The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System

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I. INTRODUCTION

One of the most notable features of the contemporary international human rights regime has been the recognition of indigenous peoples as special subjects of concern. A discrete body of international human rights law upholding the collective rights of indigenous peoples has emerged and is rapidly developing.[1]

In 1948, the Organization of American States General Assembly took initial steps toward recognition of indigenous peoples as special subjects of international concern in article 39 of the Inter-American Charter of Social Guarantees. It required states in the Inter-American system to take "necessary measures" to protect indigenous peoples' lives and property, "defending them from extermination, sheltering them from oppression and exploitation."[2] This regional recognition was followed by the adoption of the first multilateral treaty devoted specifically to recognizing and protecting in-

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1. *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (1996) [hereinafter INDIGENOUS PEOPLES]; Siegfried Wiessner, *The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660; W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT'L L. 350 (1995).

2. *Inter-American Charter of Social Guaranties*, *at* Art. 39 (1948), *reprinted in* ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 432, 433 (Edmund Jan Osmanczyk ed., 1990) [hereinafter *Inter-American Charter of Social Guaranties*].

digenous peoples' human rights, International Labour Organization Convention No.107 of 1957.[3]

The modern indigenous rights movement gained momentum in the 1960s and 1970s, when indigenous peoples in the Americas, Australia, New Zealand, and other parts of the world began to draw increased attention to their demands for continued survival as distinct communities with historically based cultures, political institutions, and entitlements to land. These efforts led to a number of important international conferences and heightened attention from scholars and international nongovernmental organizations.[4]

By the late 1970s, indigenous peoples' representatives began appearing before United Nations and other human rights bodies in increasing numbers and with increasing frequency, grounding their concerns on generally applicable human rights principles.[5] Since that time, a steady stream of important developments and responses to the concerns of indigenous peoples has issued from the international human rights system. Indigenous peoples prompted the International Labour Organization (ILO) to discard Convention No. 107's assimilationist bias, which reflected the 1950s era in which it was passed. The resulting new multilateral treaty—ILO Convention No. 169 of 1989[6]—has been ratified and is now binding on several states in the Americas and elsewhere. The establishment of the United Nations Working Group on Indigenous Populations in 1982 and the Working Group's promulgation of the Draft United Nations Declaration on the Rights of Indigenous Peoples, which is presently under review by the U.N. Commission on Human Rights, have focused even greater international attention on the protection of indigenous peoples' rights.[7]

New international standards concerning the rights of indigenous peoples have significantly influenced the work of several international human rights bodies and other international institutions. The U.N. Human Rights Committee and the U.N. Committee on the Elimination of Racial Discrimination now regularly apply the prevailing understandings of indigenous peoples' rights reflected in the newly articulated standards. They draw heavily on these understandings when they monitor human rights situations involving indigenous groups. Even beyond the formal human rights process, the discourse of indigenous human rights now affects the lending processes of the World Bank, the Inter-American Development Bank, the European Union, and the domestic legislation and policies and judge-made law of

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3. *Convention concerning the Protection and Integration of Indigenous Populations and Other Tribal and Semi-Tribal Populations in the Independent Countries*, Jun. 2, 1959, 107 I.L.O. 1957 [hereinafter *Convention No. 107*].

4. *See* INDIGENOUS PEOPLES, *supra* note 1, at 46.

5. *Id.*

6. *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, Sept. 5, 1991, 169 I.L.O. 1989 [hereinafter *No. 169*].

7. *See* Williams, *supra* note 1, at 676–83.

states.[8] All of these important developments reflect the ever-increasing interdependencies, ever-improving communications technologies, and burgeoning international institutions that characterize the contemporary international system and its human rights regime of norms and related procedures.

At the regional level in the Americas, where a large part of the world's indigenous peoples live and struggle for cultural survival, the Inter-American system for the protection of human rights, which functions within the Organization of American States (OAS), has responded to the concerns of indigenous peoples. The OAS Inter-American Commission on Human Rights, in consultation with OAS member states and indigenous peoples' representatives, has prepared a Proposed American Declaration on the Rights of Indigenous Peoples.[9] In reporting on the human rights conditions of particular OAS member states over the last several years, the Commission has focused on the concerns of indigenous peoples.[10] Further, it has accepted several important human rights complaints, which it is currently investigating, brought by indigenous peoples against various OAS member states.[11] The Commission has gone so far as to prosecute one of those cases, the *Awas Tingni Case* from Nicaragua, before the OAS Inter-American Court of Human Rights, which has the authority to issue decisions that are binding on states as a matter of international law.[12]

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8. *See* Robert A. Williams, Jr., *Sovereignty, Human Rights: Indian Self-Determination and the Post-Modern Legal System*, 2 REV. CONST. STUD. 146 (1995).

9. *See* Proposed American Declaration on the Rights of Indigenous Peoples, Art. XVIII, approved by the Inter-American Commission on Human Rights at its 133rd session on February 26, 1997, in OEA/Ser L/V/II.95.doc.7, rev. 1997 [hereinafter Proposed American Declaration]. *See generally,* Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297, 306 (1994–95); David J. Padilla, *The Inter-American Commission on Human Rights of the Organization of American States: A Case Study*, 9 AM. U. J. INTERNATIONAL L. & POLICY 95 (1993).

10. *See e.g.*, Inter-Am. C.H.R., *Report on the Human Rights Situation in Ecuador*, OEA/Ser.L./V./II.96, doc. 10 rev. 1 (1997) [hereinafter Report on Ecuador]; Inter-Am. C.H.R., *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L./V./II.102, doc. 9 rev. 1 (1999) [hereinafter Report on Colombia]; Inter-Am. C.H.R., *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L./V./II.106, doc. 59 (2000) [hereinafter Report on Peru]; Inter-Am. C.H.R., *Report on the Situation of Human Rights in Mexico*, OEA/Ser.L./V./II.106, doc. 7 rev. 1 (1998) [hereinafter Report on Mexico]; Inter-Am. C.H.R., *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V./II.97, doc. 29 rev. 1 (1997) [hereinafter Report on Brazil].

11. *See The Human Rights Situation of Indigenous Peoples in the Americas*, Inter-Am. C.H.R., OEA/Ser.L./VII.108, doc. 63 (2000) (text of decisions by Inter-American Commission on Human Rights concerning indigenous peoples). For a description of the Inter-American Commission's complaint procedure, *see* Dinah Shelton, *The Inter-American Human Rights System*, *in* GUIDE TO INTERNATIONAL HUMAN RIGHTS (Hurst Hannum ed., 3d ed. 1999).

12. *See* Caso La Communidad Mayagna (Sumo) Awas Tingni, Corte Interamericana D.H., Caso No. 11.577, sentencia de 1 de Febrero de 2000 [hereinafter *Awas Tingni admissibility decision*].

The Commission's complaint in this case was filed before the Court as a result of its decision on May 28, 1998 to present the case of the Awas Tingni Community Against the Republic of Nicaragua (case 11.577) to the Inter-American Court of Human Rights, in accordance with article 51 of the American Convention on Human Rights.

Within this context of increased international concern for indigenous peoples and their rights, the attention of the Inter-American system has focused on a central demand of the indigenous human rights movement: the protection of indigenous peoples' rights over traditional lands and natural resources.[13] Presently, the Inter-American system is dealing with at least four separate human rights complaints that raise the issues of whether indigenous peoples have rights over lands and resources on the basis of traditional use and occupancy patterns and the extent to which those rights are protected by international law, in the face of state action or neglect that fails to take account of traditional tenure. We, the co-authors of this present Article, participate in the legal representation of the individuals and communities in each of these four cases, which involve indigenous peoples in Belize, Canada, Nicaragua, and the United States.[14]

In this Article, we discuss the proposition central to the claims in these four cases, the proposition that the Inter-American human rights system recognizes and protects indigenous peoples' rights over their traditional lands and resources, and that it establishes for states corresponding international legal obligations. This assertion is grounded in several sources including provisions of the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, related processes within the Inter-American system, and other international instruments and authoritative decision processes. We further refer to domestic legislation and judicial decisions and to the voluminous literature and studies directed at indigenous peoples generated over the past quarter century by the U.N. and other international human rights institutions. We argue that this body of authority constitutes customary international law, which should inform any assessment of indigenous peoples' rights over lands and natural resources within the Inter-American system. Thus, the Inter-American human rights system possesses ample authority to respond positively and affirmatively to

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13. *See The Human Rights Situation of Indigenous People in the Americas*, *supra* note 11, chap. 3 sec. 2.

14. Professor Anaya, one of the co-authors of this Article, is the counsel of record of the community of Awas Tingni on the petition originally submitted to the Inter-American Commission in the Awas Tingni case. Professor Williams is the counsel of record for the National Congress of American Indians, which has filed an amicus curiae brief with the Inter-American Court in the same case.

Both co-authors are also involved in representing petitioners in the three other on-going human rights cases before the IACHR that are discussed in this Article. Professor Anaya is one of the attorneys for the petitioners in the Dann case presently before the Commission. *See* Mary and Carrie Dann against United States, Case No. 11.140, Inter-Am C.H.R. 99 (1999) [hereinafter *Dann admissibility decision*].

He is also one of the attorneys for the petitioners in the Belize case, presently before the Commission. *See* Maya Indigenous Communities and their Members against Belize, Case No. 12.053, Inter-Am C.H.R. 78 (2000) *available at* www.cidh.org/annualrep/2000eng/ChapterIII/Admissible/Belize12.053.htm (last visited Feb. 27, 2001), [hereinafter *Belize admissibility decision*].

Professor Williams is lead counsel for the petitioners in the Carrier Sekani Case, *see* Case 12.279 (Canada) Amended Petition and Response to the Inter-American Human Rights Commission submitted by the Chiefs of the Member Nations of the Carrier Sekani Tribal Council against Canada.

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the claims made by the indigenous peoples in these cases. But further than this, we urge the state actors and other decision makers in these cases to recognize and protect the rights of indigenous peoples in their traditional lands and resources.

Part II will discuss four cases, all currently under consideration within the Inter-American system. Part III will address the protections provided to traditional land and resource tenure by Inter-American human rights instruments and U.N. treaties. Part IV surveys international and domestic practices that together demonstrate emerging customary law regarding indigenous property rights. Part V discusses the specific state obligations that result from Inter-American human rights protections of indigenous lands and natural resources.

II. Indigenous Human Rights Complaints Presently Before the Inter-American Human Rights System

Of the four noted indigenous human rights cases presently working their way through the Inter-American system, by far the most significant developments are occurring in the *Awas Tingni Case*.[15] The case originated with a petition to the Inter-American Commission on Human Rights[16] charging Nicaragua with failure to take steps necessary to secure the land rights of the Mayagna (Sumo) indigenous community of Awas Tingni and of other Mayagna and Miskito indigenous communities in Nicaragua's Atlantic Coast region. The case is now before the Inter-American Court of Human Rights, which held a three day hearing on the merits of the case in November 2000 at the Court's chambers in Costa Rica, after unanimously rejecting Nicaragua's effort to have the case dismissed on grounds of failure to exhaust domestic remedies.[17] This case is the first ever heard by the Inter-American Court in which the central issue is indigenous collective rights to traditional lands and natural resources.

The case revolves around efforts by Awas Tingni and other indigenous communities of Nicaragua's Atlantic Coast to demarcate their traditional lands and to prevent logging in their territories by a Korean company under a government-granted concession. In 1998, the Inter-American Commission on Human Rights ruled favorably on the merits of the petition filed by the Awas Tingni community and recommended appropriate remedial action. The Commission's decision coincided with a judgment by the Supreme Court of Nicaragua establishing the illegality of the logging concession to the Korean company because of a procedural defect.[18] When Nicaragua con-

15. *See Awas Tingni admissibility decision*, *supra* note 12.

16. *See* S. James Anaya, *The Awas Tingni Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers, and Governmental Neglect in Nicaragua*, 9 St. Thomas L. Rev. 157, 165 (1996).

17. *See Awas Tingni admissibility decision*, *supra* note 12.

18. *See* Press Release, Indian Law Resource Center, Nicaragua is Sued before the Inter-American Court of Human Rights (July 13, 1998) *available at* http://www.indianlaw.org/nicaragua_is_sued.htm (last

tinued its refusal to demarcate Awas Tingni and other indigenous traditional lands, despite domestic constitutional and statutory provisions requiring the state to guarantee indigenous communal lands,[19] the Inter-American Commission itself took the case to the Inter-American Court of Human Rights. In agreement with Awas Tingni, the Commission alleges that both the logging concession and the ongoing failure of Nicaragua to demarcate indigenous land constitute violations of the right to property affirmed in article 21 of the American Convention on Human Rights and of the correlative duties of articles 1 and 2 of the Convention to guarantee the rights of the Convention.[20]

Because the Inter-American Court possesses the power to require states that have consented to its jurisdiction (as has Nicaragua) to take remedial measures for the violation of human rights, the *Awas Tingni Case* will likely establish an important precedent on indigenous land rights under Inter-American and international law. The case has already attracted significant attention worldwide from indigenous, environmental, and human rights groups, as well as influential media coverage.[21] Significantly, the World Bank has conditioned a financial aid package set for Nicaragua on the development by the government of a specific plan to demarcate the traditional lands of the Miskito and Mayagna communities.[22] This was the first time that the World Bank had placed such a condition on an aid package.

The Inter-American Commission on Human Rights is actively involved in investigating and adjudicating petitions in three other cases involving assertions of indigenous peoples' rights to their traditional lands and resources. Among others, these cases have arisen in Belize, Canada, and the United States. Unlike Nicaragua, none of these countries is a party to the American Convention on Human Rights. However, under the Commission's Statute and Regulations, the Commission may adjudicate petitions against states that are not parties to the Convention by reference to the American Declaration on the Rights and Duties of Man.[23] Thus, the petitions in each of these cases allege violations of the American Declaration, as well as of other sources of international human rights law.

In October 2000, the Inter-American Commission declared admissible a petition filed in 1998 by the Toledo Maya Cultural Council (TMCC) on behalf of thirty-seven indigenous Maya communities in the Toledo District of

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visited Feb. 27, 2001). *See also* S. James Anaya, *The Awas Tingni Petition*, *supra* note 16.

19. *See* CONSTITUCION POLITICA Art. 5 (Nicar.).

20. *See Awas Tingni admissibility decision*, *supra* note 12.

21. *See e.g.*, Julia Preston, *It's Indians vs. Loggers in Nicaragua*, N.Y. TIMES, June 25, 1996, at A8.

22. *See* World Bank—Ministry of Agriculture and Forestry, *Sustainable Forestry Investment Project*, PID 52080, (*appraisal date* July, 7 1998) (Nicaragua), *available at* http://wbln0018.worldbank.org/NiSFIP/NiSFIPOL.nsf/11ab7b3e4d19f4328525660c0077aefb/6f4cdbb67981710d8525670d00494442?OpenDocument (updated Feb. 3, 1999).

23. *See* Statute of the Inter-American Commission on Human Rights, art. 20; Regulations of the Inter-American Commission on Human Rights arts. 51–54. *See generally* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, *supra* note 11 at 124.

southern Belize. The petition protests government grants of logging and oil concessions to over 700,000 acres of rain forest in Maya traditional territories and the government's failure to recognize and protect Maya traditional land and resource tenure outside of small, confining reservations that were established by the British colonial government decades ago.[24] In further action that same month, the Commission accepted a request for precautionary measures by the TMCC on behalf of the Maya. In an extraordinary measure, the Commission specifically called upon Belize to suspend all permits, licenses, and concessions for logging, oil exploration, and other natural resource development activity on lands used and occupied by the Maya communities in the Toledo District until the Commission has investigated the substantive claims raised in the case.[25]

Significantly, the Inter-American system's recent and increased scrutiny of state action affecting indigenous peoples' rights in their traditional lands and resources reaches into all parts of the hemisphere. The Inter-American Commission has examined situations, similar to the ones concerning indigenous peoples in Belize and Nicaragua, in other countries throughout Central and South America.[26] The international human rights community has long recognized that some of the world's worst abuses of indigenous peoples' human rights by states occur in this region. But the Commission also is currently examining two indigenous land rights cases that arise from disputes in the United States and Canada. The foreign affairs agencies of these North American countries often praise their own domestic legal and political systems as providing progressive and strong regimes of recognition and protection of indigenous rights. Nonetheless, the petitions submitted by indigenous peoples to the Inter-American Commission against the United States and Canada assert serious abuses of human rights that are anything but praiseworthy. Both cases involve the treatment of indigenous peoples' rights in their traditional lands and resources under international law, revealing that no state within the Inter-American system is above scrutiny where these rights are concerned.

In 1999, the Inter-American Commission ruled the case filed against the United States by Mary and Carrie Dann,[27] traditional Western Shoshone ranchers, admissible and stated that the alleged infringement of Western Shoshone ancestral land rights by the United States warrants consideration.

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24. *See Belize admissibility decision*, *supra* note 14.

25. Letter of Oct. 25, 2000, from Jorge E. Taiana, Executive Secretary, Inter-Am. Comm. H.R., to Messrs. Schaaf, Tullberg, and Anaya (informing of Commission's precautionary measures, under article 29.2 of its Regulations, calling upon "the State of Belize to take the appropriate measures to suspend all permits, licenses, and concessions for logging, oil exploration, and other natural resource development") (on file with authors).

26. *See, e.g.*, Report on Mexico, *supra* note 10; Report on Peru, *supra* note 10; Report on Ecuador, *supra* note 10; Report on Brazil, *supra* note 10; Report on Colombia, *supra* note 10; Inter-Am. C.H.R., *Special Report on the Human Rights Situation in the So-Called "Communities of Peoples in Resistance" in Guatemala*, OEA/Ser.L./V/II.86 doc. 5 rev. 1 (1994).

27. *See Dann admissibility decision*, *supra* note 14.

For nearly two decades the Dann sisters have asserted aboriginal title rights to Western Shoshone ancestral lands as a defense to efforts by the United States to deprive them of the use and enjoyment of those lands.[28] The United States regards the "gradual encroachment" by non-Indians as having extinguished Western Shoshone rights to ancestral lands. This view comes despite the continuing presence of Western Shoshone people. Additionally, the United States has permitted large-scale gold mining and other environmentally damaging activity on lands still used by the Western Shoshone. Having been denied a remedy through a labyrinth of domestic legal proceedings that ended in the United States Supreme Court,[29] the Danns turned to the Inter-American human rights system. On September 27, 1999, the Inter-American Commission, responding to the petition filed by the Dann sisters, issued its decision on admissibility, stating that the "Danns had invoked and exhausted domestic remedies of the United States" and that the petition was timely pursuant to the Commission's regulations. The Commission also concluded that, based on the facts alleged in the petition and subsequent submissions, the violations complained of are "continuing," "on going," and a *prima facie* violation of rights protected by the Inter-American system. On these bases, the Commission declared the Danns' case admissible.[30]

Finally, in May 2000, the Inter-American Commission formally initiated consideration of a complaint filed by the Carrier Sekani Tribal Council of British Columbia, Canada, asserting violations of the Carrier Sekani indigenous peoples' aboriginal rights to land and natural resources.[31] Submitted by the chiefs of the member First Nations of the Carrier Sekani Tribal Council, the case seeks to prevent the British Columbia provincial government from "reallocating" the timber rights in the Carrier Sekani peoples' traditional territory to large corporate logging companies.[32] The government undertook this reallocation despite then on-going treaty negotiations to settle long-standing issues surrounding Carrier Sekani land and resource rights under a process established by the British Columbia provincial government with the backing of the Canadian federal government.[33] The Inter-American Commission has twice requested the Canadian government to supply information relevant to the case, and convened a hearing on the case on March 2, 2000.

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28. *See generally* S. James Anaya, *Native Claims in the United States: the Unatoned for Spirit of Place*, *in* THE CAMBRIDGE LECTURES 1991 at 25, 28–32 (Frank E. McArdle, ed. 1993) (background on the Dann case and relevant domestic proceedings).

29. *See* United States v. Dann, 470 U.S. 39 (1985).

30. *See Dann admissibility decision*, *supra* note 14.

31. *See* Amended Petition and Response to the Inter-American Human Rights Commission submitted by the Chiefs of the Member First Nations of the Carrier Sekani Tribal Council against Canada, Mar. 1, 2000, Case No. 12.279. (As this Article was in the final stages of the publication process, the IACHR announced a hearing date of March 2, 2001, at which the CSTC and Canada would appear before the IACHR to address the issues raised in the petition.)

32. *See id.*, at paras. 2–4 and 43–48.

33. *See id.*, at paras. 3–4 and 38–48.

A great deal is at stake in these ongoing indigenous land and resource rights cases. Each concerns serious threats to the safe enjoyment of indigenous peoples' human rights, including threats to the cultural survival and physical well-being of entire indigenous communities. Furthermore, these cases test the coherence of the relationship of the American Convention and American Declaration to rules and principles of international law present in other international instruments and increasingly reflected in international practice. These cases complain of state actions that compromise the integrity of basic human rights principles.

III. Protection of Indigenous Peoples' Rights to Land and Natural Resources by Inter-American Human Rights Instruments and U.N. Treaties

Various human rights instruments of the OAS govern the adjudication of these cases now working through the Inter-American human rights system. In the *Awas Tingni* case, which arises from Nicaragua, the most important instrument is the American Convention on Human Rights, since Nicaragua is a party to that multilateral treaty, as are a majority of the OAS member states. The American Convention establishes both the procedures and substantive rights that govern the adjudication of complaints by the Inter-American Commission and Inter-American Court in relation to state parties to the Convention. As already noted, the three other cases are against OAS member states that are not parties to the American Convention, and thus the principal instrument for determining the applicable substantive rights for those countries in proceedings before the Inter-American Commission is the American Declaration on the Rights and Duties of Man. The Inter-American Court considers the American Declaration to articulate general human rights obligations of OAS member states under the OAS Charter, an organic multilateral treaty with the force of law.[34]

Although neither the American Convention nor the American Declaration specifically mentions indigenous peoples, both include general human rights provisions that protect traditional indigenous land and resource tenure. These include provisions explicitly upholding the rights to property and to physical well being and provisions implicitly affirming the right to the integrity of culture. Thus, provisions of the American Declaration and the American Convention affirm rights of indigenous peoples to lands and natural resources on the basis of traditional patterns of use and occupancy, especially when viewed in light of other relevant human rights instruments and international developments concerning indigenous peoples.

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34. The Inter-American Court on Human Rights has declared that the rights affirmed in the American Declaration are, at a minimum, the human rights that OAS member states are bound to uphold. *See Interpretation of the American Declaration of the Rights and Duties of Man in the Framework of Article 64 of the American Opinion*, OC-10/90 (Ser. A) no. 10 (1989), paras. 42–43.

Other human rights instruments that bear directly on an assessment of the rights and corresponding obligations of the parties include two major U.N. human rights treaties, the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Discrimination. Each of the states involved in the cases—Canada, Belize, Nicaragua, and the United States—is a party to the Covenant on Civil and Political Rights; and each, except for Belize, is a party to the convention against discrimination. Both of these UN human rights treaties include provisions that protect indigenous peoples' rights over land and natural resources. The Inter-American Commission on Human Rights has frequently interpreted the obligations of states under the American Convention and the American Declaration by reference to obligations arising from other international instruments.[35] The Commission has found a basis for this approach in article 29 of the American Convention, which states that "[n]o provision of this Convention shall be interpreted as . . . restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party."[36]

Interpretation of the American instruments by reference to other applicable treaties is supported by the *pro homine* principle, which favors integrating the meaning of related human rights obligations that derive from diverse sources.

A. *The Right to Property*

Indigenous peoples' traditional land and resource tenure is protected by Article 21 of the American Convention on Human Rights, which provides: "Everyone has the right to the use and enjoyment of his property."[37] Similarly, article XXIII of the American Declaration on the Rights and Duties of Man affirms the right of every person "to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and the home."[38] The right to property affirmed in these two in-

35. The Inter-American Commission has on several occasions affirmed its competence to determine state responsibility by reference to international instruments other than the American Declaration and the American Convention on Human Rights, when such other instruments are relevant to a case that is properly before it. *See, e.g.*, Case 11.137 (Argentina), Inter-American Commission on Human Rights Report 55/97, OEA/Ser.L/V/II.98 doc. 7 rev., at 271, para. 157 (applying international humanitarian law). The Commission's practice of applying sources of international law other than the American Convention on the American Declaration has been viewed with approval by the Inter-American Court of Human Rights. *See "Other Treaties" subject to the Advisory Jurisdiction of the Court (Art. 64 of the Amerrican Convention on Human Rights)*, Advisory Opinion OC-1/82 (Ser. A) no. 1 (1982), para. 43 (Inter-Am. C.H.R.).

36. Report on Ecuador, *supra* note 10 at 103, (citing article 29 of the American Convention).

37. American Convention on Human Rights, *adopted* Nov.22, 1969, Art. 21, O.A.S Treaty Series No.36, 1144 U.N.T.S. 123 (*entered into force* July 18, 1978), [hereinafter American Convention].

38. American Declaration of the Rights and Duties of Man, *adopted* 1948, Ninth International Conference of American States, Art. XXIII, O.A.S. Res. XXX, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, at 17, OEA/Ser.L/V.II.82, doc. 6 rev. 1 (1992)

struments must be understood to attach to the property regimes that derive from indigenous peoples' own customary or traditional systems of land tenure independently of whatever property regimes derive from or are recognized by official state enactments. The Inter-American Commission on Human Rights has supported this interpretation of the right to property in its Proposed American Declaration on the Rights of Indigenous Peoples:

> 1. Indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property.
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> 2. Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.[39]

Excluding indigenous property regimes from the property protected by the American Convention and American Declaration would perpetuate the long history of discrimination against indigenous peoples.[40] Such discriminatory application of the right to property would be in tension with the principle of non-discrimination that is part of the Inter-American human rights system's foundation.[41]

The traditional land tenure and natural resource use patterns asserted by the Awas Tingni Community of Nicaragua, the Maya in Belize, the Dann sisters of the Western Shoshone, and the Carrier Sekani Tribal Council in Canada are common to the indigenous peoples throughout the western hemisphere. Without depending upon official state enactments, such traditional land and resource use patterns create forms of property that are recognized and functional within and among indigenous communities.

At the outset, it should be emphasized that indigenous communities in the Americas as elsewhere will define property rights according to their own unique traditions and customs. There is no "universal," or one-size-fits-all definition of "indigenous property rights," that the Inter-American system can arbitrarily settle upon. Because each indigenous community possesses its own unique social, political, and economic history, each has adapted and adopted methods of cultural survival and development suited to the unique environment and ecosystem inhabited by that community. As a result, each indigenous community creates its own customary laws for governing its lands and resources. This process of *jurisgenesis* means that indigenous socie-

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[hereinafter American Declaration].

39. Proposed American Declaration, *supra* note 9, Art. 18.

40. *See Convention No. 107*, *supra* note 3.

41. *See* American Declaration, *supra* note 38, Art. II; American Convention, *supra* note 37, Art. 24.

ties' property rights systems possess the same particularity and divergence that characterize the property rights systems of non-indigenous societies.

Generally, however, among indigenous communities a group's particular system of land tenure is recognized as embodying a property rights regime. Within the corresponding system of indigenous peoples' customary norms, traditional land tenure generally is understood as establishing the collective property of the indigenous community and derivative rights among community members. An examination of indigenous peoples' own jurisprudence, including the jurisprudence of modern indigenous judicial institutions in the United States, reveals how decision makers in indigenous communities, or tribal judges, characterize the unique systems of property rights derived from their communities' land tenure systems.

Today, more than 150 indigenous judicial systems function in the United States. These institutions are part of the self-governance structures of modern Indian nations or tribes, and they regularly apply and develop the concept of "tribal law" or "customary law" in their legal decisions. The United States legal system recognizes these decisions as authoritative and enforces them under principles of judicial comity and full faith and credit in the state and federal courts of the United States.[42] The legal interpretations and understandings of indigenous peoples' property rights, found in the growing corpus of published judicial opinions by these modern tribal courts, consistently emphasize the *sui generis* nature of the traditional land and resource use patterns that constitute forms of property in particular indigenous communities.

The tribal courts of the Navajo Nation in the southwestern United States, for example, have articulated this principle of the *sui generis* character of property rights in their indigenous community in clear and illuminating terms.[43] The Navajo courts have consistently stressed that the property rights of the Navajo people derive from their unique cultural traditions and from Navajo land tenure. The Navajo Supreme Court explained the difference between Navajo land tenure and the land tenure system of the dominant United States society in the case of *Begay v. Keedah*:

> Traditional Navajo land tenure is not the same as English common law tenure, as used in the United States. Navajos have always occupied land in family units, using the land for subsistence. Families and subsistence residential units (as they are sometimes called) hold land in a form of communal ownership.[44]

The Navajo courts have stressed that land includes both cultural and economic dimensions that are of crucial importance:

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42. *See* David Getches et al., Federal Indian Law: Cases and Materials 656–57 (4th ed. 1998) [hereinafter Federal Indian Law].

43. *See id.* at 393–98.

44. 19 Indian L. Rep. 6021, 6022 (Navajo 1991).

> There are valuable and tangible assets which produce wealth. They provide food, income and the support of the Navajo People. The most valuable tangible asset of the Navajo Nation is its land, without which the Navajo Nation would [not] exist and without which the Navajo People would be caused to disperse . . . . Land is basic to the survival of the Navajo People.
>
> While it is said that land belongs to the clans, more accurately it may be said that the land belongs to those who live on it and depend upon it for their survival. When we speak of the Navajo Nation as a whole, its lands and assets belong to those who use it and who depend upon it for survival—the Navajo People.[45]

Thus, according to Navajo customary law, as with the customs and usages of many other indigenous communities, the ownership of land is vested in the indigenous community or group as a whole.[46] Navajo customary law does recognize, however, an individual property interest:

> Land use on the Navajo Reservation is unique and unlike private ownership of land off the reservation. While individual tribal members do not own land similar to off reservation, there exists a possessory use interest in land which we recognize as customary usage. An individual normally confines his use and occupancy of land to an area traditionally occupied by his ancestors. This is the customary use area concept.[47]

Another characteristic of indigenous property rights is that they often are not conceptualized in exclusive terms, but rather as recognized regimes of shared use and property rights between groups. Indigenous communities, for example, may migrate over time and may have overlapping land use and occupancy areas. Such patterns are simply characteristic of indigenous peoples' land tenure and resource use and do not undermine the existence or determinacy of their property rights.[48] The International Labour Organization's Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries of 1989, expressly recognizes this principle. It requires its state parties to obey the following: "Measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities."[49]

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45. Tome v. Navajo Nation, 4 Navajo Rptr. 159, 161 (Window Rock D. Ct. 1983).
46. *See* Yazzie v. Jumbo, 5 Navajo Rptr. 75, 77 (Navajo 1986).
47. *In re* Estate of Wauneka, Sr., 5 Navajo Rptr. 79, 81 (Navajo 1986).
48. *See, e.g.*, Mason v. Tritton, 34 N.S.W.L.R. 572, 581 (N.S.W. 1994) (Austl.); Strong v. United States, 518 F.2d 556 (Ct. Cl. 1975), *cert. denied*, 423 U.S. 1015 (1975); Confederated Tribes of Warm Springs Res. v. United States, 177 Ct. Cl. 184 (1966).
49. *See Convention No. 169*, *supra* note 6, Art. 14(1).

With their source in indigenous peoples' own customs and usages, and with characteristics that may diverge widely from property regimes that derive from state enactments, indigenous traditional and resource tenure regimes nonetheless constitute forms of property. The existence of indigenous property regimes does not depend on prior identification by the state, but rather may be discerned by objective evidence that includes indigenous peoples' own accounts of traditional land and resource tenure.

Indigenous peoples possess unique knowledge about the lands and resources that they have traditionally occupied or used, and to which they accordingly have rights under their own legal systems, as well as under domestic and international law. International and domestic legal institutions have come to recognize and respect that indigenous peoples' own knowledge can effectively establish the existence, scope, and characteristics of their traditional land tenure. In the *Awas Tingni Case*, the Inter-American Commission on Human Rights determined that the Awas Tingni community has property rights to its traditional land, on the basis of maps and other documentation developed by the community itself with the assistance of an anthropologist.[50] Similar documentation is being presented to the Commission in the *Maya*, *Dann*, and *Carrier Sekani* cases. An increasing number of state legal systems now recognize indigenous peoples' oral history and their own documentation and mapping of their lands as evidence in legal proceedings determining land rights. In addition, expert testimony from anthropologists, geographers and other qualified scholars with relevant knowledge of indigenous peoples' customs and culture is also recognized by domestic legal systems as relevant to establishing indigenous peoples' property rights based on traditional systems of land tenure.[51]

In *Delgamuukw v. British Columbia*,[52] the Canadian Supreme Court incorporated recognition of the customs of the Gitsxan and Wet'suwet'en band members into the common law of Canada. In reversing a lower court, which refused to credit oral testimony concerning the boundaries of the bands' ancestral homelands on the grounds that it was hearsay, the Canadian Supreme Court expressed grave concern that if oral history was not admitted to prove pre-contact claims, indigenous groups would find it impossible to provide evidence of their claims because their traditions are primarily oral.[53] The Canadian Supreme Court ordered a new trial, stating that the oral testimony, which consisted of traditional songs containing descriptions of the ancestral

50. *See generally Awas Tingni Admissibility Decision*, *supra* note 12, para. 22 (recounting the Inter-American Commission's finding of violations of the right to property in respect of the Awas Tingni community's lands).

51. *See generally U.N. Submission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination Against Indigenous Populations*, Jose Martinez Cobo, special rappateur, U.N.Doc.E/CN.4/SUB.2/1986/7 & Add. 4 at par. 217 (1986) ("Official recognition and subsequent registration should follow as a matter of course, once possession and economic occupation are proved.") [herinafter Martinez-Cobo Report].

52. Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010 (Can.).

53. *Id.* at 1066–69.

territory's metes and bounds, must be considered by the trial judge as evidence of the boundaries of the bands' historically occupied lands.[54]

In the United States, the Hawaii Supreme Court has recognized customary and traditional property rights of Hawaiian native peoples by reference to their oral testimony at trial.[55] And it is well established in the legal system of the United States that the testimony of qualified anthropologists, geographers, and other academic experts carries considerable weight in establishing indigenous peoples' property rights.[56] Australia's High Court, as reflected in the landmark case of *Mabo v. Queensland*,[57] has similarly recognized the relevance of indigenous peoples' oral testimony and expert academic opinions in establishing the existence, scope, and characteristics of indigenous peoples' traditional land tenure.

Thus, evidence of indigenous peoples' traditional and customary land tenure can be established by qualified expert and academic opinion, as well as by objective facts that can be discerned from the oral accounts and documentation produced by the indigenous communities concerned. Indigenous peoples' own knowledge will, in most instances, provide the most reliable proof of the existence of property rights entitled to protection under a state's legal system. Neither the international system, nor individual states should deny an indigenous groups' claimed property rights in land by excluding or ignoring evidence derived from the culture and traditions of the indigenous group or community itself.

To do so would be to perpetuate a long history of discrimination against indigenous peoples with regard to their own modalities of possession and use of lands and natural resources. In elaborating upon the requirements of the Convention on the Elimination of All Forms of Racial Discrimination, the UN Committee on the Elimination of Discrimination (CERD) has observed:

> In many regions of the world indigenous peoples have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms . . . and have lost their land and resources to colonists, commercial companies and State enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardized.[58]

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54. *Id.* at 1079, 1071–74.

55. *See* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982); Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992); Public Access Shoreline Hawaii (PASH) v. Hawai'i County Planning Comm., 79 Haw. 425, 903 P.2d 1246, *cert. denied*, 517 U.S. 1163 (1996).

56. *See* Pueblo of Taos, 15 Ind. Cl. Comm. 688, 694–95 (1965); United States v. Washington, 384 F. Supp. 312, *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

57. Mabo v. Queensland [No.2] (1992), 175 C.L.R. 1 (Austl.).

58. Committee on the Elimination of Racial Discrimination, General Recommendation XXIII on indigenous peoples, *adopted* at the Committee's 1235th meeting, 18 August 1997, CERD/C51/Misc. 13/Rev. (1997), para. 3 [hereinafter CERD General Recommendation on indigenous peoples].

Such patterns of discrimination against indigenous peoples cannot be allowed to persist in the modern world. Thus CERD has interpreted the convention against discrimination as requiring recognition and protection of indigenous peoples' own land and resource tenure systems,[59] consistent with the interpretation of the right to property under the American Convention and American Declaration advanced here.

In *Mabo v. Queensland {No.2}* the Australian High Court exemplified the adherence to equality principles that are required to eradicate the legacies of historical discrimination affecting the enjoyment of property.[60] In that landmark case, the High Court, reversing more than a century of Australian jurisprudence and official policy, recognized "native title": that is, a right of property based on indigenous peoples' customary land tenure. In the case's leading opinion, Justice Brennan characterized as "unjust and discriminatory" the past failure of the Australian legal system to embrace and protect native title. Earlier, in *Mabo v. Queensland {No.1}*,[61] Justices Brennan, Toohey, and Gaudron, in a joint judgement, expressed the Court's majority view that a legislative measure targeting native title for legal extinguishment was racially discriminatory and hence invalid. Regarding the indigenous Miriam people of the Murray Islands, the justices viewed the discriminatory treatment of their claim to native title as "impairing their human rights while leaving unimpaired the human rights of those whose rights in and over the Murray Islands did not take their origins in the laws and customs of the Miriam people."[62]

As the Australia High Court in *Mabo I* declared, legislation providing that the state owned all land not under formal title and ignoring indigenous peoples' historic occupancy violated Australia's Racial Discrimination Act of 1975, which implemented the United Nations Convention on the Elimination of All Forms of Racial Discrimination. The 1988 *Mabo I* decision thus rejected Queensland's defense that state law resolved the aboriginal challenge, opening the way for the court's 1992 landmark decision recognizing native title under Australian law.

Examined in light of the fundamental principle of non-discrimination enshrined in both the American Declaration and the American Convention, the right to property in these same instruments necessarily includes protection for those forms of property that are based on indigenous peoples' traditional patterns of land tenure. Failure to afford such protection to the property rights of indigenous peoples would accord illegitimate discriminatory treatment to their customary land tenure, in violation of the principle of equality under the law.

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59. *See id.*
60. Mabo [No.2], *supra* note 57.
61. Mabo v. Queensland [No.1] (1988), 166 CLR 186 (Austl.).
62. *Id.* at 218.

B. *Rights to Physical Well-Being and Cultural Integrity*

Typically for indigenous peoples, as for the indigenous communities in the cases now before the Inter-American system, land and natural resources are not mere economic commodities. The lands occupied and used by an indigenous community are crucial to its existence, continuity, and culture. The land and resource rights of indigenous peoples cannot be fully understood without an appreciation of the profound, sustaining linkages that exist between indigenous peoples and their lands. The U.N. Sub-Commission on the Promotion and Protection of Human Rights (formally the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities) is now conducting a study on "indigenous people and their relationship to land."[63] An issue of the study observes that, through their involvement over the years at the U.N.,

> indigenous peoples have emphasized the fundamental issue of their relationship to their homelands. They have done so in the context of the urgent need for understanding by non-indigenous societies of the spiritual, social, cultural, economic and political significance to indigenous societies of their lands, territories and resources for their continued survival and vitality. Indigenous peoples have explained that, because of the profound relationship that indigenous peoples have to their lands, territories and resources, there is a need for a different conceptual framework to understand this relationship and a need for recognition of the cultural differences that exist. Indigenous peoples have urged the world community to attach positive value to this distinct relationship.
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> . . . [A] number of elements . . . are unique to indigenous peoples: (i) a profound relationship exists between indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the inter-generational aspect of such a relationship is also crucial to indigenous peoples' identity, survival and cultural viability.[64]

Indigenous peoples' agricultural and other land use patterns provide means of subsistence, and, further, are typically linked with familial and social relations, religious practices, and the very existence of indigenous communities as discrete social and cultural phenomena.[65] Several rights articulated in the American Convention and the American Declaration sup-

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63. *Indigenous people and their relationship to land: Second progress report on the working paper prepared by Mrs. Erica-Irene A Daes, Special Rapporteur,* U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1999/18 (June 1999) [hereinafter *U.N. indigenous land rights study, second progress report*].

64. *Id.* paras. 10, 18.

65. *See id.*, at paras. 10–18.

port the enjoyment of such critical aspects of indigenous peoples' cultures, in addition to the right to property discussed above. These rights include the rights to life (American Declaration, article I, American Convention, article 4), the right to preservation of health and physical integrity (American Declaration, article XI, American Convention, article 5.1), the right to religious freedom (American Declaration, article III, American Convention, article 12), the right to family and protection thereof (American Declaration, articles V–VI, American Convention, article 17), and rights to freedom of movement and residence (American Declaration, article VIII; American Convention, article 22). The Inter-American Commission on Human Rights has observed that, "[f]or indigenous peoples, the free exercise of such rights is essential to the enjoyment and perpetuation of their culture."[66]

The right to cultural integrity is made explicit by article 27 of the Covenant on Civil and Political Rights, which states: "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."[67] Relying especially on article 27, the Inter-American Commission on Human Rights has affirmed that international law protects minority groups, including indigenous peoples, in the enjoyment of all aspects of their diverse cultures and group identities.[68] According to the Commission, the right to the integrity of, in particular, indigenous peoples' culture covers "the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands."[69]

In its Proposed Declaration on the Rights of Indigenous Peoples, the Commission once again articulated the obligation of states to respect the cultural integrity of indigenous peoples, expressly linking property rights and customs to the survival of indigenous cultures. Article VII of the Proposed Declaration, entitled "Right to Cultural Integrity" states:

> 1. Indigenous peoples have the right to their cultural integrity, and their historical and archeological heritage, which are important both for their survival as well as for the identity of their members.

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66. Report on Ecuador, *supra* note 10.

67. *International Covenant on Civil and Political Rights*, December 16, 1966, G.A. Res. 2200(XXI), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), Art. 27.

68. *See, e.g.*, Report on Ecuador, *supra* note 10, at 103–04; Inter-Amer. C.H.R., *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc. 26 (1983), OEA/Ser.L/V/II.62, doc. 26 (1984), at 76–78 (regarding the land rights of the Miskito and other indigenous communities of Nicaragua's Atlantic Coast) [hereinafter *Miskito Report*]; Case 7615 (Brazil), Inter-Am. C.H.R., OEA/Ser.L/V/II.66, doc. 10, rev. 1, at 24, 31 (1985) (concerning the Yanomami of Brazil).

69. *Miskito Report*, *supra* note 68, at 81.

> 2. Indigenous peoples are entitled to restitution in respect of the property of which they have been dispossessed, and where that is not possible, compensation on a basis not less favorable than the standard of international law.
>
> 3. The states shall recognize and respect indigenous ways of life, customs, traditions, forms of social, economic and political organization, institutions, practices, beliefs and values, use of dress, and languages.[70]

The United Nations Human Rights Committee has confirmed the Commission's interpretation of the reach of the cultural integrity norm, as displayed in its General Comment on article 27 of the Covenant of Civil and Political Rights:

> [C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of these rights may require positive measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[71]

Indigenous peoples' traditional land use patterns are included by the Committee as cultural elements that states must take affirmative measures to protect under article 27 regardless of whether states recognize indigenous peoples' ownership rights over lands and resources subject to traditional uses.[72]

The Human Rights Committee found violations of article 27 in circumstances similar to those confronting the indigenous communities in the cases before the Inter-American system. In *B. Ominayak, Chief of the Lubicon Lake Band of Cree v. Canada*,[73] the Committee determined that Canada had violated article 27 by allowing the provincial government of Alberta to grant

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70. Proposed American Declaration, *supra* note 9, Art. VII.

71. U.N. Hum. Rts. Comm., General Comment No. 23 (50) (Art. 27), HRI/GEN/1/Rev.1 at 38, adopted Apr. 6, 1994 [hereinafter HRC General Comment on Art. 27], para. 7.

72. *See, e.g.*, J.E. Länsmann v. Finland, Communication No. 671/1995, CCPR/C/58/D/671/1995, paras. 2.1–2.4, 10.1–10.5 (Länsmann II) (Sami reindeer herding in certain land area is protected by article 27, despite disputed ownership of land). *See also* B. Ominayak, Chief of the Lubicon Lake Band v. Canada, Communication No. 167/1984, U.N. Hum. Rts. Comm., A/45/40, vol. II, annex IX.A, para 32.2 (economic and social activities linked with territory are part of culture protected by article 27); Länsmann et al. v. Finland, Communication No. 511/1992, U.N. Hum. Rts. Comm., CCPR/C/52/D/511/1992 (1994) (Länsmann I) (reindeer herding part of Sami culture protected by article 27); Kitok v. Sweden, Communication No. 197/1985, U.N. Hum. Rts. Comm., A/43/40, annex VII.G (1988) (article 27 extends to economic activity "where that activity is an essential element in the culture of an ethnic community").

73. Communication No. 167/1984, U.N. Hum. Rts. Comm., A/45/40, vol. II, annex IX.A.

leases for oil and gas exploration and timber development within the ancestral territory of the Lubicon Lake Band. The Committee found that the natural resource development activity compounded historical inequities to "threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue."[74]

Also significant are the Committee's pronouncements in the *Länsmann* cases. These two cases involved threats to reindeer herding by indigenous Sami people, through state-sanctioned rock quarrying and forestry in traditional Sami territory. In both cases, while not finding violations of the Covenant under the specific facts before it, the Committee concluded that article 27 protected Sami traditional means of livelihood in their traditional area, despite the fact that ownership to the area was in dispute.[75] Additionally, in both cases the Committee confirmed its position, articulated in an earlier case involving Sami reindeer herding, that article 27 protections extend to economic activity "where that activity is an essential element in the culture of an ethnic community."[76]

Article 27 has also been the basis of decisions by the Inter-American Commission on Human Rights in cases involving particular indigenous groups. In these decisions, the Commission has confirmed the importance and international legal obligation of protecting indigenous peoples' cultural and related property rights. In its 1985 decision concerning the Yanomami Indians of Brazil, the Commission, citing article 27, asserted that contemporary international law recognizes "the right of ethnic groups to special protection in the use of their own language, of the practice of their own religion, and in general, for all those characteristics necessary for the preservation of their cultural identity."[77] The Commission noted that the OAS and its member states list "preservation and strengthening" of the indigenous groups' cultural heritage as a "priority," and declared that Brazil's failure to protect the Yanomami from incursions by miners and others into their ancestral lands threatened the Indians' physical well being, culture, and traditions. The Commission therefore recommended that the government secure the boundaries of a reserve for the Yanomami to protect their cultural heritage. Brazil responded by moving forward with the establishment of the Yanomami Reserve and by amending its constitution in 1988 to provide greater protections to Indians and their lands.

The Inter-American Commission also invoked article 27 in its consideration of the 1983 complaint filed by the indigenous peoples of Nicaragua's Atlantic Coast against the government of Nicaragua for human rights abuses committed during the early years of Nicaragua's civil war.[78] Relying specifi-

74. *Id.* at para. 33.

75. Länsmann I, *supra* note 72; J.E. Länsmann II, *supra* note 72.

76. Kitok v. Sweden, *supra* note 72.

77. Res. No. 12/85, Case No. 7615 Inter-Am C.H.R. 24 (1985), in *Annual Report of the Inter-American Commission of Human Rights 1984–85*, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985).

78. *Miskito Report*, *supra* note 68.

cally on the cultural rights guarantees of article 27, the Commission recommended measures to secure the indigenous communities' land rights and to develop "an adequate institutional order" that would better accommodate the distinctive cultural attributes and traditional forms of organization of the indigenous groups.[79] The Commission's recommendations were instrumental in leading the government to the negotiating table with indigenous community leaders. This negotiation process culminated in the enactment of the constitutional provisions and law that affirm indigenous peoples' land rights and establish regional governments for the indigenous communities on Nicaragua's Atlantic Coast. However, Nicaragua has not fully implemented these enactments, as illustrated by the *Awas Tingni Case*.

Critical to the viable continuation of indigenous peoples' cultures is the link the Human Rights Committee and Inter-American Commission have recognized between the economic and social activities of indigenous peoples and their traditional territories. Both the Human Rights Committee and the Inter-American Commission have concluded that, under international law, the states' obligation to protect indigenous peoples' right to cultural integrity necessarily includes the obligation to protect traditional lands because of the inextricable link between land and culture in this context. Thus, rights to lands and resources are property rights that are prerequisites for the physical and cultural survival of indigenous communities, and they are protected by the American Declaration, the American Convention, and other international human rights instruments, such as the Convention of the Elimination of All Forms of Racial Discrimination and the Covenant on Civil and Political Rights.

IV. International and Domestic Legal Practice: Emerging Customary International Law

The foregoing interpretations of relevant provisions of the American instruments and applicable UN human rights treaties is reinforced by an increasingly well defined and consistent pattern of international and domestic legal practice that recognizes indigenous peoples' rights to lands and natural resources. Especially significant is the international practice associated with International Labour Organization Convention (No. 169) on Indigenous and Tribal Peoples, which has been ratified by several states in the Americas. A drafting committee that included thirty-nine states in addition to the worker and employee delegates that are part of the ILO developed the convention. It was adopted by the full conference of the ILO by an overwhelming majority of the voting delegates, including government deletates.[80] Although none of the states involved in the cases highlighted in this Article are parties to Convention No. 169, the convention nonetheless has relevance

79. *Id.* at 81–82, para. 15.
80. *See* Indigenous Peoples, *supra* note 1, at 52–53.

as part of a larger body of increasingly consistent practice at the international and domestic levels. Such other international practice includes resolutions and decisions by authoritative international bodies and developments toward new declarations by the UN and OAS on the rights of indigenous peoples. At the domestic level, relevant practices include legislation, judicial decisions, and constitutional reforms that pronounce protections for indigenous land and resource rights.

Viewed comprehensively, applicable international practice incorporates and goes beyond the domain of existing treaty obligations for states within the Inter-American system. Taken together with relevant domestic legal practice, international practice gives rise to obligations of customary international law that apply more generally throughout the Inter-American system. As demonstrated by an expanding body of literature, it is evident that indigenous peoples have achieved a substantial level of international concern for their interests, and there is substantial movement toward a convergence of international opinion on the content of indigenous peoples' rights, including rights over lands and natural resources.[81] Developments toward consensus about the content of indigenous rights simultaneously give rise to expectations that the rights will be upheld, regardless of any formal act of assent to the articulated norms. The discourse of indigenous peoples and their rights has been part of multiple international institutions and conferences in response to demands made by indigenous groups over several years backed by an extensive record of justification. The pervasive assumption has been that the articulation of norms concerning indigenous peoples is an exercise in identifying standards of conduct that are *required* to uphold widely shared values of human dignity. The multilateral processes that build a common understanding of the content of indigenous peoples' rights, therefore, also build expectations of behavior in conformity with those rights.

Under modern legal theory, processes that generate consensus about indigenous peoples' rights build customary international law. As a general matter, norms of customary law arise when a preponderance of states and other authoritative actors converge upon a common understanding of the norms' content and generally expect future behavior in conformity with the norms. The traditional points of reference for determining the existence and contours of customary norms include the relevant patterns of actual conduct of state actors. Today, however, actual state conduct is not the only or necessarily determinative indicia of customary norms. With the advent of modern inter-governmental institutions and enhanced communications media, states and other relevant actors increasingly engage in prescriptive dialogue. Especially in multilateral settings, explicit communication may itself bring about a convergence of understanding and expectation about rules, establishing in those rules a pull toward compliance, even in advance of a wide-

81. *See, e.g.*, INDIGENOUS PEOPLES, *supra* note 1; Wiessner, *supra* note 1; Williams, *supra* note 1; Hannum, *supra* note 11.

spread corresponding pattern of physical conduct. It is thus increasingly understood that explicit communication, of the sort that is reflected in the numerous international documents and decisions cited below, builds customary rules of international law. Conforming domestic laws and related practice reinforces such customary rules of international law. Non-conforming domestic practice undermines the apparent direction of the international norm-building only to the extent the international regime holds out and eventually accepts as legitimate the non-conformity.

Although international and domestic practice varies somewhat in its recognition and protection of indigenous peoples' land and resource rights, just as state practice varies in its treatment of property rights in general, it nonetheless entails a sufficiently uniform and widespread acceptance of core principles to constitute a norm of customary international law. The relevant practice of states and international institutions establishes that, as a matter of customary international law, states must recognize and protect indigenous peoples' rights to land and natural resources in connection with traditional or ancestral use and occupancy patterns. This new and emerging customary international law, along with treaty obligations arising from outside the Inter-American system, inform an understanding of the rights that are protected by the American Convention and American Declaration.

A. *International Practice*

One of the most impressive achievements of the post World War II international system in protecting human rights has been the recognition of indigenous peoples as special subjects of concern.[82] As part of this development, states and others acting through international institutions increasingly have affirmed the central importance of traditional lands and resources to the cultural survival of indigenous peoples.

The requirement that states recognize and protect indigenous peoples' rights in their traditional lands is included in the Inter-American Charter of Social Guaranties, which was adopted by the General Assembly of the Organization of American States in 1948. Article 39 of the Charter requires that states take "necessary measures . . . to give protection and assistance to the Indians, safeguarding their life, liberty, and property, preventing their extermination, shielding them from oppression and exploitation, protecting them from want and furnishing them with an adequate education."[83] Further, the article recommends establishing "[i]nstitutions or services" created specifically "to safeguard [Indian] lands, legalize their ownership thereof, and prevent the invasion of such lands by outsiders."[84]

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82. *See* INDIGENOUS PEOPLES, *supra* note 1, at 47–58 (describing and documenting relevant international developments).

83. *Inter-American Charter of Social Guaranties*, *supra* note 2, Art. 39.

84. *Id.*

ILO Convention No. 107 of 1957 similarly recognized indigenous peoples' rights of ownership to the lands they traditionally occupied.[85] Despite Convention No. 107's widely criticized—and now rejected – assimilationist bias in other respects, its recognition in 1957 of the right to collective land ownership by indigenous groups demonstrates the long-standing concern in international practice for protecting indigenous peoples' rights to their traditional lands.[86]

ILO Convention No. 169 of 1989, a revision of Convention No. 107, is international law's most concrete manifestation of the growing recognition of indigenous peoples' rights to property in lands. Convention No. 169's land rights provisions are framed by article 13(1), which states:

> In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.[87]

The Convention, which has been ratified by a significant number of American states,[88] speaks specifically to the property rights of indigenous peoples: "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized."[89]

The growing acceptance in international practice of indigenous peoples' rights in land and natural resources is further evidenced by relevant provisions of the Proposed American Declaration on the Rights of Indigenous Peoples,[90] prepared by the Inter-American Commission on Human Rights in consultation with OAS member states and representatives of indigenous peoples.[91] Emphasizing that such property rights originate from traditional patterns of land tenure, the Proposed Declaration also stipulates: "Nothing

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85. *Convention No. 107, supra* note 3, Art. 11.

86. *See* INDIGENOUS PEOPLES, *supra* note 1, at 44–45.

87. *Convention No. 169, supra* note 6, Art. 13(1). For a description and analysis of the development of Convention No. 169 by the principal ILO officer involved, *see* Lee Swepston, *A New Step in the International Law of Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY UNIV. L. REV. 677 (1990).

88. These include Argentina, Bolivia, Colombia, Costa Rica, Guatemala, Honduras, Mexico, Paraguay, and Peru.

89. *Convention No. 169, supra* note 6, Art. 14(1).

90. *See* Proposed American Declaration, *supra* note 9.

91. Commentary by OAS member states in relation to the Proposed American Declaration has reflected a range of views and some concern over terminology. But the commentary reflects a substantial core of consensus on basic principles of indigenous peoples' rights, including land rights. *See generally Report of the First Round of Consultations Concerning the Future Inter-American Legal Instrument on Indigenous Rights*, Inter-Am. C.H.R. ANN. REP. OEA/Ser.L/V/II.83, doc. 14, at 263 (1993); *Report of the Chair, Meeting of the Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Populations*, OAS Doc. 5 (December 1, 1999), *available at* http://www.oas.org/assembly/eng/documents/5.htm (last visited Feb. 27, 2001).

. . . shall be construed as limiting the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights over them."[92]

The Draft United Nations Declaration on the Rights of Indigenous Peoples, developed by the United Nations Working Group on Indigenous Populations and approved by U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, provides further evidence of the increasingly widespread international recognition of and respect for indigenous peoples' rights in lands and resources. The Draft U.N. Declaration was approved by the Sub-Commission after several years of discussions in which both states and indigenous peoples from throughout the world took part.[93] The Draft U.N. Declaration affirms:

> Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.[94]

In addition to the many documents that articulate the above principles, examination of the active engagement of international human rights bodies demonstrates the broad acceptance of these principles in the realm of practice as well. The U.N. Human Rights Committee, the U.N. Committee on the Elimination of Racial Discrimination, the relevant organs of the International Labour Organization, and the Inter-American Commission on Human Rights apply the prevailing understandings of indigenous peoples' land and resource rights when they monitor human rights situations where indigenous peoples are located and when they consider complaints brought by specific indigenous groups.[95]

Every major international body that has considered indigenous peoples' rights during the past decade has acknowledged the crucial importance of

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92. Proposed American Declaration, *supra* note 9, Art. XVIII, paras. 2 and 3(iii).

93. *See* INDIGENOUS PEOPLES, *supra* note 1, at 51–53 and notes.

94. *Draft United Nations Declaration on the Rights of Indigenous Peoples, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, U.N. ESCOR, 46th Sess., Art. 26, para. 105, U.N. Doc. E/CN.4/Sub.2/1994/45 (1994) [hereinafter *Draft U.N. Declaration*].

95. *See Report of the Committee of Experts on the Application of Conventions and Recommendations: General Report and Observations Concerning Particular Countries*, ILO, 81st Sess., Rpt. 3, pt. 4A, at 348–52 (1994) (regarding land rights of indigenous peoples in Bangladesh and Brazil); "Committee on Elimination of Racial Discrimination Urges Australia to Suspend Implementation of Amended Act on Aboriginal Land Rights," HR/CERD/99/29 (Mar. 18, 1999). *See generally* INDIGENOUS PEOPLES, *supra* note 1, at 151–84 (surveying relevant activity by international institutions).

lands and resources to the cultural survival of indigenous peoples and communities. They also have recognized the critical need for governments to respect and protect the varied and particular forms of land tenure defined and regarded as property by indigenous peoples themselves. In addition to the international human rights institutions mentioned above, the World Bank and the European Union have pronounced and acted in favor of these rights.[96] Indigenous peoples and their rights over land and natural resources have been discussed at a multitude of international meetings and conferences sponsored by the U.N., the OAS, and other inter-governmental organizations during the last several years. In their numerous oral and written public statements at these meetings, states have concurred or acquiesced in the essential elements of the principles of indigenous peoples' land and resource rights that now find expression in several international documents.[97]

B. Domestic Practice

The international norms that recognize rights based on indigenous peoples' traditional landholdings and resource use are increasingly incorporated and reflected in the domestic legal practice of states throughout the American region and the world. A large number of states give formal legal recognition to indigenous peoples' communal rights in lands and natural resources based on traditional patterns of use and occupation.[98] Throughout the Americas in particular, OAS state members have amended their constitutions or have adopted new laws to recognize and protect land and natural resource rights for indigenous peoples. In several states, judicial organs have been the architects of domestic legal doctrine recognizing such rights. Similarly, state legal systems in other parts of the world have adopted legal protections for indigenous peoples' traditional land tenure or otherwise provided them rights to land in recognition of historical tenure. Much of this global and regional practice is analyzed and described below.

Domestic legal developments are not necessarily sufficient to protect indigenous peoples in the enjoyment of their land and resource tenure. And, of course, those domestic legal advances already achieved remain far from fully implemented and translated into reality for indigenous peoples. Nonetheless, these developments signify a clear trend in the direction of the relevant international practice, and they constitute legal obligations for state officials under domestic law and give rise to expectations of conforming behavior on

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96. *See, e.g.*, *Indigenous Peoples*, Operational Directive 4.20, para. 13, WORLD BANK, (Sept. 17, 1991) (requiring respect for indigenous peoples' land rights in connection with Bank financed projects); *Resolution on Indigenous Peoples within the Framework of the Development Cooperation of the Community and Member States*, Council of Ministers of the European Union, 214th Mtg. (November 30, 1998); *Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples*, EUR. PARL. DOC. PV 58(II) (1994).

97. *See* INDIGENOUS PEOPLES, *supra* note 1, at 52–53, 56–57, 107 and notes (documenting such statements).

98. *See* Wiessner, *supra* note 1.

the part of the international community. As a result, this domestic state practice, together with relevant practice at the international level, builds customary international law. At the very least, a sufficient pattern of common practice regarding indigenous peoples' land and resource rights exists among OAS member states to constitute customary international law at the regional level.[99]

1. State Parties to the American Convention

a. Bolivia

The Bolivian Constitution of 1967, as amended in 1994, in article 171 guarantees and protects the social, economic and cultural rights of indigenous peoples including rights related to their identity, values, languages, customs, institutions, and customary land and resource use. In addition to this constitutional provision, there are several other laws specifically protecting indigenous peoples' land rights. Supreme Resolution 205862 of February 17, 1989 declares the national and social necessity of recognition, assignment, and tenure of indigenous territorial areas in order to guarantee their full economic and cultural development. Various executive decrees have recognized and demarcated indigenous peoples' lands.[100]

Bolivian Law 1257 ratifies ILO Convention No. 169, which in article 14 recognizes the right of indigenous peoples' ownership and possession of lands. Law 1715 of the National Service of Agrarian Reform reaffirms the constitutional provisions of article 171 and guarantees the rights of indigenous peoples to their "Tierras Comunitarias de Origen" (Original Communal Lands) and to the sustainable use of renewable natural resources. Similarly, Law 1715 aims to protect the integrity of indigenous peoples' areas, giving preference to indigenous peoples' rights on their lands over those of others in cases of overlapping or conflicting rights.[101] In addition, the Bolivian Forestry Law recognizes the rights of indigenous peoples to the forests on their lands and prohibits the State from granting forestry concessions in areas where indigenous peoples are living. This law also gives priority to indigenous communities for grants of forestry concessions in their areas and regards the communities as the resource managers in development of management plans for forestry operations.[102]

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99. *See* Wiessner, *supra* note 1, at 109 (identifying customary international law that affirms indigenous peoples' land rights).

100. *See* Secretaria de Asuntos Etnicos de Genero y Generacionales—Programa Indigena, Organización Internacional del Trabajo, Oficina Regional para América Latina y el Caribe-Lima-Perú, Proyecto BOL/92/102, *Reforma de la Constitución Política de Bolivia en Relación con los Pueblos Indígenas— Propuesta de Articulado sobre Comunidades y Pueblos Indígenas para el Anteproyecto de Ley de Tierras*, Informe de Misión, Raúl Arango Ochoa, Santafé de Bogotá, Colombia, noviembre de 1994, at 5 [hereinafter "OIT, Proyecto BOL/92/102"].

101. Bolivian Law 1715, Paragraph IV, Third of the Temporary provisions, and Paragraph I, Second of the Final provisions.

102. OIT, Proyecto BOL/92/102, *supra* note 100, at 16–17.

b. Brazil

Brazil amended its constitution in 1988 to accord greater protections to Indians and their lands.[103] Article 231 of the amended constitution recognizes the social organization, customs, languages, beliefs, and traditions of the indigenous peoples and their ancestral rights to lands they have traditionally occupied. This article provides that the state must demarcate indigenous lands, protect them, and assure that indigenous peoples are able to benefit from those lands. The Brazilian constitution guarantees to indigenous peoples permanent possession and exclusive use of their traditional lands including soils and waters.[104] It also provides a broad array of protections including the prohibition of removal of indigenous peoples from their lands, freedom from outside exploitation of their lands, and preservation of the environmental resources necessary for their well-being and cultural survival.[105] The constitution recognizes the right of indigenous peoples to benefit from natural resource activities on their lands while also protecting those lands from alienation. It further provides that indigenous peoples be allowed to develop according to their own usages, customs, and beliefs.[106]

Federal mandates implementing the constitutional provisions seek to provide additional protections for indigenous land rights.[107] In addition, Brazilian courts have held as unconstitutional any state action, by statute or contract, that implies a reduction or alienation of indigenous lands.[108]

c. Chile

In 1993, Chile's legislative authority established a law protecting indigenous peoples' land rights.[109] This law includes provisions recognizing indigenous communities' rights in lands that they actually occupy or possess. In article 13 the law provides that the indigenous peoples' lands, as required by national interest, will enjoy the protection of this law and will not be transferred, obstructed, taxed, nor acquired by prescription, except between communities or indigenous members of the same ethnic group. Articles 18 and 19 of this law recognize the norms of collective rights to lands as established by the customs of each ethnic group and the right of indigenous peoples to engage in collective activities on lands of cultural significance. The affected indigenous communities may request a voluntary transfer of real estate title to these culturally significant areas.

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103. Constituição tit. VIII (Braz.).

104. *Id.* Art. 231, sec. 2.

105. *Id.* secs. 2, 4, and 6.

106. *Id.* secs. 2, 3, and 5.

107. *See* L. Roberto Barroso, *The Saga of Indigenous Peoples in Brazil: Constitution, Law and Policies*, 7 St. Thomas L. Rev. 645, 664 (1995); Wiessner, *supra* note 1, at 77.

108. *See* Barraso, *id.* at 660.

109. *See* Establece Normas sobre Protección, Fomento y Desarrollo de los Indígenas y Crea la Corporación Nacional de Desarrollo Indígena, No. 19.253 (1993) (Chile).

Articles 20 through 22 create a Fund for Indigenous Lands and Waters administered by a corporation established under this law. The corporation may grant subsidies for the acquisition of lands. Articles 26 and 27 discuss the establishment of Indigenous Development Areas in which the Ministry of Planning and Cooperation, at the proposal of the corporation, may establish territorial spaces within the administrative structure of the state focused on benefiting the harmonious development of the indigenous peoples and their communities. Further articles of the law provide for indigenous peoples' participation in establishment and planning regarding protected wilderness areas, as well as in the decision-making processes that affect their rights.[110]

d. Colombia

The 1991 Constitution of Colombia provides indigenous peoples with distinct constitutional status. Indigenous peoples form a special constituency for the election of central government representatives.[111] They have the right to self-government according to their customs and traditions within their lands, including the administration of justice.[112] Cultural, social, and economic integrity is protected generally by article 330 of the Constitution. The Constitutional Court has recognized territory as a necessary condition for cultural integrity, and indigenous peoples' land rights are determined in light of ensuring that integrity.[113] The constitution provides for recognition of indigenous peoples' lands and guarantees their inalienable and imprescriptible nature.[114]

The Constitutional Court has held that the constitutional recognition of indigenous land imposes a legal obligation on the State to demarcate and protect the lands of particular indigenous communities. "The fundamental right of ethnic groups to collective property implicitly contains, given the constitutional protection of the principle of ethnic and cultural diversity, a right to the creation of reserves under the control of the indigenous communities."[115]

Article 330 guarantees indigenous peoples the right to be consulted regarding natural resource development or exploitation in their territories. For this right to be honored, the Constitutional Court has determined that the

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110. *Id.* Arts. 27, 34, and 35.

111. *See* CONSTITUCION POLITICA Arts. 171, 176 (Colom.).

112. *Id.* Arts. 330, 246.

113. *See* Sentencia No. T-188 de mayo 12 de 1993 [Corte Constitucional] 354 (Colom.) ("The right to collective property . . . is essential for the cultures and spiritual values of aboriginal peoples . . . the special relationship indigenous communities have with the land they occupy [stands out] not only because it is their principle means of subsistence, but because it is an integral element of the cosmology and religions of aboriginal peoples . . . . Without this right, the rights to culture and autonomy are merely formal.") [hereinafter Sentencia No. T-188].

114. *See* CONSTITUCION POLITICA Art. 63 (Colom.).

115. Sentencia No. T-188, *supra* note 113.

consultation must be broad and meaningful. It must include full disclosure of the proposed activities on the land and of the possible consequences of that activity. The communities must also have ample opportunity to discuss the plans among their members and to provide a meaningful response.[116] Under article 33, the state is bound to take measures to protect against detrimental effects brought to their attention by the community during the consultation period. This article provides that the exploitation of natural resources in indigenous peoples' territories will not be carried out so as to derogate from the cultural, social, and economic integrity of the indigenous communities.[117]

Columbia has also recognized the need for effective judicial proceedings to protect indigenous peoples' rights to culture and land. Different legal procedures and remedies exist for the vindication of fundamental rights (*tutela*) and collectively shared interests (*acción popular*). Although a *tutela* action is generally only available for individual rights, indigenous communities have been permitted to bring *tutela* actions to protect their land and cultural rights as fundamental rights despite the collective nature of those rights.

e. Ecuador

The new Ecuadorian Constitution of June, 1998 contains several comprehensive provisions regarding indigenous peoples' rights. In Title III, article 84, of the constitution, Ecuador recognizes and guarantees to indigenous peoples collective rights to maintain and develop their cultural and economic traditions, conserve community lands as imprescriptible property (protected from seizure and exempt from taxation), and maintain possession of ancestral community lands. Under this article, indigenous peoples are guaranteed the right to participate in the use, administration, and conservation of renewable natural resources found on their lands, be consulted in programs of non-renewable resource exploration and exploitation, and be ensured of their participation in the benefits of these activities. Indigenous peoples may also receive indemnification for the socio-environmental damage caused by resource extraction activities.

Article 84 of the Constitution further commits the State to conserve and promote indigenous peoples' practices of bio-diversity management, traditional forms of social organization, and collective intellectual property. Indigenous peoples are protected from displacement from their lands and are guaranteed the right to participate, with adequate financing from the state, in the formulation of priorities in plans and projects for the development and improvement of their economic and social conditions. The law also guarantees their right to participate in official legislative bodies.

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116. *See* Sentencia SU-039 febrero 3 de 1997 [Corte Constitucional] 655 (Colom.).
117. *See* CONSTITUCION POLITICA Art. 33 (Colom.).

Article 224 of the Ecuadorian Constitution provides for indigenous community territorial districts to be established by law. Within these territorial districts, the Constitution envisions a gradual development of autonomous governing bodies. The 1994 Codification of the Law of Agricultural Development also recognizes indigenous peoples' rights to collective and individual ownership over traditional lands. Under this law, the State commits to protect and legalize the ancestral lands of indigenous peoples as well as to consider the cultural impact water concessions will have on indigenous groups.[118]

f. Mexico

The federal laws of Mexico recognize indigenous peoples' land and resource rights and provide numerous protections for indigenous peoples' use, benefit, and management of communal lands. The Political Constitution of the United Mexican States of 1917, as amended, states specifically in article 27, section VII, that the law will protect the integrity of indigenous peoples' lands. This article also provides protections for collective uses of lands, forests, and waters and requires respect for the wishes of indigenous peoples in determining approaches for achieving the greatest benefit from the productive resources on their lands. Article 27 prohibits the sale of communal lands by political authorities, except under certain limited conditions, and prevents them from authorizing others to take advantage of communal lands and resources. The same article guarantees expedited and honest justice on agrarian issues in order to achieve legal security for indigenous tenure in communal lands and for the restitution of lands, forests, and waters to communities.

Other Mexican federal laws also protect indigenous peoples' land rights. Both the Agrarian and the Forestry Laws of 1992 require protection by authorities of indigenous peoples' lands.[119] The Agrarian Law provides that communal land properties are imprescriptible and free from seizure and for community determination of the use and organizational structure of community lands.[120] The Forestry Law requires that the consent of indigenous communities be obtained prior to authorization of forestry concessions to third parties. In recognizing indigenous peoples as legitimate owners of forest resources, the Forestry Law provides that indigenous communities' rights be guaranteed by the federal government and that they be allowed to participate in the production, transformation, and commercialization of forest resources, while promoting the strengthening of their social and economic organization.[121]

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118. CODIFICACIÓN DE LA LEY DE DESARROLLO AGRARIO Art. 38, 43 (Ecuador).

119. LEY AGRARIA [Agrarian Law] Art. 106 (1992) (Mex.); LEY FORESTAL [Forestry Law] Art. 19 (1992) (Mex.).

120. LEY AGRARIA Arts. 74, 99, & 100.

121. LEY FORESTAL Art. 19.

g. Nicaragua

Despite the actions and omissions complained of in the *Awas Tingni Case*, Nicaragua gives formal legal recognition in its Constitution and in its national laws to the land and resource rights of indigenous peoples on the basis of their traditional and customary patterns of land and resource use and occupancy. The Political Constitution of Nicaragua and the Statute of Autonomy for the Atlantic Coastal Regions of Nicaragua recognize these rights.

The Political Constitution of Nicaragua provides as follows:

> The State recognizes the existence of the indigenous peoples, who enjoy the rights, duties, and guarantees enshrined in the Constitution, and in particular those intended to maintain . . . the communal form of their lands and their enjoyment and use.[122]
>
> . . .
>
> The State recognizes the communal forms of land ownership of the Atlantic Coastal Communities. It also recognizes the use and enjoyment of the waters and forests on their communal lands.[123]
>
> . . .
>
> The State guarantees these communities the enjoyment of their natural resources, the effectiveness of their forms of communal property and the free election of their authorities and representatives.[124]

In addition, based on these Constitutional articles, the Statute of Autonomy for the Atlantic Coastal Regions of Nicaragua defines communal property as follows: "The communal property consists of the land, waters, and forests that have traditionally belonged to the Atlantic Coastal Communities."[125]

Thus, in Nicaragua, the Political Constitution and the Statute of Autonomy provide for property rights originating in the customary system of land tenure that has historically or traditionally existed among the indigenous communities of the Atlantic Coast. Nicaragua's formal domestic law is in line with developing international norms, despite the failure of the country's officials to fully implement those norms, as evidenced in the *Awas Tingni Case*.

122. CONST. NIC., *supra* note 19.
123. *Id.* Art. 89.
124. *Id.* Art. 180.
125. Statute of Autonomy of the Atlantic Coastal Autonomous Regions of Nicaragua, Law 28 of 1987, Art. 36.

2. Other American States

a. Canada

The Canadian government has negotiated several bilateral agreements and settlements with aboriginal groups since the 1970s that include the recognition of indigenous land and resource rights in large areas of land. However, in many more situations, such as the *Carrier Sekani Case*, indigenous land claims remain unresolved. The establishment of indigenous land rights in Canadian law, frequently recognized only in their breach, took place more than thirty years ago with the Supreme Court of Canada's landmark decision in *Calder v. Attorney General of British Columbia.*[126]

In the Canadian legal system, the common law doctrine of aboriginal title has developed as a *sui generis* right belonging to Canada's indigenous peoples with several distinct attributes. First, the right preexists the colonizers and survives their coming.[127] Second, the State owes a fiduciary duty of protection to indigenous peoples regarding land sold or managed on their behalf and must compensate them for any mismanagement.[128] Third, rather than impose the legal conception of ownership drawn from the larger dominant society or from British common law, under which title inheres in the individual, Canadian common law recognizes that aboriginal title is collective and inheres in the group, with individual use determined internally by the group according to its traditional land use system.[129] The standard of proof necessary to establish aboriginal title is favorable to indigenous groups who need prove only historic occupation and the presence of an organized society.[130]

Furthermore, the fiduciary duty of the Crown creates a right to consultation in the event that the State proposes to infringe aboriginal title. In *Delgamuukw v. British Columbia*, Chief Justice Lamer held that "[t]here is always a duty of consultation . . . in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue . . . . Some cases may even require the full consent of an aboriginal nation."[131]

The protections afforded to indigenous peoples' land and resource rights are buttressed in the Canadian legal system by the Constitution of 1982, which maintains that "existing aboriginal and treaty rights of the aboriginal

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126. [1973] 34 D.L.R. (3d) 145. For an analysis of recent efforts by members of the Court to define the source of aboriginal title, see Kent McNeil, *The Meaning of Aboriginal Title*, in ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUALITY, AND RESPECT FOR DIFFERENCE 135 (Michael Asch ed., 1997).

127. *See* Guerin v. The Queen, [1984] 2 S.C.R. 335, 336 (Can.). *See* Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. B. REV. 727, 729 (1987).

128. *See Guerin*, 2 S.C.R. at 336.

129. *See* Slattery, *supra* note 127, at 745.

130. *See* McNeil, *supra* note 126, for analysis of recent judicial definitions of the standard of proof necessary to establish aboriginal title.

131. Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 (Can.).

peoples of Canada are hereby recognized and affirmed."[132] This legal guarantee encompasses aboriginal title as an enforceable substantive right and thereby limits legislative acts that would restrict or extinguish indigenous peoples' aboriginal property rights. This guarantee is not subject to section 33 of the Canadian Charter of Rights and Freedoms, which allows a legislative override of other provisions,[133] nor is it subject to limitation by any other rights granted by the Charter.[134] Section 52 declares the Constitution the "Supreme Law of Canada," thereby constitutionalizing aboriginal rights, including the doctrine of aboriginal title.[135]

These Canadian constitutional guarantees, in theory at least, prevent provincial and federal legislatures from arbitrarily depriving indigenous peoples in Canada of their aboriginal rights.[136] In a landmark Canadian Supreme Court decision of the last decade, *Sparrow v. R.*,[137] the Court, interpreting section 35(1) of the 1982 Constitution, adopted a strict scrutiny standard of review of legislative acts that might impact existing aboriginal rights.

Canadian officials have negotiated a number of "modern" agreements on aboriginal land claims with indigenous peoples beginning in 1975 with the settlement of several land claims in Quebec. Under the James Bay and Northern Quebec Agreements, indigenous groups' village lands were set aside as reserves, and the groups retained hunting and fishing rights. Cree and Inuit peoples were organized as corporations and given funding and title to extensive lands. The Canadian government has also reached land settlements with northern indigenous groups, such as the Inuvialuit of the Western Arctic and the Yukon Indians. These settlements confirmed indigenous peoples' effective ownership of large land areas and provided cash settlements. The most recent settlement was the 1998 agreement between the government and the Nisga'a people of British Columbia, which was recently ratified by Canada's Parliament. Here, the Nisga'a received confirmed title to over 1900 square kilometers of land in the Nass River Valley of British Columbia and a U.S. $190 million cash settlement as compensation for the surrender of rights to certain other aboriginal lands. The agreement also provides for the establishment of a tribal government.[138]

The Canadian government has negotiated these settlements regardless of whether the indigenous groups have treaties, since aboriginal rights have an independent basis in Canadian common law. In reaching these settlements, in addition to offering land rights and financial compensation, the govern-

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132. CAN. CONST. (Constitution Act, 1982) pt. II (Rights of the Aboriginal Peoples of Canada), sec. 35(1).

133. *See* FEDERAL INDIAN LAW, *supra* note 42, at 981.

134. *See* Thomas Isaac, *The Constitution Act, 1982 and the Constitutionalization of Aboriginal Self-Government in Canada: Cree-Nas-kapo (of Quebec) Act*, CAN. NAT. L. REP. 1 (1991).

135. *Id.*

136. *See* Slattery, *supra* note 127, at 740–41.

137. Sparrow v. R., [1990] 2 S.C.R. 1075 (Can.).

138. *See* FEDERAL INDIAN LAW, *supra* note 42, at 987–88.

ment has included recognition of hunting and trapping rights, resource management authority, revenue sharing, taxation powers, and the option of participation by Canada's indigenous peoples in local and federal government.[139]

b. United States of America

The United States also has developed an extensive and influential jurisprudence and laws protecting indigenous peoples' land and resource rights in traditionally occupied territories. Despite the shortcomings in the United States legal systems exemplified in the *Dann Case*, judicial and legislative decisions have resulted in a broad pattern of recognition and protection of indigenous peoples rights in lands and natural resources. In the United States, Indian tribes' recognized land and resource rights in their lands amount to 55.4 million acres held in trust.[140] These Indian trust lands are inalienable and not subject to taxation by the federal government.[141] The interest that Indian tribes hold in their land and resources represents a unique form of property right in the United States legal system. Indigenous property is a form of "ownership in common;" it is not analogous to other collective forms of ownership known to Anglo-American private property law because an individual member of an indigenous group has no alienable or inheritable interest in the communal holding, other than that which may exist within the land tenure system of the indigenous community concerned.[142] Rather, indigenous land and resource interests are held in common for the benefit of community members. Under United States laws, the governmental processes and legal systems of indigenous peoples have the authority to recognize individual property interests of individual members of the group, property interests controlled by clans and families under traditional customary tenure rules, and tribally controlled property interests. Under United States statutes tribes are authorized to lease and develop tribal lands for mining,[143] oil and gas,[144] grazing,[145] and farming.[146]

In terms of judicial protection of indigenous peoples' land and resource rights in the U.S. legal system, the United States Supreme Court long ago stated that indigenous peoples' rights in land and resources are "as sacred as the fee simple of the whites."[147]

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139. *See id.*

140. *See id.* at 20–21.

141. *See id.* at 87–93, 718–719.

142. *See* United States v. Jim, 409 U.S. 80 (1972); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977).

143. 25 U.S.C. sec. 396 (1994).

144. 25 U.S.C. sec. 398 (1994).

145. 25 U.S.C. sec. 397 (1994).

146. 25 U.S.C. secs. 402–402a (1994).

147. Mitchell v. United States, 34 U.S. (9 Pet.) 711, 746 (1835). In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974), the United States Supreme Court stated:

Through the practice of treaty-making, the United States recognized Indian land and resource rights in traditional lands. This practice is represented by the first treaty the United States entered into with an Indian tribe: "The United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their territorial rights in the fullest and most ample manner."[148] Today, some 300-plus treaties recognize indigenous land and resource rights and form the legal basis for the extensive system of Indian-held lands in the United States. Constitutionally, these treaty lands cannot be taken from tribes without payment of just compensation by the United States.[149]

Indigenous peoples' legal interests in lands held traditionally by indigenous peoples without formal recognition by the United States (unrecognized aboriginal title) may be extinguished without compensation under U.S. law.[150] The United States legal system, nevertheless, has generally provided some, if not adequate, compensation for the taking of even this type of Indian right to land and resources.[151] The Indian Claims Commission Act, created to settle aboriginal land claims against the federal government, required compensation for extinguishment of Indian title.[152] The presumption of extinguishment of title and the amount of compensation under the Act, however, are problematic and are the source of ongoing controversy over the Act's application, as exemplified in the *Dann Case.* In the Alaska Native Claims Settlement Act,[153] Alaska Natives, in return for voluntarily relinquishing their claims to aboriginal title in Alaska, agreed to land selection rights to forty-four million acres along with money payments totaling $962.5 million. Similar land settlement acts, such as the Maine Indian Claims Settlement Act,[154] Florida Indian Land Claims Settlement Act,[155] and the Connecticut Indian Land Claims Settlement Act,[156] have continued the legislative practice of recognizing indigenous land and resource rights.

3. *States in Other Regions of the World*

As demonstrated by the foregoing examples, a pattern of domestic legal practices among member states of the Organization of American States rec-

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It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act.

148. Treaty with the Delawares, Sept. 17, 1778, Art. 6, 7 Stat. 13, 14.
149. Sioux Tribe v. United States, 316 U.S. 317, 326 (1942).
150. Tee-Hit-Ton v. United States, 348 U.S. 272, 285 (1955).
151. *See* Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 29–30 (1947).
152. 25 U.S.C. §§ 70 to 70v-3 (1994).
153. 43 U.S.C.A. §§ 1601–1629(a) (West 1983).
154. 25 U.S.C.A. §§ 1721–1735 (West 1983 & Supp. 2000).
155. 25 U.S.C.A. §§ 1741–1750e (West Supp. 2000).
156. 25 U.S.C.A. §§ 1751–1760 (West Supp. 2000).

ognizes and in some measure affirms and protects indigenous peoples' traditional land and resource tenure. This practice is not confined to states in the Americas. In most other parts of the world, states have developed impressive legal regimes for the protection of indigenous peoples' land and resource rights, oftentimes in direct response to the discourse of indigenous human rights.

a. Australia

Australia provides an example of a legal system that has come to recognize and to a significant extent uphold the land and resource rights of indigenous peoples based on traditional land tenure. Like a number of other domestic legal systems that derive from British common law tradition, Australian legal doctrine now recognizes that its indigenous peoples possess "aboriginal rights" to lands. These rights exist by virtue of historical patterns of use or occupancy and may give rise to a level of legal entitlement in the nature of full ownership referred to as "native" or "aboriginal title."[157] Apart from such native or aboriginal title in its fullest sense, aboriginal land and resource rights may exist in the form of freestanding rights to fish, hunt, gather, or otherwise use resources or have access to lands.[158] In the High Court of Australia's decision in the case of *Mabo v. Queensland {No 2}*,[159] Justice Brennan explained the basis for aboriginal land and resource rights, particularly native title, as follows:

> Native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. . . . [N]ative title . . . may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence . . . whether possessed by a community, a group or an individual . . . . Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by

157. Mabo v. Queensland [No 2] (1992) 175 C.L.R. 1, 69 (Austl.); Delgamuukw v. British Columbia, 153 D.L.R. (4th) 193 (Can.); R. v. Van Der Peet, 137 D.L.R. (4th) 289, 109 C.C.C. (3d) 1 (S.C.C.) (Can. 1996); U.S. v. Shoshone Tribe of Indians, 340 U.S. 111, 116–18 (1938); Amodu Tijani v. Secretary, Southern Nigeria, 2 A.C. 399, 3 N.L.R. 21 (P.C. 1921); Adong bin Kuwau v. Kerajaan Johor 1 M.L.J. 418 (H.D. (Malaysia 1997). *See generally* Kent McNeil, *Common Law Aboriginal Title* (Oxford: Oxford University Press, 1984); Felix S. Cohen, *Original Indian Title*, *supra* note 151; Slattery, *supra* note 127.

158. R. v. Adams, [1996] 3 S.C.R. 101 (Can.) (Mohawks of St. Regis Reserve found to have right to fish in waters not within the reserve); Antoine v. Washington, 420 U.S. 194 (1975) (upholding off-reservation right to fish). *See also* Amoudu Tijani v. Secretary, Southern Nigeria, 2 A.C. 399 (P.C. 1921) (holding native rights of a tribe include usufructuary occupation or right).

159. *Supra* note 57.

> one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.[160]

The Australian High Court cited specifically to contemporary international legal practice in upholding the rights of indigenous peoples to protection of their land and resource rights under domestic law:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the [United Nations] Optional Protocol to the International Covenant on Civil and Political Rights (see Communication 78/1980 in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol. 2, p. 23) brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[161]

In response to the Australian High Court's 1992 decision in *Mabo*, the federal government passed the Native Title Act in 1993.[162] The Native Title Act is Commonwealth legislation, but many states and territories also passed legislation to govern native title claims pursuant to the provisions of this Act. The main purposes of the Act are:

> (i) to recognize and protect native title, (ii) to establish and set standards to deal with future issues involving native title, (iii) to

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160. *Id.* paras. 58, 61.
161. *Id.* para. 42.
162. *See* Wiessner *supra* note 1, at 73, n.105.

establish a mechanism to determine native title claims, and (iv) to validate past acts that native title has now invalidated.

Native title is defined by the Act where:

> (a) the rights and interests [in the land] are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognized by the common law of Australia.

Another important aspect of the Native Title Act is that it establishes an "arbitral body"—the National Native Title Tribunal—where claimants can pursue their land claims. Claimants can also pursue land claims at a state or territory arbitration tribunal established under the standards set by the Native Title Act. Additionally, the Native Title Act provides procedural safeguards so that Native title holders are guaranteed certain procedural rights such as notification and compensation if their native title is extinguished by the government.[163]

Amendments to the Native Title Act in 1998 allowing unilateral government extinguishment of native land rights drew strenuous criticism from a broad spectrum of indigenous Australians and from the United Nations Committee on the Elimination of Racial Discrimination. That criticism demonstrates the depth and strength of international recognition and support for aboriginal rights to communal lands. The United Nations Committee on the Elimination of Racial Discrimination adopted a decision in which it described the Australian Parliament's Native Title Amendment Act as an "acute impairment of the rights of its native communities."[164] The Committee further confirmed its support of indigenous peoples' land and resource rights by calling upon the Australian Government to suspend the implementation of the Native Title Amendment Act and to respond to the Committee's concerns with the "utmost urgency."[165] The Committee affirmed that indigenous peoples' land rights are recognized in international law, and that the international community now understands that doctrines of dispossession are illegitimate and racist.[166] The Committee further expressed its concern that the Native Title Amendment Act violates Australia's responsi-

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163. *Id.* at 73 and accompanying notes.

164. Press Release, U.N., Australia Presents Report on Aboriginal Rights to United Nations Committee on Elimination of Racial Discrimination (Mar. 12, 1999), at 1, U.N. Doc. HR/CERD/99/21.

165. *CERD Urges Australia to Suspend*, *supra* note 95.

166. *Committee on Elimination of Racial Discrimination Concludes Consideration of Situation in Australia*, U.N. Doc. HR/CERD/99/22 (1999).

bilities as a signatory of the International Convention on the Elimination of All Forms of Racial Discrimination.[167]

b. Malaysia

Recent judicial decisions and legislation in Asian countries provides further evidence that there is an increasing recognition of indigenous peoples' land and resource rights in the domestic legal systems of states throughout the world. In 1998, the Malaysia Court of Appeal, in *Adong bin Kuwau v. State of Johor*, upheld a trial judgment that awarded compensation for the loss of 53,273 acres of ancestral lands in the southern state of Johor to the Jakun tribe, an Orang Asli population in peninsular Malaysia.[168] The state government had taken the land, and the Public Utilities Board of Singapore had constructed a dam to supply water to both Johor and Singapore.

The Malaysian Federal Constitution of 1957 gives the national government legislative jurisdiction over the "welfare of the aborigines"[169] and provides for the "protection, well-being and advancement of the aboriginal peoples of the Federation (including the reservation of land) . . . ."[170] Legislative measures to "protect" the Orang Asli date to 1939. The current legislation, the *Aboriginal Peoples Act*, dates from 1954 and was revised in 1967 and 1974. The Department of the Aboriginal Peoples' Affairs has existed since 1954. Under the Malaysian legal system, certain lands are reserved for aboriginal peoples, who also have recognized rights to hunt and gather over additional lands.

The trial judge in the *Adong bin Kuwau* case quoted "the landmark case of *Calder*" from Canada to support his judgment: "[W]hen the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries . . . ." Consequently, the trial judge ruled that the Jakun Tribe had the "right to continue to live on their lands, as their forefathers had lived . . . ."[171]

The trial judge also concluded that the Jakun had proprietary rights over their lands, but no alienable interest in the land itself. The proprietary rights were protected by article 13 of the Federal Constitution, which required the payment of "adequate compensation" for any taking of property. This judgment was upheld by the Malaysia Court of Appeal.

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167. *CERD Urges Australia to Suspend*, *supra* note 95. *See also Committee on Elimination of Racial Discrimination Examines Situation in Australia, Adopts Decision*, U.N. Doc. HR/CERD/99/52 (1999) (decision of August 16 reaffirming March decisions and expressing concern over lack of positive Australian action).

168. The trial judgment in Adong bin Kuwau v. Johor is reported at 1 MALAYAN L.J. 418–36 (1997). The reasons for judgment of Gopal Sri Ram, J.C.A. for the three person panel in the Court of Appeal, were issued 24 February, 1998.

169. Ninth Schedule, List 1, § 16.

170. Ninth Schedule, List 1, § 8(5)(c).

171. The trial judgment in Adong bin Kuwau v. Johor, *supra* note 168, at 428.

c. Philippines

The Constitution of the Philippines recognizes "indigenous cultural communities" and rights to "ancestral lands" and "ancestral domain." Article 12, Section 5 provides:

> The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being.
>
> The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.[172]

To implement the provisions on indigenous peoples' "ancestral domain" rights, the Philippine congress passed the *Indigenous Peoples Right Act (IPRA)* in October, 1997.[173] The *IPRA* establishes a seven person *National Commission on Indigenous Peoples (NCIP)*, replacing two earlier bodies concerned with "cultural minorities." By section 38, the *NCIP* is "the primary government agency responsible for the formulation and implementation of policies, plans and programs to promote and protect the rights and well-being of the ICCs/IPs [Indigenous Cultural Communities/Indigenous Peoples] and the recognition of their ancestral domains as well as their rights thereto."

Section 44(e) empowers the *NCIP* to "issue certificate of ancestral land/domain title." As section 56 provides that existing property rights in third parties will be "recognized and respected," this legislative power requires the Commission to establish a definition of ancestral land/domain title and to make a determination on extinguishment. Under its quasi-judicial powers, the NCIP can resolve disputes between indigenous and non-indigenous claimants and between competing claims of indigenous people. It also can "take appropriate legal action" for the cancellation of titles that have been granted illegally, which is a common problem in many parts of the country.

This legislation allows the well-established land law system of the Cordillera tribes in central Luzon to gain recognition under Philippine law. The legislation also inaugurates the process of stabilizing indigenous people's land rights in other parts of the country where settlers, business operations and government actions continue to usurp aboriginal ancestral lands.

As the preceding discussion demonstrates, a pattern of state practice exists that tends towards recognizing and affirming indigenous peoples' traditional systems of land tenure as creating rights entitled to legal protections. Certainly domestic legal developments vary significantly in manner and extent

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172. *See* Constitution of the Philippines, Art. 12, § 5.
173. *See* Republic Act 8371.

to which they recognize and confirm indigenous peoples' rights over lands and natural resources. However, consistent with developments at the international level, this pattern of domestic legal practice confirms an expanding consensus already sufficient and widespread enough to constitute customary international law—at least in regard to certain core precepts of ownership, control, and use of traditional lands and natural resources.

V. Specific State Obligations That Derive from Inter-American Human Rights Law on Indigenous Lands and Natural Resources

The foregoing discussion establishes that international law as it has developed within the Inter-American system upholds indigenous peoples rights to lands and natural resources on the basis of traditional tenure. The American Convention on Human Rights, the American Declaration on the Rights and Duties of Man, other international instruments that are applicable within the Inter-American system, and customary international law affirm multiple dimensions of indigenous peoples' connections with land and natural resources. As a corollary of the affirmation of indigenous peoples' rights in lands and natural resources, states have the obligation to take the measures necessary to make these rights effective.

In general, international law requires states to adopt the legislative and administrative measures necessary to ensure the full enjoyment of the human rights they are obligated to uphold.[174] This includes the obligation to bring the state governing apparatus in conformity with applicable human rights norms.[175] A state, therefore, cannot escape international responsibility by merely referring to its domestic laws or administrative practices. Rather, it has the obligation to change its internal laws and practices to recognize indigenous peoples' rights in relation to lands and resources and, moreover, to take affirmative steps to protect them.[176] The duty to secure the enjoyment of human rights has particular meaning in the context of indigenous peoples. As the Inter-American Commission on Human Rights has stated, because of their vulnerable conditions vis-a-vis majority populations, indigenous groups may require certain additional protections, beyond those granted to all citizens, in order to bring about true equality among the nationals of a state.[177] The "prevention of discrimination, on the one hand, and the implementation of special measures to protect minorities, on the other, are merely two aspects of the same problem: that of fully ensuring equal

174. The obligation of effectiveness is made explicit in articles 1 and 2 of the American Convention on Human Rights, in relation to rights affirmed in that Convention.

175. *See* Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser.C) No. 4, para. 166 (1988).

176. *See International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion Inter-Am. Court H.R., Advisory Opinion OC-14/94 (Ser. A) no. 14 (1994) (State responsibility referring to laws not in compliance with international human rights obligations).

177. *See* Miskito Report, *supra* note 68, at 76.

rights of all persons."[178] The Inter-American Commission has found that states owe "special legal protections" to indigenous people for the preservation of their cultural identities.[179] Similarly, the U.N. Human Rights Committee, in its General Comment on article 27 of the International Covenant on Civil and Political Rights, states that "positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture."[180] The Committee notes that "[p]ositive measures of protection are . . . required not only against acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party."[181]

In each of the cases identified above, the indigenous peoples concerned lack specific state recognition and protection of their traditional lands, and, in the absence of such recognition, unwanted natural resource exploitation or other encroachments threaten their lands. In these situations the failure to take necessary protective measures lead to a violation of rights to property, culture, and physical well-being.

A. The Obligation of States To Adopt Adequate Measures To Specifically Identify and Secure Indigenous Peoples' Communal Lands

When state governments grant concessions for natural resource exploitation without due regard for the traditional land or resource rights of indigenous peoples, such behavior is typically a part of a larger general failure by the state to identify and provide an effective form of legal recognition of the specific land areas over which indigenous peoples hold rights. This situation of state neglect is a violation of the state's obligation to adopt and implement effective measures to secure the human rights of indigenous peoples. The U.N. study on indigenous peoples' lands remarks that:

> In terms of frequency and scope of complaints, the greatest single problem today for indigenous peoples is the failure of States to demarcate indigenous lands. Demarcation of lands is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground. Purely abstract or legal recognition of indigenous lands, territories or resources can be practically meaningless unless the physical identity of the property is determined and marked.[182]

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178. Report on Ecuador, *supra* note 10, at 106 (quoting F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*) (U.N. Center for Human Rights, 1991), para. 585.

179. *See* Miskito Report, *supra* note 68, at 81.

180. HRC General Comment on Art. 27, *supra* note 48, para. 6.2.

181. *Id.* para. 6.1.

182. *U.N. indigenous land rights study, second progress report, supra* note 63, para. 47 (citations omitted).

The U.N. report cites the situation of the Awas Tingni Community as a case in which the necessary land demarcation is lacking.[183]

An obligation to secure indigenous peoples' rights in lands and natural resources follows from the provisions of the American Convention and American Declaration that affirm rights to property, physical wellbeing, and culture, and from the associated duty to adopt the measures necessary to secure the enjoyment of these rights. This obligation requires that states identify the geographic boundaries of indigenous peoples' lands and use areas and adopt other measures necessary to provide legal certainty for the rights within the domestic legal system.[184] A state's obligation to demarcate and secure for indigenous peoples their traditional lands does not depend on prior specific legal recognition by the state of rights in those lands, since the source of indigenous peoples' property and other rights in relation to land is traditional or customary tenure. As stated in the landmark U.N. *Study of the Problem of Discrimination Against Indigenous Populations:*

> Recognition here means acknowledgment of a de facto situation that provides a basis for the existence of a right. Official recognition and subsequent registration should follow as a matter of course, once possession and economic occupation are proved.[185]

Given the typical centrality of lands and natural resources to the cultural and physical survival of indigenous peoples, and to their enjoyment of human rights in general, the obligation of states to provide the necessary legal certainty that indigenous peoples' land and resource rights will be protected is *sui generis.*

Measures to demarcate and otherwise safeguard indigenous peoples' land rights are not just a matter of obligation under the American Convention and the American Declaration. The United Nations Committee on the Elimination of Racial Discrimination, in interpreting the requirements of the fundamental norm of non-discrimination embraced by the Convention, has admonished states to take specific steps to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources."[186] Similarly the U.N. Human Rights Committee has interpreted article 27 of the Covenant on Civil and Political Rights as requiring "positive measures by States" to aspects of culture "associated with the use of land resources, especially in the case of indigenous peoples.[187]

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183. *See id.* para. 49. *See also* Martinez-Cobo report, *supra* note 51.
184. *See Miskito Report, supra* note 68, at 81.
185. Martinez-Cobo report, *supra* note 51 at para. 217 (conclusions and recommendations).
186. *General Recommendation XXIII, Indigenous Peoples,* U.N. Comm. on the Elimination of Racial Discrimination, 51st Sess., para. 5, U.N. Doc. A/52/18, Annex V (1997).
187. HRC General Comment on Art. 27, *supra* note 71, paras. 6-7.

ILO Convention No. 169 articulates the nature and scope of the *sui generis* obligation to secure indigenous peoples' rights in lands and natural resources as follows: "Governments shall take steps necessary to identify the lands which [indigenous] peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession . . . . Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned."[188]

Similarly, the Proposed American Declaration on the Rights of Indigenous Peoples affirms that indigenous peoples "have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands."[189] In addition, the Proposed Declaration enjoins states to "give maximum priority to the demarcation and recognition of properties and areas of indigenous use."[190]

Failure on the part of states to provide such demarcation and recognition of indigenous peoples' properties and use areas results in difficult and threatening conditions for indigenous peoples. Without secure and defined land tenure, indigenous peoples invariably find their lands and habitats being encroached upon by outsiders. Indigenous peoples are then vulnerable to the practices of government officials who may regard indigenous peoples' land as property of the state, and indigenous peoples are deprived of the ability to effectively and freely develop their lands and resources on their own terms. If the state allows such conditions of vulnerability to persist then it assumes responsibility for this violation of the obligation to effectively secure indigenous peoples' rights in lands and natural resources. To rectify this situation, the state must develop and implement the required measures, and it must do so in cooperation with the indigenous peoples concerned. The requirement that indigenous peoples have substantial input in the development of measures to protect their rights over lands and resources follows from the rights of consultation and self-determination discussed subsequently.

B. State Obligations with Respect to Natural Resource or Other Development Initiatives Affecting Indigenous Lands

Passive neglect on the part of states in not demarcating or otherwise securing indigenous peoples' lands is frequently accompanied by active affronts to the connections that indigenous peoples seek to maintain with lands and natural resources. The American Convention and Declaration along with other sources of international law require consultation with an indigenous community with any decision that may affect the community, including decisions to grant concessions to develop natural resources in areas traditionally used or occupied by the community. Under the relevant inter-

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188. *Convention No. 169, supra* note 6, Arts. 14(2)–14(3).
189. *Proposed American Declaration, supra* note 9, Art. XVIII, para. 4.
190. *Id.* Art. XVIII, para. 8.

national standards, the objective of such consultation is to establish agreement with the affected indigenous community over the proposed development activity. Furthermore, international law requires that, for any approved development activity that affects an indigenous community, measures be adopted to safeguard the community's interests in the affected lands and to ensure economic and other benefits for the community.

1. The Obligation To Consult and Reach Agreement with Indigenous Peoples

As demonstrated above, under the American Convention, the American Declaration and other sources of international law, indigenous peoples have rights to the protection of their traditionally occupied lands and natural resources. At a minimum, therefore, the human rights norms that protect indigenous peoples' interests in land and natural resources obligate states to consult with the indigenous groups concerned about any decision that may affect their interests and to adequately weigh those interests in the decision-making process. The right to property affirmed in the American Convention and American Declaration would have little meaning for indigenous peoples if their property could be encumbered without due consultation, consideration, and, in appropriate circumstances, just compensation by the state. Within the framework of article 27 of the International Covenant on Civil and Political Rights, the United Nations Human Rights Committee has recognized the imperative of ensuring indigenous peoples' effective participation in decisions that may affect their traditional land and resource use.[191]

The right of consultation relates, moreover, to the fundamental principle of self-determination, a principle of general international law affirmed in multiple international instruments, including the International Covenant on Civil and Political Rights. At its core, self-determination means that human beings, individually and collectively, have a right to be in control of their own destinies under conditions of equality. For indigenous peoples, the principle of self-determination establishes a right to control their own lands and natural resources and to be genuinely involved in all decision-making processes that affect them.[192]

As stated in the Covenant on Civil and Political Rights, "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."[193] For indigenous peoples to freely pursue their economic, social and cultural development, they must be in a position to determine how best to utilize their own lands and resources.

In its concluding observations on Canada in April 1999, the U.N. Human Rights Committee reinforced the relationship between the right to self-

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191. *HRC General Comment on Art. 27*, *supra* note 71, para. 7.
192. *See* INDIGENOUS PEOPLES, *supra* note 1, at 85–88.
193. *International Covenant on Civil and Political Rights*, *supra* note 67, Art. 1, para. 1.

determination and the duty to consult with indigenous peoples regarding the disposition of their traditional lands and resources. Addressing the situation of indigenous peoples in Canada, "the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence."[194] Thus, the Committee admonished against governmental acts that would unilaterally infringe on indigenous peoples' enjoyment of their rights to lands and natural resources, viewing such infringement as incompatible with the right to self-determination affirmed in article 1 of the Covenant.[195]

The Draft United Nations Declaration on the Rights of Indigenous Peoples describes an "urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies."[196] This statement recognizes that the protection of fundamental rights requires a recognition and respect for indigenous peoples' own perspective on their lands and resources. To that end, the Draft Declaration concludes that, "control by indigenous peoples over developments affecting them and their lands and territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs."[197] The Draft Declaration also recognizes the right of indigenous peoples to determine "priorities and strategies for exercising their right to development" and requires states to obtain the free and informed consent of indigenous peoples before adopting and implementing legislative and administrative measures that may affect them.[198]

For its part, the Proposed American Declaration on the Rights of Indigenous Peoples affirms the right of self-determination and consultation in stating that: "Indigenous peoples have the right to participate without discrimination, if they so decide, in all decision-making, at all levels with regard to matters that might affect their rights, lives and destiny."[199] The Proposed Declaration also affirms the right of indigenous peoples "to be informed of measures which will affect their environment, including informa-

194. *Concluding Observations of the Human Rights Committee: Canada*, U.N.GAOR, Hum. Rts. Comm., 65th Sess., para. 8, U.N. Doc. CCPR/C/79/Add.105 (1999).

195. *Id.* The Human Rights Committee also has recently called upon Mexico and Norway to faithfully implement the right of self-determination in relation to indigenous peoples and their traditional lands. *See Concluding Observations of the Human Rights Committee: Mexico*, U.N. GAOR, Hum. Rts. Comm., 66th Sess., para. 19, U.N. Doc. CCPR/C/79/Add.109 (1999); *Concluding Observations of the Human Rights Committee: Norway*, U.N. GAOR, Hum. Rts. Comm., 67th Sess., paras. 10 & 17, U.N. Doc. CCPR/C/79/Add.112 (1999).

196. Draft U.N. Declaration, *supra* note 94, para. 6.

197. *Id.* para. 8.

198. *Id.* Arts. 20, 23 and 30.

199. Proposed American Declaration, *supra* note 9, Art. XV, para. 2.

tion that ensures their effective participation in actions and policies that might affect it."[200]

These statements of rights to consultation and self-determination are consistent with ILO Convention No. 169, which clarifies that indigenous peoples' right to consultation extends even to decisions about natural resources that remain under state ownership:

> In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.[201]

Further, Convention No. 169 establishes that indigenous peoples "have the right to decide their own priorities for the process of development as it affects their lives . . . [and hence] they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."[202] Consequently, the Convention stipulates that consultations "shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."[203]

The required consultations with indigenous peoples must be more than formalities or simply processes by which they are given information about development projects. Clear, complete, and accurate information is necessary, but that information alone is not sufficient for effective participation in decision-making. Rather, in order to be truly effective, the consultations must also provide indigenous peoples with a full and fair opportunity to be heard and to genuinely influence the decisions affecting their lives.[204]

The Colombian Constitutional Court elaborated upon the content of meaningful consultations with indigenous peoples in a case dealing with oil exploration within the traditional territory of the U'wa people.[205] The court ordered suspension of an oil exploration permit pending proper consulta-

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200. *Id.* Art. XIII, para. 2.

201. Convention No. 169, *supra* note 6, Art. 15, para. 2.

202. *Id.* Art. 7.

203. Convention No. 169, *supra* note 6, Art. 6, para. 2.

204. *See id.* (for proposition that consultation shall be undertaken in good faith and in a form appropriated to the circumstances). *See also* Manuela Tomei & Lee Swepston, *INDIGENOUS AND TRIBAL PEOPLES: A GUIDE TO ILO CONVENTION NO. 169*, sec. 1, para. 7 (July, 1996), *at* http://www.ilo.org/public/english/employment/strat/poldev/papers/1998/169guide (last visited Feb. 27, 2001) (for the proposition that good faith consultation includes a full and fair opportunity to be heard and to genuinely influence the decisions at issue).

205. Sentencia SU-039, *supra* note 116.

tions, and held that, in order for indigenous peoples' cultural integrity to be secured, consultation must be active and effective, and therefore involves:

> (a) full disclosure regarding proposed projects;
>
> (b) full disclosure of the possible effects of the proposed projects;
>
> (c) the opportunity to freely and privately (without outside interference) discuss the proposed projects within the entire community or among its authorized representatives;
>
> (d) the opportunity to have their concerns heard and to take a position on the viability of the project.[206]
>
> Accordingly, those conducting such consultations should make every effort to reach an agreement or accord with the indigenous community.

Similarly, the Supreme Court of Canada in its landmark *Delgamuukw* decision concerning aboriginal title held that, in the disposition of indigenous peoples' lands and resources,

> [t]here is always a duty of consultation . . . this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, [the duty] will be significantly deeper than mere consultation. Some cases . . . require the full consent of an aboriginal nation.[207]

These domestic precedents confirm that states are obligated to fully inform and meaningfully consult with indigenous peoples before making decisions disposing of or affecting their traditional lands. States must maintain the objective of reaching an agreement with the indigenous groups concerned, ensure that indigenous groups have meaningful input in the development process as it affects them and ensure that indigenous peoples' interests in land and resources are protected.

2. *The Obligation To Take Steps To Prevent or Mitigate Negative Impacts of Development Activities*

Consultations with indigenous groups over development activities should lead, at a minimum, to specific measures to safeguard the interests and rights of the indigenous communities concerned. Such safeguards include measures to prevent or mitigate the impacts of development activities that might harm or interfere with indigenous peoples' use and enjoyment of

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206. *Id.*
207. *Delgamuukw*, [1997] 3 S.C.R. at 1113.

lands and natural resources. ILO Convention No. 169 provides that "Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity."[208] To that end, the Convention requires states to adopt special measures "as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned."[209]

In the context of a logging concession, for example, such positive measures might include measures in the design of the governing operational plan to prevent environmental impacts from road-building or timber harvesting that might harm indigenous peoples' subsistence hunting and agricultural practices or interfere with access to sacred sites. Such measures might also include compensation for temporary or long-term degradation of soil or water quality.

The Human Rights Committee has affirmed that positive measures of protection should be "directed towards ensuring the survival and continued development of the cultural, religious and social identity" of the protected groups.[210] Therefore, merely examining the environmental or economic impacts of government-permitted activities does not fulfill the requirement to take positive steps to ensure the "survival" of cultures. Rather, governments must develop systems that incorporate protections for the integrity of indigenous peoples' lands and cultures in all aspects of their relationships to indigenous peoples.

Agenda 21, the detailed program of action adopted by the U.N. Conference on Environment and Development confirms the *sui generis* character of the requirement to protect indigenous peoples from the adverse effects of development activities, within the context of recognizing indigenous peoples' "historical relation with their lands." Chapter 26 of Agenda 21 calls on states to adopt and give effect to the following measures, among others:

> Adoption or strengthening of appropriate policies and/or legal instruments at the national level; Recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous peoples concerned consider to be socially and culturally inappropriate;
> Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development.[211]

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208. Convention No. 169, *supra* note 6, Art. 2, para. 1.
209. *Id.* Art. 4, para. 1.
210. *Id.* para. 9.
211. Agenda 21, U.N. Conference on Environment and Development, U.N. GAOR, 47th Sess., Annex 2, ch. 26, para. 3(a), U.N. Doc. A/CONF.151/26/Rev.1 (Vol.III) (1992).

The impact of government-sanctioned resource extraction activities in indigenous peoples' traditional territories that do not conform with this requirement not only reduces the ability of the affected cultural group to maintain its own economic and social integrity, it irredeemably changes the entire economic structure of the affected region. State-imposed economic exploitation of their lands and loss of resources deprives indigenous peoples of their traditional livelihoods, forcing them to participate in a new economic regime that they do not control. In this way the cultural fabric of the indigenous group slowly unravels, instead of "enriching the fabric of society as a whole" as anticipated by the U.N. Human Rights Committee.[212] The requirement of providing special safeguards is to protect indigenous peoples from such a fate.

3. *The Obligation To Ensure Benefits*

In addition requiring states to develop safeguards to protect indigenous peoples from the adverse impacts of development activities, international law also obligates states to ensure that indigenous peoples realize benefits from development projects and other activities that affect them and their lands. The second progress report of the U.N. Sub-Commission land rights study mentioned above, notes that "[e]conomic development has been largely imposed from outside, with complete disregard for the right of indigenous peoples to participate in the control, implementation and benefits of development."[213] Such a pattern of development activity should no longer be tolerated.

The right of indigenous peoples to benefit from economic activities conducted on their lands is an essential element of their right to property. In addition to providing recognition of their rights to control, ownership, use, and enjoyment of lands, the Proposed American Declaration on the Rights of Indigenous Peoples also provides that indigenous peoples shall participate in the benefits of resource exploitation activities and receive compensation for any loss they may sustain as a result of such activities.[214] In the *Länsmann* cases cited above, the Human Rights Committee noted that "economic activities must, in order to comply with article 27 of the Covenant on Civil and Political Rights, be carried out in a way that the [Sami] continue to benefit" from their traditional means of livelihood.[215]

The United Nations Draft Declaration on the Rights of Indigenous Peoples provides that "[i]ndigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage

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212. *See* HRC General Comment on Art. 27, *supra* note 71, para. 9.
213. *U.N. indigenous land rights study, second progress report, supra* note 63, para. 64.
214. Proposed American Declaration, *supra* note 9, Art. XVIII, paras. 1 & 5.
215. *Länsmann I, supra* note 72, para. 9.8.

freely in all their traditional and other economic activities."[216] The Draft Declaration also provides that indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.[217] ILO Convention No. 169 requires that "[t]he peoples concerned shall wherever possible participate in the benefits of [resource exploitation], and shall receive fair compensation for any damages which they may sustain as a result of such activities."[218]

To ensure that indigenous peoples' rights to property and cultural integrity are protected, benefits from economic activities should focus on strengthening indigenous peoples' ability to determine and develop priorities for their own development and on protecting their land and resources for their cultural and subsistence uses. The second progress report of the U.N. Sub-Commission land rights study quotes from a Canadian government statement as support for the idea that indigenous peoples, as well as the world at large, benefit when indigenous peoples are "guaranteed participation in land, water, wildlife and environmental management . . . ; financial compensation; resource revenue-sharing; specific measures to stimulate economic development; and a role in management of heritage resources."[219]

VI. Conclusion

In this Article, we have argued that the Inter-American human rights system provides protection for the traditional land and natural resource tenure of indigenous peoples. These protections are grounded in the affirmation of rights to property, physical well being, and cultural integrity, and in the requirement that these rights extend to indigenous peoples on a nondiscriminatory basis. Indigenous traditional land and resource tenure is a form of property, and it is crucial to the cultural and physical survival of indigenous peoples. Under the American Convention on Human Rights, the American Declaration on the Rights and Duties of Man, and other sources of international law applicable in the Americas, states are obligated to take affirmative measures to recognize and protect indigenous peoples' rights in land and natural resources on the basis of their traditional tenure.

The human rights law of the Americas which we describe in this Article results from the Inter-American system's high level of active engagement with indigenous human rights issues and concerns during the past several decades. As the cases we describe in this Article indicate, the effectiveness of this system in recognizing and protecting the human rights of indigenous peoples is being tested and contested widely throughout the Americas. But to anyone familiar with the history of indigenous peoples' rights under in-

216. Draft U.N. Declaration, *supra* note 94, Art. 21.
217. *Id.*
218. Convention No. 169, *supra* note 6, Art. 15, para. 2.
219. *U.N. indigenous land rights study, second progress report*, *supra* note 63, para. 95.

ternational law this level of active engagement with indigenous human rights issues in the Inter-American system should come as no surprise. This issue has percolated for centuries in the Americas. Its long history includes the sixteenth-century debates between the influential Spanish theologians and legal theorists Bartolome de Las Casas and Juan Sepulveda, and the writings of one of the first great architects of the European Law of Nations, Francisco de Vitoria.[220] In his renowned lectures on the rights of the indigenous peoples of the land "newly discovered," Vitoria first recognized that under universally applicable principles of law the Indians were "true owners alike in public and in private law before the advent of the Spaniards amongst them." "Just like Christians," wrote this early international law scholar, "neither their princes nor private persons could be despoiled of their property" without just cause.[221]

Ever since Vitoria and the writings of the "Spanish School" of international law,[222] the human rights situation of indigenous peoples in the Americas has remained in the forefront of the challenges confronted by international law. Emmerich de Vattel, in his influential eighteenth century writings on the law of nations, forcefully addressed the question of the rights of the indigenous peoples of the Americas to their lands, culture and religion. "Those ambitious European States which attacked the American Nations and subjected them to their avaricious rule, in order, as they said, to civilize them, and have them instructed in the true religion—those usurpers, I say, justified themselves by a pretext equally unjust and ridiculous."[223]

Chief Justice John Marshall's early nineteenth century opinions on Indian rights under United States law figured prominently in the fabric of international law concerning the rights of indigenous peoples.[224] As a judge, Marshall was confronted directly with the legacy of the European Law of Nations in the Americas respecting indigenous peoples' rights in the Cherokee Cases, in which the state of Georgia sought to assert its law and jurisdiction over the Cherokee Nation. In *Worcester v. Georgia*, one of the most cited domestic law judicial opinions in the world, Marshall wrote that the rights of discovery belonging to European discoverers under the European Law of Nations could not affect the property rights of the Indians of America, who were "already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man."[225]

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220. *See* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 96–108 (1990); INDIGENOUS PEOPLES, *supra* note 1, at 10–12.

221. FRANCISCUS DE VICTORIA, DE INDIS ET DE IURE BELLI RELECTIONES 128 (E. Nys ed., J. Bate trans. 1917).

222. *See* Felix Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO.L.J.

223. *Quoted in* INDIGENOUS PEOPLES, *supra* note 1, at 18.

224. *Id.* at 16–18.

225. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832). *See also* INDIGENOUS PEOPLES, *supra* note 1, at 17–18.

In the twentieth century, as noted in the introduction of this Article, the Organization of American States General Assembly took the initial steps in 1948 in inaugurating the modern international human rights regime's recognition of indigenous peoples as special subjects of concern. Article 39 of the Inter-American Charter of Social Guarantees requires states to take "necessary measures" to protect indigenous peoples' lives and property.[226] Member states of the OAS were among the first states to sign on and bind themselves to International Labor Organization Convention No. 169 of 1989, concerning Indigenous and Tribal peoples in Independent Countries (entered into force Sept. 1991).[227] The OAS Inter-American Commission on Human Rights, in consultation with OAS member states and indigenous peoples' representatives, has prepared the first regional human rights instrument protecting indigenous peoples' human rights, the Proposed American Declaration on the Rights of Indigenous Peoples.[228] And the Commission has actively involved itself far more than any other regional human rights body in the world through its investigations, reports, and friendly settlement procedures of the last two decades which have recognized, promoted, and protected indigenous peoples' human rights under principles of international law.[229]

In conclusion, the active engagement of the Inter-American human rights system with issues and concerns of indigenous peoples' human rights is one of the most important developments in international law today. Many of the arguments that we make in this Article about indigenous peoples' rights in their traditional lands and resources could not be credibly made in international law a few short decades or even years ago. Yet, as we have tried to show, within the Inter-American human rights system at least, these arguments are supported by an ever increasing number of international and domestic legal precedents. The resolution of the indigenous human rights cases described in this Article will, one way or another, provide additional important legal precedents. These cases hold the potential to further the transformation of international law itself into an ever more meaningful and effective instrument for addressing the human rights concerns of indigenous peoples in the Americas and around the world as well.

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226. *See* INTER-AMERICAN CHARTER OF SOCIAL GUARANTIES, *supra* note 2.

227. *See* INDIGENOUS PEOPLES, *supra* note 1, at 47–49; Convention No. 169, *supra* note 6.

228. Proposed American Declaration, *supra* note 9.

229. See text accompanying notes 9–14.