, as exemplified in Belize in relation to the indigenous Maya people, many states still fail to adequately, or at all, accommodate to and provide security for traditional or customary land tenure, and instead they facilitate moves that further undermine it.

Thus, it is not the case that the dispossession and invasion of indigenous lands is just a phenomenon of the past: it is for many indigenous peoples ongoing, in contravention of now generally accepted international norms. Any reparations for indigenous peoples must entail, at a minimum, recognition of their surviving customary land tenure and remedy those state institutional mechanisms and related conditions that continue to allow for invasion or dispossession of

indigenous lands. Such is the objective of lawsuits filed simultaneously by two Maya communities in Belize against that country's government.

2. The Lawsuits by Conejo and Santa Cruz Villages

On 3 April 2007 representatives and members of the indigenous Maya villages of Conejo and Santa Cruz filed claims in two separate lawsuits in the Supreme Court of Belize, alleging that the government violates provisions of the Constitution of Belize by its 'failure to recognize, protect, and respect the claimants' customary land rights, which are based on the traditional land use and occupation of the Maya people'.¹ In the absence of specific constitutional or other domestic legal recognition of land rights based on indigenous customary tenure, the lawsuits alleged violations of the rights to property, equality, and life as affirmed by the Constitution of Belize in general terms. The Maya claimants asked the Court to declare that the villages hold 'customary title' to their traditional lands and for an order: requiring the government 'to determine, demarcate and title' those lands, in accordance with Maya customary laws and practices; and to 'abstain from any acts that might... affect the existence, value, use or enjoyment' of those lands without the free and informed consent of the villagers.

In asserting Maya customary land rights, the statements of claim initiating the lawsuits and subsequent legal submissions invoked international law, particularly as affirmed and applied by the Inter-American Commission on Human Rights in the *Case of Maya Communities v Belize*.² In that case the Commission found the existence of a system of customary land tenure among the Maya villages of southern Belize, including Conejo and Santa Cruz villages; that this customary land tenure constitutes property protected by the American Declaration of the Rights and Duties of Man, and by extension the Charter of the Organization of American States, to which Belize is a party; and that by various acts and omissions Belize had violated the property and related rights of the Maya people which are affirmed by the American Declaration. The statements of claim also referred to the common law, which in other legal systems derived from the British one is understood to affirm 'Aboriginal' or 'native title'.

The Supreme Court of Belize, which has general jurisdiction over constitutional and related matters, consolidated the two lawsuits into one proceeding soon after the filing and, from 18–21 June 2007, conducted the trial of the case. Reproduced in substantial part below is the brief to the Court, submitted prior to the trial, setting forth the theory of the lawsuits and their factual assertions

¹ Claim Form, *Aurelio Cal et al (Santa Cruz Village) v AG*, Claim No 171 of 2007; Claim Form, *Coy et al (Conejo Village) v AG*, Claim No 172 of 2007.

² *Maya Indigenous Communities of the Toledo District v Belize*, Case No 12.053, Inter-Am. CHR Report No 40/04 (12 October 2004).

based on the documentary evidence presented. Moira Gracey, Maia Campbell, and I wrote this brief, or 'skeleton argument', with Belizean attorney Antoinette Moore, who represented the Maya claimants in the court proceedings, all under the auspices of the Indigenous Peoples Law and Policy Program at the University of Arizona Rogers College of Law.

The documentary evidence relied upon in the consolidated cases and referred to in the skeleton argument includes affidavits by members of Conejo and Santa Cruz villages attesting to their customary land tenure patterns; affidavits by experts constituting detailed anthropological and ethnographic studies on the contemporary Maya and their historical and ongoing relation to land; maps of Conejo and Santa Cruz village lands produced by the villagers themselves with the assistance of professional geographers; the Maya Atlas, a compilation of community-created maps and narratives relating to the lands used and occupied presently by 36 Maya villages throughout southern Belize; and a joint affidavit by leaders of the Maya of southern Belize, with voluminous supporting documentation, detailing the threats to Maya customary land tenure and failed efforts to abate those threats through negotiations with the government.

3. The Maya Land Rights Struggle

The consolidated Conejo and Santa Cruz lawsuits came after years of efforts on the part of Maya communities and organizations to oppose government action and permitted activity inconsistent with Maya traditional land use and occupancy. In the mid-1990s, the government of Belize, through its Ministry of Natural Resources, granted at least 17 concessions for logging on lands totalling approximately 480,000 acres in the Toledo District, the country's most southern political subdivision. The two largest of these concessions, which together covered some 185,000 acres of previously pristine tropical forest, were granted to two, apparently related Malaysian companies that operated in Belize as Atlantic Industries Ltd and Toledo Atlantic International Ltd. Added to the logging interests was a concession for oil exploration which the Belize Ministry of Energy, Science, Technology and Transportation granted several years ago to AB Energy, Inc, a company based in the United States. The oil exploration concession, which would automatically convert to a concession for oil extraction if commercially viable quantities of petroleum were found, was for 749,222 acres of the lowland portion of the Toledo District. This concession was later replaced by an exploration and production sharing agreement with US Capital Energy-Belize Ltd, for roughly the same area.

The rural parts of the Toledo District affected by the logging and oil concessions were, and continue to be, inhabited primarily by Mopan and K'ekchi-speaking Maya people, living in villages throughout the Toledo District and numbering over 10,000. Belize is a relatively young country, which gained its independence

from the United Kingdom in 1981. Under British colonial administration virtually all the land in Toledo was deemed Crown land, that is, land pertaining to the British sovereign, including land inhabited by the Maya. As Maya people began re-populating the area in the early twentieth century, most having been driven out by Spanish colonizers in prior periods, the British established 'reservations' for the benefit of several of the Maya villages within supposed Crown lands. These reservations, now on land presumed to be owned by the independent Belizean state, continue to exist and include roughly half the Maya villages. Other villages, like Conejo, are on land simply designated state land without a reservation. Even the customary land tenure patterns of those villages whose are centres located on reservations, like Santa Cruz, extend beyond reservation boundaries to land under presumed state ownership. Whether or not within a reservation, the areas officially designated as state lands that are traditionally used and occupied by Maya communities are administered by the government as its own.

On this basis, not only has the government granted concessions for large scale natural resource development on Maya traditional lands, it has also pursued a policy of parcelling and leasing these lands to individuals. To the extent the government has offered any land tenure security to Maya people, it has been in the form of individual leases to typically 30-acre plots. And under its leasing policy, leases to village lands have frequently been granted to outsiders. This leasing regime is at odds with the traditional land use practices—including rotational agriculture requiring extensive areas, hunting and gathering—that do not accommodate to individuated 30-acre plots, and it undermines social patterns and authority structures that are part of or dependent on the communal land tenure system, not to mention the faulty presumption that the land is the government's to lease.

Through a campaign of several years, Maya leaders and organizations protested to government officials against the concessions, leases, and the failure of Belizean law and public administration to adequately recognize and protect Maya rights in lands and natural resources. At the helm of this campaign throughout the 1990s was Julian Cho, the charismatic Maya chairman of the Toledo Maya Cultural Council ('TMCC') who died abruptly when he fell from a rooftop under still vague circumstances. In late-1997, the TMCC, the Toledo Alcaldes Association (the organization of the traditional Maya village authorities known as *alcaldes*), and several Maya individuals filed a lawsuit in the Supreme Court of Belize to have the logging concessions enjoined and declared in violation of Maya rights. Government officials never responded with anything more than statements of general and unfulfilled commitments to address Maya concerns, and the lawsuit stalled with no action on the part of the Court as it became apparent that the Court was plagued with corruption and ineptitude. (In fact, the judge assigned to the case was removed from the bench for malfeasance unrelated to the case.) After having failed in their efforts before Belize authorities at the domestic level, including that first lawsuit, the TMCC petitioned the Inter-American Commission on Human Rights on behalf of the Maya communities, assisted by the Indian Law Resource Center, a US-based indigenous rights advocacy group.

The Commission, an agency of the Organization of American States charged with monitoring and pronouncing on human rights matters throughout the American continents, initially responded by offering its good offices to help reach a negotiated settlement, which both the Maya representatives and the government accepted. With Julian Cho now deceased, another prominent and compelling Maya leader, Greg Choc, the chairman of the Ke'kchi Council of Belize and director of the Sarstoon-Temash Institute for Indigenous Management ('SATIIM'), helped form the Maya Leaders Alliance ('MLA') to carry out the negotiations with the government and became its principal spokesperson. A series of formal and informal discussions ensued in fits and starts, the most concrete result of which was the signing of a framework agreement to guide negotiations toward a final settlement. On 12 October 2000, Choc and several other Maya leaders that were part of the MLA, including representatives of the TMCC and the Alcaldes Association, ceremoniously signed with the Prime Minister of Belize, Said Musa, 'Ten Points of Agreement'. Most notably, point six of the agreement provided recognition 'that the Maya People have rights to lands and resources in southern Belize based on their long-standing use and occupancy'. But subsequent negotiations bore little fruit, and the government resisted taking concrete steps toward making good on its commitment to effectuate its general recognition of Maya land rights based on traditional tenure. To the contrary, the neglect and active infringement of Maya land rights continued as before.

4. The Decision of the Inter-American Commission on Human Rights

When the Commission became convinced that negotiations were going nowhere, at least for the time being, it issued a detailed report analyzing and pronouncing on the merits of the case. The Commission found, not only that Belize had violated the right to property affirmed by Art XXIII of the American Declaration of the Rights and Duties of Man, but also that its failure to effectively secure and respect Maya customary land tenure violated the right to equality before the law of Art II of the American Declaration. The Commission accepted the argument that the government's failure to recognize and protect Maya property based on customary land tenure, as it recognizes and secures other forms of property, is discriminatory. Further, the Commission found that Belize violated the right to judicial protection of Art XVIII of the Declaration because of the delay and inaction in the earlier lawsuit filed by the TMCC and the Alcaldes Association. On the bases of these findings, the Commission recommended that the state of Belize adopt, 'through fully informed consultations with the Maya people, the legislative, administrative and other measures necessary'³ to secure Maya property rights based on customary land tenure and that it repair the environmental damage resulting from the

³ Ibid, at para 197(1).

logging. In accordance with its rules of procedure, the Commission first delivered the report to the government on 30 October 2003 as a confidential document; but the government, with the Commission's approval, quickly made the report available to the public. According to the government, this was 'to ensure its customary transparency and widest dissemination as it begins consultations on the matter'.⁴ The Commission itself published the report on 12 October 2004.

The Commission's report vindicated the position that Maya property rights exist on the basis of customary tenure independently of any government grant, and it gave new impetus to negotiations between the Maya leaders and the government. To convey that it was taking seriously the call for further consultations with the Maya on the land issue, the government appointed as its chief negotiator Assad Shoman, a widely respected historian and high level official who would later become Belize's ambassador to the United Kingdom. But in statements to Maya leaders and the media, government officials stressed the Commission's lack of formal authority to issue other than non-binding recommendations, thus seeking to avoid the merits of those recommendations and the findings of international responsibility underlying them. It soon became apparent that, while quite willing to talk, Shoman had no authority to concede on behalf of the government the kind of significant reforms required to secure Maya land rights in accordance with the Commission's decision. Shoman admitted as much in a letter to the MLA, and negotiations again stalled.

Thus by mid-2005 there was talk of new litigation. A cautious level of confidence in a Belizean judiciary that was by then reformed with new judges that were demonstrating independence, along with the Inter-American Commission's favourable decision, inspired an initiative that would entail going back to the Supreme Court. The MLA and local communities worked to develop a legal strategy with a group of lawyers and law students I coordinated as part of the human rights advocacy project of the Indigenous Peoples Law and Policy Program at the University of Arizona College of Law. Working previously with the Indian Law Resource Center, I had been the lead counsel for the Maya parties in the case before the Inter-American Commission on Human Rights. I was now drawn to the evident resolve in the Maya leaders to continue the land rights effort and not to allow the Commission's decision to become an empty victory with no practical meaning for the Maya people.

Through various consultations and meetings, eventually the villages of Conejo and Santa Cruz emerged as the subjects of two separate lawsuits that would serve as test cases to obtain a judicial affirmation of customary land tenure that would benefit all Maya communities. SATIIM, the organization headed by Greg Choc, had been working with Conejo and other villages in the vicinity of the Sarstoon-Temash National Park, in an effort to involve the villages in the management of the park. Conejo had negotiated the boundaries of its village lands with the neighbouring villages, and its members were keen on seeing those boundaries and its rights within them validated by the government. Santa Cruz was part of

⁴ *Ibid.*, at para 189.

a block of Maya villages that was being assisted by the relatively new Julian Cho Society ('JCS'), so named in honour of the late leader, to develop coordinated strategies for land tenure security and resource management. The JCS is led by Cristina Coc, a young, university-educated Maya woman whose brother-in-law was Julian Cho. Coc's dynamism and engagement with the people of Santa Cruz helped motivate and prepare them for the lawsuit, and she became a driving force in the MLA, being named along with Greg Choc as one of its spokespersons.

The MLA enhanced its capacity to develop and execute its litigation strategy when it hired as coordinator Martin Cus, also a Maya, to assist with MLA activities around the strategy and with the increasingly burdensome administrative tasks. Soft-spoken and amiable, Cus proved to be a formidable asset in mobilizing support among the various Maya villages for the Conejo and Santa Cruz lawsuits.

The need for aggressive action to secure customary Maya land tenure was highlighted when, in April 2006, the government, within the framework of its production sharing agreement with the company, granted US Capital Energy-Belize Ltd permission to enter the Sarstoon-Temash National Park to conduct seismic testing for oil exploration. The seismic testing began the same month, without any prior consultations with Conejo and other Maya villages whose traditional lands extend into the park. The park itself had been created in 1994 as a nature preserve without consulting the Maya communities whose longstanding uses of land and resources were being restricted by the park regime. The SATIIM organization was created in an effort to mitigate the park's existence on Maya traditional land by including the affected villages in the park's management and using the park regime itself as a bulwark against threats from the outside. Under the leadership of Greg Choc, SATIIM succeeded in negotiating with the government a co-management agreement that included as parties the villages in the vicinity of the park.

Expectations under the agreement were shattered when the government authorized the oil exploration activities in the park, and SATIIM sued for judicial review in the Belize Supreme Court. In its judgment of 29 September 2006, the Court held that the authorization was defective, but only because it had been granted without the environmental impact assessment prescribed under Belize Environmental Protection Act. The government proceeded quickly to cure the defect so that the seismic testing could continue, avoiding the more fundamental issue of the existence of Maya customary rights to land and resources. As painstakingly noted by the Court in its judgment, the SATIIM lawsuit had not raised that issue.

But it would soon be raised in the subsequent lawsuits.

5. Going to Court

On the day the Conejo and Santa Cruz lawsuits were filed, six buses that had been travelling from the southern part of the country since well before dawn arrived at the courthouse in Belize City. Out poured upwards of 300 people from several Maya villages. They gathered with banners and Maya ritual in a show of solidarity

and support for the lawsuits. The villagers marched from the courthouse several blocks to a large meeting room at a prominent hotel, where representatives of the claimant villages, the MLA, and their lawyers made statements to the press. The major Belize news media gave extensive coverage to the filing, and it quickly became a major story. When the trial of the case began just over two months later, several busloads of Maya villagers again gathered at the courthouse.

At the four-day trial, there unfolded a story of people and land, and of a struggle to maintain the connection between the two. Several witnesses supplemented the written affidavits and other documentary evidence. Two representatives of each of the villages testified in their Mopan and Ke'kchi Mayan languages through an interpreter, highlighting the still vibrant nature of their customary land use practices. Cristina Coc and Greg Choc also testified, providing context and background. Film maker Beth Gage introduced a six-minute video she and her husband, George Gage, had produced which provided a visual representation of life in Conejo and Santa Cruz villages. Anthropologist Richard Wilk, one of the foremost authorities on the Maya of Belize, gave what amounted to a seminar on the history, ethnography, and customary land tenure of the Maya. Having denied a motion for me to present argument in court as someone not admitted to the bar of Belize, the judge allowed me to present as an expert witness on the relevant international law and common law doctrine of other jurisdictions.

The government's defence rested on denying altogether the existence of Maya property rights based on customary land tenure, notwithstanding the recognition of 'rights... based on longstanding use and occupancy' in the Ten Points of Agreement. Despite the judge's urging, government attorney Nicola Cho never explained the inconsistency. Instead, she argued that the contemporary Maya villages of southern Belize, having developed at their present locations after British assertion of sovereignty, cannot establish a sufficiently long or continuous connection with the land they now occupy. This argument employed highly dubious characterizations of the relevant history and law that favour colonial and state dominance over territory. Cho urged accordingly no weight to contemporary international law or to the decision of the Inter-American Commission on Human Rights. The government presented no live witnesses at the trial, but rather relied on affidavits and a video of its own, the relevance of which the judge admonished was not readily apparent.

The government's position was in stark contrast with that represented by the Maya claimants' evidence and with the arguments advanced by their attorney Antoinette Moore. While not capturing the drama of the courtroom proceedings, the skeleton argument that follows sets forth the case for securing Maya land rights that was pressed upon the Court. The argument envisions a domestic constitutional order that incorporates and upholds indigenous customary land tenure, influenced by a transnational legal discourse that is sympathetic to this end. As at the time of writing the Court has not yet rendered its judgment in the Conejo and Santa Cruz village lawsuits. But whatever the outcome, the challenge remains joined for

reparations against institutional practices and conditions that would perpetuate historical oppression and further erode indigenous land rights in the present.

Postscript

On 18 October 2007, the Supreme Court of Belize rendered its judgment in the Conejo and Santa Cruz lawsuits, ruling entirely in favour of the Maya parties.⁵ Chief Justice Abdulai Conteh read his 67-page decision for the court from the bench before a packed courtroom of Maya villagers, who sat appearing stunned as the victory unfolded. Just before the present volume went to press, the 21-day period for appealing the judgment expired with no appeal, making the decision final.

Finding the evidence presented by the Maya parties 'overwhelming,' the Chief Justice concluded that the Maya people of Southern Belize have rights to land based on their customary land tenure, and he affirmed

I have no doubt that the claimants' rights to and interests in their lands in accordance with Maya customary land tenure, form a kind or species of property that is deserving of the protection the Belize Constitution accords to property in general. There is no doubt this form of property, from the evidence, nurtures and sustains the claimants and their very way of life and existence.⁶

The Chief Justice was 'fortified' in this conclusion by the finding of property rights by the Inter-American Commission on Human Rights in the *Maya Communities* case.⁷ In regard to the claimant villages in particular, the court declared that

the Maya Villages of Santa Cruz and Conejo hold collective title to the lands their members have traditionally used and occupied within the boundaries established through Maya customary practices; and that this collective title includes the derivative individual rights and interests of Village members which are in accordance with and subject to Santa Cruz and Conejo and Maya customary law.⁸

Justice Conteh extensively addressed but ultimately rejected the government's argument that the claimants have no title because they are unable to prove exclusive and continuous occupation of lands, adopting a more flexible standard in this regard than that advanced by the government, and one more attentive to the dynamic nature of customary tenure in the face of colonial onslaught.⁹ He also found unconvincing the alternative argument that any pre-existing rights of the Maya communities

⁵ *Aurelio Cal et al. v The Attorney General of Belize and the Minister of Natural Resources and Environment*, Claims Nos 171 and 172 of 2007, Judgment of (18 October 2007).

⁶ *Ibid.* para 102.

⁷ *Ibid.* para 100.

⁸ *Ibid.* para 136(b).

⁹ *Ibid.* para 24; *see also* *Ibid.* para 61 ('I do not, in any event, think that the dates of establishment of particular villages are necessarily determinative of or fatal to the existence of customary land tenure or interests in land. I am satisfied by the overwhelming evidence that the Maya people

had been extinguished by the assertion of British colonial sovereignty, government-issued land grants, or the creation of Indian reservations over the area.¹⁰

Having determined the existence of the claimants interests in land arising from Maya customary tenure and protected by the Constitution of Belize (Arts 3(d), 17), the court proceeded to find that the government's 'acts and omissions . . . regarding the claimants' rights to and interests in their lands, do not accord with the protective regime of the constitution regarding property.'¹¹ At the same time, however, it held that the government's neglect had not reached the level of 'arbitrary deprivation' or 'compulsory taking' of property so as to trigger the constitutional requirement of reasonable compensation.¹²

The court further found that Belize had infringed the constitutional rights to equality and non-discrimination (Arts 3, 16):

. . . [B]ecause of their communal aspect and unique source, Maya customary rights to lands and resources are by nature, different from the type of property rights routinely respected by government offices and ministries. Therefore, by failing to accommodate this difference by, for example, treating individualized leases as an adequate substitute for a Maya farmer's customary interest in his village lands . . . and by treating lands used collectively by Conejo and Santa Cruz Villages as vacant national lands, government officials, as agents of the defendants, are acting discriminatorily against the claimants.¹³

Finally, the court concluded that the government violated the constitutional right to 'life, liberty, security of the person, and the protection of the law' (Art 3(a) of the members of Conejo and Santa Cruz villages, pointing out that, 'without the legal protection of their rights to and interests in their customary land, the enjoyment of their right to life and their very lifestyle and well-being would be seriously compromised and be in jeopardy.'¹⁴

The court thus ordered the government to demarcate and title Conejo and Santa Cruz lands, and to refrain from issuing leases or permits to use those lands without the village's 'informed consent.'¹⁵ In addition to relying on the decision of the Inter-American Commission on Human Rights in the *Maya Communities* case to interpret the relevant constitutional rights, the court also looked to numerous other international sources, including the newly adopted United Nations Declaration on the Rights of Indigenous Peoples.¹⁶ In this and other respects, the analysis and conclusions of the court's judgment are substantially in line with those set forth in the brief that follows.

had occupied land in what is today Toledo District and still continue to occupy these lands, including the members of the Conejo and Santa Cruz villages, based on Maya customary land tenure.)

¹⁰ Ibid. paras 69–93.

¹¹ Ibid. para 109.

¹² Ibid. para 110.

¹³ Ibid. para 114.

¹⁴ Ibid. para 117.

¹⁵ Ibid. para 136(c), (d).

¹⁶ Ibid. para 118–132.

IN THE SUPREME COURT OF BELIZE, A.D. 2007

Claim No. 171 of 2007

BETWEEN

AURELIO CAL in his own behalf and on behalf of the Maya VILLAGE OF SANTA CRUZ

and

BASILIO TEUL, HIGINIO TEUL, MARCELINA CAL TEUL, and SUSANO CANTI

Claimants

and

THE ATTORNEY GENERAL OF BELIZE and THE MINISTER OF NATURAL RESOURCES AND THE ENVIRONMENT

Defendants

Claim No. 172 of 2007

BETWEEN

MANUEL COY, in his own behalf and on behalf of the Maya VILLAGE OF CONEJO

and

MANUEL CAAL, PERFECTO MAKIN AND MELINA MAKIN

Claimants

and

THE ATTORNEY GENERAL OF BELIZE and THE MINISTER OF NATURAL RESOURCES AND THE ENVIRONMENT

Defendants

SKELETON ARGUMENT OF THE CLAIMANTS¹⁷

[omissis]

Issues Presented as Agreed Upon by the Parties

- I. Whether there exists, in southern Belize, Maya customary land tenure.
- II. Whether the members of the villages of Conejo and Santa Cruz have interests in land based on Maya customary land tenure and, if so, the nature of such rights.
- III. If the members of the villages of Conejo and Santa Cruz have any interests in lands based on Maya customary land tenure:
 - A. Whether such interests constitute "property" that is protected by sections 3(d) and 17 of the Constitution;
 - B. Whether any government acts and omissions violate the claimants' rights to property in sections 3(d) and 17 of the Belize Constitution;

¹⁷ Most references, including the references to the documentary evidence presented and legal authorities, have been omitted.

- C. Whether any government acts and omissions violate the claimants' right to equality guaranteed by sections 3 and 16 of the Constitution;
- D. Whether any government acts and omissions violate the claimants' rights to life, liberty, security of the person and the protection of the law guaranteed under sections 3(a) and 4 of the Constitution.

INTRODUCTION

1. These consolidated cases were brought by members and representatives of Conejo and Santa Cruz villages, indigenous Maya communities in the Toledo District of southern Belize. The claimants seek redress for violations of the constitutionally-protected rights the people of these villages have to the lands they have traditionally used and occupied. This skeleton argument synthesizes the relevant facts and law to establish that each of the issues presented should be resolved in favour of the claimants.

SUMMARY OF ARGUMENT

2. The members of the villages of Conejo and Santa Cruz have rights in land based on Maya customary land tenure, which undoubtedly exists in southern Belize. Conejo and Santa Cruz are Maya villages whose members live, farm, hunt, and fish; collect medicinal plants, construction, and other materials; and engage in religious ceremonies and other activities on lands and waters within defined areas surrounding each village. Their land use and occupation reflect a broader pattern of Maya customary land tenure that is present among Maya communities throughout the Toledo District of southern Belize and has its roots in the millennial inhabitation of the Maya indigenous people of the Mesoamerican region of which Belize is part.
3. This customary land tenure gives rise to property rights that are critical to the claimants' physical and cultural survival. In addition to being grounded in Maya customary law, the proprietary nature of these rights is affirmed by international human rights law and the common law. In particular, the Inter-American Commission on Human Rights of the Organization of American States has affirmed the customary property rights of the Maya people of Belize, including the claimants. Just like other forms of property, such Maya property rights are protected, by articles 3(d) and 17 of the Belize Constitution, against discriminatory treatment or other infringement.
4. The government of Belize has a special duty of care, or fiduciary obligation, toward the Maya indigenous people with respect to their property and related rights in lands and resources, in light of the historical discrimination they have faced as indigenous people. In the *Ten Points of Agreement*, which it signed with Maya leaders in 2000, the government recognized "that the Maya People have rights to lands and resources in southern Belize based on their long-standing use and occupancy."
5. Yet government officials at every level have ignored or acted to undermine Maya customary land tenure, including that of Conejo and Santa Cruz Villages. As a matter of policy, the government now refuses to recognize Maya customary land tenure as giving rise to property rights that it and others must respect. It accords Maya customary land rights no legal protection, and instead actively infringes these rights by its programme of individual leases and exploitation of natural resources.
6. The government's failure to recognize, respect, and protect the land rights of the Maya claimants that derive from their own customs and traditions is in violation of the

right to property secured by articles 3(d) and 17 of the Belize Constitution. It is also discriminatory, in violation of articles 3(d) and 16 of the Constitution. Additionally, the government's neglect of the Maya claimants' customary property rights infringes their rights to life, liberty, security of the person, and the protection of law guaranteed in section 3(a) and 4 of the Constitution.

ARGUMENT

7. The applicable law and facts in these consolidated cases establish that the claimant villages and their members have rights based on Maya customary land tenure, rights that are protected by the Constitution of Belize, and that these rights have been violated by the government. The essential facts that constitute the basis of the claims in these proceedings are not substantially in dispute. Ample evidence of these facts are in the affidavits and other documents annexed to the claim forms initiating these cases, as well as in parts of the affidavits and exhibits submitted by the government defendants in their defence. Other parts of the defendants' affidavits allege facts or provide impressionist opinions of a political nature that are irrelevant to the issues presented and that should therefore be discarded.

ISSUE I: Maya customary land tenure exists in southern Belize, as confirmed by the Inter-American Commission on Human Rights

8. It is well known that people who are identified as Maya have, for centuries, formed organized societies that have inhabited a vast territory—which includes the Toledo District of southern Belize—long before the arrival of Europeans and the colonial institutions that gave way to the modern State of Belize. Distinct linguistic subgroups and communities have existed and evolved within a system of interrelationships and cultural affiliations among the historical and contemporary Maya people of the Middle American region encompassing Belize. The contemporary Mopan and Q'eqchi'-speaking people of the Toledo District are the descendants or relatives of the Maya subgroups that inhabited the territory since pre-colonial times.
9. In response to a petition brought on behalf of the Mopan and Q'eqchi' (sometimes spelled Kekchi or Ke'kchi) Maya communities of southern Belize, the Inter-American Commission on Human Rights, in its Report No. 40/04 of 2004, addressed the situation of these communities with regard to lands and resources. [omissis] After an extensive examination of the historical record and evidence presented by both the representatives of the Maya parties and the government of Belize, the Commission concluded:

[T]he members of the Mopan and Ke'kchi Maya communities of the Toledo District of Southern Belize constitute an indigenous people whose ancestors inhabited the Toledo District prior to the arrival of the Europeans and the colonial institutions that gave way to the present State of Belize. [Maya Indigenous Cmty. of Toledo Dist. v. Belize, Case 12.053, Report No. 40/04, Inter. Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev., para. 122 (2004) (hereinafter "Maya Communities case")]
10. The Inter-American Commission further recognized the existence of an historical and ongoing system of customary land tenure on the part of the Maya people that establishes "a communal property right to the lands they currently inhabit in the Toledo District." [Maya Communities case, para. 127]

11. The government itself recognized the existence of Maya customary land rights, when the Prime Minister signed the Ten Points of Agreement with Maya leaders on October 12, 2000. Point 6 of the agreement states: "the Maya People have rights to lands and resources in southern Belize based on their longstanding use and occupancy."
12. This agreement was in the framework of ultimately failed negotiations prompted by the Inter-American Commission on Human Rights after receiving the petition from the Maya parties. The government represented to the Commission that its recognition of Maya land rights based on longstanding use and occupancy was responsive to the Maya claim for recognition of customary land tenure. It can hardly maintain now that it meant something else. [Maya Communities case, para. 69]
13. Yet now the government in its defence denies the existence of Maya customary land tenure, without presenting any evidence to rebut the abundant proof that it is in fact a reality in southern Belize.
14. In affirming the existence of Maya customary land tenure in southern Belize, the Inter-American Commission relied on essentially the same evidence that is now before this Court, including expert evidence by anthropologists Grant Jones and Richard Wilk. Professor Jones, one of the foremost authorities on the Maya of southern Belize, concludes that "without any doubt the Mopan population of the Toledo District has ancestral roots in the area that long predate British colonial claims over the territory." Professor Jones also finds, and in his report details, ample evidence to establish that the Q'eqchi' likewise have ancestral roots in the earlier population. Additionally, Professor Richard Wilk, another leading authority on the Maya of southern Belize, confirms that "[i]t is quite possible that Kekchi, mixed Kekchi-Chol, or mixed Kekchi-Mopan habitation of Toledo goes back to the 1500s."
15. The weight of the evidence presented by the claimants' affidavits in the present proceedings, just as the evidence before the Inter-American Commission, indicates continuity in Maya society and land use in the Toledo territory that extends back, not just to the time of European contact, but to ancient times. [omissis] Nevertheless, movement is inherent in the customary land-use patterns of the Maya people, and thus the population of Maya villages in what is present day Toledo District has waxed and waned over time. Furthermore, the process of European colonialism and conquest provoked a series of dislocations and relocations of the Maya of this area, including involuntary removal of many of the Maya residents to what is now Guatemala, the consequent mixing of Maya from different regions, and their return to and re-settlement of the area of southern Belize as circumstances permitted. Thus, the Maya people moved back and forth for centuries between territories that were only later to be divided by national boundaries.
16. British colonial officials welcomed and encouraged Maya re-settlement of the area from the earliest days of the colony of British Honduras until at least the late twentieth century. They encouraged Maya settlement both to increase the available pool of labour and to ensure an adequate food supply for the colony, and sought to dissuade Maya from subsequently moving back into Guatemala. In order to ensure peaceful and productive relations with the Maya, the British government both tolerated and affirmatively protected Maya customary land use. In some areas, it did this by creating Indian reservations and reserving other lands for the use and benefit of Indians.

- However, the reservations did not and do not now include all or even most of the Maya villages. Additionally, the British government affirmed the authority of alcaldes—the traditional Maya leaders—elected in Maya villages and provided social services to Maya villages. This policy has continued since independence.
17. Today, the Maya people continue to live under a traditional governance system, which is grounded in their distinctive cultural values and has changed and adapted over time in response to interaction with European societies and environmental changes, among other factors. Conejo Village and Santa Cruz Village are two of some 38 Maya communities that currently occupy lands in the Toledo District according to their traditional customs, values, and norms. The lands these two and many other Maya villages use and occupy is outside of, or extends beyond, the reservations established during British colonial rule and includes land officially designated as national land.
 18. Maya land-use patterns are governed by a system of unwritten customary rules that form part of the social, cultural, and political organization of their communities.
 19. Within their customary system, Maya villages hold land collectively, while individuals and families enjoy derivative, subsidiary rights of use and occupancy. These subsidiary rights include the right of villagers to use village lands for long-term purposes, such as maintaining homes and cultivating permanent and annual crops. [omissis]. Maya villagers also have rights to hunt, fish, and extract resources within their village lands; within neighbouring Maya village lands, subject to the authority of those villages; and within shared use areas outside the customary boundaries of any one particular village. The exercise of these rights is vital to the health and physical survival of the individual claimants and other members of Conejo Village and Santa Cruz Village, and is an integral component of the culture of the Maya people.
 20. The Maya communities of Toledo District carry out a complex pattern of subsistence and cultural practices on the land, including swidden agriculture, hunting, fishing, gathering, and religious uses of specific sites. Generally, the customary patterns of use and occupancy, or land tenure system, manifest in roughly concentric zones of land use that surround each of the villages. [omissis]
 21. Most Maya land use in the Toledo District is related to their production of food and the hunting and gathering of other resources for their own subsistence. [omissis]
 22. Given that neither British colonial nor Belizean statutory law has provided a way to demonstrate Maya customary land rights with official papers, some Maya farmers have used the leasing system—the only available formal option outside of Indian reservations—to manifest their entitlement. Many Maya individuals have taken out leases out of fear of losing their traditional lands to others, including to village outsiders and foreigners who buy or lease village land from the government. In many cases, land-use practices within the leased areas have continued to be guided by customary norms. [omissis]
 23. In accordance with their traditions, Maya villages determine their customary boundaries with neighbouring villages through meetings of the elders and leadership of the respective villages. Different villages at different times have physically cut those boundaries into the forest; others do not rely on physical markers. Each village has effective collective control over who is allowed to use village lands within its

customary boundaries for sedentary, long-term purposes, including settlement and farming. Each village also regulates other uses within its customary boundary area, such as hunting, fishing and forest resource extraction by non-residents including Maya villagers from neighbouring communities, all in accordance with and subject to Maya customary law.

24. While boundaries between villages for agricultural and settlement purposes are defined and widely respected, hunting, fishing, and gathering areas of different villages generally overlap in practice. Villagers generally recognize that animals and fish move from place to place, and that some wild resources grow unevenly on the landscape, and expect that people will go to places of abundance when engaging in these activities, regardless of precise territorial boundaries.
25. The customary method of rotating agriculture practiced by the Maya is adapted to the environment of the broadleaf rainforest and involves an extensive, rather than intensive, use of the land. Thus there is a natural limit to the size of individual communities. Traditionally, as available agricultural land becomes limited to distant areas, individuals begin to settle far from the residential zone. When these settlements reach a certain size, the members centralize their homes, elect a leader and create a governance structure, and a new village is created.
26. Maya villages regulate settlement (and thus population growth) and maintain social and cultural cohesion through traditional governance institutions that have evolved over the centuries. The Maya have always had community leaders who oversee collective affairs in coordination with other leaders and the entire community. These village leaders apply customary norms to regulate land use and other aspects of community life, including the *fajinas*, a form of communal labour. Maya governance systems have adapted over time, first to accommodate the Spanish colonial *alcalde* system, then to accommodate British colonial administration, and most recently to accommodate the imposition of the Village Councils Act. The Maya institution of the *alcalde* was not created by the British, but has been part of the administrative and legal structure of Belize since before its constitution as a British colony. While some of the *alcaldes'* judicial duties are statutorily defined, all the rest of their activities rest on custom.
27. Maya customary land tenure is constant in its underlying values while flexible in its specific articulation, so that specific land-use patterns and customary rights in each Maya community vary from the general pattern according to both the topographical and soil characteristics of the area, and the social and historical context of the particular village.

ISSUE II: The Members of Conejo and Santa Cruz villages have interests in lands based on Maya customary land tenure, and the nature of those interests is in accordance with the customary patterns of use and occupancy that give rise to them

28. Conejo and Santa Cruz villages are among the Maya communities that the Inter-American Commission on Human Rights found to have property rights on the basis of Maya customary land tenure. [omissis]
29. The Inter-American Commission held that rights and interests in land arise from the ongoing patterns of land use by the Maya people, even though those patterns

have shifted and evolved over time. The Commission rejected the government's contention, now again advanced by the defendants, that many, if not all, contemporary Maya communities lack rights in lands because they were established in relatively recent times. Following the jurisprudence of the inter-American human rights system, the Commission found that "the dates of establishment of particular Maya villages, in and of themselves, are not determinative of or fatal to the existence of Maya communal property rights in lands." [Maya Communities case, para. 130]

30. Rather, as affirmed by the Inter-American Commission on Human Rights, Maya villages and their members have rights to the lands they presently use and occupy according to traditional patterns within the broader territory historically used by them or their ancestors, notwithstanding that particular land uses or village configurations may in some instance be relatively recent. This understanding of the existence of indigenous customary rights in land is consistent with international and domestic legal trends.
31. The Commission further stressed that "the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of indigenous communities and the effective enjoyment of their human rights more broadly," such that, for the Maya people in particular, rights "have extended to the use of the land and its resources for purposes relating to [their] physical and cultural survival..." [Maya Communities case, paras. 114, 127]
32. The people of both Conejo and Santa Cruz are among the contemporary Maya with ancestral roots embedded in the area in which they live. They have collective and individual customary rights based on their ongoing traditional land tenure patterns, which are characteristic of and linked to the customary land tenure of Maya people throughout southern Belize. These rights are critical to their survival and enjoyment of human rights.
33. Because these rights derive from customary land tenure, it follows that their nature is a function of that very customary tenure. These rights are also a function of the conditions needed to protect the human rights of the village members. [Maya Communities case, paras. 55, 151]
34. As stated by the Australian High Court in describing the recognition of indigenous customary land tenure by the common law:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. . . . [Mabo v. Queensland II, (1992) 175 C.L.R. 1, (hereinafter "Mabo II") paras. 58, 61]

Conejo Village

35. The claimants Manuel Caal, Manuel Coy, Melina Makin, and Perfecto Makin, like other members of Conejo Village, identify as Q'eqchi' Maya and are Q'eqchi'-speaking. The contemporary Q'eqchi' people are the descendants or relatives of the Maya subgroups that inhabited the territory at least as far back as the time of European exploration and incursions into what is now Toledo District in the seventeenth and eighteenth centuries. The Mopan and the Manche Chol subgroups

- lived in the area of what is now the Toledo District at the time of the Spanish in the sixteenth century. The Spanish forcibly resettled them to the West, where the Mopan and the Manche Chol intermixed with the Q'eqchi', blurring the lines between these subgroups. [omissis] Q'eqchi', mixed Q'eqchi'-Chol, or mixed Q'eqchi'-Mopan habitation of Toledo could date back to the 1500s. The claimants themselves have seen evidence in and around Conejo Village of both ancient and more recent historical Maya presence in the area, including sacred caves and pottery shards.
36. Today, Conejo Village and its members are part of the larger Maya society of southern Belize and integrated with its system of customary land tenure. The lands used and occupied by the village are located outside of any Indian reservation, on land that is entirely, or almost entirely, designated by the government as national land. Conejo was founded by José Makin about 125 years ago. [omissis]
 37. Land-use patterns in Conejo Village follow the general land tenure patterns of the Maya people, with the derivative interests in land that are established by those patterns. Like other members of Conejo Village, Perfecto Makin, Manuel Coy, and Manuel Caal all grow corn, rice, ground food, and tree crops according to the rotating fallow customs they learned from their parents. In accordance with Maya custom, they selected where to plant their crops from available village land. The plots where these crops are grown are recognized to belong to them by other members of the community.
 38. Like other people in Conejo Village, the claimants have learned skills and customs passed down by their parents and grandparents which are essential to maintaining their subsistence way of life. These skills include hunting, fishing, and gathering forest resources over traditional land for food, housing, and medicinal purposes. Villagers are free to hunt and gather forest resources anywhere, including in lands over which other villagers make their plantations, and in neighbouring village lands. Where the claimants engage in these activities in lands belonging to neighbouring villages, they respect the authority of those villages to regulate their own village land use. This respect is reciprocated by neighbouring Maya villagers hunting, gathering, and fishing in Conejo Village lands. Thus, Conejo villagers exercise their rights to engage in these activities within and outside Conejo Village lands.
 39. Melina Makin engages in land-use practices that are traditional for Maya women. She raises domestic animals around the home, which her community recognizes as belonging to her and her family. [omissis]
 40. The land tenure system in Conejo functions under the authority of the alcalde, the village chairman, village council, and the community at large. The Village Councils Act of 1999 defined the jurisdiction of village councils throughout Belize over land-use issues, without making any provision for its interaction with the Maya alcalde system. Because the alcalde has exercised jurisdiction over land-use issues in village lands, villages have had to accommodate the new system with the old, and have done so in different ways according to the specific situation. [omissis]
 41. Some members of Conejo Village have applied for government-issued leases, though most villagers continue to farm within communal lands. In 2000, a government official came into Conejo and encouraged villagers to take out leases, ostensibly in order to prevent village outsiders from buying land within the village. [omissis]

42. In 2005, Conejo Village leaders arranged for physical demarcation of the boundaries of their communal lands. In accordance with Maya custom, Conejo Village leaders met with leaders of neighbouring villages to cut a physical path through the vegetation to mark their shared boundary. The line was then marked with Global Positioning System (GPS) equipment, which was used to produce maps of the shared boundaries between Conejo Village and its neighbours. These boundaries were then confirmed by neighbouring community leaders in written agreements. Conejo Village agricultural lands located within the Sarstoon-Temash National Park were then included, resulting in the map submitted by the claimants in this proceeding.
43. This map reflects the communal land in which Conejo residents exclusively farm, and where, by custom, Conejo authorities regulate settlement and land use, including those lands where Conejo Village members farmed until they were obligated to stop as a result of the creation of the Sarstoon-Temash National Park. Under Maya custom, the village of Conejo holds a collective customary right, or title, to this land, and its members enjoy derivative individual rights of use and occupation according to customary practices.

Santa Cruz Village

44. The claimants Basilio Teul, Higinio Teul, Marcelina Cal Teul, Susano Canti, and Aurelio Cal are members and residents of Santa Cruz Village, which is predominantly Mopan-speaking, with some Q'eqchi' speakers. The area of Santa Cruz has been occupied by Maya people to greater and lesser degrees since time immemorial. Small numbers of Mopan Maya have lived and moved in the general area of Toledo District continuously since before contact with the Spanish. However, many were forcibly removed by the Spanish to Peten. Grant Jones concludes that "without any doubt, the Mopan population of the Toledo District has its ancestral roots in the area that long predate British colonial claims over the territory." [omissis]
45. Santa Cruz villagers and their forbearers have always considered this region to be part of their traditional territory in which they had a right to settle. Santa Cruz was an *alquilo* of San Antonio. An *alquilo* is a relatively low-density rural settlement, where crops are grown near the home, or a place where farmers reside during the harvest season to keep watch over their crops. The Maya farmers living in the *alquilo* later decided to move closer together and create a new village, which they named Santa Cruz. San Antonio was founded in 1882, when colonial officials encouraged Maya farmers to move their village east to ensure that it fell within the borders of British Honduras. [omissis] Today, some Santa Cruz lands are officially designated national or Crown land; other Santa Cruz lands fall within the boundary of the San Antonio reservation.
46. Like Conejo Village, Santa Cruz Village and its members form part of the larger Maya society and are integrated within its system of customary land tenure. [omissis]
47. A number of years ago, a couple of villagers in Santa Cruz applied for and were issued leases by the government. This caused conflict and confusion as to what normative system applied over the leased lands, because, for example, the leaseholders prohibited other villagers from collecting firewood, thatch, string, and other materials on the leased land. These are activities that Santa Cruz villagers are customarily entitled to do freely throughout their communal lands. The leases were not renewed after

they eventually expired. The vast majority of villagers in Santa Cruz have chosen not to take out leases to their lands and view leasing as potentially disruptive of their traditional land tenure system.

48. Like other Santa Cruz villagers, the claimants and other affiants from Santa Cruz were taught skills and customs that have been essential to maintain their subsistence way of life. Their parents and grandparents showed the claimants how to hunt, fish, and gather forest resources over traditional land for food, housing, and medicinal purposes.
49. Typical of Maya women, Marcelina Teul, in addition to planting and harvesting the family crops, maintains a home and garden that the other village members recognize as belonging to her and her family. In addition, she collects a variety of forest resources from village lands, including water, food, and firewood for cooking. These uses of the land are intimately bound up with culturally defined practices of subsistence, sacred rituals and family relationships.
50. The land tenure system in Santa Cruz functions under the authority of the alcalde, the village chairman and council, and the community at large. The Village Councils Act of 1999 defined the jurisdiction of village councils throughout Belize over land-use issues, without making any provision for its interaction with the Maya alcalde system. Because the alcalde has exercised jurisdiction over land-use issues, villages have had to accommodate the new system with the old. [omissis]
51. In late 2006, Santa Cruz leaders arranged for the mapping of their communal lands. Where the village boundaries were clear and well-defined, they were marked using a Global Positioning System (GPS) instrument and, with the use of related technology, included in the map of Santa Cruz lands submitted with this claim. Also illustrated by the map are the areas jointly used by Santa Cruz and neighbouring villages where the exact boundary between them is not precisely defined. The map reflects the communal land in which Santa Cruz residents live and farm to the exclusion of others, and where, by custom, Santa Cruz authorities regulate settlement and land use, including those areas where Santa Cruz Village members farmed until they were obligated to stop as a result of the creation of the Rio Blanco National Park. Under Maya custom, the Village of Santa Cruz holds a collective right, or title, to this communal land, and its members enjoy derivative individual rights of use and occupation according to customary practices.

Issue III(A): The customary land rights of Conejo and Santa Cruz villages constitute “property” that is protected by sections 3(d) and 17 of the Constitution

1. The Constitution protects property “of any description”

52. The Constitution affirms resolutely in Section 3 that “every person in Belize is entitled to the fundamental rights and freedoms . . . , whatever his race, place of origin, political opinions, colour, creed or sex, . . . namely . . . (d) protection from arbitrary deprivation of property.” This right is expanded upon in Article 17(1), which guarantees that “No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired.” Section 16(1) also provides that “no law shall make any provision that is discriminatory either

of itself or in its effect.” (emphasis added). [Belize Constitution, cap. 4, pt. 2, §§ 3, 16-(1), 17-(1) Revised Edition (2000–2003)]

53. Property is defined broadly in the Law of Property Act to include “any thing in action and any interest in real and personal property.” (emphasis added). [Law of Property Act, cap. 190, § 2(1) (2000)]

2. Maya use and occupancy of land according to customary practice give rise to property rights

54. That Maya customary land tenure in Belize, including that of Conejo villagers, constitutes “property” was conclusively established by the Inter-American Commission of Human Rights:

[T]he Mopan and Ke’kchi Maya people *have demonstrated a communal property right to the lands that they currently inhabit* in the Toledo District. These rights have arisen from the longstanding use and occupancy of the territory by the Maya people. . . . This communal property right of the Maya people is the subject of protection under Article XXIII of the American Declaration [of the Rights and Duties of Man] (emphasis added). [Maya Communities case, paras. 127, 131]

55. An interpretation of the meaning of “property” in the Constitution that includes property arising out of Maya customary land tenure is consistent with the purpose of the Constitution, as described in the preamble:

WHEREAS the people of Belize . . . (a) affirm that the Nation of Belize shall be founded upon principles which acknowledge . . . faith in human rights and fundamental freedoms . . . and the equal and inalienable rights with which all members of the human family are endowed. . . . (e) *require policies of state which protect . . . the identity, dignity and social and cultural values of Belizeans, including Belize’s indigenous peoples* . . . with respect for international law and treaty obligations in the dealings among nations (emphasis added). [Belize Constitution, cap. 4, preamble, Vol. I, Tab 1]

56. For the Maya claimants, as is the case for indigenous peoples throughout the hemisphere, the property rights asserted here are of central importance to their identity, dignity, and social and cultural values:

[T]he [Inter-American] Commission has emphasized the distinct nature of the right to property as it applies to indigenous people, whereby the land traditionally used and occupied by these communities plays a central role in their physical, cultural and spiritual vitality. [Maya Communities case, para. 155]

57. Some time ago, the Supreme Court of Belize in *Attorney General for British Honduras v. Bristowe* affirmed the longstanding common law principle that the law recognizes property interests based on customary usages that are not originally sanctioned by the sovereign:

[...] the rights of the Crown were then acquired for the first time *salvo jure cuius libet* and *without prejudice to any pre-existing rights of property*, which, in accordance with *lex loci*, her Majesty’s subjects were lawfully possessed and no retroactive exercise of the rights of the Crown could rightfully effect or

disturb these vested interests. (emphasis added). [A.G. for British Honduras v. Bristowe, [1878] (No. 4) at 14 (Parker, C.J.)]

58. In *Bristowe*, the defendants based their claim on the customary law of British settlers, which had been codified in Burnaby's Code prior to the territory's incorporation into the British Empire. As the Privy Council observed in upholding the decision of the Belize Supreme Court:

[T]he early settlers were governed by rules passed by assemblies of the whole body, and that magistrates were elected to enforce the observance of these rules, and generally to administer justice. Amongst those rules were regulations for allotting plots of land to the settlers... [A.G. for British Honduras v. Bristowe, [1880] 6 App. Cas. 143, 148 (P.C.)]

59. The customary land tenure system described was that of non-indigenous settlers during colonial times, but the *Bristowe* case nonetheless sets an important precedent relevant here. It affirms an expansive understanding of the concept of property, one that incorporates custom as a source of rights and that is equally applicable to the Maya in the modern constitutional era.
60. From the earliest days of British Honduras, the customary law of the inhabitants has been part of the law of the land. The 1855 Act to declare the Laws in force in this Settlement incorporated British common law "in so far as it is not at variance with any Local Law of this Settlement" and imported Imperial statutory law "not at variance with or qualified by any local law or recognized custom" in British Honduras. That *alcaldes* would apply Maya custom in the exercise of their duties was acknowledged by colonial officials and indeed was one reason for incorporating the *alcalde* into the administration of the colony.
61. *Alcaldes'* powers and duties sourced in Maya custom continue to the present day, as recognized by the government itself. These include the authority of the *alcaldes* to oversee decisions about who moves into Maya villages, to manage communal lands, and to call *fajinas* or communal labour. The legal maxim *consuetudo pro lege servatur* ("custom is held to be law") affirms the common law's recognition of the legal nature of *alcaldes'* customary activities. Like the customary property rights of the non-indigenous settlers in *Bristowe*, the rights to land that arise from, and are regulated by Maya customary law and authority, are likewise entitled to protection as property.

3. The constitutional guarantee against discrimination requires protection of Maya customary property rights

62. The constitutional protection from discrimination "of itself or in effect" applies to all laws of Belize, including the Constitution. Any interpretation of the constitutional protections for "property of any description" that excludes such protection for property arising from Maya customary land tenure is impermissibly and unconstitutionally discriminatory. In *Mabo v. Queensland*, the High Court of Australia affirmed the customary land tenure of the indigenous people of that country. In his reasoning supporting that decision, Justice Brennan of the High Court noted:

The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country... Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the

indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. [*Mabo II*, (1992) 175 C.L.R. 1, para. 42]

63. The Constitutional Court of South Africa likewise has held that failure to respect indigenous customary property rights is invariably discriminatory:

Courts in other jurisdictions have in recent times been faced with the complex and difficult problems of dealing... with the injustices caused by dispossessions of land, or rights in land, from indigenous inhabitants... such dispossessions invariably took place in a racially discriminatory manner. [*Alexkor Ltd & Another v. Richtersveld Cmty. & Ors.*, 2003 (12) BCLR 1301, para. 34 (CC) (S. Afr.)]

4. When interpreting the Constitution, the Court should take account of Belize's international obligations to protect customary indigenous land tenure

64. The Interpretation Act affirms that, "where more than one construction of the provisions in question is reasonably possible... a construction which is consistent with the international obligations of the Government of Belize is to be preferred to a construction which is not" (emphasis added). [Interpretation Act, cap. 1, pt. II, §65 (2000)]
65. Specifically, the Privy Council, in a decision binding on this Court, has confirmed that Belize's obligations within the Inter-American human rights system should inform the interpretation of constitutional rights:

A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court... is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society... By becoming a member of the Organization of American States Belize proclaimed its adherence to rights which, although not listed in the charter of the Organization, are expressed in the [American] Declaration [of the Rights and Duties of Man]... [T]he courts will not be astute to find that a constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the constitution, that it does. [Reg. v. Reyes, [2002] UKPC 11, paras. 26-28]

66. As stressed earlier, the Inter-American Commission on Human Rights has held resolutely that the Maya claimants have property rights arising from Maya customary land tenure. These rights, the Commission held, are protected by Art XXIII of the American Declaration of the Rights and Duties of Man, which affirms, in general terms, the right to property. In so holding, the Commission specified that that the rights protected by Art XXIII of the American Declaration, to which Belize much adhere under the OAS Charter, "are not limited to those property interests that are already recognized by states or that are defined by domestic law, but rather that the right to property has an autonomous meaning in international human rights law." Thus, the customary land tenure interests of the Maya people that are recognized as property under the American Declaration are also property "of any description" to which the protections of the Constitution apply. [*Maya Indigenous Communities case*, paras. 117, 127]

67. In addition to its obligation under the Organization of American States Charter to adhere to the rights proclaimed in the American Declaration, Belize has made legal commitments under a number of other human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on the Elimination of All Forms of Racial Discrimination, both of which oblige Belize to uphold and protect Maya customary rights to lands and resources. Customary international law and general principles of international law, which are likewise binding on Belize, also affirm indigenous property rights in traditional lands. [...]
68. Adding their voices to the Inter-American Commission on Human Rights, other international human rights agencies have recently affirmed that Belize's international obligations specifically require it to respect and protect the customary interests of the Maya people in the lands they use and occupy in southern Belize. These international agencies include the United Nations Committee on the Elimination of Racial Discrimination and the UN Special Rapporteur on the Fundamental Freedoms and Human Rights of Indigenous People.

5. Constitutional and common law jurisprudence in other countries supports protection of Maya property rights based on customary land tenure

69. Decisions of courts in other jurisdictions are consistent with the report of the Inter-American Commission in regard to indigenous peoples' land and resource rights. For example, the High Court of Malaysia has affirmed that customary land tenure of indigenous communities enjoys the constitutional protection accorded to property in that country's constitution. [Adong bin Kuwau v. Kerajaan Negeri Johor, [1996] 1 MALAY L.J. 418, (Johor Bahru, H.C.), paras. 32–39] [Constitution of Malaysia, art. 13 (Mal. 1957, amended 1963)]
70. Such constitutionally protected property was held to exist even where the claimant indigenous community had moved, as late as 1955, into a previously unsettled portion of its traditional territory. The Malaysia court noted that movement within a broader territory in response to population growth or environmental factors was part and parcel of the indigenous customary land-use patterns. [Nor Anak Nyawai v. Borneo Pulp Plantation, 6 MALAY L.J. 241, 252 (Kuching, H.C. 2001), Vol. III, Tab 4]
71. While the claimants rely directly on constitutional protection of their customary property rights, the common law also protects the rights they claim. Courts in several other Commonwealth jurisdictions and the United States have interpreted the common law to recognize "native" or "aboriginal" rights as forms of property based on indigenous customary land tenure. Aboriginal rights at common law are grounded in occupation by native people according to their own customary law, and these rights are proprietary in nature, often in ways equivalent to full title.[...]
6. The government is unable to successfully assert that Conejo and Santa Cruz property rights based on customary tenure were extinguished prior to their constitutional affirmation
72. Because the Constitution of Belize protects Maya customary rights since its enactment, those rights may not be infringed without just compensation and other requirements that are imposed by section 3(d) of the Constitution. However, the

- defendants may attempt to support their position that Maya customary rights do not exist by asserting that such rights were extinguished by government action prior to the Constitution. The common law doctrine of extinguishment, with its origins in the colonial era, holds that Parliament or the relevant legislature may unilaterally take, or "extinguish", customary or aboriginal rights in land when those rights are not secured by treaty or statute.
73. Any assertion that Maya customary rights were extinguished prior to the Constitution cannot succeed for the following reasons. First, the defendants are estopped from arguing extinguishment, because of historical government action encouraging or acquiescing to Maya customary land tenure. Second, pre-constitutional acts of extinguishment should not have any effect on contemporary Maya customary land tenure in light of contemporary human rights principles that should guide interpretation of the Constitution. Third, even if the doctrine of extinguishment does apply, the government is unable to meet its burden of demonstrating a clear legislative intent to extinguish Maya rights at any time.
- a. The defendants are estopped from asserting that the claimants' customary rights have been extinguished*
74. The doctrine of estoppel ensures that where one, by words or conduct, causes another to believe the existence of a certain state of things, and induces another to act on that belief so as to alter a previous position, the former is precluded from asserting a defence or taking a position contrary to the previous representation. In the context of indigenous peoples, the Supreme Court of Canada held that the Crown cannot promise to do something with indigenous lands to induce an indigenous group to take a certain course of action, and then simply ignore that promise to the indigenous group's detriment. [Guerin v. The Queen, [1984] 2 S.C.R. 335, 344]
75. The government of Belize and its predecessor consciously decided at various points in time to encourage Maya (re-)settlement in the southern part of the country. The British colonial government induced Maya to settle land by making representations that they would be welcomed in so doing, including in the 1950s. Consequently, Maya people, including the forbearers of many of the claimants, did settle in the area in accordance with their customary land use norms. The government of Belize and its predecessor confirmed the propriety of this exercise of their customary land use by affirming their villages' elected alcaldes.
76. Furthermore, the government has represented to international bodies and Maya organizations, of which the claimants are part, that the government will respect Maya rights to land based on their longstanding use and occupancy, and that it will formalize those rights. It did so most notably in the Ten Points of Agreement, which it compacted in the year 2000 with several Maya organizations. It cannot now be open to the defendants to assert that those rights have been extinguished.
- b. The application of the extinguishment doctrine to contemporary Maya customary land tenure is inconsistent with human rights norms*
77. As already stated, the Constitution protects against any contemporary act of extinguishment of Maya customary property rights. The same holds for international human rights law in its present state, which as discussed above affirms these rights. International human rights law, furthermore, rejects giving effect to historical acts

of extinguishment of indigenous rights in land, especially when indigenous peoples maintain a connection to the land. Contemporary human rights norms affirm that indigenous peoples have rights to the lands they traditionally occupy, notwithstanding any historical act of extinguishment or conquest that may have undermined those rights in the past. It is noteworthy that the Inter-American Commission on Human Rights mentioned but ultimately gave no weight to argument of possible extinguishment of Maya rights presented by the government in the *Maya Communities* case.

78. The claimants and their communities continue to use, occupy, and possess the lands over which they assert their customary property rights. To hold these rights non-existent because of pre-Constitution or historical acts of extinguishment would gravely undermine that use and possession and facilitate assault on a range of human rights related to the cultural and physical survival of the people of Conejo and Santa Cruz. The doctrine of extinguishment has no place in an examination of the customary land tenure of these Maya communities from a human rights perspective, and it should have no place in determining the existence or status of those rights under the Belize Constitution. Under the maxims of interpretation identified earlier, contemporary international human rights norms should be read into the constitutional protections for property, as well as into the common law as it relates to indigenous or aboriginal land rights.
79. Contemporary international human rights norms not only reject according validity to unilateral governmental acts of extinguishment of indigenous peoples' rights, but also require the *restitution* of lands of which an indigenous community has been unwillingly dispossessed when it maintains a meaningful cultural or material connection with the lands. Interpreting the implications of the right to property of the American Convention on Human Rights, the Inter-American Court on Human Rights held that "the members of indigenous peoples who have unwillingly lost possession of their lands... are entitled to restitution thereof or to obtain other lands of equal extension and quality," even when those lands have passed into the hands of third parties. [Sawhoyamaya Indigenous Community v. Paraguay, 146 Inter-Am. Ct.H.R. SER. C, (2006), para. 128]
80. The villages of Conejo and Santa Cruz do not seek restitution of lands; they simply want to maintain possession of the lands they traditionally use and occupy. Their current exercise of their customary rights is clear evidence that those rights exist and have relevance today. The defendants' affidants themselves assert that physical occupation of lands of itself deserves respect both under the law and as a matter of policy.
- c. The government is unable to meet its burden of proving that the claimants' rights have been extinguished.*
81. In the alternative, if the defendants are to be permitted to assert that the claimants' customary rights have been extinguished, the burden is on them to prove the elements required to satisfy the doctrine, and they are unable to meet that burden. The onus is on the defendants to prove both a clear and plain legislative intent to extinguish Maya customary land rights, and an actual extinguishing effect of any such legislative action on the exercise of those rights. In circumstances such as the present, there is a presumption against extinguishment, since at common law the

ongoing exercise of customary rights is *prima facie* proof of their continued existence. [R. v. Sparrow [1990] 1 S.C.R. 1075, 1099 (Can.), Vol. III, Tab 12] [AG Isle of Man v. Mylchreest, (1879) 4. App. Cas. 294, 308, Vol. I, Tab 12]

82. The defendants have not presented any legislative act that manifests a clear and plain intent to extinguish Maya customary rights. The general exercise of sovereign authority, the establishment of reservations, parks or conservation areas, the granting of natural resource concessions, the occasional imposition of fees for use of land, or the leasing of land do not suffice to extinguish Maya customary rights. Such acts are neither based on a clear legislative intent to extinguish such rights, nor have they actually prevented the exercise of those rights. On the contrary, the evidence demonstrates that, while the government has not recently recognized and protected the Maya customary land rights, historically successive governments and legislatures held quite permissive policies toward Maya customary occupation of lands, just as they have acted to observe other non-statutory property rights.

Issue III(B): The government's acts and omissions violate the claimants' rights to property in sections 3(d) and 17 of the Belize Constitution

83. The Belize government violates the claimants' property rights by failing to effectively recognize their customary land tenure or to secure Conejo and Santa Cruz traditional communal lands, by issuing third party concessions to extract natural resources from Conejo and Santa Cruz lands, and by purporting or threatening to grant property rights within these lands that are inconsistent with Conejo and Santa Cruz customary land tenure. The actions and omissions of the Belize government are part of a broad pattern of complete disregard for Maya customary property rights throughout the Toledo District. Government initiated or permitted activities in other Maya villages, such as leasing, logging, oil exploration, hydroelectric dam construction, and highway paving, effectively deny security of land tenure to the claimants. For the Maya people of Conejo and Santa Cruz, these activities have highlighted their need for, and the government's corresponding obligation to provide, affirmative protection of their property rights.

1. The government violates the claimants' right to property by failing to recognize and respect Maya customary land tenure

84. Despite its signed acknowledgement of Maya rights to lands and resources in the Ten Points Agreement, the government of Belize in all of its instances behaves as though Maya customary property rights do not exist, and in fact the government in its defence herein now sustains outright that the Maya people have no customary land rights that are proprietary in nature. The government of Belize disregards the rights of Maya communities and individuals over their land, and treats Maya land as unburdened national lands for the purposes of issuing leases, grants, and concessions under various national laws, including the *National Lands Act*. This behaviour leads the claimants to reasonably and understandably fear their land will be taken from them.
85. In the mid-1990s, the government granted a number of logging concessions over the area occupied by Maya communities, causing great damage to Maya lands. From 1995 to 1997, Maya community members publicly denounced the logging concessions and activities in national symposiums; newspaper articles and editorials; public

- demonstrations; requests to government agencies; and meetings with various public officials including the Prime Minister. Despite these efforts, the government failed to recognize Maya lands and halt the logging. Consequently, in 1996, the Toledo Maya Cultural Council (TMCC) and the Toledo Alcaldes Association filed a claim against the government of Belize in the Supreme Court, but the case languished and was never decided on its merits.
86. Failing to obtain a timely determination of Maya rights by the courts of Belize, in 1998 the Toledo Maya Cultural Council (TMCC) submitted a petition to the Inter-American Commission on Human Rights on behalf of the Maya communities of Toledo against the state of Belize alleging violations of rights enshrined in the American Declaration of the Rights and Duties of Man and in various provisions in international law, for failing to protect Maya land and resource rights.
 87. The TMCC and the Toledo Alcaldes Association attempted for ten months to negotiate a resolution to the problem with the government, under the auspices of the Inter-American Commission on Human Rights, without success. At the initiative of these Maya groups, negotiations again took place in the fall of 2000. These negotiations achieved the promising, but ultimately hollow, Ten Points of Agreement, which was signed on October 12, 2000 between the Prime Minister and Maya leaders of Toledo, and which recognized that "the Maya People have rights to lands and resources in southern Belize based on their longstanding use and occupancy."
 88. In its final report on the case of the *Maya Indigenous Communities of the Toledo District v. Belize*, the Inter-American Commission on Human Rights found that the Maya people of Belize have communal property rights to the lands the Maya communities traditionally use and occupy. The government of Belize was provided with a draft of this report in October 2003 and then later with the Commission's final report, which was published in October 2004. Nevertheless, the government failed to follow any of the recommended measures. [Maya Communities case, paras. 9–16 (2004)]
 89. After signing the Ten Points of Agreement and after the Inter-American Commission issued its report confirming the existence of Maya customary property rights, the claimants again sought to achieve legal recognition through a series of negotiations, meetings, correspondence, and communications with the government. During one meeting in late 2005, the Minister of Natural Resources and Environment, John Briceño, agreed to a boundary-demarcation pilot project in the Maya village of Conejo. Accordingly, on May 5, 2006, Conejo Village submitted a written request to the government asking for demarcation and recognition of Conejo Village lands in accordance with the Ten Points of Agreement and the final report of the Inter-American Commission. The leaders presented the Prime Minister with a map of the boundaries of the village, together with confirmation from all neighbouring villages that there was no dispute as to the boundaries. To date, there has been no response at all from the government.
 90. On February 22, 2007, Santa Cruz Village submitted a similar written request to the government of Belize. However, the government so far has also failed to acknowledge or respond to this request.

91. Rather than extending legal and administrative protection to the claimants' property rights, government officials have told the claimants and other residents of Conejo and Santa Cruz that they have no secure rights in their land unless they obtain government-issued leases to the lands. Government officials have told the claimants in no uncertain terms that if they do not have a lease, their lands may be leased to outsiders and they will be dispossessed of those lands. Several members of Conejo Village have applied for leases to lands, but both they and the village as a whole view this imposed parcelling of community lands as actually or potentially disruptive to traditional land tenure rights and to their attendant cultural norms.
92. Both leaseholders and non-leaseholders have expressed concern with the government leasing system. The rectangular shape of lease plots captures both fertile and infertile lands. The lease areas are not big enough to accommodate the long fallow agricultural system the Maya have developed over centuries to maintain soil fertility, and leases do not take into account the needs of future generations within that system. Limiting farming to the leased land thus causes the land to eventually become overworked and unfertile. The leases also represent a financial burden on Maya leaseholders who must pay significant amounts, usually through borrowing, for the surveys required to apply for a lease. If the lease is granted, leaseholders must pay annual rent. Many Maya cannot afford to obtain a lease at all. This is all for land that the Maya villagers have possessed in accordance with longstanding customs and traditions.
93. Furthermore, each Maya farm family in Toledo requires access to a variety of land types in order to grow and gather all the crops and resources they need to survive in any given year. [omissis]
94. The government has also issued a concession to conduct oil exploration over the whole of Toledo District to US Capitol Energy Ltd. Seismic testing and oil exploration has begun within Conejo Village and neighbouring village lands, without adequately consulting the affected Maya communities. [omissis] This is despite provisions in the Petroleum Act that require the written consent of the owner or lawful occupier of lands in order for a permittee to exercise its rights under such a concession, and compensation for any damage caused.
95. In 1994, the government of Belize created the Sarstoon-Temash National Park over an area that included lands used and occupied by the community of Conejo, and declared it a National Protected Area. This declaration was made without any prior consultation with or even notice to Conejo or the other nearby communities. It was not until almost two years after the park was created that the villages learned of its existence. Fearful that the park management plan would not take into account their livelihood needs, village representatives agreed to a co-management arrangement of the park. The park was created over areas used by Conejo residents to farm *milpa* plots, hunt, fish, and gather a variety of forest materials. While some degree of accommodation of Conejo Village's use and governance rights has occurred through the co-management agreement, the exercise of these rights has been significantly curtailed.
96. In 1994, at the request of Santa Cruz Village, the government of Belize created the Rio Blanco National Park, which is located within the lands used and occupied by

Santa Cruz villagers. The park was created over areas used by Santa Cruz residents to farm *milpa* plots, hunt, fish, and gather a variety of materials from the forest. The residents agreed to restrictions on farming in the park. [omissis] Some villagers feel that the stringent restrictions on hunting, fishing, and gathering required by the *National Parks Act* are more onerous than are required to fulfill the community's objectives in requesting the park's creation on their land, and that the co-management board ought to have greater authority to permit traditional activities within its boundaries.

97. As part of its pattern of disregard for Conejo and Santa Cruz customary land tenure, the government has issued concessions to outsiders to log on Conejo and Santa Cruz lands. Their logging activities have impaired Conejo and Santa Cruz's own use and enjoyment of the land, but no compensation has ever been paid to Conejo or Santa Cruz Villages. Animals hunted for subsistence have become scarcer after the logging, and many of the most useful and commercially-valuable trees have been removed from the forest.
98. In the mid-90s, the government announced its intention to pave the road running through Santa Cruz to connect it to the highway system of Guatemala. A temporary moratorium on leasing within one mile of the road was imposed in 1997 after Maya communities along the route raised concerns that completion of this road would create pressure by land speculators and settlers from outside the Maya communities to parcel and occupy land along its length, land which they currently use and rely upon. This moratorium may be lifted by the government at any time by ratifying a Corridor Zoning Plan. Additionally, without any consultation with Conejo Village, the government has also planned to pave a road through Conejo lands, which is intended to connect to Guatemala's highway system. As a result of previous road construction over Conejo lands in the absence of consultation with villagers, a site sacred to Conejo residents was destroyed and an ancient Maya burial site was looted.
2. The government violates the claimants' constitutional right to property by failing to adopt affirmative measures to legally secure Maya customary land tenure
99. In the context of the refusal of government officials to respect or often even acknowledge the existence of the claimants' customary property rights, the guarantees contained in sections 3, 16 and 17 of the Constitution are rendered meaningless unless the state adopts affirmative measures to identify and protect those rights.
100. In light of its power over the claimants' rights and its dealings and attempted dealings with lands the people of Conejo and Santa Cruz use and occupy, the government of Belize has a duty to affirmatively ascertain the extent and nature of their rights according to traditional land tenure, to demarcate and provide documentation of the area of communal title, and to officially accommodate within government procedures the claimants' rights to lands and resources outside the boundaries of this area, according to the traditional practices of Conejo and Santa Cruz villagers.
101. Both Conejo and Santa Cruz villages have made specific requests to the government to recognize and provide recognition and demarcation of their respective village, as pointed out above at paragraphs 89 and 90. Yet the government has refused to act on those requests.

102. The Inter-American Commission on Human Rights has affirmed the positive obligation on states to take protective measures to secure indigenous peoples' rights: [E]nsuring the full and effective enjoyment of human rights by indigenous peoples requires consideration of their particular historical, cultural, social and economic situation and experience. In most instances, this has included identification of the need for special measures by states to compensate for the exploitation and discrimination to which these societies have been subjected at the hands of the non-indigenous. [Mary & Carrie Dann v. United States, Case 11.140, Report No. 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860, para. 125 (2002)]
103. The Commission has adhered to the holding of the Inter-American Court of Human Rights that the right to property for indigenous peoples includes "the right that the state . . . carry out the delimitation, demarcation, and titling" of traditional lands, and that this process should be in accordance with the relevant indigenous people's "customary law, values, customs and mores." [Awas Tingni case, paras. 153, 164, Vol. IV, Tab 1]
104. Thus, the Commission found that Belize violated the property rights of the Maya people, not just because it actively infringed those rights by granting concessions to log on Maya traditional lands, but also because it failed to affirmatively secure those rights:
- Accompanying the existence of the Maya people's communal right to property under Article XXIII of the Declaration is a correspondent obligation on the State to recognize and guarantee the enjoyment of this right. In this regard, the Commission shares the view of the Inter-American Court of Human Rights that this obligation necessarily requires the State to effectively delimit and demarcate the territory to which the Maya people's property right extends and to take the appropriate measures to protect the right of the Maya people in their territory, including official recognition of that right. In the Commission's view, this necessarily includes engaging in effective and informed consultations with the Maya people concerning the boundaries of their territory, and that the traditional land-use practices and customary land tenure system be taken into account in this process.
- It is also apparent to the Commission that despite its recognition of the property right of the Maya people in their traditional lands, the State has not delimited, demarcated and titled or otherwise established the legal mechanisms necessary to clarify and protect the territory on which their right exists. In this regard, the record indicates that the present system of land titling, leasing and permitting under Belizean law does not adequately recognize or protect the communal rights of the Maya people in the land that they have traditionally used and occupied. According to the information provided by the Petitioners, which has not been refuted by the State, the regime governing the ownership of private property does not recognize or take into account the traditional collective system by which the Maya people use and occupy their traditional lands.

[...] Accordingly, the Commission finds that the State of Belize violated the right to property enshrined in Article XXIII of the American Declaration to the detriment of the Maya people. [Maya Communities case, paras. 132–135]

105. Similarly, the Constitutional Court of Colombia has affirmed that constitutional protection of indigenous customary property rights inherently entails an affirmative duty of the state to demarcate indigenous lands:

The fundamental right of ethnic groups to collective property implicitly contains, given the constitutional protection, ... a right to the creation of reserves controlled by the indigenous communities ... the competent public authority is ordered to give effect to the repeated requests for the creation of a reserve and the necessary socio-economic and legal studies ... all of which is tied to the effectiveness of the right to collective property in land, which is essential to the existence and development of indigenous peoples. [Crispin Loaiza Vera y otros, T-188/93, (1992, Constitutional Court of Colombia)]

106. The special duty of care affirmed in international law is articulated in common law countries as a fiduciary duty owed by states to indigenous peoples. In Australia, the High Court described its source this way:

[I]t is, in part at least, precisely the power to affect the interests of a person adversely which gives rise to a duty to act in the interests of that person ... the very vulnerability gives rise to the need for the application of equitable principles. ... [T]he general presumption that the British Crown will respect the rights of indigenous peoples occupying colonised territory, as discussed above, itself indicates that a government will take care when making decisions which are potentially detrimental to aboriginal rights. [Mabo II]

107. The Supreme Court of Canada has also recognized that where government inaction or underinclusive legislation impedes the exercise of fundamental constitutional rights, or permits private parties to violate them, there is a positive duty on the state to act to enable or reinforce the exercise of those rights. [Dunmore v. Ontario, [2001] S.C.J. No. 87, paras. 22–29, Vol. II, Tab 2]

108. In Canada, a positive obligation to respect and accommodate indigenous interests in lands also arises from the honour of the Crown, which requires fair dealings with indigenous peoples in regard to both settled and unsettled claims.

There is always a duty of consultation ... in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. [...] Some cases may even require the full consent of an aboriginal nation." [Delgamuukw v. British Columbia, [1997] 153 D.L.R. (4th) 193, para. 168 (Lamer, C.J.), Vol. I, Tab 28]

The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. *The honour of the Crown requires that these rights be determined, recognized and respected.* While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests ... *These words apply as much to unresolved*

claims as to intrusions on settled claims. (emphasis added). [Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, paras. 24, 32 (McLachlin C.J.)]

109. Courts in Malaysia, too, have affirmed the fiduciary duty of the state, grounded in the public trust inherent in Parliament's exercise of power over indigenous peoples' rights, "to protect the welfare of the aborigines including their land rights, and not to act in a manner inconsistent with those rights, and further to provide remedies where an infringement occurs." [Kerajaan Negeri Selangor & Ors v Sagong Bin Tasi & Ors, [2005] 6 MLJ 289, 312, para. 50]. (Gopal Sri. Ram J.C.A.), Vol. II, Tab 12]
110. To date, the government of Belize has refused to negotiate with sufficient resolve to develop a solution to the vulnerable condition of Maya customary property rights in the face of conflicting government land administration policies and increasing threats of incursions by non-Maya. Despite the findings and recommendations of the Inter-American Commission, and its own admission of the existence of Maya customary rights in the Ten Points of Agreement, the government of Belize continues to behave as though these rights do not exist or do not merit legal protection. The government asserts that lands used and occupied by the Maya people can and will be leased or sold, and it issues resource extraction concessions and approves high-impact infrastructure projects, all without any regard for Maya use of, or rights to, the affected lands. The claimants justifiably fear that without affirmative recognition and demarcation of their lands, their property, livelihoods, cultural integrity, health and lives are at risk.

Issue III(C): The government's failure to provide legal protection to Maya customary land tenure violates the right to equality guaranteed by sections 3 and 16 of the Constitution

111. Article 3 of the Constitution guarantees fundamental rights and freedoms to "every person in Belize ... whatever his race" and Article 16 further provides that "no law shall make any provision that is discriminatory either of itself or in its effect" and "no person shall be treated in a discriminatory manner by any person or authority." [Belize Constitution, cap. 4, pt. 2, §§ 3, 16(1), 16(2)]
112. Treatment is discriminatory when it "afford[s] different treatment to different persons attributable wholly or mainly to their respective descriptions by ... race [or] place of origin ... whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description." [Belize Constitution, cap. 4, pt. 2, § 16(3)]
113. Precisely examining the acts and omissions of the government of Belize in respect to Maya customary land tenure, the Inter-American Commission on Human Rights determined that:

Belize violated the right to equality before the law, to equal protection of the law, and to nondiscrimination ... to the detriment of the Maya people of the Toledo District, by failing to provide them with the protections necessary to exercise their right to property fully and equally with other members of the Belizean population. [Maya Communities case, para. 171]

114. The Supreme Court of Canada has developed extensive jurisprudence on what constitutes discrimination that is adverse in its effect. It has noted that adverse effect discrimination "need not be motivated by a desire to disadvantage an individual or group... It is sufficient if the effect of the legislation is to deny someone the equal protection or benefit of the law." Thus, the focus of inquiry must be the impact of the law on the individual or the group concerned. Here, the absence of current legal protections for Maya land tenure impacts adversely on the Maya people. [Eldridge v. British Columbia, [1997] S.C.J. 86, para. 62, Vol. II, Tab 3]
115. The law of British Honduras, and subsequently Belize, formally incorporated the customary legal systems of the inhabitants of the area. The *National Lands Act* passed in 1992 defines national lands as those "not already located or granted" in reference to the customary system of early settlers' "location laws". Similarly, and at the other extreme of Belizean legal development, the first *Act to declare the Laws in force in this Settlement* passed by the Legislature of British Honduras in 1855 provided that:
- IV...so much of the Common Law of England, as has been used in or is applicable to this Settlement and the inhabitants thereof, *in so far as it is not at variance with any Local Law of this Settlement*... are hereby declared to be, part of the Laws of this Settlement. (emphasis added).
- VII... All laws of universal application... *in so far as they... are not a variance with or qualified by any... recognized custom thereof*, shall be, and the same are hereby declared to be laws of this Settlement. (emphasis added).
116. Despite this longstanding attentiveness to incorporation of the law and customs already governing inhabitants of the colony and later Belize, and despite a permissive posture by British colonial authorities toward Maya customary occupation in the past, today only the property interests that were created by inhabitants of European descent are effectively respected and protected by Belizean officials. For example, Belizean government representatives promote leasing to the exclusion of customary indigenous land tenure. Government officials process applications for leases to land without any regard to whether or what customary rights are held over those same lands. Government officials have created parks and nature preserves, granted natural resource extraction concessions, and approved a hydroelectric development all without consultation with, the consent of, or compensation to the Maya communities that use those lands, which would be required on lands with a title registered under the *Registered Land Act* or similar legislation. The failure of Belizean authorities, at all levels, to respect and protect the customary property right of the people of Conejo and Santa Cruz denies the Maya people security of land tenure and places their livelihoods and communities at the whim of individual officials.
117. Furthermore, as noted by this Court, "true justice does not give the same to all but to each his due: it consists not only in treating like things alike, but unlike things as unlike." In addition to not treating like things alike as described above, government officials also fail to treat unlike things as unlike. Because of their collective aspect and unique source, Maya customary rights to lands and resources are by

- nature different from the sorts of property rights routinely protected and respected by government offices and ministries. By failing to accommodate this difference, for example by treating individualized leases as an adequate substitute for a Maya farmer's customary interest in his village lands, and by treating lands used collectively by Conejo and Santa Cruz villagers as vacant national lands, government officials are discriminating against Maya people. [Roches v. Wade, [2004] (No. 132), para. 51 (Belize Supreme Court), Vol. III, Tab 16]
118. International human rights law affirms that the failure of states to respect and protect traditional indigenous land tenure is a form of impermissible discrimination, as manifested in the decision of the Inter-American Commission on Human Rights condemning Belize. Additionally, the United Nations Committee on the Elimination of Racial Discrimination has recognized that dispossession of lands is the prime historical expression of racism against indigenous peoples, and it has called upon states to take steps to protect indigenous land rights to comply with obligations under the International Convention on the Elimination of All Forms of Racial discrimination, a multilateral treaty binding on Belize:
- [I]n 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... 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.... The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources... [U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation XXIII: Rights of Indigenous Peoples*, U.N. Doc. A/52/18 Annex V (Aug. 18, 1997), Vol. V, Tab 32] [Maya Communities case, para. 119]
- Issue III(D): The government is violating the claimants' rights to life, liberty, security of the person and the protection of the law**
119. The Constitution of Belize affirms in section 3(a) that "*every person in Belize is entitled to... life, liberty, security of the person, and the protection of the law*", and in section 4 that "A person shall not be deprived of his life intentionally..." (emphasis added).
120. The Maya claimants rely on agriculture, hunting, fishing and gathering for their physical survival. These activities are also an integral part of other aspects of a dignified life, including their culture, religion, and vocations. Legal protection of their individual and collective customary property rights is thus fundamental to the enjoyment rights to life and security of the person.
121. In the *Maya Communities* case, the Inter-American Commission held that health and well being in the context of indigenous peoples' rights was so dependent on the integrity and condition of indigenous land that "broad violations" of indigenous property rights necessarily impacted the health and well-being of the Maya. [Maya Communities case, paras. 154-156, 193-194]

122. In the same vein, the Supreme Court of Canada has affirmed that where government action has a serious effect on physical or psychological health, or where it results in a loss of control of an individual over his own health, the right to security of the person is violated. [Chaoulli v. Quebec, [2005] 1 S.C.R. 791, paras. 122–123]
123. The Inter-American Court of Human Rights has noted that the right to life has a “wide dimension or scope . . . , which includes the conditions necessary for a life with dignity.” In order to ensure the conditions needed for the dignified existence encompassed by the right to life, the court noted that positive action may be required by states. In a concurring opinion, Judge Antonio Cançado Trindade of the Inter-American Court of Human Rights found:
- [I]t is not only presumed that no person shall be deprived of his life arbitrarily (negative obligation) but also that, in the light of its obligation to secure the full and free enjoyment of human rights, the States shall adopt all appropriate measures to protect and preserve the right to life (positive obligation). [parentheses in original] [Sawhoyamaya Indigenous Community v. Paraguay, 146 Inter-Am. Ct.H.R. SER. C, para. 2 (2006)]
124. That case concerned an indigenous people that had been dispossessed of their lands. The Inter-American Court further held that, particularly for indigenous peoples, the conditions for a dignified existence inherently protected by the right to life includes access to traditional lands. In that case, the right to life had been violated when the state
- did not adopt the adequate measures . . . [to] relocate them within their ancestral lands, where they could have used and enjoyed their natural resources, which resources are directly related to their survival capacity and the preservation of their ways of life. [Sawhoyamaya Indigenous Community v. Paraguay, 146 Inter-Am. Ct.H.R. SER. C, paras. 152, 164 (2006)]

Conclusion

125. Each of the claimant villages asserts a collective title to the lands its members have traditionally used and occupied, and over which its authorities exercise control. The lands to which each village holds such collective title are illustrated by the maps submitted with their respective claims. By Maya custom, Conejo and Santa Cruz villages each have an exclusive right to use their respective lands within the areas marked by the maps for sedentary, long-term purposes, including settlement and farming. Additionally, Conejo and Santa Cruz villages each collectively have the right to regulate other uses, such as hunting, fishing and forest resource extraction, by non-residents including Maya villagers from neighbouring communities, all in accordance with, and subject to, Maya customary law. This collective title includes the derivative individual rights and interests of village members accorded to them and regulated by Maya customary law.
126. The claimants submit that for the above-mentioned reasons, a remedy ordering the government to determine, demarcate and provide documentation for those rights, in consultation with the claimant villages, is appropriate to address the consequences of the refusal of government authorities at all levels to respect the claimants’ property rights. This order would ensure that both government officials

and private third parties are put on notice of the claimants’ rights, and would make the rights routinely enforceable. Such a remedy would be well-founded in international and common law principles of the special duty of care owed by governments to indigenous peoples, especially with respect to their lands.

DATED this 13th day of June, 2007

[omissis]