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Submission to the 77th General Assembly Report
The situation in Guyana, South America: Protected Areas and Amerindian Peoples' Rights

The State of Guyana

- **Cannot take away Amerindian land in order to create a protected area**
- **Cannot create a protected area over any land owned by Amerindian communities**
- **Can create a protected area over land which is owned by the State but cannot interfere with traditional Amerindian rights over that land**

1. The Justice Institute Guyana expresses its deep appreciation to the Special Rapporteur for his work and for the opportunity to make this submission.

Context: Land rights

2. Protected areas sit within a framework of national law which either protects or fails to protect indigenous land rights.
3. Indigenous land rights are grounded in indigenous systems of law and occupation of land. Indigenous land ownership should encompass all the normal rights that go with ownership as determined by the indigenous landowners and should be recognised in national law.
4. Amerindian land rights in Guyana may be indigenous land rights based on pre-colonial rights or they may be non-indigenous land rights held by Amerindian peoples who entered Guyana after colonisation.[1]
5. Amerindian peoples have been in Guyana for thousands of years. All of these peoples have indigenous land rights. However there is historical evidence that Amerindian peoples moved into Guyana in the seventeenth and eighteenth centuries after colonisation by the Dutch, in the nineteenth century after the transfer of sovereignty to the British and in the twentieth century. These Amerindian peoples[2] are not able to claim 'indigenous land rights' based on pre-colonial presence. However under national law they are entitled to claim land that they occupy and use or with which they have a cultural or spiritual attachment.[3]

[1] See '*Indigenous Land Title in Guyana – four obstacles to consider*' The Commonwealth Lawyer Vol 31, No. 2 August 2021 *Melinda Janki*

[2] For example the Wapichan, the Arecuna and some Arawak and Warrau peoples

[3] See '*Amerindian land claims settlements – an alternative Commonwealth model*? The Commonwealth Lawyer Vo. 15 No. 2 August 2006 *Melinda Janki*

6. In 2006, the land claims process was put into a modern statute – the Amerindian Act - incorporating the principles of the then draft United Nations Declaration on the Rights of Indigenous Peoples. The Amerindian Act 2006 was developed in consultation with Amerindian peoples and Amerindian organisations across Guyana.

7. There is archaeological evidence that while dense populations and elaborate socio-political systems developed elsewhere, in the Guianas the 'pattern of small semi-permanent villages and simple kinship based societies was never superseded.'[4] The land claims and titling process reflects this reality. Over 100 Amerindian communities hold title to the land that they occupy and use. All Amerindian land titles are held collectively, are absolute and forever. By law Amerindian peoples are prohibited from selling or giving away their land – the land must remain with the people.

8. The titles encompass all of the normal rights of ownership i.e. land and everything on the land. The forests and the carbon in those forests is owned by the community not the State. Land title excludes ownership of minerals. However by law the Amerindian landowners control access to all minerals and therefore no mining is permissible without the free prior informed conditional consent of the landowners.[5]

Prohibition on taking Amerindian Land

9. Once an Amerindian land claim has been settled the Amerindian landowners obtain a title that is collective, absolute and forever. The land is then demarcated and a map issued. Amerindian land ownership is protected as private property under the Constitution and cannot be taken by the State. The provision in the Constitution which would once have allowed the State to take Amerindian land in order to protect or manage it must now be read subject to the constitutional prohibition on discrimination, the constitutional right to equal protection of the law, and the constitutional right to protection of indigenous cultural heritage and way of life. By law the State cannot take any Amerindian land for conservation or any other purpose.

Prohibition on creating a protected area over Amerindian land

10. Section 58(2) of the Amerindian Act 2006 states that no protected area can be established over lands owned communally by Amerindians unless they give their consent.

[4] Evans and Meggars, *Archaeological Investigations in British Guiana*, Smithsonian Institute 1960 P346

[5] See '*The Amerindian Veto over Mining*' IBA Current Practice Vol 3 No 2 September 2007, *Melinda Janki*

Prohibition on interfering with rights

11. Section 58(3) provides that the State may create a protected area over land that is being occupied or used by an Amerindian community which does not have a title to the land. However the State may not alter or abrogate any traditional rights unless the Amerindian community gives its consent in writing. Furthermore the Amerindian community which has the traditional rights must be consulted about the management of the protected area. Such consultation must be adequate not token.
12. In practice the Amerindian community should claim the land and obtain legal title to the land and a map showing the boundaries of the land. This then removes the power of the State to interfere with the land.

The right to create a protected area

13. Once a land claim is settled and the title is issued, Amerindian councils determine how the land is to be used. The councils can make rules for the management, use, preservation, protection and conservation of their lands and resources as well as access to sites of sacred or cultural significance.[6] They can set up their own protected areas. Amerindian councils control access to the land and resources as well as traditional knowledge and intellectual property.[7]

Kanashen – the WaiWai protected area

14. Kanashen is an example of best practice. It implements Article 25 of the UN Declaration on the Rights of Indigenous peoples which states that:

> "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."

15. Kanashen is the largest protected area in Guyana. It is approximately 648,000 hectares. It is owned by the WaiWai people under an absolute title. They control the headwaters of the Essequibo, Guyana's largest river. The protected area, also known as the 'Community Owned Conservation Area' was established by the WaiWai people, not by the government. It was legally recognised in 2007 through subsidiary legislation made under the Amerindian Act 2006 by the WaiWai Council

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[6] Section 14(1) of the Amerindian Act 2006

[7] See 'Protecting Amerindian traditional knowledge: a brief look at Article 8(j) and the Amerindian Act 2006.' New Guyana Bar Review 2011 *Melinda Janki*

and published by the Minister [8].

16. As absolute owners of the land, the WaiWai control access to their territory. They determine who may or may not visit them and on what conditions. The government has no say over the protected area and no right to interfere in the management of the territory.

17. The WaiWai protected area is also recognised under the Protected Areas Act 2011 as an Amerindian Protected Area[9]. This makes it eligible for funding under the Protected Areas. Control remains with the WaiWai people and their council.

18. The WaiWai Protected Area enables the WaiWai to maintain their relationship with their land as they think best. It is a model for other countries to consider.

19. Under the Amerindian Act 2006, Amerindian peoples speak for themselves through their communities and their councils and have legal self-determination within the boundaries of Guyana as a sovereign state. No civil society organisation can speak for any Amerindian community. Nevertheless the WaiWai faced considerable opposition when they sought to obtain title to their land and to set up their protected area. The opposition came from the Forest Peoples Programme based in England and their local partner the Amerindian Peoples Association (APA).[10]

Iwokrama

20. The Iwokrama forest is a protected area established under the the Iwokrama Centre for Rain Forest Conservation and Development Act 1995 (the 'Iwokrama Act'). It is approximately 370,000 hectares. The area is divided between a wilderness reserve and areas for sustainable utilisation. The Iwokrama Act prohibits all mining, forestry and resource utilisation without the permission of the Centre which manages Iwokrama. However there is a statutory exception for Amerindian peoples. Section 6 of the Iwokrama Act says,

> **"**Nothing in this Act shall be construed to prejudice, alter or affect any right or privilege heretofore legally or traditionally possessed, exercised or enjoyed by any Amerindian who has a particular connection with any area of land within or neighbouring the Programme Site."

21. Traditional rights include hunting, fishing, farming, gathering, resource use and rights for subsistence and so on. These rights are exercised sustainably to ensure that future generations

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[8] 'Amerindian Village of Kanashen (Protection, Management, Operation and Research in the Conservation Area) Rules'.

[9] Declaration of Kanashen Village as an Amerindian Protected Area 18th August 2017

[10] See 'The WaiWai Protected Area – Our land: Our Life' in *Governance for Sustainability*, eds. Bosselman, Engel and Taylor (2008) *Melinda Janki & Cemci Sose (Kayaritomo/chief)*

are able to exercise those rights freely. A traditional privilege would be traditional mining for gold, diamonds etc. Only Amerindian peoples have such rights and privileges. It is illegal for Iwokrama to interfere with any traditional Amerindian rights or privileges.

22. Iwokrama also has obligation to consult and involve Amerindian communities under section 7 as follows:

> "To ensure adequate consultation with, and involvement of, the Amerindian community in the activities of the Programme, a process of dialogue and interchange of views with the said community shall be embarked upon by the Centre."

23. Iwokrama was set up under an agreement between the Government of Guyana and the Commonwealth Secretariat. Under that agreement, which forms a schedule to the Iwokrama Act, there is also a duty to recognise the Amerindian contributions to conservation as follows:

> "The Centre shall develop and adopt procedures for recognising and rewarding the contributions of Amerindian and other rural communities in the conservation and improvement of genetic resources of economically useful plant and animal species. The Centre shall also take steps to protect, recognise and reward the intellectual knowledge and contributions of indigenous communities in the field of sustainable forest management through an appropriate intellectual property rights system."

Kaieteur National Park

24. Kaieteur National Park was established by the British colonial government on 4th January 1930 by the Kaieteur National Park Act which completely prohibited all activities within the park and made no provision for Amerindian rights. Section 4 stated

> "It shall not be lawful for any person to enter into, travel or encamp within the park or to build any structure therein, or to hunt, chase, catch, shoot at, kill or otherwise disturb any animal or cut, pluck or gather any of the flora or interfere with or disturb the soil by mining or other operations within the park or to remove anything whatsoever from the park except in accordance with regulations made under this Act."

25. The law abrogated Amerindian rights, in particular the rights of the Patamona people, in the Kaieteur National Park. This colonial disregard for indigenous rights belongs in the past and was a text book example of how not to do conservation.

26. On 9th March 1999 the government passed an order which extended the park from around 6,500 hectares to 62,700 hectares. They did not protect Amerindian rights. Park officials began to enforce the restrictions in the extended area. They even chased Patamona children out of the area for gathering fruits. The Patamona people, led by the captain of Chenapau and members of

the Village Council, appealed to the President for the restoration of their rights in the extended area. The President immediately instructed the National Parks Commission to stop interfering with Patamona rights and culture. Following a discussion with Chenapau's lawyer[11] the President agreed to amend the law and restore the rights. The Kaieteur National Park (Amendment) Act 2000 was passed a year later. It provides for protection of Amerindian rights in the park.

27. Within the extended area of around 56,200 hectares all rights were restored. The assumption was that Amerindian rights were a part of sustainable forest and wildlife management. The amendment stated:

> "Nothing in this Act shall be construed as being in derogation of any right, privilege or freedom hitherto exercised by the Amerindian people, who shall continue to enjoy such right, privilege or freedom, to fish, hunt and generally to forage, and in so doing to promote sustainable forest and wild life management."

28. Within the original area of 6,500 hectares, the rights remained extinguished except that an unrestricted right to travel in and out of the area was restored.

Conclusion

29. Leaving aside the issue of regaining lost sovereignty, the strongest protection that indigenous peoples can have within a state is a legal title that is constitutionally protected and a map that correctly shows the boundaries of the land held by title. It would then be legally impossible for States to remove lands and resources from indigenous peoples for conservation, protected areas etc.

Biographical Note

This submission has been prepared by Melinda Janki an Attorney-at-Law in Guyana and an international lawyer who has worked with indigenous peoples around the world. Melinda was lead drafter of the Amerindian Act 2006 along with Dr Arif Bulkan. She was legal adviser to the WaiWai in the creation of their protected area. As director of the Justice Institute Guyana, Melinda developed and delivered training programmes on law and land rights to over a thousand Amerindian leaders and community members. Melinda's published study 'West Papua and the Right to Self-determination under International Law' is the foundational legal text for Papuan self-determination. It has been translated into Bahasa and distributed within Indonesia by the Papuan peoples.[12]

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[11] Melinda Janki

[12] https://www.ilwp.nl/team_member/melinda-janki/