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INDIGENOUS LEGAL TRADITIONS, CULTURAL RIGHTS, AND TIERRAS COLECTIVAS: A JURISPRUDENTIAL READING FROM THE EMBERÁ-WOUNAAN COMMUNITY

Lauren Koller-Armstrong *

ABSTRACT

This paper provides a brief overview of the Emberá-Wounaan indigenous group in the context of its legal traditions, worldview, and socio-political organization. In addition, this work examines how overlapping systems of tribal (Emberá-Wounaan) law and national Panamanian law have shaped 1) the tribe's geographic boundaries; and 2) environmental management in tribal communities. The relationship between indigenous and national legal systems becomes most apparent in areas of enacted law and in development projects like national park designation that, while implemented in indigenous communities, are nevertheless problematic because of the western ideals they often embody. Drawing on John W. Ragsdale's approach to historical review and jurisprudential readings,¹ I argue that indigenous cultural practices, symbols, and systems of agriculture are useful 'texts' that help identify underlying values and sources of law within the Emberá-Wounaan community. By examining the relationship between legal traditions and national law, areas of both conflict and collaboration emerge within the context of community development. Finally, this analysis highlights the role of international law and legislative reform in resolving disputes over collective land ownership and collective land titling in indigenous communities.

I. INTRODUCTION

While serving as a Peace Corps Volunteer in rural Panama from 2002-2005, I had the opportunity to live and work in various parts of the country. While my service began in the central lowlands of the Azuero Peninsula, an area known for cattle-ranching, slash and burn agriculture, and a dominant Mestizo culture, the final months of my assignment were spent in the eastern region of Panama. The Darién province, which shares a border with Colombia, stands in stark contrast to Panama's *interior*² by virtue of its lush vegetation and multi-ethnic population. Unlike other provinces in the country, there is a strong presence of Afro-Antillean, Indigenous, and Mestizo culture in Darién.

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¹ Specifically, Ragsdale explains that while "some current jurisprudential scholars prefer to depict 'law' narrowly...it would seem more realistic and accurate to view law in a broader, more holistic sense...that include[s] all the forces, institutions, and conventions that serve to order and guide individual and group conduct in society." John W. Ragsdale, Jr., *Anasazi Jurisprudence*, 22 AM. INDIAN L. REV. 393, 396 (1998). See *infra* notes 3-7 and accompanying text for further discussion.

² Literally, *interior* means interior in Spanish and is used by Panamanians to refer to the central region of the country.

As such, there are strikingly different patterns of land use in this region that are rooted in distinct cultural values and historical practices. Further, development projects sponsored by the Panamanian government, multi-national corporations, and non-governmental organizations have become a catalyst for competing uses of local land. Because the Darién region is rich in natural resources and biodiversity, it is a desirable area for park preservation, tourism, timber extraction, shrimp fishing, and cattle ranching. I returned to Panama after my Peace Corps service to conduct field research on patterns of development and land use as they related primarily to Indigenous communities. By examining the goals of project recipients as well as project proponents, my objectives were to identify those involved in the negotiation process, understand how definitions of development varied among actors, and determine whose interests were served by the development projects currently in place.

The primary concerns voiced by Emberá and Wounaan leaders during my field research, however, were not about land use in and of itself. Rather, community members spoke of collective land titling rights, and how that system of ownership would in turn enable an autonomous system of land management. At that time, no formal recognition of the indigenous system of communal property ownership existed outside of the indigenous reservations, or *comarcas*, that were created in 1983. As a result, there was no collective land titling mechanism in place for indigenous communities residing on land that had long been occupied, but was not included in the original delineation and designation of the *comarcas*. Additionally, the designation of national parks or wildlife reserves on collective indigenous land continues to place numerous restrictions on land use by the Emberá and Wounaan. Some of these restrictions (e.g., severe limits on hunting and timber extraction of any kind) are in conflict with customary land use, and when coupled with the current land titling regime, effectively cripple the community's ability to own and manage its land in a culturally-appropriate way.

Within the larger scope, these issues speak to the structure-value paradigm introduced in John W. Ragsdale's *Anasazi Jurisprudence*.³ Generally, Ragsdale's article uses Anasazi culture as a 'text' that can be used to reveal the underlying values and beliefs that preceded written law.⁴ Specifically, he analyzes Anasazi architecture, rock writing, and agriculture as statements of core principles and values rather than accepting them as structures alone. With respect to architecture, Ragsdale draws on the physical structure of dwellings to identify underlying values of natural order, inclusiveness, and equality.⁵ He also notes that rock writing and pottery designs embody the Anasazi worldview by depicting the relationship between humans and other living elements as part of a cosmic scheme.⁶ Most compelling, however, is Ragsdale's analysis of the Anasazi farming systems as a proxy for egalitarian values. Of this, he states: "The perishable nature of agricultural produce, and the intrinsic limits on potential consumption, even with redistributive arrangements, militate against a skewed acquisition of power, wealth, and materials."⁷ Thus, by interpreting symbols, structures, and practices as 'texts,' Ragsdale conducts a powerful jurisprudential reading that speaks to the intersection of culture and law.

Applying this approach to my field research on rural development and land use in Panama, it is clear that both tribal practices and the indigenous worldview, or relationship between humans and nature, are infused with jurisprudence of the Emberá and

³ See generally Ragsdale, *supra* note 1.

⁴ See *id.* at 396-98.

⁵ See *id.* at 403-09.

⁶ *Id.* at 411.

⁷ *Id.* at 416.

Wounaan. At the same time, national governmental restrictions on land use illustrate a somewhat different value system embodied by the nation-state. I would argue that these 'texts' are useful ways of identifying internal values, and may be used to identify both conflicting and unifying principles between tribal and national systems. As a result, this analysis suggests that by identifying shared goals or values, a number of state-tribal conflicts may be resolved, while remaining differences may be addressed in the international forum.

A number of texts, both traditional and contemporary, were consulted for this analysis. The majority of information gathered was Spanish-language material covering a broad spectrum of disciplines, including: books and articles published by the Colombian Institute for Anthropology and History, Panamanian legal documents, interview transcripts and community meeting notes from field research, and social data from the United Nations and other international organizations. In order to strike a balance between the viewpoints and goals of various actors, each of these respective 'texts' were read as they applied to various issues at hand, namely the origins of man, the environmental practices of the Emberá, and the value systems embedded within the Panamanian system of land ownership. While some sources, like governmental documents or Panamanian statutes, were very textual, others represented a blend of interpretation and observation, as was the case with one ethnographer's work that melded magical realism with accounts of everyday life in describing the complexity of rural, indigenous development.⁸

II. TRADITIONAL LAW

For the Emberá and Wounaan of eastern Panama, traditional law is rooted in what is known as the community's traditional knowledge base. Like many indigenous groups, Emberá-Wounaan traditional knowledge is a dynamic and integrated worldview that accounts for social order within the community.⁹

Broadly, this traditional knowledge is an understanding of how the earth maintains its people: the earth, land or territory and its diverse components are part of one Creator, but each with its own spirit.¹⁰ While the Emberá worldview is interdisciplinary, and embodies principles of biology, religion, philosophy, sociology, history, and art, it also possesses an overarching theme of unity. This unity among animals, plants, and humans is based on the single, primordial origin of Emberá life that gave birth to all in existence.¹¹ Ragsdale's work underscores such a worldview as well, whereby the core presumption in Anasazi society was that everything in the universe was bound together, in contrast with the often-categorized Western system.¹²

According to myth of origin, all human beings were initially carved from wood (and later dirt or clay) and guided by an Emberá goddess, referred to as Dabeiba.¹³ This common history

⁸ See STEPHANIE KANE, *THE PHANTOM GRINGO BOAT: SHAMANIC DISCOURSE AND DEVELOPMENT IN PANAMA* xv-xix (1994).

⁹ The Anasazi worldview, for example, is founded on a cosmic order that guides law and behavior through political and social structures. See Ragsdale, *supra* note 1, at 395, 402.

¹⁰ Heraclio Herrera, *Protecting Community Rights Over Traditional Knowledge: Implications of Customary Laws and Practices, in PANAMA CASE STUDY—KUNA AND EMBERA FOREST PEOPLES* (Fundación Dobbo Yala 2004) (on file with author).

¹¹ See ASTRID ULLOA, *KIPARÁ: DIBUJO Y PINTURA, DOS FORMAS EMBERÁ DE REPRESENTAR EL MUNDO* 22 (1992) [hereinafter ULLOA, *KIPARÁ*].

¹² Ragsdale, *supra* note 1, at 402.

¹³ See PATRICIA VARGAS SARMIENTO, *IMPACTO Y REACCIÓN ANTE LA OCUPACIÓN ESPAÑOLA, SIGLOS XVI Y XVII* 6 (1993).

among the Emberá and Wounaan pre-dates the Spanish Conquest, and describes the territories and circumstances under which creation took place and gave rise to traditional culture.¹⁴ Anthropologists have studied the differing histories of human creation in both Emberá and Wounaan cultures, concluding that they are essentially two versions of the same history where particular characters or descriptions may reflect distinct cultural elements of each sub-group (i.e., the Emberá or Wounaan respectively).¹⁵ Of the differing versions, those that refer to human creation from wood are considered more traditional, while other versions are said to resemble a Christianized concept of creation that resulted from the Spanish Conquest.¹⁶

Within the Emberá and Wounaan communities, history is a part of the past as well as the present and the future: it describes the universe of both the living and the dead that the *jaibaná*¹⁷ controls and is constructed from the group's historical and geographic trajectory over time. The creation of Emberá society is attributed to Dabeiba, the young indigenous woman who taught the Emberá about agriculture, basket-weaving, and ceremonial body-painting. She is recognized for having shown the first human beings which trees and plants to select for food, weaving material, and natural dyes. It is believed that even today, Dabeiba reminds the community of her presence by sending heavy winds and rain.¹⁸ Most Wounaan versions of the 'origins of man,' though, describe how the Creator slipped and cut his hand while carving a *Woun*, or Wounaan person, out of cocobolo wood and formed man out of clay instead.¹⁹ Nevertheless, both cultures explain that the wooden figurines have since become immortal beings in the underworld, while humans return to the ground from which they were created.²⁰ Interestingly, and perhaps appropriately, then, the *jaibanás* of traditional Wounaan and Emberá communities carve their ceremonial staffs out of cocobolo, or rosewood, just as the Creator did with the first beings of the underworld.²¹

Traditional knowledge is central not only to Emberá-Wounaan customary law, but is also an integral part of the indigenous belief system vis-à-vis the role of humans in nature. The traditional laws and traditional knowledge of both tribes are infused with social, cultural, and spiritual values.²² Like Ragsdale's reading of Anasazi texts, the interdisciplinary worldview of the Emberá-Wounaan implies a human obligation to serve and be in community with the earth.²³ Perhaps this central belief stems from human origins in dirt and clay and the mortality ascribed to them because of it. Such a reading of this indigenous text—specifically, the creation/origins of the Emberá-Wounaan—could also explain why the *jaibaná* still incorporates carvings of immortal beings of the underworld into his/her ceremonial staff. Because the *jaibaná* is believed to be the medium through which humans are connected to nature, the ceremonial staff is a powerful tool through which the healer can incorporate both the underworld and the higher world

¹⁴ *Id.*

¹⁵ *Id.* at 46-47.

¹⁶ CAMILO ANTONIO HERNÁNDEZ, IDEAS Y PRÁCTICAS AMBIENTALES DEL PUEBLO EMBERÁ DEL CHOCÓ 25 (1995).

¹⁷ A *jaibaná* is a local healer and community leader who is self-selected as a child and dedicates him/herself to mastering the use of medicinal plants.

¹⁸ VARGAS SARMIENTO, *supra* note 13, at 22-23.

¹⁹ Julie Velasquez Runk, *And the Creator Began to Carve us of Cocobolo: Historical Ecology of the Wounaan Forest use in Eastern Panama*, Center for the Study of Institutions, Population, and Environmental Change (CIPEC): 2002 Summer Institute Participant Abstracts, http://www.cipec.org/training/summer_institute/02institute/02participants.html#Runk (last visited Mar. 15, 2009).

²⁰ HERNÁNDEZ, *supra* note 16, at 25.

²¹ Native Futures, *The Wounaan Story: A Short History of Wounaan Villages in Panama*, <http://www.nativefuture.org/wounaan.html> (last visited Mar. 15, 2009).

²² See Herrera, *supra* note 10, at 1.

²³ Ragsdale, *supra* note 1, at 406.

into his/her practices (see image on following page). Based on these practices and historical accounts, then, we see that the Emberá-Wounaan worldview is a holistic blend of various principles, namely: reciprocity, solidarity, unity and equilibrium, and duality and equality.²⁴

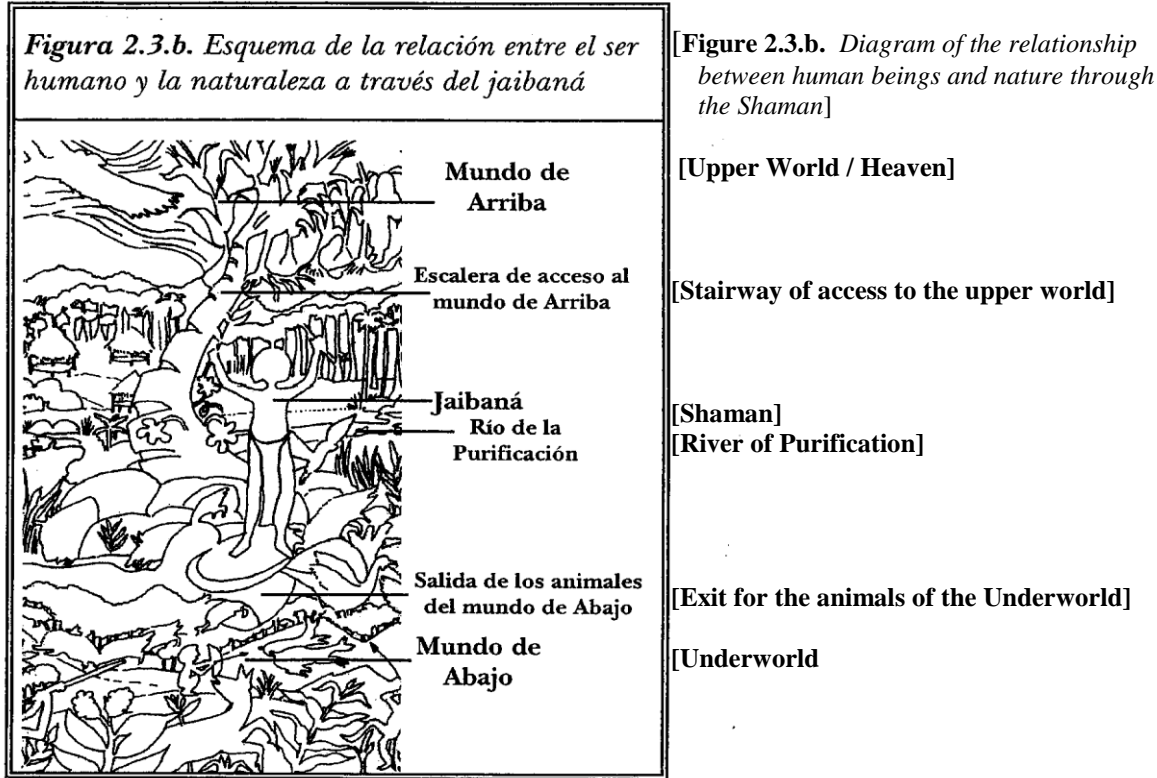


Diagram showing the relationship between human beings and the natural world through the jaibaná.²⁵

III. TRADITIONAL GOVERNANCE OF THE EMBERÁ-WOUNAAN

Until the early 1980's, the Emberá and Wounaan were not recognized as sovereign groups with independent political and governmental structures or territorial rights. Traditional indigenous governance was egalitarian and familial, whereby the head of each family had authority over the household and determined how resources were distributed and how disputes would be settled.²⁶ In addition, the elders and shamans/healing men, or *jaibanás*, were well respected by the community for their knowledge and experience, and carried implicit authority within kin groups.²⁷ In some communities, a village chief, or *Noko*, was also appointed as a

²⁴ Herrera, *supra* note 10, at 1.

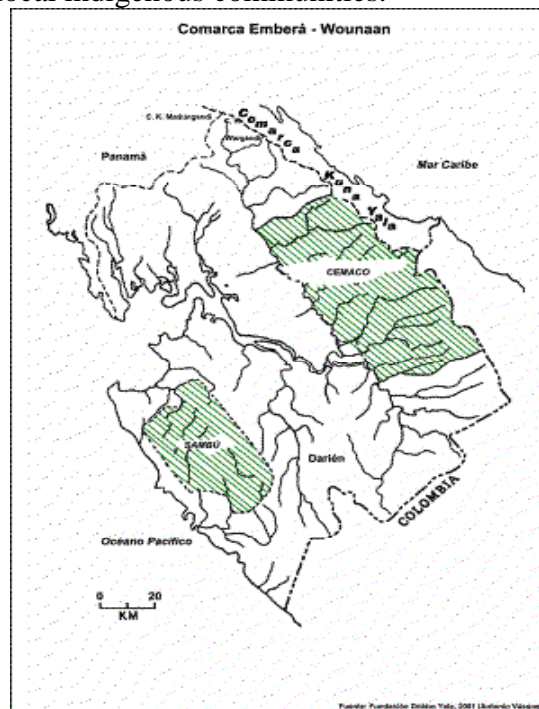
²⁵ ASTRID ULLOA, HEIDI RUBIO, AND CLAUDIA CAMPOS, TRUA WUANDRA: ESTRATEGIAS PARA EL MANEJO DE FAUNA CON COMUNIDADES EMBERÁ EN EL PARQUE NACIONAL NATURAL UTRÍA, CHOCÓ, COLOMBIA 96, fig.2.3.b. (1996) (author's unofficial translation) [hereinafter ULLOA, TRUA WUANDRA].

²⁶ *Emberá and Wounaan Sociopolitical Organization*, WORLD CULTURE ENCYCLOPEDIA, <http://www.everyculture.com/Middle-America-Caribbean/Ember-and-Wounaan-Sociopolitical-Organization.html> (last visited Mar. 15, 2009) [hereinafter *Sociopolitical Organization*].

²⁷ *Id.*

moderator in communal decision-making. In general, however, no formal tribal leaders, chiefs, councils, or other community organizations existed.²⁸

Through an indigenous uprising in 1983, however, the Emberá and Wounaan made formal demands for tribal recognition as well as cultural and territorial independence from the Panamanian government, and shortly thereafter became a semi-autonomous tribe through the enactment of Law 22.²⁹ Passed in November of 1983, Law 22 was the legislative act that formally established the *Comarca Emberá-Wounaan*, or Emberá-Wounaan reservation, and outlined the new structure and function of this cultural and political body.³⁰ The law secured roughly 1,013 total acres for independent use and ownership by the Emberá-Wounaan. The allotted land is comprised of two areas that function as the Sambú and Cémaco districts for political purposes (see figure on following page).³¹ While this was a long-awaited and hard-won change, the enactment of Law 22 transformed the political structure within Emberá-Wounaan nation in unexpected ways. Although heads of households, village chiefs, and the *jaibanás* were still central to the organization of the community, a more complex and politicized system of governance has since developed, which illustrates the inevitable influence of national government on local indigenous communities.



Districts/regions of the *Comarca Emberá-Wounaan*, or Emberá-Wounaan reservation in Panama.³²

²⁸ *Id.*

²⁹ Native Planet, *The Embera and Waounan Indigenous People of Panama and Colombia: Modern History and Social and Political Organization*, <http://www.nativeplanet.org/indigenos/embera/> (last visited Mar. 15, 2009).

³⁰ While the Emberá and Wounaan are distinct, yet similar sub-groups of the Chocó family, they are collectively referred to as the Emberá-Wounaan and thus jointly administer the *comarca*. Ley No. 22 de 8 de Noviembre, Por la Cual se Crea La Comarca Emberá de Darién, No. 19.976 *Gaceta Oficial*, Jan. 14, 1984, available at http://www.asamblea.gob.pa/legispan/PDF_NORMAS/1980/1983/1983_016_1874.pdf.

³¹ *Participación Electoral de los Indígenas en la República de Panamá*, IV CONGRESO INTERNACIONAL DE DERECHO ELECTORAL 8, <http://www.tribunal-electoral.gob.pa/publicaciones/publicaciones/documentos/piemv.doc> (last visited Mar. 15, 2009) [hereinafter *Participación Electoral*].

³² Image provided by Fundación Dobbo Yala & Nepenthes Organization (on file with author).

IV. CURRENT GOVERNANCE AND ITS ORIGINS

The *Carta Orgánica Administrativa*, or legislative compilation, of Law 22 establishes the current system of the Emberá-Wounaan governance through a hierarchical *congreso*, or political organization, that focuses on the reservation and its elected traditional leaders and government representatives.³³ This system of governance consists of the traditional village leaders (e.g., *Nokoes*), general chiefs, a head chief, an advisory panel, and community police.³⁴ Additionally, governance systems exist at the national, regional, communal, and familial levels.

At the national level, a general chief is elected for a five-year term, and presides over the whole *comarca*.³⁵ A general congress is held every other year, whereby delegates from each community attend and deliberate on national issues affecting each tribe.³⁶ At the district level (illustrated on the previous page as Cémaco and Sambú), a regional chief and advisory panel serve as the governing bodies, and organize yearly congressional meetings. Village leaders and police are delegated at the community level, and under the advisement of the village leaders (*Nokoes*), monthly meetings are organized whereby the community discusses internal issues and upcoming events.³⁷ In most villages, local committees are often created to address education, health, fishing, agro-forestry, artisan work, tourism, and women's activities.³⁸ Within each of these local committees is also a government-like structure that includes a president, vice-president, secretary, treasurer, vocal, and fiscal representative.

Because all indigenous *comarcas* are part of Panama's national government, each one participates in the election of national representatives (e.g., president, legislators, mayors, and district representative) as well as traditional authorities described above (e.g., general chief, regional chiefs, advisory panels, village leaders).³⁹ With respect to representation and allotment, the Emberá-Wounaan reservation elects two mayors, five district representatives, and five council members by national popular vote. Additionally, the reservation appoints its own traditional leaders as exclusive representatives and spokespersons for the indigenous community at large.⁴⁰

V. INFLUENCE AND IMPLICATIONS OF NATIONAL GOVERNMENT

As mentioned earlier, the Emberá-Wounaan system of governance began to mesh with the larger political organization of Panama at both a local and national level after the enactment of Law 22. Though unexpected, the ensuing dynamics were not uncommon. Below is a chart depicting the problems faced by a rural indigenous community in Latin America as a result of tribal relations with the nation-state.

³³ *Sociopolitical Organization*, *supra* note 26, at 1.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Native Planet, *supra* note 29, at 1.

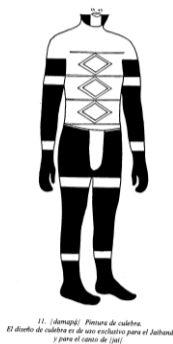
³⁹ *Participación Electoral*, *supra* note 31, at 7.

⁴⁰ *Id.* at 8.

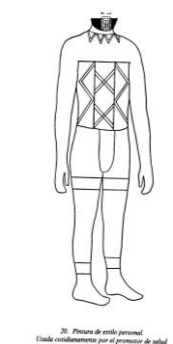


Titles (from top to center): “General Problems in the Jungle” – “Life in the Jungle”⁴¹

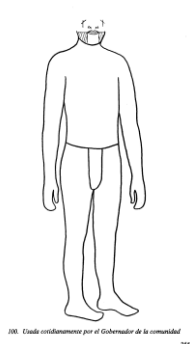
As highlighted in the previous illustration, several sources of conflict within the community stem from operation of the national government and its associated apparatus: the church (*iglesias*), foreign/non-traditional education (*educación foranea*), and the state and its laws (*estado-leyes*).⁴² Nevertheless, many Emberá and Wounaan villages have found ways to incorporate traditional cultural practices into the contemporary system of governance and operation of the nation-state. Below are various types of body painting used by community leaders on a daily basis or by the *jaibaná* during ceremonial practices.⁴³



11. [Emberá] Pintura de cadáver. El diseño de cadáver es de uso exclusivo para el *jaibaná* y para el canto de [sic]



20. Pintura de estilo personal. Usado exclusivamente por el promotor de salud



100. Usado cotidianamente por el Gobernador de la comunidad

Corporal designs for the *jaibaná* (ceremonial), health promoter (daily), and Governor (daily), respectively⁴⁴

⁴¹ DERECHOS TERRITORIALES INDÍGENAS Y ECOLOGÍA EN LAS SELVAS TROPICALES DE AMÉRICA 290 (Gaia Foundation and CEREC eds., 1992) [hereinafter DERECHOS TERRITORIALES].

⁴² *Id.*

⁴³ ULLOA, KIPARÁ, *supra* note 11, at 143, 152, 255.

⁴⁴ *Id.*

While specific designs have always been used to designate the *jaibaná* (see image on the far left), this form of recognition has since been extended to the village's health promoter as well as the Governor, though it is not clear when these additional designs were initially developed.⁴⁵ Nevertheless, it is evident that newer roles of authority and care-giving in the community are recognized through this traditional form of self-adornment with *jagua* plant-based dye. Ragsdale's 'textual' reading is relevant not only to the physical marking of various leaders here, but also to the symbolism of the designs used. This practice illustrates the need and importance of such members in the community, and underscores shared values of well-being, harmony, and order as evidenced by the symmetry of the designs and the consistency of areas chosen to be marked.

Community decision-making and dispute resolution are other practices that incorporate the input of both traditional and contemporary leaders. While there are local meetings every month where general business matters are discussed, the community will also meet on an ad-hoc basis to make decisions on timely or unexpected issues. For example, the community called a special meeting to discuss my arrival as a field researcher. In such situations, the issue at hand is first presented by the village leader, who may then invite the primary parties involved in the matter to speak; this may be the potential visitor, or the individuals involved in a local conflict or disruption that occurred if that is the reason for the meeting. After presenting oneself and his/her explanation of what is going on in the community, local committee members then have a chance to speak on the issue at hand, where they may voice their support or disapproval. After other community members have had the opportunity to express their concerns or provide input, the group comes to a consensus on an appropriate course of action that is often reiterated by the village leader who wraps up the meeting. The issue is then closed for discussion.

While there is no judicial body *per se* in the *comarca*, it appears that issues arising at the local level are treated much like cases before the court system: facts are presented, and community members have the opportunity to voice their opinion on those facts in light of past experiences concerning a similar situation the same way precedent decisions are applied to pending cases before the court. If distinctions are made or other noteworthy differences exist that warrant a different course of action, the community generally arrives at a decision that leaders may reiterate or clarify. These processes of local discussion and dispute resolution allow for input from newer leaders and lay persons in the community and also maintain traditional reverence for elders, *Nokoes*, and *jaibanás*, whose opinions are afforded great deference.

At the national level of representation, however, there is less indigenous influence and practice. As mentioned earlier, within each reservation area there is a regional chief, or *cacique regional*, who acts as the indigenous representative for all the communities residing within the bounds of the reservation.⁴⁶ However, because the reservation was designated jointly to the Emberá and Wounaan in 1983, the appointment of only one individual for both tribal groups has become problematic in terms of regional and cultural representation.

Leonides Quiroz, a Wounaan community leader, has spoken extensively about the history of the Wounaan people and the struggle to maintain a related, yet distinct, cultural identity from the Emberá.

"Most Panamanians are more interested in getting to know other countries rather than knowing the different indigenous cultures within their own borders. If you asked someone

⁴⁵ *Id.*

⁴⁶ Native Planet, *supra* note 29, at 1.

[on the street here in Panama] what they know about the Wounaan, they only mention something about ‘the Chocó’ Indians—this is simply ignorant.⁴⁷

As Leonides mentions, the Emberá and Wounaan are culturally related, yet lingually distinct sub-groups of the larger Chocó indigenous nation residing primarily in Chocó department/province of Colombia. From roughly the 16th century on, numerous sub-groups occupying different tributaries of the Chocó River developed independent languages and variations of ancestral customs. It’s believed the Emberá began settling in the Darién province of Panama in the late 18th century, while most Wounaan families arrived during the mid 20th century.⁴⁸ Despite the fact that these two tribes maintain distinct, traditional languages, the phenotypical and cultural similarities between these two ethnic groups have led to the continued collective identification of both the Emberá and Wounaan as the Chocó Indians, though this is no longer accurate.

Thus, although the first leadership positions in the newly formed *comarca* were designed to represent both the Emberá and the Wounaan, the Wounaan nation separated itself politically from the Emberá in 1998 because of concerns that the Emberá were becoming increasingly politicized and were not fully aligned with the interests of the smaller Wounaan population.⁴⁹ While the split between the Emberá and Wounaan may provide for more accurate social and cultural representation of each tribe, it has become more difficult for both groups to advance their particular interests on a national scale because the power of collective bargaining has been sacrificed. Such internal divisions have also complicated the efforts of indigenous communities outside the bounds of the *comarca* that are trying to pass collective land titling legislation. Nevertheless, because both tribes are facing the same challenges to territorial recognition, there has been more recent collaboration between the Emberá and Wounaan residing outside the reservation. In fact, a multi-ethnic committee for collective land titling has since been formed among Wounaan, Emberá, and Kuna indigenous leaders.⁵⁰

VI. COLLECTIVE LAND RIGHTS: WHERE INDIGENOUS LEGAL TRADITIONS AND NATIONAL LAW MEET

As illustrated, the relationship between the Emberá and Wounaan and the land they occupy is rich and complex. Territory is of great importance to both tribes because it is 1) central to the indigenous worldview; and 2) an avenue through which the Emberá-Wounaan maintain cultural practices and assert their autonomy via land management.

First, as discussed earlier, nature is fundamental to the Emberá-Wounaan worldview: the areas in which both groups have settled are rich in history that documents the solidarity of indigenous peoples in the face of Spanish colonization. These communities—some of which

⁴⁷ Interview with Leonides Quiróz, Esq., Project and Program Coordinator, Wounaan Pueblo Development Foundation, in Panama City, Panama (Dec. 16, 2005) (author’s unofficial translation) (taped interview and corresponding notes on file with author).

⁴⁸ *Emberá and Wounaan History and Cultural Relations*, WORLD CULTURE ENCYCLOPEDIA, <http://www.everyculture.com/Middle-America-Caribbean/Ember-and-Wounaan-History-and-Cultural-Relations.html> (last visited Mar. 15, 2009).

⁴⁹ Native Planet, *supra* note 29, at 1.

⁵⁰ Interview with Adolfo Mezua, President, Organization for Emberá-Wounaan Youth (OJEW) in Pan. City, Pan. (June 1, 2006) (author’s unofficial translation) (interviews and corresponding notes on file with author); Interview with Graciliano Cárdenas, President, Collective Land Titling Committee, in Darién, Pan. (June 16, 2006) (author’s unofficial translation) (interviews and corresponding notes on file with author).

have since been protected within the bounds of the *comarca*—are sacred places where spirits and Emberá-Wounaan ancestors dwell. Ancestors and spirits, as well as animals, other beings, and the Emberá themselves are all part of a universal world order that has been depicted by several ethnographers as a scale of sentient beings.⁵¹

This scale is conceptualized in a spatial way that reflects the composition of a community and its surrounding area. At the center of the scale are the Emberá people themselves—the most fully human of all sentient beings.⁵² Just beyond the central community where the Emberá reside is the forest upriver, where other tribal groups, animal, and spirits are located respectively.⁵³ While these other human and biological elements are placed increasingly farther from the Emberá world, all are connected and accessible along an axis of feeling/sensation (as distinguished from perception or logic) that interposes the distance between what is familiar and what is unknown.⁵⁴ From this worldview, the relationships between the Emberá and other beings are organized around environmental relationships and space/territory. (see illustration below.)

[Figure 2.2.b. Diagram of the Embera relationship in the human world with animal kingdom]

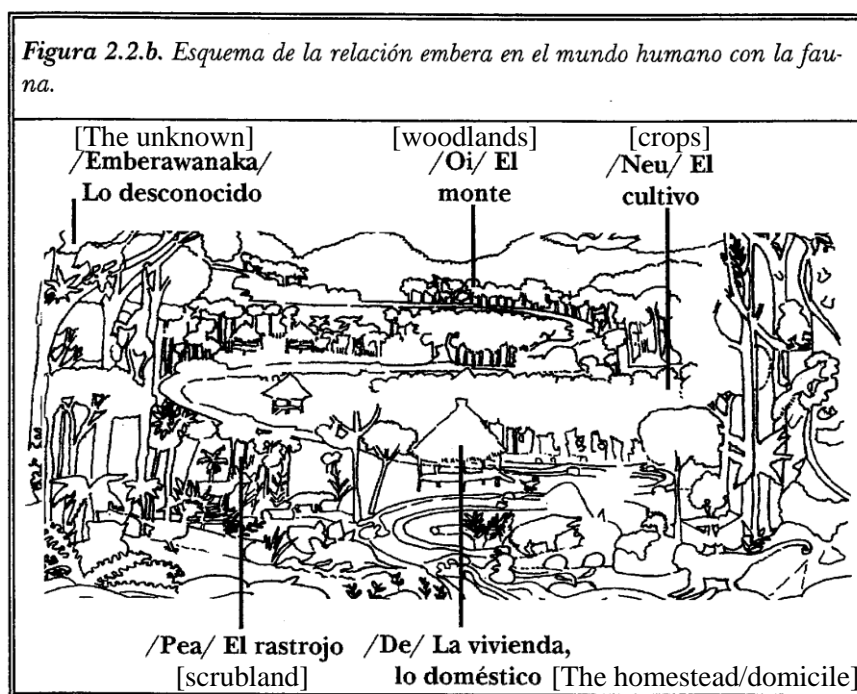


Figure illustrating the Emberá concept of human and environmental relations⁵⁵

In addition to its centrality to the Emberá world order, territory also provides a place where indigenous culture is carried out collectively. Territoriality enables the Emberá-Wounaan to manage land in a way that is consistent with their worldview of nature and allows for the maximum expression of cultural, religious, and communal values. A subject that came up

⁵¹ KANE, *supra* note 8, at 105-07.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ ULLOA, TRUA WUANDRA, *supra* note 25, at 93 fig.2.2.b.

frequently in field research interviews was land use related to national park designation, which reinforced how indigenous culture is inextricably linked in many ways to the territory occupied by the Emberá and Wounaan. Other examples of the manifestation of indigenous culture through the environment include ceremonial body painting,⁵⁶ the importance of the river along which a community is established, and the availability and use of local plants in artisan work such as basket weaving and wood carving—each of which are discussed in turn.

Known locally as *jagua* or *kipará*, the Emberá and Wounaan mark their bodies with a plant-based, semi-permanent dye for ceremonies, celebrations, and daily use. As noted earlier, this practice is a valuable ‘text’ that can be read as an expression of the interconnectedness between art, nature, religion, and culture for the Emberá-Wounaan in various ways. While the marking of one’s body with such natural dyes indicate unity with the surrounding environment, the depiction of animal and plant designs on the body serves as an art form based in nature. More broadly, the painting of oneself for ceremonies or festivals illustrates the religious and cultural value of such expression.⁵⁷

Perhaps most central to many Emberá and Wounaan communities is the river upon which the town is established. Not only do rivers serve as the inner roadways of the rainforest and primary travel route between communities; they are also the place where clothes are washed, where people bathe, and where drinking water is collected. Even in communities where aqueducts (i.e. gravity-based water systems) are installed, many individuals still prefer to get water directly from the source. In fact, during a community meeting over the current aqueduct system in Nuevo Vigía, Darién, one man complained he didn’t feel like he could get clean unless he bathed in the river. The water from the pipes can feel too warm and unnatural, he explained, and is not refreshing in the same way as the water from the river. Other community members also voiced concern about the way this new water system would affect their daily practice of washing clothes by allowing dirty clothing to accumulate in the house; this would present a divergence from the current, favored practice which was to wash one’s clothes daily while bathing in the river.

Another significant land-culture connection is the way women collect plants used in artisan work: most often, they will seek out the necessary materials where they are naturally grown, rather than cultivate those plants near the home. When invited to go cut *chunga*⁵⁸ with a local artisan group, it was evident that finding the plant and harvesting it in its natural surroundings was the proper, honorable, and customary thing to do. Despite the fact that such an endeavor can take several hours or half a day on foot, the harvesting of *chunga* from the depths of the forest was a necessary and very valuable task in the process of making artisan baskets. Again, this practice may be read as yet another ‘text’ that speaks to the role of human beings in the natural world. Perhaps the women did not feel it was their role to domesticate, cultivate, or otherwise manipulate the growth of the *chunga* plant—perhaps this was the role of the Creator and the natural environment. Under such a worldview, then, the women’s role as humans and as stewards was to simply collect what was needed from within the forest’s natural domain.

⁵⁶ See ULLOA, KIPARÁ, *supra* note 11.

⁵⁷ Interwoven religious, artistic, and functional values are also present in Anasazi architecture. Specifically, Ragsdale discusses how the use of solar flows in Anasazi buildings was practical as well as celebratory, and that such systems helped create community with the sky. Ragsdale, *supra* note 1, at 405.

⁵⁸ *Chunga* is a thorny palm tree from which the blades are cut, split, and dried to produce a thread-like fiber that is used in weaving baskets.

While there are many other practices that illustrate the interconnectedness between the Emberá-Wounaan and their natural environment, these examples provide a sense of what it means to use the land and local resources in a way that is consistent with indigenous culture and underscores the importance of land ownership in maintaining such communal practices.

Thus, recognition of collective, indigenous territory by the Panamanian government is an issue that directly and intimately affects the rights of the Emberá and Wounaan—particularly the communities’ rights to own and occupy their own land, and to manage it in a way that is consistent with their respective cultures and forms of governance. To this end, one Panamanian indigenous leader was quoted in the literature I reviewed, saying “we have come fighting for [further] delineation of reservation lands, because [at the same time] it represents an equal fight for indigenous rights.”⁵⁹ While some time has passed since this remark was made, such sentiments were reiterated to me time and again during my field research. As Graciliano Cárdenas said at a community meeting in Manené, Darién: “The first step is passing a collective land titling law. The recognition of this system of ownership is a threshold issue...[and] equity and respect can only be gained through this.”⁶⁰ On another occasion, Wounaan leader Leonides Quiroz explained:

“The principal thing—before development—is legal and judicial recognition and ownership of ancestral lands. Until this is accomplished, we are prevented from developing or investing in any sort of infrastructure because the land is not yet officially ours, and before we know it, we could be on private property, like what has happened with the national parks. We’re imprisoned in the land essentially—land that we’ve occupied for three, four generations.”⁶¹

The value of land ownership in securing indigenous rights and autonomy is not only voiced by many Emberá and Wounaan people in Panama, but is also evident on a larger scale, as outlined specifically in the United Nations’ Declaration on the Rights of Indigenous Peoples that Panama signed in September 2007. In particular, the Declaration highlights the “need to respect and promote the inherent rights of indigenous peoples” as manifested in “their political, economic and social structures” stemming from “their cultures, spiritual traditions, histories and philosophies,” and specifically noting “their rights to their lands, territories and resources.”⁶²

VII. EFFECT OF OVERLAPPING SYSTEMS ON TRIBAL GEOGRAPHIC BOUNDARIES

At roughly 22,500 and 6,900, the Emberá and Wounaan comprise close to 10% of Panama’s indigenous population, and 1% of the nation’s population.⁶³ While other indigenous reservations in Panama (e.g. the Kuna and Nöbe-Buglé *comarcas*) accurately encompass the lands occupied by these tribes, more than three quarters of the Emberá-Wounaan population resides outside the bounds of their respective *comarca*.⁶⁴ Part of this may be attributed to the tribes’ dispersed settlement along the rivers of eastern Panama that occurred in response to

⁵⁹ DERECHOS TERRITORIALES, *supra* note 41, at 354 (quoting Bernardo Jaen) (author’s unofficial translation).

⁶⁰ Interview with Graciliano Cárdenas, *supra* note 50.

⁶¹ Interview with Leonides Quiroz, *supra* note 47.

⁶² See United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007) [hereinafter DRIP].

⁶³ Economic Commission on Latin America (ECLAC), LOS PUEBLOS INDÍGENAS DE PANAMÁ: DIAGNÓSTICO SOCIODEMOGRÁFICO A PARTIR DEL CENSO DEL 2000 37 (United Nations 2005), available at <http://www.eclac.org/publicaciones/xml/7/22277/LCW20-panama.pdf>.

⁶⁴ *Id.* at 35-39.

Spanish colonization in the 15th and 16th centuries, which made it difficult to outline distinct areas for reservations.⁶⁵ In 1972, however, the new Panamanian Constitution gave indigenous peoples a right to participate in the political system, and set forth a land reservation system for the seven tribes present in the country: the Emberá, Wounaan, Kuna, Ngöbe, Bugle, Naso, and Teribe. The Panamanian government also created an office for indigenous affairs, and worked in conjunction with Wounaan and Emberá leaders to draft a bill known as Law 22 that declared the bounds of the Emberá-Wounaan Reservation. However, the resulting *comarca* only encompassed 31 of 53 villages, and at present there are at least 37 Wounaan and Emberá communities located outside this legally-protected area.⁶⁶ Thus, Panama's Law 22, which delineated the indigenous reservations into two large blocks of territory in 1983, does not accurately reflect the settlement pattern of the Emberá-Wounaan. Thus, a large percentage of the Emberá-Wounaan currently live on what is referred to as *tierras colectivas*, or collective lands, that are not yet recognized as part of Panama's indigenous reservation system or otherwise semi-autonomous regions.

While the Emberá and Wounaan continue to occupy the land on which they have settled regardless of its status as state land, indigenous land, or reservation land, the benefits and protections afforded to those on reservation land are quite apparent. Article 5 of the Panamanian Constitution provides the avenue through which *comarcas*, or indigenous reservations, are created in an effort to ensure other social rights set forth in Article 127 of the same. Article 5 states that in addition to the country's political division into provinces, districts, and townships, "other political divisions" may also be created.⁶⁷ The resulting *comarcas*, then, are politically-autonomous lands held collectively by the indigenous group occupying it and are thus protected from appropriation.⁶⁸ Such recognition is extremely valuable—not only because land ownership itself is secured, but also because of the political and cultural autonomy that flow directly from it.

While the primary purpose of Panama's Law 22 is to establish and delineate the Emberá-Wounaan Reservation, it also outlines the bundle of rights associated with autonomous land ownership. The *Carta Orgánica Administrativa*, a 70-page booklet outlining Law 22, explicitly secures the right to 1) economic independence and development; 2) cultural discretion in the use and management of natural resources; and 3) the implementation of bilingual (Spanish-Emberá or Spanish-Woun Meo) education programs in grade school.⁶⁹

Although Article 127 of the Panamanian Constitution also recognizes general indigenous rights to property outside the *comarca*, the reality of that situation is quite different. The text of Article 127 notes that:

The State guarantees to indigenous communities the reserve of the necessary lands and collective property to achieve their social and economic well-being. The law shall regulate the procedures that are to be followed in order to achieve this end and the corresponding delineations, within which the appropriation of private property is prohibited.⁷⁰

⁶⁵ See VARGAS SARMIENTO, *supra* note 13, at 6.

⁶⁶ See Native Futures, *supra* note 21.

⁶⁷ CONST. POL. PAN., art. 5 (1972) (amended 1994), available at <http://pdba.georgetown.edu/Constitutions/Panama/panama1994.html> (author's unofficial translation).

⁶⁸ Ley No. 22 de 8 de Noviembre, Por la Cual se Crea La Comarca Emberá de Darién, No. 19.976 *Gaceta Oficial*, Jan. 14, 1984, available at http://www.asamblea.gob.pa/legispan/PDF_NORMAS/1980/1983/1983_016_1874.pdf.

⁶⁹ See *id.* at arts. 16-21.

⁷⁰ CONST. POL. PAN. at art. 127 (author's unofficial translation).

A broad reading of this text would imply that collective land rights for the Emberá-Wounaan can be obtained simply by recognizing that such ownership is necessary for the social and economic well-being of the group. While the formation of *comarcas* has accomplished this goal for a number of indigenous communities, Panama's Agrarian Code is what typically governs land usage and the land titling process for territory outside the reservations.⁷¹ Unfortunately, this unprotected territory is precisely where a large percentage of the Emberá-Wounaan people reside.

Collective land ownership outside the *comarcas*, then, is not secured or recognized as it is in Law 22. The Agrarian Code, which consists of a set of statutes that work in conjunction with the Panamanian Constitution, categorize all land as either state land or private property.⁷² The process for titling unoccupied state land through the Agrarian Reform agency requires that the individual petitioner 1) does not possess any other land (or is putting already-owned land to good use); and 2) promises to put the land in question to its best use.⁷³ The Code also indicates that those who currently occupy and cultivate the land are given priority over all others who may claim title to it.⁷⁴

Additionally, the Agrarian section of Panama's Constitution notes that "the State will pay special attention to the integrated development of the agricultural sector," will "encourage the maximum use/productivity of the soil," and will "guarantee every farmer the right to a proper existence."⁷⁵ Other statements that follow include the prohibition of "areas that are uncultivated, unproductive" and reiterate the national goal of "promoting the economic, social, and political participation" of the rural and the indigenous.⁷⁶ A reading of the Agrarian Code as its own cultural 'text' illustrates underlying national values of westernized agricultural practices, private land ownership, and a normative concept of 'best use.' It is also apparent that the national practice is to incorporate indigenous peoples into the larger scheme of land ownership and management rather than give deference to the customary methods employed by many indigenous farmers.

As noted, Panama's national land titling regime redefines territory and resources as either private or public, and thus replaces customary use and ownership practices. While customary practices often take the form of verbal agreements, legal ownership is based on written documentation that codifies overarching values of development and modernization as defined by the nation-state.⁷⁷ Heraclio Herera of Fundación Dobbo Yala, a Panamanian organization that advocates for indigenous land rights, has written extensively on the competing values of land usage among cultures. He notes that systems of traditional Emberá-Wounaan knowledge are based on practices in which geographical boundaries and time frames are not defined, and the predominant concept of collective land use is to create benefits through reciprocity rather than

⁷¹ COD. AGR. at art. 10 (indigenous land), art. 12(b) (distribution of national property), art. 12(d) (takings of private property), art. 22(a)-(b) (main classifications of land as either state or private property), art. 27(5) and commentary (indigenous land as an exception to state land) (Pan. 1962), available at http://webserv-mida.mida.gob.pa/MIDA/pdfsleyes/1962_ley_00037.pdf [hereinafter Agrarian Code].

⁷² *Id.* at art. 2.

⁷³ *Id.* at arts. 57, 58.

⁷⁴ *Id.*

⁷⁵ CONST. POL. PAN. at art. 122 (1972) (amended 1994) (author's unofficial translation).

⁷⁶ *Id.* at arts. 123-24 (author's unofficial translation).

⁷⁷ KANE, *supra* note 8, at 116.

individual, economic benefit.⁷⁸ As shown, however, the Agrarian Code supports land use that meets a subjectively-defined ‘social function,’ and only provides property titles for land that is being ‘worked’ (e.g. cultivated, occupied by cattle, or used for timber extraction).⁷⁹

In response to such difficulties, organizations like the Dobbo Yala Foundation and the Organization for Emberá-Wounaan Youth (OJEWY) have proposed and supported legislative amendments that would recognize the existing *tierras colectivas*, or collective lands, that many tribal members occupy. Currently, the bill referred to as Law 99 (which seeks to legalize the Emberá and Wounaan collective lands in Darién) has evolved into a law that will delineate *all* indigenous pueblos in Panama that remain outside the existing reservations.⁸⁰ This new legislation, Law 411, will establish a special process for the adjudication of collective lands of indigenous pueblos, and must pass both the primary and secondary House debates before it becomes an official law.⁸¹ While the legislative efforts thus far are promising, the issue is nevertheless a contentious one, and must pass the criticism of many Panamanian legislators. Most opponents of the *tierra colectiva* legislation argue that existing *comarcas* already provide a higher per-capita area of land than the rest of the Panamanian population, and that current indigenous land use practices are not the ‘best use’ when compared to other more commercially viable alternatives (e.g. timber extraction and cattle ranching).⁸²

VIII. EFFECTS ON ENVIRONMENTAL MANAGEMENT IN TRIBAL COMMUNITIES

While the issue of land titling has been at the forefront of the Emberá-Wounaan struggle for cultural and territorial recognition, it is also embedded within a larger, nationalized system that organizes people, territory, and resources. By the mid-1990s, significant international conservation and development funding was established in eastern Panama, with over \$110 million spent or otherwise allocated to the region by 2006.⁸³ Generally, these national and international policies and programs affecting the Emberá-Wounaan contradict the indigenous worldview and many customary laws because they define borders, project deadlines, and focus on individual and commercial gain.⁸⁴ At the same time, the Panamanian national government has struggled to reconcile what it means to support “development” when that definition can encompass very different, and often contradictory, practices.⁸⁵

The chart on the following page compares traditional environmental management practices of the Emberá with those endorsed by national government. Based on information from indigenous communities in the Chocó department of Colombia (where the National Utría Park of Colombia was formed), the chart has been used to identify culturally-appropriate methods of environmental management given the impending restrictions on land use there. As indicated, the primary methods of fauna management by the Emberá community (in the left hand column) involved the *jaibaná*, and centered on principles of reciprocity and knowledge between

⁷⁸ See Herrera, *supra* note 10, at 1.

⁷⁹ *Id.*

⁸⁰ E-mail from Adolfo Mezua, President, Organization for Emberá-Wounaan Youth (OJEWY) (Oct. 20, 2008, 10:52 CST) (on file with author).

⁸¹ *Id.*

⁸² Economic Commission on Latin America, *supra* note 63, at 35 (noting that while 10% of Panama’s population is indigenous, the *comarca* system occupies 20% of all land in the country).

⁸³ Julie Velásquez Runk, *Political Economic History, Culture, and Wounaan Livelihood Diversity in Eastern Panama*, 24 J. AGRIC. & HUMAN VALUES 93, 96 (2007).

⁸⁴ Herrera, *supra* note 10, at 2.

⁸⁵ Velásquez Runk, *supra* note 83, at 97.

humans and animals within the context of hunting. Meanwhile, the national method of management (in the center column) focused on delineated protected areas such as reserves or refuges that would be supplemented with domestication and farm-raising of other species for consumption. In the right hand column are the proposed management alternatives intended to meet the Park's conservation goals from a holistic standpoint but instead focus exclusively on indigenous practices *or* national management techniques (see below).

Cuadro 4. 2. Tipos de manejo de fauna de caza y alternativas preseleccionadas por los embera para su análisis.

MANEJO EMBERA DE LA FAUNA	MANEJO SOCIEDAD NACIONAL(LEGAL Y CIVIL)	ALTERNATIVAS PRE-SELECCIONADAS
Relación de reciprocidad simbólica con los animales: Prácticas del jaibaná		Control del jaibaná
Relación de reciprocidad simbólica con animales: Prácticas del jaibaná Producción poliactiva Conocimiento de la fauna Interrelación de espacios de uso Rotación de áreas de caza Agricultura itinerante Cacería trashumante	Área protegida Áreas de uso con restricciones: Territorio fáunico Cotos de caza Reservas de caza Zonas Fuentes de fauna Reservas comunales Rotación de áreas de caza	Refugios
Cacería selectiva Producción poliactiva Relación de reciprocidad simbólica con animales: Prácticas del jaibaná Conocimiento de la fauna	Regulación del uso de la fauna Vedas	Cacería selectiva o Vedas: Completa Época de cría Sexo Edad
Conocimiento de la fauna Producción poliactiva: Extensión de uso de recursos	Sustitución de fuentes de proteína.	Uso de nuevos recursos: Pesca Marina
Producción poliactiva Conocimiento de la fauna	Sustitución de fuentes de proteína.	Mejoramiento técnico de la cría de especies menores: Cerdos y gallinas
Relación de reciprocidad simbólica con animales: Prácticas del jaibaná Cría de mascotas	Zoocría: Repoblación. Comercio. Alimentación.	Zoocría: Alimentación

Chart illustrating respective methods of fauna management at local and national levels.⁸⁶

It is necessary, then, to look at environmental practices and societal values from both the indigenous and national viewpoints when forming comprehensive land use policies. In order to find a national-indigenous balance, however, it is essential to consider the underlying values and idiosyncrasies of all parties involved. Programs endorsed and drafted by international development agencies such as the Inter-American Development Bank (IADB), for example, may outline goals that are not embraced by the host-country nationals administering them. During

⁸⁶ ULLOA, TRUA WUANDRA, *supra* note 25, at 170. See Appendix A for author's unofficial translation.

my field research in 2006, one development agent in particular referred to tribal organizations and their land management as ‘others’ that implicitly complicated his work.⁸⁷ Surprisingly, though, this individual was in charge of implementing local projects that focused on land title acquisitions in precisely those communities. By the same token, national programs that solely address the conservation of one resource (e.g. aquatics, fauna, or forestry) may neglect the important role of other socio-cultural and biological factors as they contribute to holistic Emberá and Wounaan livelihoods. For example, projects that focus only on forest resources may not first assess whether the use of this resource (e.g. fish or timber) is central to the community’s income-generation or independent sustenance. Likewise, projects that encourage the formation of farming or fishing cooperatives may be incongruent with local people’s resistance to develop close relationships with program administrators from state agencies.⁸⁸

Thus, while some integrated development and conservation plans have sought out and addressed indigenous viewpoints, much of the increased interaction between (inter)national and indigenous agents are attributable to the rising political role of the Emberá and Wounaan. By the mid-1980’s, after the creation of the *comarcas* via Law 22, the Emberá and Wounaan had developed two separate leadership bodies for those residing inside and outside the reservation.⁸⁹ As discussed earlier, the Wounaan and Emberá distinguished themselves politically in 1999 with the creation of yet another *congreso*, or political body, that incorporated Wounaan villages within and outside of the *comarca*.⁹⁰ As such, these *congresos* provided an opportunity for the Emberá and Wounaan to delegate leaders and spokespersons for each respective community, whereby local interests, viewpoints, and concerns could be taken to a national forum.

Astrid Ulloa, a Colombian anthropologist and researcher who has worked extensively with the Emberá, argues that indigenous peoples have increasingly used political scenarios as an opportunity to establish coalitions and relationships that provide even greater access to, and participation in, national and international political arenas.⁹¹ This has certainly proved true in the Emberá community of Manené, where political leverage has been used to advance a platform for collective land titling in the area. At the time of my field research, community leaders had suggested a strategy: they would offer their votes in favor of the Panama Canal expansion if the national government backing the project (and conducting the election for it) would advance the interests of the Emberá and Wounaan communities by supporting the *tierra colectiva* legislation. While attending a community meeting in Manené, members of the multi-ethnic Collective Land Committee explained to the community how the national Panamanian government needs the indigenous peoples’ support for canal expansion just as much as the indigenous communities rely on the nation-state for the health and educational services provided. As Graciliano, the Committee’s leader, proclaimed: “The land titling law has been under review and is up for approval in the government next month...this is the opportunity to gain leverage in canal votes. If we respect and support their vote, they must respect and support Law 99.”⁹² Throughout the same meeting, however, leaders continued to reiterate allegiance to the state (“we are

⁸⁷ Interview with [name withheld], Project Coordinator, in Darién, Panama (May 19, 2006) (notes from interview on file with author).

⁸⁸ Velásquez Runk, *supra* note 83, at 101.

⁸⁹ *Id.* at 96.

⁹⁰ *Id.*

⁹¹ ASTRID ULLOA, THE ECOLOGICAL NATIVE: INDIGENOUS PEOPLES’ MOVEMENTS AND ECO-GOVERNMENTALITY IN COLOMBIA 3 (2005) [hereinafter ULLOA, ECOLOGICAL NATIVE].

⁹² Interview with Graciliano Cárdenas, *supra* note 50.

Panamanian...this Canal means opportunity and employment for us”) amidst the adversarial backdrop of a gathering focused on using political leverage to advance indigenous rights.

Nevertheless, while these situations may provide the Emberá-Wounaan with opportunities to participate as equals in the nation’s political process, such methods of negotiation still have their downfalls. As Ulloa recognizes, western notions of individual property rights and ‘best use’ are, at times, in tension with the recognition of collective autonomy of indigenous peoples.⁹³ Specifically in environmental management programs, she states that:

The recognition of biodiversity as a new commodity that can be valued...and marketed...creates new political, economic, and cultural situations for indigenous people regarding the management of their resources. These situations...[are] problematic from a western perspective, particularly with respect to property rights among people who may not view nature as the possession of any one generation or something that should or can be sold.⁹⁴

Such sentiments are particularly relevant to communities like Manené, with its recent National Park designation. Traditional agricultural practices and lifestyles are now subject to regulation by the national government, which prescribes a combination of land preservation with non-traditional cultivation techniques and animal husbandry. Alonso, a retired village leader and active member of the Emberá community of Manené noted: “the Park is on top of us, pushing us...yet we haven’t received any benefit [from its new designation]. We can’t cut one tree—not even to use to make our *piraguas*,⁹⁵ which is [our] custom and is not commercial [activity].”⁹⁶ Alonso continued that now all farming and hunting activities as well as incoming cargo from the *piraguas* would have to pass through the Park authority. In addition to that, he explained:

“They bring in these seminars that tell us how to raise animals the way *they* do...but we’re adults. They told us how to grow corn, harvest plantains, and raise pigs...yet only the last seminar we had was on accounting (in conjunction with agricultural production), which was what we really needed to spend time on. I’ve got lots of certificates on how to plant trees and crops, though [laughs]...as if I didn’t know.”⁹⁷

In this sense, the Emberá of Manené have essentially become what Ulloa broadly refers to as “caretakers of their own cultures and territories” under westernized market-oriented values and preservationist assumptions.⁹⁸ Ulloa attributes this situation to the social construction of biodiversity as opposed to an indigenous, nature-based notion of biodiversity in which the environment would belong to and be cared for by everyone collectively. I would argue, however, that the situation in Manené arises from Panama’s power hierarchy, whereby national government ultimately controls the activity of indigenous people on their own collective land.

⁹³ ULLOA, ECOLOGICAL NATIVE, *supra* note 91, at 9-10.

⁹⁴ *Id.* at 9.

⁹⁵ *Piraguas* are traditional dugout canoes used by many Emberá and Wounaan communities along the rivers, and serves as the main mode of transportation. Additionally, the construction of a *piragua* is an exhausting, yet extremely important task in which most members of the community participate.

⁹⁶ Interview with Alonso Moreno in Manené, Pan. (June 15, 2006) (author’s unofficial translation) (interview and field notes on file with author).

⁹⁷ *Id.*

⁹⁸ ULLOA, ECOLOGICAL NATIVE, *supra* note 91, at 10.

Often times, Panama's national policies themselves are influenced greatly by the U.S. and others in the international arena. As noted by Alonso during one of our interviews, there was constant conflict between Park authorities and the village leaders with respect to the new regulations and how they affected the community. "We don't know if Manené is recognized as collective land by the authorities, though *they* want *us* to recognize it as the Park."⁹⁹ In this sense, Alonso is identifying indigenous values of respect, knowledge and reciprocity in the context of land, particularly how the recognition of land ownership differs depending on the perspective.

Other case studies, however, present a situation more favorable to the Emberá. The creation of Colombia's National Park in Utría is one example of how traditional law and customary practices among the Emberá have been used as a source of community project planning. In 1987, Colombia's Utría National Park was designated in an area that overlapped significantly with pre-existing Emberá communities—roughly 70% of the Park's area.¹⁰⁰ As a result, a series of biological and socio-cultural investigations were conducted in order to document indigenous natural resource use and then design integrated conservation projects to meet both local and national goals.¹⁰¹

The premise of these studies, and their resulting publications, is that environmental conservation plans are most effective when based on integrated, yet distinct, cultural frameworks of how to manage natural resources.¹⁰² Such a balance is achieved by looking at value systems, social dynamics, and perceptions at both and local national levels. The preservation of a particular animal species, for example, is one topic that illustrates the intersection of different cultural values and approaches. To the nation (or state agency) creating the Park, endangered species protection may be a goal based on the aesthetic values, biological factors, or international pressure from environmental organizations. For local indigenous groups, however, the goal of species protection may be driven by that animal's particular cultural value, its symbolism to tribal religion or world order, and importance as a food source.¹⁰³ Thus, these underlying values may dictate very different courses of action in fulfilling the same goal. While the nation-state may attempt to reach this goal by restricting hunting of that species, indigenous community members may rely on the *jaibaná* or other leader connected to the animal and spirit worlds to 'call' the animal back into the community.¹⁰⁴

Documented of development organizations, however, may not accurately reflect the everyday reality that the Emberá and Wounaan are living. As noted in the integrated plans for Colombia's Utría National Park, conflicts have arisen when politics and management plans are not jointly managed by both indigenous community members and the state.¹⁰⁵ While many state-sponsored agencies in Panama are now recognizing the Emberá and Wounaan worldviews and cultural practices, they are still overshadowed by dominant resource management plans that are incongruent with customary practices. As one Latin American indigenous leader proclaimed, "We are against development when it operates to benefit the national government and international agencies at the cost of indigenous territories."¹⁰⁶

⁹⁹ Interview with Alonso Moreno, *supra* note 96.

¹⁰⁰ See HERNÁNDEZ, *supra* note 16.

¹⁰¹ *Id.*

¹⁰² See generally ULLOA, TRUA WUANDRA, *supra* note 25.

¹⁰³ See *id.*

¹⁰⁴ HERNÁNDEZ, *supra* note 16, at 114.

¹⁰⁵ See generally ULLOA, TRUA WUANDRA, *supra* note 25.

¹⁰⁶ DERECHOS TERRITORIALES, *supra* note 41, at 354 (quoting Bernardo Jaen) (author's unofficial translation).

IX. INTERNATIONAL SUPPORT FOR TRIBAL-BASED MANAGEMENT

What options are available, then, to tribes whose land rights are not recognized or secured through collective land titling? Here, the land rights claims of the Emberá-Wounaan are analogous to those of the Awas Tingni of Nicaragua, an indigenous tribe whose legal battle for possession of ancestral lands set an international precedent.¹⁰⁷ When the issue of land recognition through a viable titling procedure was brought before the Inter-American Court of Human Rights (IACHR), the Court indicated that “it was not enough that the Nicaraguan Constitution and its laws recognize in general terms the rights of indigenous peoples.”¹⁰⁸ It is necessary for the government to provide an avenue through which they can secure the enjoyment of those rights, which is not being done.¹⁰⁹ Given the current titling regime in Panama, the Emberá-Wounaan residing outside the *comarca* are likewise unable to embrace their rights to cultural autonomy in the face of such a vague (and underinclusive) recognition of those rights.

Just as the Awas Tingni relied on a number of land provisions in the United Nations’ Declaration on the Rights of Indigenous Peoples,¹¹⁰ so too do the Emberá-Wounaan; this document helps garner international support in presenting a claim both in Panama and internationally. While Articles 8, 10, 25, 26, 29, and 32 all mention land rights specifically, the document as a whole protects the right to maintain cultural autonomy *through* land ownership (as well as other practices) rather than simply securing cultural or land rights exclusive of one another. The Declaration recognizes indigenous values of reciprocity and harmony by seeking to protect both culture and land in an integrated way. In particular, Article 26 of the Declaration, of which Panama is a signatory, states:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.¹¹¹

On April 28, 2007, eleven indigenous leaders in Panama signed a declaration outlining the goal of legal recognition of collective lands.¹¹² The Declaration states that despite the demarcation of five indigenous reservations created by Panama’s Law 22, the government has

¹⁰⁷ The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Court H. R., (Ser. C) No. 79 (Judgment on the merits and reparations of August 21, 2001), available at <http://www.elaw.org/resources/text.asp?id=1050>.

¹⁰⁸ S. James Anaya and 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. 8 (2002); available at <http://www.law.arizona.edu/journals/ajicl/AJICL2002/vol191/introduction-final.pdf>.

¹⁰⁹ *Id.* at 2.

¹¹⁰ See DRIP, *supra* note 62.

¹¹¹ *Id.* at art. 26.

¹¹² DECLARACIÓN DE LOS PUEBLOS INDÍGENAS DE PANAMÁ (Panama City, Apr. 28, 2007) (author’s unofficial translation) (on file with author).

still maintained a situation of social, economic, and territorial exclusion and marginalization of the country's indigenous people.¹¹³ For the Emberá-Wounaan, this is apparent in the territorial invasion of indigenous land by Latino farmers, logging companies, transnational mining corporations, and tourism enterprises.¹¹⁴ Such exploitation, however, is protected under the current agrarian regime and Panamanian law; while the statutes technically address indigenous land rights, no formal mechanism exists through which the Emberá-Wounaan may title communal, ancestral lands. However, the Emberá-Wounaan may nevertheless bring a claim against the national government through two distinct organizations: the United Nation's Human Rights Committee (UNHRC) or the Organization of American States (OAS).¹¹⁵

Within the UN structure, the Human Rights Committee (HRC) is a treaty-based organization responsible for enforcing the International Covenant on Civil and Political Rights (ICCPR). Since its inception, the HRC "has been active in examining government reports bearing upon the rights of indigenous peoples and in encouraging official policies and behavior in line with contemporary norms" as well as the policies outlined in the ICCPR.¹¹⁶ The ICCPR, of which Panama is a signatory, was adopted in 1966 and took effect in 1976.¹¹⁷ Under the Covenant, Articles 1 and 27 provide for the special rights of indigenous groups and their members. Article 1 indicates that "[a]ll peoples have the right to self-determination [and] by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."¹¹⁸ Article 27 focuses on the rights of individuals *within* the indigenous and minority groups themselves, stating that:

In those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.¹¹⁹

Article 27 has been broadly interpreted by the UNHRC, however, to protect indigenous groups' cultural integrity in addition to the individual protections outlined in the text.¹²⁰ While claims are traditionally brought by one state party against another,¹²¹ there is an Optional Protocol within the Covenant that enables individuals to bring claims for the violation of individuals rights like those covered in Article 27.¹²²

Since Panama has ratified the Optional Protocol, the Emberá-Wounaan are eligible to bring a claim for violation of their individual, cultural rights as outlined in the ICCPR and, more

¹¹³ *Id.* at 1.

¹¹⁴ *Id.*

¹¹⁵ For a fuller discussion of Wounaan land rights claims before the United Nations and Organization of American States, see Zachary McNish, *The Awá Tingni Decision and the Land Rights of the Wounaan Indigenous People of Eastern Panama* (Feb. 23, 2007) (unpublished manuscript, Duke University School of Law) (on file with author).

¹¹⁶ JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3, 229 (Oxford U. Press, 2d ed. 2004).

¹¹⁷ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

¹¹⁸ *Id.* at art. 1.

¹¹⁹ *Id.* at art. 27.

¹²⁰ ANAYA, *supra* note 116, at 229.

¹²¹ ICCPR, *supra* note 117, at art. 41.

¹²² Office of the High Commissioner for Human Rights, *Optional Protocol to the International Covenant on Civil and Political Rights*, art. 1, Dec. 16, 1966, 999 U.N.T.S. 302, available at http://www.unhcr.ch/thml/menu3/b/a_opt.htm (last visited Apr. 27, 2008) [hereinafter Optional Protocol].

specifically, Article 27. However, the Protocol requires that all domestic remedies be exhausted before a claim can be brought,¹²³ and the land-titling mechanism which the Emberá-Wounaan are demanding must be read implicitly from Article 27, as there is no specific reference to ancestral land rights and land titling processes.

In addition to relief through the United Nations, the Emberá-Wounaan may also consider bringing a claim through the Organization of American States (OAS). As a member of the OAS, Panama has adopted a number of treaties and conventions designed to protect indigenous rights—most notably the American Convention on Human Rights (American Convention).¹²⁴ The American Convention was adopted by the OAS in 1969, entered into force in 1978, and has since developed a Commission charged with investigating “human rights violations committed by governmental authorities” and making recommendations to those states charged with violations.¹²⁵

The Commission’s enforcement mechanism is the Inter-American Court of Human Rights (IACHR),¹²⁶ which acts principally to interpret and apply the Convention.¹²⁷ Like the Optional Protocol provision of the United Nations’ ICCPR, all domestic remedies must have been exhausted before a petition alleging a violation of rights may be filed with the Commission.¹²⁸ After deciding to accept the petition, the Commission makes a determination of whether a human rights violation occurred, and if affirmative, makes recommendations to the state in violation.¹²⁹ If the nation state fails to comply with the recommendations set forth by the Commission, the case may be referred to the Inter-American Court of Human Rights, which can then order a remedy and/or award compensatory damages.¹³⁰

The procedure available to the Emberá-Wounaan is much like that of the Awas Tingni in Nicaragua. Because Panama is a signatory to the Convention and has recognized the binding jurisdiction of the Inter-American Court on Human Rights,¹³¹ the Emberá-Wounaan may file a petition with the Commission regarding their right to communal land-titling mechanisms after having exhausted all domestic remedies. If the Commission determines that the conflict may not be resolved between the Emberá-Wounaan and the Panamanian government—as was the case with the Awas Tingni and the Nicaraguan government—it has the authority to refer the case to the Inter-American Court. Based on the success of the Awas Tingni in gaining possession and titling of ancestral lands through this Court, this international precedent could greatly aide the Emberá-Wounaan in their struggles with such issues.

¹²³ *Id.* at art. 2.

¹²⁴ Organization of American States, Department of International Law, *Multilateral Treaties*, <http://www.oas.org/juridico/english/Sigs/b-32.html> (last visited Mar. 15, 2009) [hereinafter *Multilateral Treaties*].

¹²⁵ Secretariat of the Inter-American Court of Human Rights, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 45, July 2003, 9 OEA/Ser.L/V/I.4 Rev. 9, available at <http://www.corteidh.or.cr/docs/libros/Basingl01.pdf>.

¹²⁶ *Id.* at 14.

¹²⁷ *Id.* at 15-16.

¹²⁸ Organization of American States, Inter-American Commission on Human Rights, *What is the IACHR? Commission Processing of Individual Cases*, <http://www.cidh.oas.org/what.htm> (last visited Mar. 15, 2009).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Multilateral Treaties*, *supra* note 124.

X. CONCLUSION

This work has examined how overlapping systems of tribal (Emberá-Wounaan) law and national Panamanian law have led to the formation of the tribe's geographic boundaries, and the increasingly complex environmental management in tribal communities outside the Emberá-Wounaan reservation, or *comarca*. The relationship between indigenous and national legal systems becomes most apparent in areas of enacted law and in development projects like national park designation that, while implemented in indigenous communities, are nevertheless problematic due to the western ideals they embody. By viewing indigenous cultural practices as 'texts' from which we can identify underlying values and sources of law, I argue that we can better understand the conflict between the Emberá-Wounaan community and the national Panamanian government with regards to collective land titling. Given the United Nation Declaration on the Rights of Indigenous Peoples and the case of the Awas Tingni, the Emberá-Wounaan may prove successful in bringing a claim for collective land titling before an international forum if domestic avenues of relief prove ineffective.