

EL GRAN CANAL DE NICARAGUA: WHEN GOVERNMENT INFRASTRUCTURE INFRINGES ON THE LAND RIGHTS OF INDIGENOUS COMMUNITIES

*Juliana Ramirez**

I. INTRODUCTION.....	412
II. LAND RIGHTS.....	414
III. INTERNATIONAL RECOGNITION OF THE LAND RIGHTS OF INDIGENOUS COMMUNITIES.....	418
A. <i>The Indigenous and Tribal Peoples Convention (ILO 169)</i>	418
1. The Recognition of Indigenous Ties to Land ...	418
2. The Right of Consultation	419
3. The Right of Participation	420
4. The Indigenous Communities May Only be Relocated Upon Free and Informed Consent ...	421
B. <i>The American Convention on Human Rights</i>	421
1. The Right to Property	422
2. The Right to Judicial Protection	423
a. ILO 169 Enforcement Measures	424
b. The Demarcation of the Rama and Creole Lands	424
c. Lack of Consultation	424
d. The Denial of the Right of Participation ...	426
e. The Requirements for Relocation of the Communities	426
C. <i>Violations and Remedies Under the American Convention on Human Rights</i>	427
1. Enforcement Procedures Under the Inter- American System	427

* J.D., May 2016, Southwestern Law School.

2. The Rama and Creole Communities and Their Lack of Property Rights	428
3. The Denial of Judicial Protection	428
IV. CONCLUSION	429

I. INTRODUCTION

“This is a project that will bring well-being, prosperity, and happiness to the Nicaraguan people.”

—*Daniel Ortega, President of Nicaragua*¹

For a country with a century-old “dream” of having a canal,² President Ortega’s words seemed like a glimmer of hope; Nicaragua would finally get the canal it had longed for. On June 15, 2013, President Ortega along with Wang Jing, the Chairman of the Hong Kong Nicaragua Development Group (HKND), announced a plan to build an interoceanic canal that would bisect the country.³ This project is estimated to nearly “double” the GDP for the second poorest country in the region;⁴ however, it has already caused upheaval among the indigenous communities of the Atlantic Coast because the canal is expected to cut across their communal lands and these communities have “yet to be . . . consulted” regarding the development on and the expropriation of their land.⁵ While the canal may provide a new source of economic growth within the country, Nicaragua should be obligated to recognize the land rights of the indigenous communities directly affected by the canal project under international law.

On June 13, 2013, Nicaragua entered into agreement with the HKND Group that granted them a fifty year concession to build and maintain the interoceanic canal, with an option to extend the concession for an additional fifty years.⁶ This massive project is expected to

1. Jon Lee Anderson, *The Comandante’s Canal: Will a Grand National Project Enrich Nicaragua, or Only Its Leader?*, *NEW YORKER*, Mar. 10, 2014, at 50.

2. *HKND Group Successfully Obtains Exclusive Right to Develop and Manage Nicaragua Grand Canal for 100 Years*, HKND GROUP (July 1, 2013, 4:26 PM), <http://hknd-group.com/portal.php?mod=view&aid=44> [hereinafter HKND GROUP].

3. Anderson, *supra* note 1.

4. Jonathan Watts, *Nicaragua Waterway to Dwarf Panama Canal*, *GUARDIAN* (June 12, 2013, 2:42 PM), <http://www.theguardian.com/world/2013/jun/12/nicaragua-canal-waterway-panama>.

5. *See id.*

6. *See* HKND GROUP, *supra* note 2; Ed Adamczyk, *Chinese-Built Canal Would Join Oceans, but Divides Nicaragua*, *UNITED PRESS INT’L*, http://www.upi.com/Top_News/World-News/2014/12/14/Chinese-built-canal-would-join-oceans-but-divides-Nicaragua/3911418418638/ (last updated Dec. 15, 2014, 11:46 AM).

cost between “\$40 billion to \$50 billion” dollars and will include several subprojects such as two free trade zones, a resort, an international airport and a road network.⁷ The canal project was scheduled to begin on December 23, 2014 and is estimated to take approximately five years to complete.⁸ Many experts have criticized the short time frame estimated for the project.⁹ Experts believe that a project of this magnitude should take about ten to eleven years to complete, if done properly.¹⁰ The canal is also expected to have the capacity to handle the world’s largest ships, Super Post-Panamax Ships, while the Panama Canal can only accommodate Post-Panamax Ships, which hold about half of the amount of containers that the Super Post-Panamax Ships can accommodate.¹¹ This will likely give the Nicaraguan Canal an advantage over the Panama Canal since companies will save on shipping cost by using the larger ships.

Furthermore, the canal brings promise of economic growth and employment for the citizens of Nicaragua.¹² Some advocates for the canal have estimated that Nicaragua will see up to a 15 percent increase in economic growth due to the canal.¹³ Additionally the canal project is projected to create 50,000 jobs during the first five years and over “200,000 more once the canal is up and running.”¹⁴

These statistics make the Nicaraguan Canal sound like a worthwhile venture for a country desperate to boost its economic stability, but at what cost? On December 10, 2014, several thousand protesters gathered at the capital of Nicaragua shouting statements like, “No to the Canal,” and “Ortega, sell out.”¹⁵ These protesters oppose the ca-

7. Adamczyk, *supra* note 6; Leonor Álvarez, *HKND presenta ruta del Gran Canal de Nicaragua* [HKND Presents Route for Nicaragua Grand Canal], LA PRENSA (July 7, 2014), <http://www.laprensa.com.ni/2014/07/07/nacionales/202195-hknd-presenta-ruta-del-gran-canal-de-nicaragua>.

8. Adamczyk, *supra* note 6.

9. See *Nicaragua Canal Route: Atlantic-Pacific Link Unveiled*, BBC NEWS (July 8, 2014), <http://www.bbc.com/news/world-latin-america-28206683>.

10. See *id.*

11. *Nicaragua Canal: Significance*, HKND GROUP, <http://www.hknd-group.com/portal.php?mod=list&catid=35> (last visited Jan. 30, 2016).

12. See Carrie Kahn, *A Chinese Man, a \$50 Billion Plan and a Canal to Reshape Nicaragua*, NPR NEWS (Aug. 15, 2014, 10:54 AM), <http://www.npr.org/sections/parallels/2014/08/14/340402716/nicaragua-banks-on-its-own-canal-to-boost-economy>.

13. *3 Big Concerns About Nicaraguan Canal Plan*, THINKADVISOR (July 24, 2014), <http://www.thinkadvisor.com/2014/07/24/3-big-concerns-about-nicaraguan-canal-plan?page=2>.

14. Kahn, *supra* note 12.

15. Zach Dyer & AFP, *Thousands March to Protest Nicaragua's Ambitious Canal Project*, TICO TIMES (Dec. 10, 2014), <http://www.ticotimes.net/2014/12/10/thousands-march-to-protest-nicaraguas-ambitious-canal-project>.

nal for one main reason: they fear that their land will be confiscated without adequate compensation.¹⁶

The indigenous communities along the canal route, the Rama and Creole communities, are particularly vulnerable to the expropriation of their land because the canal will pass through their lands, likely forcing them to relocate.¹⁷ The canal is expected to begin at Punta Gorda on the Caribbean Sea, where two indigenous communities reside, and extend to the city of Brito on the Pacific Ocean.¹⁸

While the canal project is important to the Nicaraguan economy, it is also important that this expansion in industry and commerce does not infringe upon the indigenous land rights of the Rama and Creole communities. The Rama and Creole peoples are “hunters, fishers and agriculturalists,” who live off of the land.¹⁹ The canal project poses substantial risks to their wellbeing, culture, language and religion—all of which these people have struggled for decades to protect.²⁰ Part I of this article will argue that domestic law in Nicaragua has not provided sufficient protection of the land rights of the Rama and Creole peoples. Part II will outline the legal protections afforded to these indigenous communities under the Indigenous and Tribal Peoples Convention (ILO 169) and the American Convention on Human Rights. Lastly, Part III argues that Nicaragua has violated the land rights of the Rama and Creole communities under international law and they should seek remedies under ILO 169 and the American Convention on Human Rights for the violations of their land rights.

II. LAND RIGHTS

Nicaragua has specific domestic laws that protect the rights of the indigenous communities. The primary domestic laws that protect indigenous land rights are the Constitution, the Autonomy Statute and the Demarcation Law.²¹ On their face, these laws seem to protect indigenous communities from the unlawful expropriation of their land;²²

16. Adamczyk, *supra* note 6.

17. Tim Johnson, *A Vanishing Culture: Nicaragua's Rama Indians Face Peril from Canal and Migrants*, McCLATCHYDC (June 18, 2015, 6:00 AM), <http://media.mcclatchydc.com/static/features/NicaCanal/RAMA.html?brand=mcd>.

18. See Kahn, *supra* note 12.

19. *About the Rama*, EXPLORATION NATION, <http://explorationnation.com/71-expedition/191-about-the-rama> (last visited Jan. 30, 2016).

20. See *id.*

21. See *Environmental Sustainability Issues in Nicaragua*, FOUND. FOR SUSTAINABLE DEV., <http://www.fsdinternational.org/country/nicaragua/envissues> (last visited Jan. 30, 2016).

22. See *id.*

however, the numerous and continual violations of these laws render them virtually ineffective.

The Nicaraguan Constitution specifically recognizes communal forms of land ownership and the indigenous peoples have the right to use and enjoy their communal lands.²³ While the constitution also provides for the expropriation of private property in the interest of public utility and with fair compensation, it also provides that the land ownership system of indigenous communities shall instead be regulated according to the law on this matter.²⁴ Other laws on the matter include the Autonomy Statute and the Demarcation Law.²⁵

In 1987, the Autonomy Statute was enacted to formally recognize the autonomy of the indigenous communities in Nicaragua.²⁶ The statute additionally established that the indigenous communities in Nicaragua have inalienable communal property rights that cannot be “donated, sold, leased nor taxed, and are inextinguishable.”²⁷ While the Autonomy Statute was created to recognize and protect communal land ownership, there are continuing instances of illegal land seizures by the government and land grabs by non-indigenous settlers. For example, in 2012 the Office of the Attorney General of Nicaragua “seized approximately twenty acres” of land in Sebaco, Matagalpa, which is considered “historically indigenous land,” without a report or explanation as to why the seizure occurred.²⁸ Additionally, indigenous communities in Nicaragua have alleged that “land grabs by non-indigenous settlers” and “illegal logging and other exploitation of natural resources” have continually gone unpunished by the government.²⁹ These incidents provide an illustration of the violations that the indig-

23. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] tit. I, ch. I, art. 5, tit. IV, ch. VI, art. 89, LA GACETA, DIARIO OFICIAL [L.G.] Jan. 9, 1987 [hereinafter CONSTITUTION].

24. CONSTITUTION, arts. 44, 107.

25. See generally Ley No. 28, Sept. 2, 1987, Estatuto de Autonomia de las Regiones Autonomas de la Costa Atlantica de Nicaragua [Autonomy Statute for the Autonomous Regions in the Atlantic Coast of Nicaragua] LA GACETA, DIARIO OFICIAL [L.G.], Oct. 30, 1987 (Nicar.) [hereinafter Autonomy Statute]; Ley No. 445, Dec. 13, 2002, Ley del Régimen de Propiedad Comunal de los Pueblos Indígenas y Comunidades Étnicas de las Regiones Autónomas de la Costa Atlántica de Nicaragua y de los Ríos Bocay, Coco, Indio y Maíz [Law of Communal Property Regime of the Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Bocay, Coco, Indio and Maiz Rivers] ch. 1, art. 1, LA GACETA, DIARIO OFICIAL [L.G.], Jan. 23, 2003 (Nicar.) [hereinafter Demarcation Law].

26. Autonomy Statute, *supra* note 25, at tit. I, ch. I, art. 1.

27. *Id.* at tit. IV, ch. 1, art. 36.

28. BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, NICARAGUA 2013 HUMAN RIGHTS REPORT 10, <http://www.state.gov/documents/organization/220670.pdf>.

29. *Id.* at 28.

enous communities have endured and also show the ineffectiveness of the laws that were meant to protect against such violations.

In 2002, Nicaragua enacted the Demarcation Law, also known as Law 445, in order to regulate the system of communal land ownership of the indigenous communities in Nicaragua.³⁰ This law was created to provide specific guarantees of communal ownership, land use, and management of traditional lands for indigenous communities.³¹ The law also set up a process by which indigenous land would be demarcated and titled.³² Although, the Demarcation Law provides for recognition of indigenous land rights by land titling, the U.S. Department of State Human Rights Report has reported that the National Commission of Demarcation and Titling, Attorney General's Office, and the Nicaraguan Institute of Territorial Studies have all failed to effectively demarcate indigenous lands.³³ The Nicaraguan Center on Human Rights (CENIDH) has also denounced the titling process, stating that there is "an atmosphere of impunity and corruption in the territorial demarcation process."³⁴ Often times, a delay in the titling process is due to the government attempting to have the indigenous community accept an unfavorable offer or a circumstance where there is a dispute as to what land is historically theirs.³⁵ Unfortunately, the indigenous land along the canal route has not yet been titled and many non-governmental organizations in the region expect that the titling process will be delayed due to the canal project.³⁶

While land titling is an important step to recognizing indigenous land rights, indigenous communities will still have to deal with the issue of evictions. The Nicaraguan government has not engaged in evictions of settlers on the titled land "due to a lack of political will and an

30. Demarcation Law, *supra* note 25, at ch. I, art. 1.

31. *Id.* art. 2.

32. *See generally id.* at ch. VIII.

33. U.S. DEP'T OF STATE, *supra* note 28, at 27.

34. *Id.*

35. Observations on the 3rd Periodic Report by Nicaragua on its Compliance with the International Covenant on Civil and Political Rights, Indigenous Peoples Law and Policy Program, University of Arizona (on behalf of Awas Tingni Community), for the 92nd session of the Human Rights Committee (Mar. 20, 2008), <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AwasTingniObservations.pdf>.

36. *Canal Interoceánico de Nicaragua Aislará a Afrodescendientes del Caribe sur* [Nicaraguan Interoceanic Canal Will Isolate Peoples of South African Descent], LA PRENSA (Oct. 8, 2014, 2:18 PM), <http://www.prensa.com/uhora/mundo/canal-nicaragua-aislara-afrodescendiente/405087>.

alleged lack of funding” to enforce the law.³⁷ Therefore, even years after the government provides the Rama and Creole communities with a land title, they may not be free to enjoy their land; in fact, it may be years before the government evicts settlers from the titled property.³⁸

Currently, the Rama and Creole peoples, who are directly affected by the canal, have attempted to resolve the situation within Nicaragua’s court system. “On June 29, [2012], Rama-Creole leadership filed a case [of unconstitutionality] in the [Supreme Court of Nicaragua (CSJ)] against the government for granting a concession to [HKND Group] to build an interoceanic canal that would cross certain parts of indigenous community territory.”³⁹ However, on December 10, 2013, the CSJ dismissed the claim.⁴⁰ The CSJ stated that the South Atlantic Autonomous Regional Council (RAAS) gave approval for the canal project on behalf of the Rama and Creole communities and that they represent the interest of the local Rama and Creole communities along the canal route, therefore, their rights were not violated.⁴¹ The CSJ further concluded that the concession was a valid constitutional exercise without addressing the fact that the regional council’s approval was contrary to the desire of the local indigenous community or even mentioning the international rights to which the communities are entitled.⁴²

After attempting to seek a resolution under domestic law, the Rama and Creole communities have not been able to successfully protect their land rights under domestic law.⁴³ Although, Nicaraguan law is not devoid of legal provisions regarding the protections of indigenous land rights, the indigenous communities of Nicaragua often find themselves subject to government measures that infringe on their land rights without access to remedial measures.⁴⁴ Therefore, I propose

37. NICAR. CTR. FOR HUMAN RIGHTS, NICARAGUA AND THE SECOND ROUND OF THE UNIVERSAL PERIODIC REVIEW 36 (2014), http://www.cenidh.org/media/documents/docfile/INFORMES_EPU_ESPA%C3%91OL_E_INGLES__web.pdf.

38. *See id.*

39. U.S. DEP’T OF STATE, *supra* note 28, at 28.

40. Sentencia [S.] No. 30, de las 8:30 a.m., Dec. 10, 2013, LA GACETA, DIARIO OFICIAL [L.G.] [Supreme Court of Justice] p. 934, 940-41, Cons. II (Nicar.).

41. *Id.* at 938.

42. *Id.* at 940.

43. *See* U.S. DEP’T OF STATE, *supra* note 28, at 28.

44. *See generally id.* (asserting that some Nicaraguan indigenous communities are excluded from decisions affecting their lands and natural resources); S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT’L & COMP. L. 1 (2002) (arguing that the case of the *Mayagana (Sumo) Awas Tingni Community v. Nicaragua*, decided by the the Inter-American Court of Human

that the Rama and Creole peoples seek the legal protections afforded to them under international law.

III. INTERNATIONAL RECOGNITION OF THE LAND RIGHTS OF INDIGENOUS COMMUNITIES

A. *The Indigenous and Tribal Peoples Convention (ILO 169)*

In 1989, the International Labor Organization created the Indigenous and Tribal Peoples Convention (ILO 169) with the purpose of protecting the rights of indigenous communities.⁴⁵ ILO 169 is a legally binding treaty that Nicaragua ratified in August 2010.⁴⁶ ILO 169 outlines a variety of rights afforded to indigenous communities.⁴⁷ This article, however, will focus primarily on the provisions regarding land rights and participatory rights. These provisions require states to recognize lands that indigenous communities have traditionally occupied and also require states to consult with indigenous communities regarding any legislative or administrative measure that will directly affect them.⁴⁸

1. The Recognition of Indigenous Ties to Land

ILO 169 aims to establish an international recognition for the special significance that indigenous communities share with their traditional lands.⁴⁹ Their cultural and spiritual values are intimately linked to their land. Article 13 of ILO 169 specifically requires that governments respect this relationship, and⁵⁰ Article 14 further requires that states provide the indigenous communities with rights of ownership and possession of the lands that they have traditionally occupied in recognition of the ties they have to the land.⁵¹ Therefore, ILO 169 requires governments to take steps, as necessary, to demarcate the lands of the indigenous communities and guarantee effective protection of these land rights.⁵² To that extent, ILO 169 requires that

Rights, set the first legally binding decision by an international tribunal to uphold the collective land and resource rights of indigenous peoples in the face of a state's failure to do so).

45. See generally Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO 169].

46. *Ratifications for Nicaragua*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102780 (last visited Jan. 30, 2016).

47. Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10 NW. J. INT'L HUM. RTS. 54, 60 (2011).

48. See generally ILO 169, *supra* note 45, arts. 1, 6, 7, 13, 14, 17.

49. *Id.* art. 13.

50. *Id.*

51. *Id.* art. 14.

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

penalties be established to protect the indigenous communities against unauthorized intrusion upon or use of lands that are under the ownership of an indigenous community.⁵³

2. The Right of Consultation

In addition, ILO 169 provides that indigenous communities must be consulted when consideration is given to legislative or administrative measures that may affect the indigenous communities directly.⁵⁴ Though the right of consultation does not require that the parties reach a consensus, a consultation should provide the affected communities with an opportunity to participate in the formulation, implementation and evaluation of measures that affect them directly.⁵⁵ Where consideration is provided to a legislative or administrative measure, ILO 169 states that a consultation must be undertaken through appropriate procedures, with adequate representation and good faith.⁵⁶

There is no singular model for the appropriate procedures that must be undertaken for consultations. Nevertheless, states must: (1) consider the decision-making methods familiar to indigenous communities; (2) ensure that the indigenous communities have adequate representation; and (3) implement the consultations in a timely manner.⁵⁷ To ensure that indigenous communities are adequately represented, states must recognize the traditional institutions of the indigenous communities.⁵⁸ In fact, most indigenous communities have institutions with councils of elders or locally elected leaders who are appointed to represent the community.⁵⁹ Accordingly, for a consultation to be valid, the indigenous group must be adequately represented by either their elders or elected leaders.⁶⁰ Moreover, the convention specifically provides that a consultation is considered timely under the following three instances: (1) when a state is considering a legislative or admin-

53. *Id.* arts. 14(2), 18.

54. *Id.* art. 6(1).

55. *See id.* art. 6(1).

56. *See id.* art. 6(2).

57. Workshop on Free, Prior and Informed Consent, New York, N.Y., Jan. 17-19, 2005, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices* 9, U.N. Doc. PF11/2004/WS.2/8.

58. *See generally* ILO 169, *supra* note 45, art. 14.

59. INT'L LABOUR ORG., ILO CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES, 1989 (NO. 169): A MANUAL 17 (2003), http://www.ilo.org/public/libdoc/ilo/2003/103B09_345_engl.pdf [hereinafter ILO Manual].

60. *See id.*

istrative measure that is likely to affect an indigenous community;⁶¹ (2) prior to exploration or exploitation of sub-surface resources;⁶² or (3) when any consideration is given to alienate their lands or transmit land rights outside their own communities.⁶³ If these requirements are not respected, the consultations will not comply with the convention.

Finally, such consultations must be undertaken “in good faith and in a form appropriate to the circumstances.”⁶⁴ While good faith is subject to the facts surrounding the circumstances at hand, the good faith requirement stipulates that governments may not simply engage in formalistic meetings. Rather, the state must engage in actual, substantive negotiations with the indigenous communities whose land is directly affected such that the communities will have an opportunity to influence the ultimate decision. For instance, if the meetings are merely informational or conducted in a manner or language that the representatives do not understand, the consultation will not satisfy the convention’s requirement. To comply with the convention, a consultation must be carried out “with the objective of achieving agreement or consent to the proposed measures.”⁶⁵

3. The Right of Participation

In addition to consultations, ILO 169 provides that indigenous communities have the right to participate in any policy, program or project that has a direct effect on their land.⁶⁶ ILO 169 protects this right of participation for indigenous communities based on the understanding that the indigenous communities should decide their own priorities in the process of developing those projects, which will affect not only their lives, but also their beliefs, institutions and the lands they occupy.⁶⁷ To protect this interest, article 7 of the convention provides that governments shall allow for the concerned communities to

61. ILO 169, *supra* note 45, art. 6(1)(a).

62. *Id.* art. 15(2).

63. *Id.* art. 17.

64. *Id.* art. 6(2).

65. Int’l Labour Org., *Report of the Director-General: Seventh Supplementary Report: Report of the Committee Set Up to Examine the Representation Alleging Non-observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Engineers of the Federal District (SENGE/DF) 8, to the Officers of the Governing Body, GB.304/14/7 (Mar. 17, 2009)*, http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_104654.pdf [hereinafter *Report of the Director-General: Brazil*].

66. ILO Manual, *supra* note 59, at 15.

67. Int’l Labour Org., *Report of the Secretary-General: Second Supplementary Report: Representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Ecuadorian*

be involved in all aspects of the development process.⁶⁸ Also, in order for the indigenous communities to make informed decisions, the state must conduct environmental and social impact studies so that the affected peoples can adequately assess the impact of planned development activities on their land.⁶⁹

4. The Indigenous Communities May Only be Relocated Upon Free and Informed Consent

Although indigenous people have the right to participate in the development of their land, situations may arise when they may be required to relocate. In such a scenario, ILO 169 provides that the relocation of indigenous people may only take place upon free and informed consent and full compensation.⁷⁰ ILO 169 states that informed consent “means that the indigenous and tribal peoples understand fully the meaning and consequences of the displacement and that they accept and agree to it.”⁷¹ Consent is not considered valid unless the affected community has “clear and accurate information on all the relevant facts and figures” regarding their relocation.⁷² If the affected population is not able to return to their lands, they shall be provided with the quality of the lands that they previously occupied.⁷³ In any event, the lands must be suitable for their present needs and future growth.⁷⁴

B. *The American Convention on Human Rights*

The American Convention on Human Rights was created in 1969 to protect fundamental rights and protect against discrimination on the basis of “race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”⁷⁵ In September 1979, Nicaragua ratified the convention and is now obligated to comply with the provisions of the conven-

Confederation of Free Trade Union Organizations (CEOSL), to the Officers of the Governing Body, GB.282/14/2 (Nov. 14, 2001).

68. ILO Manual, *supra* note 59, at 18; *see also* ILO 169, *supra* note 45, art. 7(1).

69. ILO Manual, *supra* note 59, at 22.

70. *Id.* at 45.

71. *Id.* at 44.

72. *Id.*

73. *Id.* at 45.

74. *Id.*

75. Organization of American States, American Convention on Human Rights art. 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

tion.⁷⁶ The two compliance bodies for the American Convention on Human Rights are the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights.⁷⁷ While the convention is not specifically tailored to the needs of indigenous communities, the compliance bodies have used the rights outlined in the convention to provide multiple indigenous communities with remedies to the violations of their essential rights.⁷⁸ The two provisions that are commonly used to protect indigenous land rights are article 21 (the “right to property”) and article 25 (the “right to judicial protection”).⁷⁹

1. The Right to Property

Article 21 of the American Convention on Human Rights provides that everyone has the right to use and enjoy their property without “exploitation.”⁸⁰ In the event that someone shall be “deprived of [their] property” in the interest of society, they must receive “just compensation.”⁸¹ The Inter-American Court has recognized communal forms of property under article 21 even in situations where such property lacks formal title.⁸² In *Awat Tingni v. Nicaragua*, Nicaragua argued that an indigenous community did not have formal entitlement to their lands when the government granted a logging concession to a Korean company because the indigenous community did not have a “formal title” deed.⁸³ However, the Inter-American Court held that the community was entitled to the land under article 21 and found a positive state obligation to recognize indigenous land tenure through demarcation.⁸⁴

Although the right to property is not an absolute right, the Inter-American Court in *Saramaka People v. Suriname* indicated specific requirements that must be met if a state needs to restrict the right of

76. American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32), Signatories and Ratifications, ORG. OF AM. ST., http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm#Nicaragua (last visited Jan. 30, 2016).

77. ACHR, *supra* note 75, art. 33.

78. See e.g., Mayagna (Sumo) Awat Tingni Community v. Nicaragua, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 151 (Aug. 31, 2001). See generally *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

79. See Mayagna, *supra* note 78.

80. ACHR, *supra* note 75, art. 21.

81. *Id.*

82. Mayagna, *supra* note 78, ¶¶ 146, 148.

83. *Id.* ¶¶ 104(k), 104(l).

84. *Id.* ¶ 153.

property.⁸⁵ “[A] state may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional; and d) with the aim of achieving a legitimate objective in a democratic society.”⁸⁶ Additionally, when all requirements are met, the state must also ensure the survival of the indigenous community by allowing them to participate in the development plan, ensuring that they will receive a benefit from such plan, and by performing the requisite environmental and social impact assessments prior to the execution of the project.⁸⁷

2. The Right to Judicial Protection

The “right to judicial protection” is outlined in article 25 of the American Convention on Human Rights.⁸⁸ This provision provides that “[e]veryone has the right to simple and prompt recourse . . . [by] a competent court . . . for protection against acts that violate his [or her] fundamental rights recognized by the constitution or laws of the state concerned or by [the American Convention on Human Rights].”⁸⁹ If a state fails to decide a case on the merits or fails to recognize a violation of fundamental rights, then the Inter-American Court has held that these actions are in violations of a person’s right to judicial protection.⁹⁰ In *Awes Tingni v. Nicaragua*, an indigenous community brought a claim of unconstitutionality against Nicaragua after the country granted a logging concession on indigenous land.⁹¹ The Supreme Court of Justice in Nicaragua decided the case without making reference to the rights of the applicants.⁹² Similarly, when the same indigenous group filed a second claim of unconstitutionality, the Supreme Court did not decide the case on the merits, but instead the court stated that it reached a decision in the initial case and therefore the remedy was time-barred.⁹³ The Inter-American Court held that the legal remedy was ineffective in both cases since the Supreme Court decisions did not recognize the violation of the community’s rights nor did it protect the rights of the applicants.⁹⁴

85. *Saramaka People*, *supra* note 78, ¶ 127.

86. *Id.*

87. *Id.* ¶ 129.

88. ACHR, *supra* note 75, art. 25.

89. *Id.*

90. *See Mayagna*, *supra* note 78, ¶¶ 136-39.

91. *Id.*

92. *Id.* ¶ 104(b).

93. *Id.* ¶¶ 133-34.

94. *Id.* ¶¶ 136-37, 139.

a. ILO 169 Enforcement Measures

In addition to the territorial rights and protections afforded by ILO 169, the indigenous communities of Nicaragua also have access to remedial measures under international law if their rights have been violated. ILO 169 provides for a reporting and monitoring system by which states are required to report to the Committee of Experts on the Application of Conventions and Recommendations (CEACR) regarding the measures that it has taken in compliance with the convention.⁹⁵ The CEACR reviews the reports “in a flexible manner” so as to take into consideration the specific conditions and characteristics of the country.⁹⁶ Once review of the reports are completed, the CEACR makes a direct request to states for additional information or issues recommendations on measures that should be taken to remedy violations of rights.⁹⁷ ILO 169 also has a complaint procedure in place whereby representatives can bring complaints to the committee if there are allegations of serious violations.⁹⁸

b. The Demarcation of the Rama and Creole Lands

In the case of the canal project, articles 13 and 14 of ILO 169 require Nicaragua to respect the lands that the Rama and Creole communities occupy and also demarcate their land.⁹⁹ As mentioned earlier, the indigenous land that is affected by the canal route has not yet been demarcated. Additionally, in protection of indigenous lands, Nicaragua will have to create safeguards to prevent unauthorized intrusions, which seem to occur frequently in Nicaragua as illustrated in Part I of this article. Given that Nicaragua has not demarcated the land of the Rama and Creole communities, Nicaragua is not currently in compliance with its obligation under ILO 169 to recognize the indigenous ties to the land.

c. Lack of Consultation

One of the main principles under ILO 169 is the right of “consultation.”¹⁰⁰ In 2005, the Brazilian Government drafted a bill that would

95. *Supervision*, INT'L LABOUR ORG., <http://www.ilo.org/indigenous/Conventions/Supervision/lang-en/index.htm> (last visited Jan. 30, 2016).

96. *Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169*, INT'L LABOUR ORG. 184 (2009), http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_106474.pdf [hereinafter *A Guide to ILO*].

97. ILO 169, *supra* note 45, art. 6.

98. *Supervision*, *supra* note 95.

99. ILO 169, *supra* note 45, arts. 13, 14.

100. *A Guide to ILO*, *supra* note 96, at 59.

provide for grants of logging concessions to private parties on indigenous lands.¹⁰¹ A group of indigenous communities made a complaint with the compliance body of ILO 169 stating that they were not consulted in accordance with the consultation provisions in the convention.¹⁰² The government argued that it held consultations with numerous regional representatives and non-government organizations that represented the indigenous community affected.¹⁰³ However, the committee of experts for ILO 169 found that those meetings were only indirect forms of consultation and therefore did not meet the consultation requirement.¹⁰⁴

The situation with the Rama and Creole communities is similar to the case in Brazil; the Supreme Court of Nicaragua stated in its decision that approval of the canal from the Regional Council was sufficient representation of the interest of the local communities affected by the canal.¹⁰⁵ However, as we see in the case of Brazil, this type of consultation is an indirect form of consultation and therefore not sufficient under the provisions of ILO 169. Additionally, Nicaragua has done much more than merely consider a legislative measure; the government has already enacted legislation for the canal and construction was set to begin on December 24, 2014.¹⁰⁶ Although the project is currently halted, the indigenous communities have not been consulted regarding the use and development on their land.¹⁰⁷ This is a clear violation of Nicaragua's obligation under the convention to provide a timely consultation. While the government has not conducted consultations, it has held informational meetings about the canal.¹⁰⁸ However, questions regarding the effects on the indigenous communities were not answered.¹⁰⁹ These informational meetings have not risen to the level required for a consultation because they were not conducted

101. *Report of the Director-General: Brazil, supra* note 65, 2.

102. *Id.* at 1.

103. *Id.* at 4.

104. *Id.* at 7.

105. *Id.* at 8.

106. Jonathan Watts, *Nicaraguans Promised 'Big Christmas Present' with Work Due on New Canal*, GUARDIAN (Nov. 20, 2014, 6:03 AM), <http://www.theguardian.com/world/2014/nov/20/nicaragua-atlantic-pacific-canal-work-begins>.

107. Mark Anderson, *Nicaragua Canal Will Wreak Havoc on Forests and Displace People, NGO Warns*, GUARDIAN (Sept. 30, 2014, 8:21 AM), <http://www.theguardian.com/global-development/2014/sep/30/nicaragua-canal-forest-displace-people>.

108. *See id.*

109. *See* Jeremy Hance, *Is the Gran Canal Really a 'Big Christmas Present' for Nicaraguans?*, MONGABAY (Dec. 4, 2014), <http://news.mongabay.com/2014/12/is-the-gran-canal-really-a-big-christmas-present-for-nicaraguans/>.

with the objective of achieving agreement or consent of the parties, but rather to provide information regarding the canal project.¹¹⁰

d. The Denial of the Right of Participation

The right of participation under ILO 169 not only provides that the state must provide indigenous communities with the right to participate in measures that directly affect them, it also provides that the environmental and social impact studies must be performed prior to the start of a project.¹¹¹ In the case of the Brazilian logging concessions stated above, the Committee Report further provided that studies are to be carried out in a matter so as to assess the social, spiritual and environmental impact on the people's concern from the logging activities.¹¹² The results of these studies are not considered optional but rather a fundamental criteria for the "implementation of [the proposed] activities."¹¹³

Currently, the HKND Group has not released studies regarding the impact of the canal on the land of the indigenous communities.¹¹⁴ However, Wang Jing, president of the HKND Group, recently stated that, "[w]e are not going to begin the project without the complete scientific and feasibility studies."¹¹⁵ While he indicated that the studies would be complete in October 2014, that date has come and gone, and no studies have been released.¹¹⁶ Therefore, under the current circumstances, it is likely that the indigenous communities affected by the canal project will not have the opportunity to participate in the development process in accordance with their rights under the convention.

e. The Requirements for Relocation of the Communities

Lastly, in the event that an indigenous community is required to relocate, ILO 169 requires that states receive "free and informed consent" from the indigenous community affected.¹¹⁷ In 1999, representatives of an indigenous community in Columbia brought a complaint to the committee of experts stating that the Colombian government failed to adequately consult them prior to building a dam that flooded

110. ILO 169, *supra* note 45, art. 6.

111. *See id.* art. 7.

112. *Report of the Director-General: Brazil*, *supra* note 65, 11.

113. *Id.*

114. *See* Nicaragua News Bulletin, *Nicaragua: Route 4 Chosen for the Grand Canal*, LATIN AM. BUREAU (July 14, 2014), <http://lab.org.uk/nicaragua-route-4-chosen-for-the-grand-canal>.

115. *Id.*

116. *See id.*

117. ILO 169, *supra* note 45, art. 16.

their historic lands.¹¹⁸ Once the committee found that the state failed to consult that community about the dam under its obligations under article 6 of ILO 169, the committee discussed the need for the relocation of families whose land was flooded due to the construction of the dam.¹¹⁹ With the help of ILO representatives, the government of Colombia subsequently created food and transportation subsidies for the affected members and produced written agreements which granted the community additional land since their lands had been flooded.¹²⁰

If a situation arises where the Rama and Creole communities will need to be relocated, the Nicaraguan government cannot unilaterally force the indigenous communities to relocate without “their free and informed consent” prior to the implementation of the canal project, according to article 16 of ILO 169.¹²¹ If the government decides to alienate their lands, the communities must be compensated and provided with land comparable to their alienated lands and sufficient to support their present and future needs.¹²²

C. *Violations and Remedies under the American Convention on Human Rights*

1. Enforcement Procedures under the Inter-American System

The Rama and Creole communities directly affected by the canal project may also submit a claim before the Inter-American Commission on Human Rights for violations under the American Convention on Human Rights.¹²³ The Commission is the “consultative organ of the Organization [of American States],” which investigates alleged human rights violations.¹²⁴ Upon investigation, the commission will determine if the state has committed a violation; if so, the commission will provide the state with a procedure for compliance.¹²⁵ If the state still fails to adequately comply, then the Commission will decide if the

118. INT'L LABOUR ORG., *Report of the Committee set up to examine the representation alleging nonobservance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association (ASMEDAS), to the Officers of the General Body, GB.282/14/4 (Nov. 14, 2001).*

119. *See id.* ¶¶ 63-64.

120. *See id.* ¶¶ 65, 67.

121. ILO 169, *supra* note 45, art. 16.

122. *Id.*

123. Organization of American States, Charter of the Organization of American States (A-41), Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.

124. *Id.*

125. ACHR, *supra* note 75, art. 48.

case should be submitted to the Inter-American Court of Human Rights.¹²⁶

The Inter-American System uses many principles outlined in international law to form its decisions, including ILO 169 and the American Convention on Human Rights. Therefore, the Rama and Creole community leaders can use multiple sources of international law to bolster their claim before the Inter-American Commission.¹²⁷ The Inter-American Human Rights system has progressively developed clear standards in relation to indigenous peoples' participation rights with regard to their property rights, and effective judicial protection.

2. The Rama and Creole Communities and Their Lack of Property Rights

The Rama and Creole communities are currently facing the possibility of losing their traditional lands. The Nicaraguan Government has failed to demarcate these communities' lands¹²⁸ and without title to the land, such communities will not be formally entitled to the land. However, it is likely that the Inter-American Commission on Human Rights will find that these communities are entitled to the land through land tenure under article 21 of the American Convention on Human Rights, and the commission will likely require Nicaragua to demarcate the land of the Rama and Creole communities.

Additionally, Nicaragua cannot restrict the Rama and Creole's right of property unless it can show that the project is necessary, the relinquishment is proportional, and the aim serves a legitimate societal interest.¹²⁹ Even assuming that the canal project will meet these requirements, Nicaragua has still failed to protect the survival of the Rama and Creole Communities, as required under article 21 of the American Convention on Human Rights because the indigenous communities have not been given an opportunity to participate in the development of the project, and the environment and social impact assessments have not been released.

3. The Denial of Judicial Protection

As previously stated, the Rama and Creole communities brought a claim of unconstitutionality against the concession of the canal project; however, the Supreme Court of Nicaragua dismissed the claim

126. *Id.* art. 51.

127. See e.g., *Saramaka People*, *supra* note 78.

128. U.S. DEP'T OF STATE, *supra* note 28, at 1.

129. ACHR, *supra* note 75, art. 21.

without addressing any violations to the community's rights under international law.¹³⁰ The Inter-American Court has held that this is a violation of the right of judicial protection because the decision does not provide the applicants with legal protection.¹³¹ Therefore, the Supreme Court of Nicaragua would be held in violation of the communities' rights under article 25 of the American Convention on Human Rights because it decided the case without recognition of these communities' land rights under international law.

IV. CONCLUSION

Although the Inter-Oceanic Canal has been called the "saving grace" of the Nicaraguan economy, Nicaragua cannot simply escape its obligation to recognize the land rights of the indigenous communities affected by the canal; international law provides protections for the land rights of indigenous communities and remedial measures for the violations against those rights.

Nicaragua has three main laws that protect the land rights of indigenous communities within the country. These laws provide that the lands of the indigenous communities are inextinguishable, yet numerous land seizures and land grabs from the government and non-indigenous settlers leave these laws virtually ineffective. Furthermore, the Supreme Court of Justice in Nicaragua has denied claims filed by the Rama and Creole communities, leaving them vulnerable to the confiscation of their lands.

International law provides an alternative source of remedies for the violative behavior of states. ILO 169 and the American Convention on Human Rights are two sources of international law that protect the land rights of indigenous communities.¹³² Both conventions have compliance bodies that report on and investigate a signatory state's actions to ensure that it is in compliance with its international obligations.¹³³

In the process of the canal project, Nicaragua has violated numerous obligations under international law. The government has not consulted the direct representatives of the Rama and Creole communities prior to the enactment of the legislative measure for the canal. Simi-

130. NICARAGUA, THE INDIGENOUS WORLD 2014, THE INT'L WORK GROUP FOR INDIGENOUS AFFAIRS 93, 98 (Cæcilie Mikkelsen et al. eds., 2014), http://www.iwgia.org/iwgia_files_publications_files/0671_12014eb.pdf.

131. See generally Mayagna, *supra* note 78.

132. See generally ILO 169, *supra* note 45; ACHR, *supra* note 75.

133. See generally ILO 169, *supra* note 45; ACHR, *supra* note 75.

larly, it has not given the communities an opportunity to participate in the implementation of the canal project, and it has not released environmental or social impact studies. Furthermore, the Supreme Court decision violated the right of judicial protection under the American Convention on Human Rights because the court's decision did not take into account any violations of the communities' rights.

While Nicaragua has violated its international obligation to recognize indigenous land rights in the past, it is important that the Rama and Creole communities assert their rights under ILO 169 and the American Convention on Human Rights because these conventions provide accountability for the state's unlawful actions. This is not to say that the indigenous communities will be completely protected from government land seizures or expropriations. If the communities decide to file a complaint with ILO 169 and the Inter-American Commission on Human Rights, they can at least guarantee that Nicaragua will have some international oversight for its actions. Therefore, in order to protect the land rights of the indigenous communities along the canal route, Nicaragua should be obligated to recognize these communities' land rights under international law.