

INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES: THE MOVE TOWARD THE MULTICULTURAL STATE*

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I. INTRODUCTION

Indigenous peoples and the cultural attributes that define them have survived with great resilience in the face of tremendous adversity suffered through centuries, despite the designs of both early colonizers and more recent liberal assimilationists. They have survived as they have striven to maintain the cultural integrity that makes them different, while adapting, often ingeniously, to the changing conditions around them. The subsequent articles in this issue focus on the situations of particular indigenous groups. Written by legal experts who are members of the indigenous peoples they discuss, these articles tell of the continuing vitality and the struggles of the peoples of the Chittagong Hill Tracts in Bangladesh, the Maya of Guatemala, the Maasai of Kenya and Tanzania, the Saami of the European Far North, and the indigenous peoples of the Philippines. What we see are peoples who are determined to be part of this world as viable communities – indeed, as self-determining *peoples* – and not to be relegated to histories of conquest or pre-modernity, or to be among the objects of tourists' voyeurism.

Throughout the world, distinct social and cultural groupings identify themselves as “indigenous” by reference to the characteristics that distinguish them from the larger societies that have grown up around them. In some ways, the term “indigenous” can be understood to refer to all but the most transient or migratory segments of humanity. The European nationalities that spawned colonialism are, in a literal sense, indigenous to their homelands. The dominant settler populations that were born of colonial patterns have created societies that many might now describe as indigenous to the place of settlement. It even may be said that recently migrating populations are in the process of becoming part of the dominant “indigenous” receiving society or laying down roots that will, over time, establish their own distinctive “indigenous” connections with the place of migration. Within international law and institutions, however, the term “indigenous,” or similar terms such as “native” or “aboriginal” (as in the domestic legal regimes of many countries) have long been used to refer to a particular subset of humanity that represent a common set of experiences rooted in historical subjugation by colonialism, or something like colonialism.¹ Today, indigenous

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1. See Erica-Irene A. Daes, Working Paper by the Chairperson-Rapporteur, U.N.Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996), (on the concept of “indigenous people”)

peoples are identified, and identify themselves as such, by reference to identities that pre-date historical encroachments by other groups and the ensuing histories that have challenged their cultural survival and self-determination as distinct peoples.²

Numerous processes within the international system have focused on the common set of ongoing problems that are central to the demands of indigenous groups, such that there are discernible patterns of response and normative understandings associated with the rubric of indigenous peoples. These international processes now reveal a contemporary body of international human rights law on the subject.³ Principal among the relevant international processes are efforts to have a U.N. Declaration on the Rights of Indigenous Peoples adopted.⁴ A similar effort has also been undertaken by the Organization of American States (OAS) to adopt a declaration on indigenous rights.⁵ Discussions around drafts of these documents have not yet yielded definitive agreement on particular texts, but over the years these discussions have helped to forge new understandings and a certain level of global consensus about indigenous peoples and their rights. General human rights principles that are included in widely ratified treaties and that are clearly already part of international law – principles such as non-discrimination and cultural integrity – have been interpreted by authoritative institutions as upholding the collective rights of indigenous peoples. Additionally, minimum standards of indigenous rights are made explicit in International Labor Organization (Convention No. 169) on Indigenous and Tribal Peoples,⁶ a multilateral treaty ratified by fifteen states in the Americas and

(surveying historical and contemporary practices).

2. Cf. Benedict Kingsbury, *'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414 (1998) (arguing for a flexible approach to understanding the concept of "indigenous peoples" that emphasizes the commonality of "experiences, concerns and contributions made by groups in many different regions"). See, generally, Erica-Irene A. Deas, Note by the Chairperson-Rapporteur of the Working Group on Indigenous Populations: Criteria Which Might Be Applied When Considering the Concept of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/AC.4/1995/3 (1995).

3. See, generally, S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (Oxford Univ. Press 1996); PATRICK THORBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* (Manchester Univ. Press 2002).

4. See *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Working Group on Indigenous Populations, 11th Sess., at 105, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (1994) [hereinafter *Draft U.N. Declaration*].

5. See *Proposed American Declaration on the Rights of Indigenous Peoples*, Inter-American Commission on Human Rights, 1333d Sess. (95th Reg. Sess.), art. VI.1, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.95, Doc.7 Rev. (Mar. 14, 1997) [hereinafter *Proposed American Declaration*].

6. Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), June 27, 1989, INT'L LABOR CONF. (entered into force Sept. 5, 1990) [hereinafter *ILO Convention No. 169*].

elsewhere. Moreover, these and other developments can be seen as giving rise to a body of customary international law on the subject, even before the final adoption of the U.N. and OAS declarations.⁷ Customary international law is significant because it generally binds the constituent units of the world community to act in certain ways, apart from formal assent to articulated norms.

This Article sets forth the broad contours and many of the sources of the international human rights regime as it concerns indigenous peoples. It demonstrates that this regime advances a multicultural model of political ordering and incorporation of indigenous peoples into the fabric of the state.⁸ Under this model, indigenous peoples are to be able to join others in the states in which they live on the basis of equality in terms of cultural identity and not just individual citizenship. Indigenous peoples are not to be forced or pressured to assimilate and thus lose their distinctive cultural attributes to dominant cultural patterns. Rather, the terms of integration of indigenous people into the social and political orders of states must allow them to continue to live with their cultures intact. For indigenous peoples such cultural integrity means the continuation of a range of cultural patterns, including patterns that establish rights to lands and natural resources, and are embodied in indigenous customary law and institutions that regulate indigenous societies. It is a truly multicultural state to which this model of international human rights aspires and one which subsequent articles in this issue support.

In its practical application the model of the multicultural state remains problematic. Even in states such as Guatemala, that formally embrace a multicultural model in their constitutions and other official pronouncements,⁹ this

7. Norms of customary law arise – or, to use the much favored term, *crystallize* – when a preponderance of states and other authoritative actors converge on a common understanding of the norms’ contents and generally expect future behavior to conform with those norms. The argument that multiple developments within the international arena over several years have given rise to customary international law concerning indigenous peoples is set forth in ANAYA, *supra* note 3, at 49-58; S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33-86, 53-74 (2001).

8. This multicultural model is generally in accord with an influential strain of political philosophy led by authors such as Will Kymlicka. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* (Clarendon Press 1995); WILL KYMLICKA, *POLITICS IN THE VERNACULAR* (Oxford Univ. Press 2001); *CITIZENSHIP IN DIVERSE SOCIETIES* (Will Kymlicka & Wayne Norman eds., Oxford Univ. Press 2000).

9. See CONST. GUATEMALA art. 58 (1985) (recognizing “the right of persons and communities to their cultural identity in accordance with their values, languages and customs”) (translation from Spanish by author). See also, e.g., POLITICAL CONST. COLOMBIA art. 7 (1991) (affirming that “[t]he State affirms and protects the ethnic and cultural diversity of the Colombian Nation”); POLITICAL CONST. BOLIVIA art. 1 (1967) (as amended in 1995) (defining Bolivia as “free, independent, sovereign, multiethnic and pluricultural”); POLITICAL CONST. NICARAGUA art. 8 (1987) (as amended in 1995) (stating that “[t]he people of Nicaragua is of a multi-ethnic nature”); POLITICAL CONST. MEXICO

model can remain a distant ideal, as the article by Romeo Tiu on the conditions of the Maya people demonstrates. Entrenched majority attitudes, social patterns, and legal practices that have been hostile to indigenous cultures for centuries are hard to change. Nonetheless, the multicultural model appears to be now firmly embraced by the international human rights regime, in an effort to move the reality closer to the ideal and to establish that movement as a global priority.

II. NON-DISCRIMINATION AND CULTURAL INTEGRITY

The right of indigenous peoples to maintain the integrity of their cultures is a simple matter of equality, of being free from historical and ongoing practices that have treated indigenous cultures as inferior to the dominant cultures. The right to equality and its mirror norm of non-discrimination are at the core of the contemporary international human rights regime. In its statement of guiding principles, the U.N. Charter admonishes states to show “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹⁰ Equality and non-discrimination precepts are emphasized and elaborated upon in numerous international and regional human rights instruments, including the U.N. Convention on the Elimination of All Forms of Racial Discrimination,¹¹ the American Convention on Human Rights,¹² the African Charter on Human and Peoples’ Rights,¹³ the Declaration on the Elimination of All Forms of Discrimination Based on Religion or Belief,¹⁴ the American Declaration of the Rights and Duties of Man,¹⁵ and the Universal Declaration of

art. 2 (1917) (as amended in 2001) (stating that “[t]he Nation has a pluricultural composition originally founded in the indigenous peoples”); POLITICAL CONST. ECUADOR art. 1 (1998) (defining Ecuador as “a social state of law, sovereign, unitary, independent, democratic, pluricultural and multi-ethnic”) (translations from Spanish by author).

10. U.N. CHARTER art. 1(3).

11. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, G.A. Res. 2106 A(XX), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

12. American Convention on Human Rights, Nov. 22, 1969, G.A.S. Treaty Ser. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) (affirming, *inter alia*, in article 24 that “all persons are equal before the law”).

13. African Charter on Human and Peoples’ Rights, June 27, 1981, Organization of African Unity, art. 20, 21 I.L.M. 59 (1981) (entered into force Oct. 21, 1986) (affirming, in article 3, the equality of every individual and, in article 19, that “[a]ll peoples shall be equal”).

14. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc A/36/684 (1981).

15. American Declaration on the Rights and Duties of Man, adopted by the 9th International Conference of American States (Mar. 30-May 2, 1948), O.A.S. Res. 30, O.A.S. Doc. OENSer.UV/I.4, rev. (1965) (affirming, *inter alia*, in article II that “[a]ll

Human Rights.¹⁶ It is generally accepted, moreover, that states are enjoined by customary international law not to promote or condone systemic racial discrimination.¹⁷

The non-discrimination norm has special implications for indigenous groups, which, practically as a matter of definition, have been treated adversely on the basis of their immutable cultural differences. A seminar of experts convened by the United Nations to discuss the effects of racial discrimination on indigenous-state relations concluded that “[i]ndigenous peoples have [been] and still are, the victims of racism and racial discrimination.”¹⁸ The report on the seminar elaborates:

Racial discrimination against indigenous peoples is the outcome of a long historical process of conquest, penetration and marginalization, accompanied by attitudes of superiority and by a projection of what is indigenous as “primitive” and “inferior.” The discrimination is of a dual nature: on the one hand, gradual destruction of the material and spiritual conditions [needed] for the maintenance of their [way of life], on the other hand, attitudes and behaviour signifying exclusion or negative discrimination when indigenous peoples seek to participate in the dominant society.¹⁹

In the same vein, the U.N. Committee on the Elimination of Racial Discrimination (CERD) has emphasized that:

[I]n many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists,

persons are equal before the law . . . without distinction as to race, sex, language, creed or any other factor”).

16. Universal Declaration of Human Rights, G.A. Res. 217 A (III), Dec. 10, 1948 (affirming, *inter alia*, in articles 1 and 2 that “[a]ll persons are born free and equal in dignity and rights” and entitled to the enjoyment of human rights “without distinction of any kind”), reprinted in Human Rights: A Compilation of International Instruments, U.N. Doc. ST/HR/1/rev.4, (Vol. 1, pt. 1), at 1, Sales No. E.93. XIV.1 (1993) [hereinafter U.N. Compilation of Instruments].

17. See Richard Lillich, *Civil Rights, in HUMAN RIGHTS IN INTERNATIONAL LAW* 115-170, 133, 151 (Theodor Meron ed., Clarendon Press 1984). See also *Barcelona Traction (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (1970).

18. *Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States*, U.N. Doc. E/CN.4/1989/22, HR/PUB/89/5, at 5 (1989).

19. *Id.* at 5.

commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.²⁰

The “problem of discrimination against indigenous populations”²¹ was in fact the point of departure for the surge of United Nations’ activity concerning indigenous peoples over the last few decades. International Labor Organization (ILO) Convention No. 169 and the draft indigenous rights declarations being considered by the United Nations and the Organization of American States reiterate the norm against discrimination with specific reference to indigenous peoples.²² Clearly, it is no longer acceptable for states to incorporate institutions or tolerate practices that perpetuate an inferior status or condition for indigenous individuals or groups, or their cultural attributes. It is for this reason that CERD has paid special attention to indigenous peoples in its efforts to achieve compliance with the U.N. Convention on the Elimination of All Forms of Racial Discrimination, a convention that has been widely ratified.²³

20. U.N. Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation XXIII: Indigenous Peoples*, U.N. Doc. CERD/C/51/misc 13/Rev 4, at ¶ 3 (1997) [hereinafter *CERD General Recommendation on Indigenous Peoples*].

21. E.S.C. Res. 1589(L), U.N. ESCOR, 50th Sess., Supp. No. 1, at 16, U.N. Doc. E/5044 (1971) (Economic and Social Council resolution authorizing the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities to conduct a “[c]omplete and comprehensive study of the problem of discrimination against indigenous populations,” a study that resulted in the now well-known *Martinez Cobo Report*).

22. See ILO Convention No. 169, *supra* note 6, art. 3(1) (“Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination”); Draft U.N. Declaration, *supra* note 4, art. 2 (“Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination”); Proposed American Declaration, *supra* note 5, art. VI.1 (“Indigenous peoples have the right to special guarantees against discrimination that may have to be instituted to enjoy internationally- and nationally-recognized human rights”).

23. See, e.g., *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 49th Sess., Supp. No. 18, at 30, U.N. Doc. A/49/18 (1994) (considering the legal regime applicable to Saami land and hunting rights in Sweden); *id.* at 88, 92 (evaluating developments in Australia concerning indigenous land rights); *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 48th Sess., Supp. No. 18, at 40-43, U.N. Doc. A/48/18 (1993) (evaluating government programs in Ecuador concerning indigenous languages, lands, benefits from natural resource exploitation, and participation in government decision-making); *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 47th Sess., Supp. No. 18, at 38-44, 47-52, 59-62, U.N. Doc. A/47/18 (1992) (discussing broad range of issues concerning indigenous peoples in connection with reports by, respectively, Costa Rica, Bangladesh, Colombia, and Chile); *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 46th Sess., Supp. No. 18, at 28-32, 5-56, 62-69, 90-94, U.N. Doc. A/46/18 (1991) (similar discussion in connection with reports by Argentina, Canada, Sweden, Australia, and

The non-discrimination norm goes beyond ensuring for indigenous *individuals* the same civil and political freedoms or the same access to the state's social welfare programs accorded others within a state. It also upholds the right of indigenous *groups* to maintain and freely develop their cultural identities in co-existence with other sectors of humanity. Hence, in connection with the U.N. Convention against Racial Discrimination, CERD has called upon states to:

- (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
- (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
- (e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.²⁴

This statement by CERD extends to indigenous peoples the same notion of respect for cultural integrity that developed within international law in other contexts some time ago. The notion of respect for cultural integrity was a feature of treaties among European powers negotiated at the close of World War I.²⁵ More recently, the states participating in the Conference on Security and Cooperation in Europe (now the Organization for Security and Cooperation in Europe – OSCE) have declared the right of national minorities to “maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will,”²⁶

Mexico).

24. *CERD General Recommendation on Indigenous Peoples*, *supra* note 20, ¶ 4.

25. See NATAN LERNER, *GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW* 7 (M. Nijhoff Publishers 1991) (listing European treaties with provisions protecting the rights of religious and ethnic minorities).

26. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 29, 1990, art. 32. See also *id.* arts. 32.1-32.6 (detailing this right). Similarly, the states participating in the CSCE affirmed “that the ethnic, cultural, linguistic and religious identity of national minorities will be protected and that persons belonging to national minorities have the right freely to express, preserve and develop that identity without any discrimination and in full equality before the law.” Charter of Paris for a New Europe, CSCE, Nov. 21, 1991, 30 I.L.M. 193 (1991). At the Budapest Summit

and the Council of Europe has promulgated a Framework Convention on the Rights of National Minorities,²⁷ which embraces and develops this theme. Beyond the OSCE and European contexts, the Convention Against Genocide, the first U.N.-sponsored human rights treaty, upholds that *all* cultural groupings have a right to exist.²⁸

Affirmation of the world's diverse cultures was the central concern of a resolution by the Fourteenth General Conference of the U.N. Educational, Scientific and Cultural Organization (UNESCO). The 1966 UNESCO Declaration of the Principles of International Cultural Cooperation proclaims in its first article:

1. Each culture has dignity and value which must be respected and preserved.
2. Every people has the right and duty to develop its culture.
3. In their rich variety and diversity, and in the reciprocal influence they exert on one another, all cultures form part of the common heritage belonging to all man-kind.²⁹

More recently, UNESCO adopted a Universal Declaration on Cultural Diversity, in which it proclaimed:

The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples.³⁰

in 1994, the CSCE became a permanent organization, the Organisation for Security and Cooperation in Europe (OSCE).

27. Framework Convention for the Protection of National Minorities, Nov. 10, 1995, 34 I.L.M. 351 (1995) (entered into force Feb. 1, 1998).

28. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, G.A. Res. 260 A(III), 78 U.N.T.S. 277 (entered into force Sept. 3, 1953) (defining, in art. 2, genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such").

29. Declaration of the Principles of International Cultural Cooperation, U.N. Educational, Scientific and Cultural Organization, 14th Sess., art. 1, Nov. 4, 1966, *reprinted in* U.N. Compilation of Instruments, *supra* note 16, vol. 1, pt. 2, at 591.

30. Universal Declaration on Cultural Diversity, Gen. Conf. of UNESCO, 31st Sess., art. 4, Nov. 2, 2000.

Respect for cultures of non-dominant populations is promoted by Article 27 of the International Covenant on Civil and Political Rights.³¹ Article 27 affirms in universalist terms the right of persons belonging to “ethnic, linguistic or religious minorities . . . in community with other members of their group, to enjoy their own culture, to profess and practise their own religion [and] to use their own language.”³² Such rights are reaffirmed and elaborated upon in the 1992 U.N. Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities.³³

While rights of cultural integrity outside the specific context of indigenous peoples have been associated with “minority rights,”³⁴ indigenous rights advocates have frequently rejected calling indigenous groups “minorities” in their attempts to establish indigenous peoples within a separate regime with greater legal entitlements. For example, in a communication to the U.N. Human Rights Committee concerning the Mikmaq of Canada,³⁵ the author of the communication asserted that the “Mikmaq tribal society” was not a “minority” but rather a “people” within the meaning of article 1 of the Covenant of Civil and Political Rights, which holds that “[a]ll peoples have the right to self-determination.” International practice has not endorsed such a formal dichotomy, but rather has tended to treat indigenous peoples and minorities as distinct but overlapping categories subject to common normative considerations. The specific focus on indigenous peoples through international organizations indicates that groups within this rubric are acknowledged to have distinguishing concerns and characteristics that warrant treating them apart from, say, minority populations of Western Europe. At the same time, indigenous and minority rights issues intersect substantially in related concerns of non-discrimination and cultural integrity.³⁶

31. International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200(XXI), art. 27/999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

32. *Id.*

33. Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, Dec. 18, 1992, G.A. Res. 47/135 [hereinafter *Minority Rights Declaration*], reprinted in U.N. Compilation of Instruments, *supra* note 16, vol. 1, pt. 1, at 140.

34. For an extensive survey of the topic, see *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, U.N. Sub-commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/38/Rev.1, Sales No. E.78.XIV.1 (1979) (Francesco Capotorti, special rapporteur). See also PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* (Clarendon Press 1991); LA PROTECCIÓN INTERNACIONAL DE LAS MINORÍAS (Fernando Mariño et al. eds., Ministerio de Trabajo y Asuntos Sociales 2001).

35. See *Mikmaq Tribal Society v. Canada*, Communication No. 78/1980, *Report of the Human Rights Committee*, U.N. GAOR, 39th Sess., Supp. No. 40, at 200, 202, U.N. Doc. A39/40, Annex 16 (1984) (decision on admissibility adopted July 29, 1984).

36. See Ian Brownlie, *The Rights of Peoples in Modern International Law*, in *THE RIGHTS OF PEOPLES* 5 (James Crawford ed., Clarendon Press 1988) (“[H]eterogeneous

Article 27 of the International Covenant on Civil and Political Rights articulates “rights of *persons* belonging to” cultural groups,³⁷ as opposed to specifying rights held by the groups themselves. It is apparent, however, that in its practical application, article 27 protects group as well as individual interests in cultural integrity. Given that culture is a product of, and is manifested through group dynamics, the enjoyment of rights connected with culture is mostly meaningful in a group context. It would be impossible or lacking in meaning, for example, for an indigenous individual to partake of a traditional indigenous system of dispute resolution *alone*, or to speak an indigenous language alone, or engage in a communal religious ceremony alone.³⁸ This understanding is implicit in article 27 itself, which upholds rights of persons to enjoy their culture “*in community* with other members of their group.”³⁹ Culture, ordinarily, is an outgrowth of a collectivity, and, to that extent, affirmation of a cultural practice is an affirmation of the particular cultural group.

Conversely, and as more clearly expressed by article 27, the individual human being is, in his or her own right, an important beneficiary of cultural integrity. The relationship of the individual to group entitlement of cultural integrity was shown by the U.N. Human Rights Committee’s decision in the case of Sandra Lovelace.⁴⁰ Lovelace, a woman who had been born into an Indian band residing on the Tobique Reserve in New Brunswick, Canada, challenged section 12(1)(b) of Canada’s Indian Act, which denied Indian status and benefits to any Indian woman who married a non-Indian. The act did not operate the same way with respect to Indian men. Because she had married a non-Indian, section 12(1)(b) denied Lovelace residency on the Tobique Reserve. She alleged violations of various provisions of the covenant, including articles proscribing sex discrimination, but the committee considered article 27 as “most directly applicable” to her situation. In ruling in her favor, the committee held that “the right of Sandra Lovelace to access to her native culture and language ‘in community with the other members’ of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists.”⁴¹

While the *Lovelace* case emphasizes the rights of the individual, the

terminology which has been used over the years – references to ‘nationalities,’ ‘peoples,’ ‘minorities,’ and ‘indigenous populations’ – involves essentially the same idea.”).

37. International Covenant on Civil and Political Rights, *supra* note 31, art. 27 (emphasis added).

38. This point is made and elaborated upon in Douglas Sanders, *Collective Rights*, 13 HUM. RTS. Q. 368-386 (1991).

39. International Covenant on Civil and Political Rights, *supra* note 31, art. 27, (emphasis added).

40. *Lovelace v. Canada*, Communication No. R.6/24, *Report of the Human Rights Committee*, U.N. GOAR, 36th Sess., Supp. No. 40, at 166, U.N. Doc. N36/40, Annex 18 (1977) (views adopted Dec. 29, 1977).

41. *Id.* at 173 (quoting art. 27).

Human Rights Committee's decision in *Kitok v. Sweden*⁴² demonstrates that the group interest in cultural survival may take priority. Ivan Kitok challenged the Swedish Reindeer Husbandry Act (which is discussed in Mattias Ahrén's article in this issue). The Act reserves reindeer herding rights exclusively for members of *samebys*, a Saami social and legal entity with foundations in Saami customary reindeer herding practices. Although ethnically a Saami, Kitok had lost his membership in his ancestral *sameby*, and the *sameby* had denied him re-admission. The Human Rights Committee acknowledged that reindeer husbandry, although an economic activity, is an essential element of the Saami culture. The committee found that, while the Swedish legislation restricted Kitok's participation in Saami cultural life, his rights under article 27 of the covenant had not been violated. The committee concluded that the legislation was justified as a means of ensuring the viability and welfare of the Saami as a whole. In these and other cases, the Human Rights Committee has emphasized that article 27 of the covenant broadly protects indigenous cultural integrity in a manner attentive to the particularities of diverse indigenous cultures and the interests of groups as well individuals.

Added to the foregoing is the ILO Convention on Indigenous and Tribal Peoples, Convention No. 169 of 1989,⁴³ which is today perhaps the most prominent and specific international affirmation of indigenous cultural integrity and group identity. Convention No. 169, which has been ratified by several Latin American countries, as well as Denmark, Fiji, Norway, and The Netherlands, is a revision of the ILO's earlier Convention No. 107 of 1957, and represents a marked departure in world community policy from the philosophy of integration or assimilation underlying the earlier convention. The basic theme of Convention No. 169 is indicated by the convention's preamble, which recognizes "the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they lie."⁴⁴ Upon this premise, the convention includes provisions advancing indigenous cultural integrity,⁴⁵ land and resource rights,⁴⁶ and non-discrimination in social welfare spheres;⁴⁷ it generally enjoins states to respect indigenous

42. Comm. No. 197/1985, *Report of the Human Rights Committee*, U.N. GOAR, 43rd Sess., Supp. No. 40, at 207, U.N. Doc. A/43/40, Annex 7(G) (1988) (views adopted July 27, 1988).

43. ILO Convention No. 169, *supra* note 6.

44. *Id.* pmb., ¶ 5. The principal aspects of the convention are described further in Parts III and IV, *infra*, in a synthesis of conventional and customary international norms concerning indigenous peoples.

45. *E.g.*, *id.* art. 5 ("[T]he social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected").

46. *Id.* pt. 2 (land). The principal land rights provisions of ILO Convention No. 169 are discussed below.

47. *Id.* pt. 3 ("Recruitment and Conditions of Employment"), pt. 4 ("Vocational

peoples' aspirations in all decisions affecting them.⁴⁸

Ambassador España-Smith of Bolivia, chair of the International Labor Organization Conference Committee that drafted ILO Convention No. 169, summarized the consensus of the committee as follows:

The proposed Convention takes as its basic premise respect for the specific characteristics and the differences among indigenous and tribal peoples in the cultural, social and economic spheres. It consecrates respect for the integrity of the values, practices and institutions of these peoples in the general framework of guarantees enabling them to maintain their own different identities and ensuring self-identification, totally exempt from pressures which might lead to forced assimilation, but without ruling out the possibility of their integration with other societies and life-styles as long as this is freely and voluntarily chosen.⁴⁹

The same theme of cultural integrity is at the core of the Draft U.N. Declaration on the Rights of Indigenous Peoples,⁵⁰ which was produced by the U.N. Working Group on Indigenous Populations and is now under consideration by the U.N. Commission on Human Rights. The draft declaration is premised on the understanding "that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such."⁵¹ Many states have joined indigenous rights advocates in expressing widespread agreement with that essential thrust even while diverging in their views on particular aspects of the

Training, Handicrafts and Rural Industries"), pt. 5 ("Social Security and Health"), pt. 6 ("Education and Means of Communication").

48. See, e.g., *id.* art. 7(1):

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Id.

49. International Labor Conference, Provisional Record 31, 76th Sess., at 31/4-5, (1989) [hereinafter 1989 ILO Provisional Record 31]. See also government statements in International Labor Conference, Provisional Record 32, 76th Sess., at 32/11-32/13 (1988) [hereinafter 1988 ILO Provisional Record 32].

50. Draft U.N. Declaration, *supra* note 4.

51. *Id.* pmbl., ¶ 1.

draft.⁵² Support for such precepts is also apparent in government comments solicited by the OAS Inter-American Commission on Human Rights as part of its preliminary work toward developing an OAS instrument on indigenous peoples' rights.⁵³

The affirmation of cultural integrity as a norm within the framework of human rights establishes a strong foundation for the norm within international law. However, it also necessarily means that the exercise of culture is limited by that very human rights framework, such that certain cultural practices may not be protected. For instance, concerns are often raised about cultural practices that discriminate against or inflict harm on women.⁵⁴ In her article on the Maasai, Nasieku Tarayia finds a need for reform in the treatment of women and the girl child, but within a larger argument that is in favor of seeing the Maasai retain their overall cultural integrity and existence as a distinct people. She advocates abandonment of the practice often referred to as female genital mutilation, seeing it as part of a right of passage with understandable historical roots but without justification in the contemporary Maasai world. In short, the practice cannot be sustained as part of a right to cultural integrity because it is contrary to human rights.

The UNESCO Universal Declaration on Cultural Diversity adds to its endorsement of culture, "No one may invoke cultural diversity to infringe upon

52. This is evident, *inter alia*, in the documents produced by the working group chair synthesizing or summarizing government and other statements commenting on earlier drafts produced by the chair of the U.N. Working Group on Indigenous Populations. *Analytical Commentary on the Draft Principles Contained in the First Revised Text of the Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc E/CN.4/Sub.2/AC.4/1990/39 (1990) [hereinafter 1990 Analytical Commentary]; *Analytical Compilation of Observations and Comments Received Pursuant to Sub-Commission Resolution 1988/18*, U.N. Doc. E/CN.4/Sub.2/1989/33/Add.1-3 (1989) [hereinafter 1989 Compilation of Observations]; *Draft Declaration on the Rights of Indigenous Peoples: Revised Working Paper submitted by the Chairperson/Rapporteur, Erica-Irene Daes, Pursuant to Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolution 1990/26*, U.N. Doc. E/ CN.4/Sub.2/1991/36 (1991) [hereinafter 1991 Revised Working Paper].

53. See Inter-Am. Comm. H. R., *Report on the First Round of Consultations Concerning the Future Inter-American Legal Instrument on the Rights of Indigenous Populations*, reprinted in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 1992-1993, O.A.S. Doc. OEA/Ser.L/V/II.83, at 263, 283-84 (1993) [hereinafter Report on First Round of Consultations on Inter-American Instrument] (especially under the following headings of the report: "Right to have differences accepted," "Right to preserve and develop their traditional economic structures, institutions and lifestyles," and "Rights relative to their own cultural development").

54. See, e.g., AYALET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* 45-62 (Cambridge University Press 2001) (discussing subordination of women through cultural norms concerning family relations).

human rights guaranteed by international law, nor to limit their scope.”⁵⁵ This principle can hardly be challenged if the human rights framework is accepted as a basis for advancing a right to cultural integrity, but the question remains: By what process may it be legitimately determined that a particular cultural practice is illegitimate? Whatever the ultimate answer to this question, the internal decision-making dynamics that are themselves part of a cultural group identity should be the starting point. Nasieku Tarayia, herself a Maasai woman, is part of an ongoing discussion among the Maasai to identify and reform practices that infringe upon the human rights of women. She advocates an education campaign in Maasai society to change attitudes so that the Maasai people generally will come to see practices such as female genital mutilation as wrong.

In any assessment of whether a particular cultural practice is prohibited rather than protected, the cultural group concerned should be accorded a certain deference for its own interpretive and decision-making processes in the application of universal human rights norms, just as states are accorded such deference. It may be paradoxical to think of universal human rights as having to accommodate diverse cultural traditions, but that is a paradox embraced by the international human rights regime by including rights of cultural integrity among the universally applicable human rights, precisely in an effort to promote common standards of human dignity in a world in which diverse cultures flourish.⁵⁶

While, in principle, the cultural integrity norm can be understood to apply to all segments of humanity, the norm has developed remedial aspects particular to indigenous peoples in light of their historical and continuing vulnerability. Until relatively recently in the Western Hemisphere, the Pacific, and elsewhere, societies that have developed through patterns of settlement and colonization did not value indigenous cultures and, in fact, promoted their demise through programs of assimilation and extermination. This is exemplified in the histories of the indigenous peoples offered in the articles that follow. As these articles also show, even as such policies have been abandoned or reversed, indigenous cultures remain threatened as a result of the lingering effects of those historical policies and because, typically, indigenous communities hold a non-dominant position in the larger societies within which they live.⁵⁷

As the international community has come to consider indigenous cultures equal to all others, the norm of cultural integrity has developed to entitle indigenous groups to affirmative measures to remedy the undermining of their cultural survival in the past and to guard against continuing threats, as manifested

55. Universal Declaration on Cultural Diversity, *supra* note 30, art. 4.

56. Ayalet Shachar provides an excellent effort to unravel this paradox and promote practical institutional arrangements that accommodate distinctive cultural groups while protecting individual interests in liberty and equality. See SHACHAR, *supra* note 54.

57. Rodolfo Stavenhagen observes that many elites in the Americas still regard “Indian cultures [as] backward, traditional, and not conducive to progress and modernity.” RODOLFO STAVENHAGEN, THE ETHNIC QUESTION: CONFLICTS, DEVELOPMENT, AND HUMAN RIGHTS 49, U.N. Sales No. E.90.III.A.9 (1990).

by the resolution of the U.N. Committee on the Elimination of Racial Discrimination.⁵⁸ It is not sufficient, therefore, that states simply refrain from coercing indigenous peoples to assimilate or abandon their cultural practices. ILO Convention No. 169 provides: “Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.”⁵⁹ The draft U.N. Declaration on Indigenous Rights echoes the requirement of “effective measures” to provide security for indigenous culture in its many manifestations.⁶⁰ Comments by governments to relevant international bodies, as well as trends in government initiatives domestically, indicate broad acceptance of the requirement of affirmative action to secure indigenous cultural survival, even while the full implementation of the initiatives and consensus remains slow in coming.

III. THE VARIABILITY AND RANGE OF CULTURAL ATTRIBUTES AND THEIR AFFIRMATION

In statements to international human rights bodies, governments have reported a broad array of domestic initiatives concerning indigenous peoples, including constitutional and legislative reforms, and have characterized those initiatives as generally intended to safeguard the integrity and life of indigenous cultures.⁶¹ The reported reforms vary in scope and content partly because of the

58. See *supra* notes 20 and 24 and accompanying text.

59. ILO Convention No. 169, *supra* note 6, art. 2(1).

60. See Draft U.N. Declaration, *supra* note 4, art. 13 (with particular regard to religion), art. 14 (historiography, language, philosophy, and literature), art. 15 (education), art. 12 (restitution of cultural and intellectual property).

61. Representatives of the following governments reported on such domestic initiatives to the committee of the International Labor Conference that drafted Convention No. 169: New Zealand, Brazil, Soviet Union, United States, Mexico, and Honduras. These reports are summarized in 1989 ILO Provisional Record 25, 76th Sess., at 25/2-25/4, ¶¶ 9-14 (1989). The following additional governments reported on similar initiatives to the plenary of the 1989 International Labor Conference upon submission of the revised convention for a record vote: Bangladesh, India, Argentina, and Peru. 1988 ILO Provisional Record 32, *supra* note 49.

Additional domestic initiatives reflecting the norm of cultural integrity have been reported to the U.N. Working Group on Indigenous Populations and other U.N. bodies. See, e.g., Pekka Aikio, President of the Finnish Saami Parliament, *Statement by the Observer Delegation of the Government of Finland to the U.N. Working Group on Indigenous Populations: Review of Developments* (July 1993) (describing initiatives to amend the Finnish Constitution to enhance guarantees for maintenance and development of Saami culture); Intervention of the Mexican Delegation to the 50th Session of the U.N. Commission on Human Rights (Feb. 1994), at 3 (describing provisions of the Mexican Constitution to provide recognition of and protection for indigenous peoples and their

diversity of circumstances and characteristics of the indigenous groups concerned. The indigenous peoples of the United States, for example, who have developed extensive ties with the global economy, are properly regarded as having requirements different from those of the isolated forest-dwelling tribes of Brazil. Government representatives have been quick to point out the diversity among indigenous groups when attempting to articulate prescriptions for the protection of indigenous rights.⁶² In the articles that follow, it is evident that diverse circumstances confront the diverse indigenous groups, including varied state legal systems and social and economic patterns, and that these different circumstances require varied responses. The diversity in circumstances and among indigenous peoples, however, does not undermine the strength of the cultural integrity norm as much as it leads to an understanding that the norm requires different applications in different settings. In all cases, the operative premise is to secure the survival and flourishing of indigenous cultures through mechanisms devised in accordance with the needs and preferences of the indigenous peoples concerned.

The cultural integrity norm, particularly as embodied in article 27 of the Covenant on Civil and Political Rights, has been the basis of decisions favorable to indigenous peoples by the U.N. Human Rights Committee and the Inter-American Commission on Human Rights of the OAS. Both bodies have held the norm to cover all aspects of an indigenous group's survival as a distinct culture, understanding culture to include economic or political institutions and land use patterns, as well as language and religious practices. In a case concerning the Miskito Indians of Nicaragua, the Inter-American Commission on Human Rights cited Nicaragua's obligations under article 27 and found that the "special legal protections" accorded the Indians for the preservation of their cultural identity should extend to "the aspects linked to productive organisation, which includes, among other things, the issue of ancestral and communal lands."⁶³

cultures); Declaracion de Colombia en Nombre del Grupo Latinoamericano y del Caribe en la Conmemoración del Año Internacional de Poblaciones Indígenas, Conferencia Mundial de Derechos Humanos, Vienna (June 18, 1993) (statement of Colombia on behalf of Latin American and Caribbean Group reporting developments in Latin America).

62. See, e.g., *Information Submitted by the Government of Canada in Regard to the Revised Draft Declaration on Indigenous Rights*, U.N. Doc. E/CN.4/Sub.2/AC.4/1990/1/Add.3, at 1-2 (1990); 1991 Statement of the Government of New Zealand to the U.N. Working Group under Agenda Item 4, at 2.

63. *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*, Inter-Am. Comm. on Hum. Rts., O.A.S. Doc. OEA/Ser.UV/II.62, doc. 10 rev. 3 (1983), O.A.S. Doc. OEA/Ser.UV/II.62, doc. 26 (1984) (Case No. 7964 (Nicaragua)), at 81 [hereinafter *Miskito Report and Resolution*]. The commission noted that the requirement of special measures to protect indigenous culture is:

based on the principle of equality: for example, if a child is educated in a language which is not his native language, this can mean that the child is treated on an equal basis with other children who are

In its 1985 decision concerning the Yanomami of Brazil, the commission again invoked article 27 and held that “international law in its present state . . . recognises the right of ethnic groups to special protection on their use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity.”⁶⁴ The commission viewed a series of incursions into Yanomami ancestral lands as a threat not only to the Yanomami’s physical well-being but also to their culture and traditions.⁶⁵ Significantly, the commission cited article 27 to support its characterization of international law, even though Brazil was not a party to the International Covenant on Civil and Political Rights, thus indicating the norm’s character as general or customary international law. This same interpretation of the content and reach of the norm of cultural integrity and article 27 in relation to indigenous peoples was reiterated by the Inter-American Commission in its 1997 human rights report on Ecuador, a report that included an analysis of the situation of indigenous peoples in the Amazon region who had experienced environmental damage as a result of oil development.⁶⁶

A similarly extensive view of the cultural integrity norm as applied to indigenous peoples has been taken by the U.N. Human Rights Committee, although clearly in the context of applying treaty obligations assumed under the covenant. Building upon the jurisprudence of *Kitok v. Sweden*,⁶⁷ the committee in *Ominayak v. Canada*⁶⁸ construed the cultural rights guarantees of article 27 to extend to “economic and social activities” upon which the Lubicon Lake Band of Cree Indians relied as a group.⁶⁹ Thus, the committee found that Canada (a party to the covenant and its optional protocol) had violated its obligation under article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and for timber development within the aboriginal territory of the

educated in their native language. The protection of minorities, therefore, requires affirmative action to safeguard the rights of minorities whenever the people in question . . . wish to maintain their distinction of language and culture.

Id. at 77 (quoting U.N. Secretary-General: The Main Types and Causes of Discrimination, U.N. Pub. 49.XIV.3, ¶¶ 6-7).

64. Case No. 7615 (Brazil), Inter-Am. Commission Res. No. 12/85 (Mar. 5, 1985), *Annual Report of the Inter-American Commission on Human Rights, 1984-1985*, O.A.S. Doc. OEA/Ser.L/V/II.66, doc. 10, rev. 1, at 24, 31 (1985).

65. *Id.* at 29-31.

66. *See Report on the Situation of Human Rights in Ecuador*, Inter-Am. Comm. on Hum. Rts., O.A.S. Doc. OEA/Ser.L/V/II.96, doc 10, rev. 1, Chapter IX (Apr. 24 1997).

67. *Kitok v. Sweden*.

68. *Ominayak, Chief of the Lubicon Lake Band v. Canada*, Comm. No. 267/ 1984, *Report of the Human Rights Committee*, U.N. GOAR, 45th Sess., Supp. No. 40, vol. 2, at 1, U.N. Doc. N45/40, Annex 9 (A) (1990) (views adopted Mar. 26, 1990). The case is discussed and analyzed in Dominic McGoldrick, *Canadian Indians, Cultural Rights and the Human Rights Committee*, 40 INT’L & COMP. L.Q. 658-669 (1991).

69. *Ominayak*, *supra* note 68, at 27.

Lubicon Lake Band. The committee acknowledged that the band's survival as a distinct cultural community was bound up with the sustenance that it derived from the land.⁷⁰

After its decision in the *Ominayak* case, the committee incorporated its broad and contextual interpretation of article 27 into its General Comment No. 23(50), which states that:

[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 those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.⁷¹

The Human Rights Committee, however, has also instructed that rights of cultural integrity are not absolute when confronted with the interests of society as a whole. In *Lansmänn and Others v. Finland*,⁷² the committee considered the effects of state-authorized stone quarrying in the Mount Riutusvaara in northern Finland where Saami groups herd reindeer. The committee reiterated that reindeer herding forms part of Saami culture, in spite of the use of modern technologies to carry out this activity and its economic aspects, and hence it is protected under article 27 of the covenant.⁷³ The cultural integrity norm applied in this case even though Saami claims to property rights over the area in question remained

70. Compare the *Ominayak* case with *Diegaardt et al. v Namibia*, Comm. No. 760/1997, U.N. Doc. CCPR/C/69/D/60/1997 (views adopted July 25, 2000), in which the committee considered a claim by the Rehoboth Baster Community, a community descended from indigenous Khoi and Afrikaans settlers, that their rights under article 27 were violated due to impediments to their use and enjoyment of certain lands. The committee declined to find a violation of article 27, having determined that there were insufficient cultural connections between the claimed land, on which community members grazed cattle and engaged in other activities, and a distinctive way of life. *Id.* ¶ 10.6.

71. Human Rights Committee, *General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights: General Comment No. 23(50) (art. 27)*, U.N. Doc. CCPR/C/21/Rev.1/Add.5, ¶ 7 (1994) (footnote omitted).

72. *Länsman et al. v. Finland*, Comm. No. 511/1992, Hum. Rts. Comm., U.N. Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1994).

73. The Committee emphasized that article 27 “does not only protect *traditional* means of livelihood of national minorities” and that reindeer herding formed a protected part of the Saami culture despite the fact that the Saami “may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology.” *Id.* ¶ 9.3 (emphasis in the original).

unresolved.⁷⁴ Nonetheless, the committee decided, with the following analysis, that the circumstances of the case did not constitute a violation of article 27:

A State may understandably wish to encourage development or allow economic activity by enterprises [M]easures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.

The question that therefore arises in this case is whether the impact of the quarrying on Mount Riutusvaara is so substantial that it does effectively deny to the [Saami] authors the right to enjoy their cultural rights in that region.

[T]he Committee concludes that quarrying on the slopes of Mt. Riutusvaara, in the amount that has already taken place, does not constitute a denial of the authors' right, under article 27, to enjoy their own culture. It notes in particular that the interests of the Muotkatunturi [Saami] Herdsmen's Committee and of the authors [of the complaint against the state] were considered during the proceedings leading to the delivery of the quarrying permit, that the authors *were* consulted during the proceedings, and that reindeer herding in the area does not appear to have been adversely affected by such quarrying as has occurred.⁷⁵

However, while it declined to find a violation of article 27 under the circumstances, the committee was careful to warn that an increase in the stone quarrying activity in the area used by Saami reindeer herders could give rise to a violation of article 27 in the future.⁷⁶ It should also be noted that the committee

74. *See id.* ¶ 9.5.

75. *Id.* ¶¶ 9.4-9.6.

76. *Id.* ¶ 9.7. The Committee also applied this analytical framework in a subsequent case in which the same Saami group from Finland challenged State logging plans in their reindeer herding area. *Länsmann et al. v. Finland*, Comm. No. 671/1995, Hum. Rts. Comm., U.N. Doc. CCPR/C/58/D/671/1995 (Nov. 22, 1996) [*Länsmann II*]. Similar to the previous *Länsmann* case, *supra* note 72, the committee in *Länsmann II* ruled that the planned lumber exploitation did not amount to a violation of article 27, but warned about future plans and the aggregate effect of these with plans for quarrying within the same area. *Id.* ¶¶ 10.6, 10.7. *See also* Sara et al. v. Finland, Comm. No. 431/1990, Hum. Rts. Comm., U.N. Doc. CCPR/C/50/D/431/1990 (Revised Decision on Admissibility, Mar. 23, 1994) (reiterating that Saami reindeer herding is a protected cultural activity under article 27 of the covenant, but declaring the case inadmissible for failure to exhaust internal remedies). In another case the committee recognized the cultural significance for the Maori of access to their traditional fishing grounds, and that Maori commercial and non-commercial fishery enjoyed protection under article 27. *See* Mahuika et al. v. New Zealand, Comm. No. 547/1993, Hum. Rts. Comm., U.N. Doc. CCPR/C/70/D/547/1993 ¶ 9.3 (Nov. 15, 2000).

arrived at its conclusion of no existing violation without any consideration of the dispute over ownership of the area, effectively accepting the state as the owner of the lands claimed by the Saami.⁷⁷

The Human Rights Committee has reinforced the importance of recognizing the specific context when applying the norm of cultural integrity by requiring recognition of the particularities of indigenous cultures in the application of articles other than article 27 of the covenant. In the case of *Hopu & Bessert v. France*,⁷⁸ the committee considered allegations of human rights violations stemming from the planned construction of a hotel complex in a beach area in Tahiti where there were burial remains of Polynesians who lived hundreds of years ago. The contemporary indigenous people who complained of the construction could not establish direct ancestral links to the people whose remains were buried. Nonetheless the committee found violations of the rights to family and privacy, which are protected by articles 17 and 23 of the covenant. The committee deemed it necessary to apply the particular concept of “family” alive in the culture of the contemporary indigenous people concerned. In doing so, the committee found that for these people “family” included historical ancestors, regardless of direct kinship ties, and that, within such a contextual understanding of “family,” the burial grounds involved family and privacy interests. Thus, the committee agreed that the planned construction of the hotel complex, without sufficient accommodation for those interests, violated articles 17 and 23.⁷⁹

Among the numerous other aspects of indigenous culture that may require special attention in particular contexts are those having to do with indigenous peoples’ works of art, scientific knowledge (especially with regard to the natural world), songs, stories, human remains, funerary objects, and other such tangible and intangible aspects of indigenous cultural heritage. These issues have been the subject of a study by the working group chair, Erica-Irene Daes, under

However, the committee ruled that the circumstances presented, in which the State of New Zealand limited Maori fishing according to an agreement negotiated with Maori leaders, did not constitute a violation of the Covenant. *Id.* ¶¶ 9.4-9.8.

77. A different conclusion about the legality of the impugned acts could result from the application of international norms upholding property rights of indigenous peoples over their traditional lands. See footnotes 92-149, *infra*, and corresponding text.

78. *Hopu & Bessert v. France*, Comm. No. 549/1993, Hum. Rts. Comm., U.N. Doc. CCPR/C/60/D/549/1993/Rev.1. (Dec. 29, 1997).

79. *Id.* ¶ 10.3. The Committee declined to apply article 27 of the Covenant to this case because upon acceding to the covenant France made a declaration that article 27 was inapplicable to it. In a joint dissenting opinion, committee members David Kretzmer, Thomas Buergenthal, Nisuke Ando, and Lord Colville saw the case as not establishing violations of articles 17 and 23, but rather as only raising claims under article 27 which could not be invoked because of France’s declaration. By contrast, in their separate concurring opinion, committee members Elizabeth Evatt, Cecilia Medina Quiroga, Fausto Pocar, Martin Scheinin, and Maxwell Yalden viewed France’s declaration as having no effect in respect to its overseas territories and considered the case to raise important issues under article 27.

the sponsorship of the U.N. Sub-commission on Promotion and Protection on Human Rights. The 1993 Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples⁸⁰ identifies widespread historical and continuing practices that have unjustly deprived indigenous peoples of the enjoyment of the tangible and intangible objects that are part of their cultural heritage.⁸¹ The study also identifies legislative and policy initiatives in a number of countries to correct these practices and proposes additional initiatives as well as measures for greater international cooperation on this matter.⁸²

80. *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, Sub-commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1993/28 (1993) (Erica-Irene Daes, special rapporteur) [hereinafter *U.N. Study on the Protection of Cultural Property*].

81. The study identifies these practices in association with historical patterns of European exploration and settlement, and as an element of continuing industrial and commercial forces of both European and non-European societies:

18. As industrialisation continued, European States turned to the acquisition of tribal art and the study of exotic cultures. Indigenous peoples were, in succession, despoiled of their lands, sciences, ideas, arts and cultures.

19. This process is being repeated today, in all parts of the world . . . Ironically, publicity about the victimisation of indigenous peoples in these newly-exploited areas has also renewed Europeans' interest in acquiring indigenous peoples' arts, cultures and sciences. Tourism in indigenous areas is growing, along with the commercialisation of indigenous arts and the spoiling of archaeological sites and shrines.

20. At the same time, the "Green Revolution", biotechnology, and demand for new medicines to combat cancer and AIDS are resulting in a renewed and intensified interest in collecting medical, botanical and ecological knowledge of indigenous peoples . . . There is an urgent need, then, for measures to enable indigenous peoples to retain control over their remaining cultural and intellectual, as well as natural, wealth, so that they have the possibility of survival and self-development.

Id. at 7. Similar observations were included in U.N. Secretary-General, *Intellectual Property of Indigenous Peoples: Concise Report of the Secretary-General*, U.N. Doc. E/CN.4/Sub.2/1992/30 (1992). See also, *Information Concerning the Report of the Special Rapporteur on the Study of the Cultural and Intellectual Property of Indigenous Peoples: Information Submitted by the Movement "Tupay Katari,"* U.N. Doc. E/CN.4/Sub.2/AC.4/1993 (1993).

82. As examples of initiatives already taken, the study cites, *inter alia*, the Native American Graves Protection and Repatriation Act of 1990 (U.S.), and the Aboriginal Affairs and Torres Strait Islander Heritage Act of 1984 (Austl.). *U.N. Study on the Protection of Cultural Property*, *supra* note 80, at 10. The study also surveys existing international legal instruments and mechanisms regulating the transfer and control over intellectual and cultural property (e.g., the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural

At the request of the sub-commission, the chair of the working group followed her study with a draft statement of principles on indigenous cultural heritage.⁸³ This draft was the subject of a seminar convened by the Office of the High Commissioner for Human Rights.⁸⁴ These principles build upon indigenous peoples' articulated demands⁸⁵ and the consensus reflected in international instruments already adopted by states, including resolutions of the 1992 United Nations Conference on Environment and Development. The Rio Declaration on Environment and Development recognizes the "vital" role indigenous peoples may play in sustainable development "because of their knowledge and traditional practices."⁸⁶ In addition, the conference resolution adopted as Agenda 21 calls upon states, in "full partnership with indigenous people and their communities," to adopt or strengthen appropriate policies and legal mechanisms to empower indigenous peoples in the enjoyment of and control over the knowledge, resources and practices that comprise their cultural heritage.⁸⁷ The Convention on Biodiversity, another outcome of the 1992 conference, establishes that each state party shall, "[s]ubject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use

Property (1970)) and points out the inadequacies of these existing mechanisms for the purposes of securing indigenous peoples' enjoyment and control over their cultural heritage. *Id.* at 30-35.

83. See Erica-Irene Daes, *Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, Preliminary Report of the Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1994/31, Annex (1994). After considering comments by governments, international institutions, indigenous peoples, and NGOs, the working group chair revised the set of principles and guidelines. See Erica-Irene Daes, *Protection of the Heritage of Indigenous People: Final Report of the Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1995/26 (1995). There are revised Principles and Guidelines for the Protection of the Heritage of Indigenous People. See *id.*, at 9. Ms. Daes recommended that her text be the basis for a declaration by the U.N. General Assembly in 1996. *Id.* at 8.

84. See *Human Rights of Indigenous Peoples: Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples* (Feb. 28 - Mar. 1, 2000), U.N. Doc. E/CN.4/Sub.2/2000/26 (2000). The forty-five participants of the seminar included "representatives of Governments, United Nations bodies and organisations, specialised agencies, organisations of indigenous peoples and competent indigenous persons." *Id.* ¶¶ 1, 3.

85. See The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, First International Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/AC.4/1993/CRP.5 (1993) (a conference of over 150 indigenous representatives from several countries in the Pacific and the Americas).

86. Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, principle 22, U.N. Doc. A/CONF.151/26 (vol. 1), Annex 1 (1992).

87. U.N. Conference on Environment and Development, agenda 21, ¶¶ 26.3, 26.4(b), U.N. Doc. A/CONF.151/26 (vol. 3), Annex 2 (1992).

of biological diversity.⁸⁸ Consensus on these and related precepts have engendered a discussion within the World Intellectual Property Organization to re-evaluate the international intellectual property regime as it relates to indigenous peoples.⁸⁹

IV. LAND AND NATURAL RESOURCES

While the particular characteristics of indigenous cultures vary among diverse groups, a common feature tends to be a strong connection with lands and natural resources. The U.N. Human Rights Committee and the Inter-American Commission on Human Rights, in the cases previously mentioned, acknowledged the importance of lands and resources to the survival of indigenous cultures and, by implication, to indigenous self-determination. That understanding is a widely accepted tenet of contemporary international concern over indigenous peoples.⁹⁰ It follows from indigenous peoples' articulated ideas of communal stewardship

88. Convention on Biological Diversity, U.N. Conference on Environment and Development, UNEP.Bio.Div./CONF. L2.1992 (1992). This and related provisions of the Convention on Biodiversity are the subject of ongoing discussions within the framework of periodic meetings of the "Conference of the Parties" to the convention.

89. See *Roundtable on Intellectual Property and Traditional Knowledge (Geneva, November 1-2, 1999): Report*, WIPO/IPTK/RT/99/7 (May 4, 2000); *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Geneva, Apr. 30 to May 3, 2001): Report*, WIPO/GRTKF/IC/1/13); *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Geneva, June 13 to 21, 2002): Report*, WIPO/GRTKF/IC/3/17 (June 21, 2002). For critical assessments of the international intellectual property regime as it relates to indigenous peoples' knowledge and works of art, see MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? (Harvard Univ. Press 2003); GRAHAM DUTFIELD & DARRELL ADDISON POSEY, BEYOND INTELLECTUAL PROPERTY: TOWARD TRADITIONAL RESOURCE RIGHTS FOR INDIGENOUS PEOPLES (Int'l Dev. Res. Ctr. 1996).

90. See *Study of the Problem of Discrimination against Indigenous Populations*, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1986/7, Add. 4, at 39 (1986) (Jose R. Martinez Cobo, special rapporteur) [hereinafter U.N. Indigenous Study] ("It must be understood that, for indigenous populations, land does not represent simply a possession or means of production It is also essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture."). *Id.* A more recent study of the sub-commission, which was entirely focused on the issue of indigenous peoples and land, reinforces these principles, arguing the need to take effective actions to guarantee indigenous peoples' rights over land and natural resources based on their traditions and customs. See Erica-Irene Daes, *Indigenous Peoples and Their Relationship to Land – Final Working Paper Prepared by the Special Rapporteur*, Sub-Commission for the Promotion and Protection of Human Rights, U.N. Doc., E/CN.4/Sub.2/2001/21 (2001) [hereinafter *Study on Indigenous Peoples and Land*].

over land and a deeply felt spiritual and emotional connection with the earth and its fruits.⁹¹ Furthermore, indigenous peoples have typically relied on a secure land and natural resource base to ensure the economic viability and development of their communities. Such features of the relationship between indigenous peoples and land resources is emphasized in each of the subsequent articles in this volume in relation to the indigenous groups discussed.

The self-determination provision common to both the international human rights covenants is relevant to indigenous land claims. It affirms: "In no case may a people be deprived of its own means of subsistence."⁹² This prescription intersects with the idea of property, a long established feature common to societies throughout the world. The concept of property includes the notion that human beings have rights to lands and chattels that they, by some measure of legitimacy, have reduced to their own control.⁹³ Legal systems have varied in prescribing the rules by which the rights are acquired and in defining the rights. The most commonly noted dichotomy has been between the system of private property rights in Western societies and the now rare, classical communist systems in which the state retains formal ownership of most or all real estate and natural resources while granting rights of use.⁹⁴ The common feature, however, is that people *do* acquire and retain rights of a proprietary nature in relation to other

91. For a compilation of indigenous peoples' statements about the land and its meaning, see TOUCH THE EARTH: A SELF PORTRAIT OF INDIAN EXISTENCE (T. C. McLuhan ed., Outerbridge & Dienstfrey 1971); THOMAS R. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION (Hill & Wang 1985) (documenting the testimony of Alaska Natives concerning their feelings about the lands and resources that traditionally have sustained them); JULIAN BURGER, REPORT FROM THE FRONTIER: THE STATE OF THE WORLD'S INDIGENOUS PEOPLES 13-16 (Zed Books 1987) (on indigenous "land and philosophy").

92. International Covenant on Civil and Political Rights, *supra* note 31, art. 1(2); International Covenant on Economic, Social and Cultural Rights, Dec.16,1966, G.A. Res. 2200(XXI), 993 U.N.T.S. 3, art. 1(2) (entered into force Jan. 3,1976). In its concluding observations on the fourth periodic report by Canada regarding the International Covenant on Civil and Political Rights, the UN Human Rights Committee "emphasized" article 1(2) of the Covenant on Civil and Political Rights in recommending that Canada reform its laws and internal policies, to guarantee the indigenous peoples of that country the full enjoyment of their rights over lands and natural resources. *See Concluding Observations of the Human Rights Committee: Canada*, U.N. Doc. CCPR/C/79/Add.105, ¶ 8 (1999).

93. *See, generally*, RENE DAVID & JOHN E. C. BRIERLY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 290-95 (3d ed. 1985) (comparative discussion of "ownership").

94. The following literature reflects many of the dimensions of this dichotomy: Edward J. Epstein, *The Theoretical System of Property Rights in China's General Principles of Civil Law: Theoretical Controversy in the Drafting Process and Beyond*, 52 L. & CONTEMP. PROBS. 177-216 (1989); Randy Bergman & Dorothy C. Lawrence, *New Developments in Soviet Property Law*, 28 COLUM. J. TRANSNAT'L L. 189-206 (1990); Symposium, *Property: The Founding, the Welfare State, and Beyond – 8th Annual National Federalist Society Symposium on Law and Public Policy*, 13 HARVARD J.L. & PUB. POL'Y 1-165 (1990).

people, and respect for those rights is valued.

Property has been affirmed as an international human right. The Universal Declaration of Human Rights states, “Everyone has the right to own property alone as well as in association with others,” and that “[n]o one shall be arbitrarily deprived of his property.”⁹⁵ Similar prescriptions are repeated in the American Convention on Human Rights,⁹⁶ the American Declaration on the Rights and Duties of Man,⁹⁷ and the European Convention on Human Rights.⁹⁸

Inasmuch as property is a human right, the fundamental norm of non-discrimination requires recognition of the forms of property that arise from the traditional or customary land tenure of indigenous peoples, in addition to the property regimes created by the dominant society. Several U.N. and OAS studies and declarations have highlighted that among the most troublesome manifestations of historical discrimination against indigenous peoples has been the lack of recognition of indigenous modalities of property.⁹⁹ A study commissioned by the Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous Peoples and their Relationship to Land*, identifies the still persistent effects of this historical discrimination and calls for reforms in domestic legal systems to abolish the doctrines and practices that hinder recognition of indigenous land and resource tenure systems.¹⁰⁰

Early international jurisprudence invoked property precepts to affirm that indigenous peoples in the Americas and elsewhere had original rights to the lands they used and occupied prior to contact with the encroaching white societies.¹⁰¹ That jurisprudence made its way into the legal and political doctrine of some of the countries that were born of colonial patterns, most notably the United States.¹⁰²

95. See Universal Declaration of Human Rights, *supra* note 16, art. 17.

96. See American Convention on Human Rights, *supra* note 12, art. 21.

97. See American Declaration of the Rights and Duties of Man, *supra* note 15, art. XXIII.

98. See *Protocol (No. 1) to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Mar. 20, 1952, Europ.T.S. No. 9, at art. 1 (1952) (entered into force May 18, 1954).

99. See U.N. Indigenous Study, *supra* note 90, at 10-12; *The Human Rights Situation of Indigenous Peoples in the Americas*, pmbI; *Resolution on Special Protection for Indigenous Populations*, Inter-American Commission on Human Rights, Dec. 28, 1972, O.A.S. Doc. OEA/Ser.P, AG/doc.305/73 rev.1 (1973); *CERD General Recommendation on Indigenous Peoples*, *supra* note 20, ¶ 3 (“indigenous peoples have been, and are still being, discriminated against and . . . they have lost their land and resources to colonists, commercial companies and State enterprises”).

100. See Study on Indigenous Peoples and Land, *supra* note 90, ¶¶ 40-48, 144.

101. A common theme of the classical theorists of international law (1500s through early 1700s) was that non-European aboriginal peoples had territorial and autonomy rights which the Europeans were bound to respect. See ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW*, *supra* note 3, at 11-16.

102. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 554, 559 (1832) (drawing upon the “law of nations” to affirm the “original natural rights” of Indians to their lands); United

That doctrine, however, developed without valuing indigenous cultures or recognizing the significance of their ongoing relationship with the land. Thus, under U.S. law, indigenous peoples have long enjoyed rights to lands on the basis of historical use and occupancy; but the government may unilaterally “extinguish” those rights, and any claims arising from such extinguishment usually have been satisfied, in the best of cases, by a simple money transfer. Within the Western liberal frame adopted in the political and juridical culture of the United States, indigenous peoples’ lands have been treated as fungible with cash.¹⁰³

In contemporary international law, by contrast, modern notions of cultural integrity, non-discrimination, and self-determination join property precepts in the affirmation of *sui generis* indigenous land and resource rights, as evident in ILO Convention No. 169. The land rights provisions of Convention No. 169 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.

The concept of indigenous territories embraced by the convention is deemed to cover “the total environment of the areas which the peoples concerned occupy or otherwise use.”¹⁰⁴

Indigenous land and resource or territorial rights are of a collective character,¹⁰⁵ and they include a combination of possession, use, and management

States *ex. rel. Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1942) (affirming that “aboriginal title” exists until Congress by clear and unambiguous action authorizes its extinguishment); *see generally*, Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28-59 (1947).

103. *See* S. James Anaya, *Native Land Claims in the United States: The Unatoned for Spirit of Place*, in *THE CAMBRIDGE LECTURES* (Frank McArdle ed., Les Editions Yvon Blais 1993) (criticizing the scheme, under the Indian Claims Commission Act of 1946, to settle Indian land claims by cash payments).

104. ILO Convention No. 169, *supra* note 6, art. 13(2).

105. *See Report of the Committee set up to examine the representation alleging non-observation by Peru of the Convention on Indigenous and Tribal Peoples, 1989 (No.169), Made Under Article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP)*, GB.273/14/4, Nov. 1998, ¶ 32(b) (emphasizing the “collective aspects” of the relationship of indigenous peoples with land, and that “when communally owned indigenous lands are divided and assigned to individuals or third parties [as permitted by Peruvian law] this often weakens the exercise of their rights by the community or the indigenous peoples and in general they may end up losing all or most of the land, resulting in a general reduction of the resources that are available to indigenous peoples when they own their lands communally.”).

rights. In its article 14(1), Convention No. 169 affirms:

The rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognised. In addition, 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.

Further, article 15 requires that states safeguard indigenous peoples' rights to the natural resources throughout their territories, including their right "to participate in the use, management and conservation" of the resources. The convention falls short of upholding rights to mineral or subsurface resources in cases in which the state generally retains ownership of those resources.¹⁰⁶ Pursuant to the norm of non-discrimination, however, indigenous peoples must not be denied subsurface and mineral rights where such rights are otherwise accorded landowners. In any case, the convention asserts that indigenous peoples are to have a say in any resource exploration or extraction on their lands and to benefit from those activities.¹⁰⁷ In applying the convention, relevant ILO institutions have emphasized that, when natural resource development activities may affect indigenous communities, a process of consultation with the communities, is required, at a minimum, before the development begins.¹⁰⁸ Prior consultation and appropriate mitigation measures are required in respect to any natural resource extraction from indigenous ancestral or traditional lands, regardless of formal ownership of the lands or the exclusivity of indigenous occupation, when the extraction may in some way affect the lives of the indigenous people.¹⁰⁹

The convention adds that indigenous peoples "shall not be removed from the lands which they occupy" unless under prescribed conditions and where

106. See ILO Convention No. 169, *supra* note 6, art. 15(1).

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

108. For an analysis of the requirement of consultation established by the Convention and the application of this requirement through ILO supervisory mechanisms, see footnotes 172-77, *infra*, and accompanying text.

109. See *Third Supplementary Report of the Committee Established to Examine the Representation Alleging Non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Single Confederation of Workers of Colombia (CUT)*, GB. 276/17/1, GB 282/14/3, Nov. 14, 2001, ¶ 86 (specifying that Colombia was required to apply the convention's consultation provisions prior to authorizing oil development in an area outside the U'wa reserve and rejecting the government's position that the provisions applied only in regard to areas regularly and permanently occupied by indigenous communities).

necessary as an “exceptional measure.”¹¹⁰ When the grounds for relocation no longer exist, they “shall have the right to return to their traditional lands” and when return is not possible “these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them.”¹¹¹ The convention also provides for recognition of indigenous land tenure systems,¹¹² which typically are based on long-standing custom. These systems regulate community members’ individual interests in collective landholdings, and they also have bearing on the character of collective landholdings vis-à-vis the state and others.

Thus Convention No. 169 affirms the notion, promoted by various international institutions, that indigenous peoples, as groups, are entitled to a *continuing* relationship with lands and natural resources according to traditional patterns of use or occupancy. Use of the words “traditionally occupy” in article 14(1), as opposed to use of the past tense “occupied,” suggests that the occupancy must be connected with the present in order for it to give rise to possessory rights. In light of the article 13 requirement of respect for cultural values related to land, however, a sufficient contemporary connection with lost lands may be established by a continuing cultural attachment to them, particularly if dispossession occurred recently.

Also relevant in this regard is article 14(3), which requires “[a]dequate procedures . . . within the national legal system to resolve land claims by” indigenous peoples. This provision is without any temporal limitation and thus, empowers claims originating well in the past. Article 14(3) is a response to the historical processes that have afflicted indigenous peoples, processes that have trampled on their cultural attachment to ancestral lands, disregarded or minimized their legitimate property interests, and left them without adequate means of subsistence. In light of the acknowledged centrality of lands and resources to indigenous cultures and economies, the requirement to provide meaningful redress for indigenous land claims implies an obligation on the part of states to provide remedies that include, for indigenous peoples, the option of regaining traditional lands and access to natural resources.¹¹³

Although Convention No. 169 has thus far been ratified by only fifteen states, government statements to the U.N. Working Group on Indigenous Populations and other international bodies confirm general acceptance of at least the core aspects of the land rights norms expressed in Convention No. 169. The statements tell of worldwide initiatives to secure indigenous rights to possess and

110. ILO Convention No. 169, *supra* note 6, art. 16.

111. *Id.* art. 16(3).

112. *Id.* art. 17(1).

113. For a concurring analysis of the land rights provisions of Convention No. 169 by the legal officer of the International Labor Organization primarily involved in the drafting of the Convention, see Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples*, 15 OKLA. CITY U. L. REV. 677, 696-710 (1990).

use land and to redress historical claims.¹¹⁴ Further, discussions over language for the U.N. Indigenous Rights Declaration have included efforts (albeit sometimes contentious efforts) to build on the already recognized rights.¹¹⁵ The acceptance of indigenous land rights is also evident in the preparatory work for the proposed OAS juridical instrument on indigenous peoples' rights,¹¹⁶ Chapter 26 of Agenda 21 adopted by U.N. Conference on Environment and Development,¹¹⁷ and the World Bank's Operational Directive 4.20 for Bank-funded projects affecting indigenous peoples,¹¹⁸ among other sources.

114. *See, e.g.*, Statement of the Hon. Robert Tickner, M.P. federal minister for Aboriginal and Torres Strait Island affairs, speaking on behalf of the government of Australia, U.N. Working Group on Indigenous Populations, 12th Sess. (July 27, 1994) (discussing recently adopted Native Title Act of 1994 to confirm indigenous possessory rights and to provide compensation for the dispossessed); Statement by the Observer Delegation of Brazil, U.N. Working Group on Indigenous Populations, 12th Sess., July 1994 (discussing legislative initiative to implement constitutional provisions regarding indigenous land rights and to revise nonconforming laws); Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous Populations, Statement by the Observer Delegation of Canada, Delivered by Gerald E. Shannon, ambassador and permanent representative, U.N. Working Group on Indigenous Populations, 11th Sess. July 29, 1993 (discussing land claim settlement procedures involving indigenous groups throughout Canada); *Information Received from Governments*, U.N. Doc. E/CN.4/Sub.2/AC.4/1991/ 4, June 5, 1991 (information from Colombia regarding government measures to secure indigenous territorial rights); *Information Received from Governments*, U.N. Doc. E/CN.4/ Sub.2/AC.4/1989/2, at 7-8 (1989) (information from Brazil reporting constitutional guarantees and efforts to demarcate indigenous lands).

115. *See* 1990 Analytical Commentary, *supra* note 52, at 10-15 (discussing commentary by government and indigenous observers on the land rights provisions of the first revised text of the U.N. Draft Declaration on Indigenous Rights). *See also Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, E/CN.4/2001/85 (Feb. 6, 2001) at ¶¶ 105-115; *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, E/CN.4/2002/98, (Mar. 6, 2002) at ¶¶ 38-44, (discussions on land rights provisions of the U.N. Draft Declaration involving state and indigenous representatives).

116. *See Report on First Round of Consultations on Inter-American Instrument*, *supra* note 53, at 306-07 (summarizing government and indigenous organizations' comments on "territorial rights"); *Report of the Chair, Special Meeting of the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples held in Washington D.C., Apr. 2-6, 2001*, O.A.S. Doc. OEA/Ser.K/XVI, GT/DADIN/doc.23/01 rev.1, 68-71 (July 26, 2001); *Report of the Rapporteur, Special Meeting of the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples held in Washington D.C., Mar. 11-15, 2002*, O.A.S. Doc. OEA/Ser.K/XVI, GT/DADIN/doc.83/02 13-14 (June 26, 2002).

117. Chapter 26 recognizes indigenous peoples' "historical relationship with their lands." Agenda 21, *supra* note 87, ¶ 26.1 (emphasis added). It also prescribes a number of measures to protect and strengthen that relationship. *Id.* ¶¶ 26.1, 26.3, 26.4.

118. World Bank Operational Manual, *Operational Directive 4.20: Indigenous*

The growing international acceptance of indigenous rights to land reflected in ILO Convention No. 169, and related developments, coincides with the jurisprudence (discussed above) of the U.N. Human Rights Committee and the Inter-American Commission on Human Rights regarding the implications of the cultural integrity norm.¹¹⁹ It also coincides with the interpretations of the general human right to property that has been promoted by the Inter-American Commission and adopted by the Inter-American Court of Human Rights.

In the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,¹²⁰ the Inter-American Court of Human Rights accepted the commission's conclusion that Nicaragua had violated the property rights of the indigenous Mayagna community of Awas Tingni by granting a foreign company a concession to log within the community's traditional lands and by failing otherwise to provide adequate recognition and protection of the community's traditional land tenure. The Court held that the concept of property articulated in the American Convention on Human Rights¹²¹ includes the communal property of indigenous peoples, even if that property is not held under a deed of title or is not otherwise specifically recognized by the state. Awas Tingni, like most of the indigenous communities of the Atlantic Coast, did not have specific government recognition of its traditional lands in the form of a land title or other official documents, despite provisions in Nicaragua's constitution and laws affirming, in general terms, the rights of indigenous peoples to the lands they traditionally occupy.¹²² In the absence of such specific government recognition, Nicaraguan authorities had treated the untitled traditional indigenous lands – or substantial parts of them – as state lands, as they had done in granting concessions for logging

Peoples, ¶ 15(c) (1991) (establishing recognition of customary or traditional indigenous land tenure systems as a premise of bank-assisted projects). This Operational Directive is currently in the process of review. The World Bank policy on indigenous peoples is addressed at footnote 174, *infra*.

119. *See supra* notes 65-81 and accompanying text.

120. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Court H.R. (Ser. C) No. 79 (Judgment on merits and reparations of Aug. 31, 2001), in 19 ARIZ. J. INT'L & COMP. L. 395 (2002) (pub. abridged ver.) [hereinafter *Awas Tingni case*].

121. By virtue of article 21 of the American Convention on Human Rights, *supra* note 12, "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law." *Id.* The Court declared, "Article 21 of the American Convention recognises the right to private property 'Property' can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value." *Awas Tingni case*, *supra* note 120, ¶¶ 143-44.

122. POLITICAL CONST. NICARAGUA arts. 5, 89, 180 (1987) (amended by Law No. 92 (1995)); Statute of Autonomy for the Autonomous Regions of Nicaragua's Atlantic Coast, Ley No. 28, Oct. 30, 1987, art. 36 (La Gaceta, No. 238).

in the Awas Tingni area.¹²³ The Court concluded, especially in light of articles 1 and 2 of the convention, which require affirmative state measures to protect rights recognized by the convention and domestic law, that such negligence on the part of the state violated the right to property of article 21 of the American Convention.¹²⁴

Although the Court stressed that Nicaragua's domestic law itself affirms indigenous communal property, the Court also emphasized that the rights articulated in international human rights instruments have "autonomous meaning for which reason they cannot be made equivalent to the meaning given to them in domestic law."¹²⁵ The Inter-American Commission on Human Rights had pressed this point in prosecuting the case before the Court, invoking in its written submissions the jurisprudence of the European Court of Human Rights regarding the analogous property rights provision of the European Convention on Human Rights, and referring to developments elsewhere in international law and institutions specifically concerning indigenous peoples' rights over lands and natural resources.¹²⁶ The Inter-American Court accepted the commission's view that, in its meaning autonomous from domestic law, the international human right of property embraces the communal property regimes of indigenous peoples as defined by their own customs and traditions. The Court emphasized that:

Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their

123. For relevant background, see JORGE JENKINS MOLIERI, *EL DESAFÍO INDÍGENA EN NICARAGUA: EL CASO DE LOS MISKITOS* 33-114 (1986) (a history on the Atlantic Coast region); Theodore Macdonald, *The Moral Economy of the Miskito Indians: Local Roots of a Geopolitical Conflict*, in *ETHNICITIES AND NATIONS: PROCESSES OF INTERETHNIC RELATIONS IN LATIN AMERICA, SOUTHEAST ASIA, AND THE PACIFIC* 114-22 (Remo Guidieri et al. eds., 1988); S. James Anaya, *The Awas Tingni Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers, and Government Neglect in Nicaragua*, 9 *ST. THOMAS L. REV.* 157 (1996); S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 *ARIZ. J. INT'L & COMP. L.* 1, 1-15 (2002).

124. *Awas Tingni* case, *supra* note 120, ¶¶ 142-55.

125. *Id.* ¶ 146.

126. See *Final Written Arguments of the Inter-American Commission on Human Rights Before the Inter-American Court of Human Rights in the Case of the Mayagna (Sumo) Indigenous Community of Awas Tingni Against the Republic of Nicaragua*, Aug. 10, 2001, in 19 *ARIZ. J. INT'L & COMP. L.* 1, 367, (2002), ¶¶ 62-66 [hereinafter *Final Arguments of the Inter-American Commission in the Awas Tingni Case*].

spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.¹²⁷

Accordingly, the Court determined that indigenous peoples not only have property rights to their traditional lands protected by the American Convention on Human Rights, but that they also are entitled, under the Convention, to have the state demarcate and title those lands in their favor in circumstances where those rights are not otherwise secure. The Court found that *Awás Tingni* in particular has the “right that the State . . . carry out the delimitation, demarcation, and titling of the territory belonging to the Community.”¹²⁸ This decision is commensurate with article 14(2) of ILO Convention No. 169, which provides: “Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.”¹²⁹

In arriving at its conclusions in the *Awás Tingni* case, the Court applied what it termed an “evolutionary” method of interpretation, taking into account modern developments in conceptions about property and cultural integrity as related to indigenous peoples and their lands.¹³⁰ In his concurring opinion, Judge García Ramírez expounded upon this interpretive methodology, making specific references to the relevant provisions of ILO Convention No. 169, even though Nicaragua is not a party to that convention, as well as to parts of the draft U.N. and OAS declarations on the rights of indigenous peoples.¹³¹ Judge Cançado Trindade, the president of the Court, joined judges Pacheco Gómez and Abreu Burelli in another concurring opinion, reiterating the cultural and spiritual underpinnings of indigenous peoples’ relations to lands.¹³²

127. *Awás Tingni* case, *supra* note 120, ¶ 149.

128. *Id.* ¶ 153.

129. *Cf. Report of the Committee Set Up to Examine the Representation Alleging Non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the National Confederation of Trade Unions of Greenland (Sulinermik Inuussutissarsiuqartut Kattuffiat-SIK)*, I.L.O. Doc. GB.280/18/5 (Nov. 2000) (concluding that, because the Greenland Home Rule Act recognizes the entire territory of Greenland as belonging to the Inuit of Greenland as a whole, Denmark is under no obligation under the convention to demarcate the particular lands within Greenland that correspond to a particular Inuit community).

130. *Awás Tingni* case, *supra* note 120, ¶¶ 146-49.

131. *See id.* ¶¶ 7-9 (Separate opinion of Judge Sergio García Ramírez).

132. *See id.* (separate opinion of Judges A.A. Cançado Trindade, M. Pacheco Gómez, & Abreu Burelli).

The Inter-American Commission on Human Rights followed the precedent and interpretive methodology of the *Awes Tingni* case in addressing a dispute concerning the land rights of the Western Shoshone people. In the case of *Mary and Carrie Dann v. United States*,¹³³ the commission extended the interpretation of the right to property of the American Convention on Human Rights advanced in the *Awes Tingni* case to the similar property rights provision of the American Declaration on the Rights and Duties of Man,¹³⁴ emphasizing the due process and equal protections prescriptions that are to attach to indigenous property interests in lands and natural resources. The case arose from the refusal of Western Shoshone sisters Mary and Carrie Dann to submit to the permit system imposed by the United States for grazing on large parts of Western Shoshone traditional lands.¹³⁵ Faced with efforts by the United States government to stop them forcibly from grazing cattle without a permit and to impose substantial fines on them for doing so, the Danns argued that the permit system contravened Western Shoshone land rights. The United States conceded that the land in question was Western Shoshone ancestral land, but contended that Western Shoshone rights in the land had been “extinguished” through a series of administrative and judicial determinations.

The commission examined the proceedings by which the United States contended that Western Shoshone land rights had been lost and determined that those proceedings did not afford the Danns and other Western Shoshone groups adequate opportunity to be heard and that the proceedings otherwise denied these groups the same procedural and substantive protections generally available to property holders under United States law.¹³⁶ The commission noted the inadequacy of the historical rationale for the presumed taking of Western

133. *Mary and Carrie Dann v. United States*, 11.140 (U.S.), Inter-Am. Comm. H.R., Report No. 75/02 (merits decision of Dec. 27, 2002) [hereinafter *Dann case*].

134. See American Declaration on the Rights and Duties of Man, *supra* note 15, art. XXII (“Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”) As noted by the commission, its examination of state conduct in relation to the declaration is to promote observance of the general human rights obligations of OAS member states that derive from the OAS Charter. See *id.* ¶ 95, n.55. The Inter-American Court of Human Rights has held that the provisions of the American Declaration on the Rights and Duties of Man express the human rights obligations of states under the OAS Charter. See Inter-Am. Court H.R., Advisory Opinion OC-10/89, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, July 14, 1989, Ser. A, No. 10, ¶¶ 42-45 (1989).

135. For background on this case and the domestic proceedings before United States’ courts, see John D. O’Connell, *Constructive Conquest in the Courts: A Legal History of the Western Shoshone Lands Struggle – 1864 to 1991*, 42 NAT. RESOURCES J. 765 (2003); Thomas E. Luebben & Cathy Nelson, *The Indian Wars: Efforts to Resolve Western Shoshone Land and Treaty Issues and to Distribute the Indian Claims Commission Judgment Fund*, 42 NAT. RESOURCES J. 835 (2003).

136. See *Dann case*, *supra* note 133, ¶ 133-44.

Shoshone land – the need to encourage settlement and agricultural developments in the western United States – and also cited the United States’ failure to apply to the Western Shoshone the same just compensation standard ordinarily applied for the taking of property under U.S. law.¹³⁷ Thus, the commission found that the United States had “failed to ensure the Danns’ right to property under conditions of equality contrary to Articles II [right to equal protection], XVIII [right to fair trial] and XXIII [right to property] of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands.”¹³⁸

In applying and interpreting the cited provisions of the American declaration in the *Dann* case, the commission was explicit in its reliance on developments and trends in the international legal system regarding the rights of indigenous peoples.¹³⁹ Significantly, the commission declared that the “basic principles reflected in many of the provisions” of the Proposed American Declaration on the Rights of Indigenous Peoples, “including aspects of [its] article XVIII, reflect general international legal principles developing out of and applicable inside and outside of the inter-American system and to this extent are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples.”¹⁴⁰ Article XVIII of the proposed declaration¹⁴¹ provides for the protection of traditional forms of land tenure in terms similar to those found in ILO Convention No. 169, which the commission also highlighted in its analysis.¹⁴² Thus, the commission further

137. *See id.* ¶¶ 144-45.

138. *Id.* ¶ 172. In effect, the Commission found that many aspects of U.S. law relating to indigenous peoples are incompatible with international human rights law. These aspects include the doctrine by which the United States is deemed capable of unilaterally “extinguishing” indigenous rights, including land rights and treaty rights by which indigenous land rights arising from prior occupation (aboriginal title) can be extinguished without the United States incurring an obligation of just compensation. *See Lonewolf v. Hitchcock*, 187 US 553 (1903); *Tee-Hit-Ton v. United States*, 348 U.S. 272 (1955). For a critical analysis of this and other related doctrines of U.S. law, see Robert Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WISC. L. REV. 219 (1986).

139. *See Dann*, *supra* note 133, ¶¶ 124-28. The commission noted “a review of pertinent treaties, legislation and jurisprudence reveals the development over more than 80 years of particular human rights norms and principles applicable to the circumstances and treatment of indigenous peoples.” *Id.* ¶ 125.

140. *Id.* ¶ 129.

141. Article XVIII of the Proposed American Declaration of the Rights of Indigenous Peoples, *supra* note 5, establishes, *inter alia*, “Indigenous peoples have the right to legal recognition of their varied and specific forms and modes of possession, control and enjoyment of their territories and property [and] are entitled to recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied and to the use of those to which they have also had access for their traditional activities and livelihood.”

142. *See Dann*, *supra* note 133, ¶¶ 127-28.

signaled the development of a *sui generis* regime of international norms and jurisprudence concerning indigenous peoples and the benchmark represented by ILO Convention No. 169 in that development, even in regard to states, like the United States, that are not parties to the convention.

In the *Awás Tingni* case, the commission had maintained that, given the gradual emergence of an international consensus on the rights of indigenous peoples to their traditional lands, such rights are now a matter of customary international law.¹⁴³ Continuing this line of thought in the *Dann* case, the commission summarized what it considers the pertinent “general international legal principles” that are *now* applicable both within and outside of the Inter-American system:

(1) the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;

(2) the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and

(3) where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.¹⁴⁴

It is thus evident that certain minimum standards concerning indigenous land rights, rooted in accepted precepts of cultural integrity, property, non-discrimination, and self-determination, have made their way not just into conventional law but also into general or customary international law.¹⁴⁵

143. See Final Arguments of the Inter-American Commission in the *Awás Tingni* Case, *supra* note 126, ¶ 64.

144. *Dann*, *supra* note 133, ¶ 130 (footnotes omitted).

145. The distinction between *customary* international law and *general principles* of international law is ambiguous in modern doctrine. Essentially, norms of customary international law are those deriving from state and other authoritative practice that extend into the international plane. See footnotes 74-79, *infra*. Whereas general principles of international law are variously identified as those that can be seen reflected on a widespread basis in such practice, those articulated or discernible from numerous international treaties and other standard-setting documents, or those widely shared among

V. CUSTOMARY LAW AND SELF-GOVERNANCE

The article in this volume by Jose Molintas on the indigenous peoples of the Philippines describes the customary land tenure system that has regulated land use among the people of the Cordillera separate from the formal state property system. Mattias Ahrén, in his article, discusses the system of customary rules governing Saami reindeer herding, a system of rules that has received some, but not complete, recognition by the states within which the Saami live. Such customary law systems are fundamental to both the existence and definition of the land and resource rights of indigenous peoples, as well as to rights of self-governance more generally.

In the *Awasi Tigni* case discussed above, the Inter-American Court of Human Rights found indigenous customary land tenure patterns to be the basis of property rights that are protected by international human rights law. According to the Court:

Indigenous peoples' customary law must be especially taken into account As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.¹⁴⁶

The Court also asserted that the demarcation and titling of indigenous lands should be done "in accordance with their customary law, values, customs and mores."¹⁴⁷ The Court thus recognized both the validity of indigenous customary law in general and its particular role in defining the content of a collective right to property. In another case, *Aloboetoe v. Suriname*, the Inter-American Court considered Saramaka customary law on family relations and succession when determining the compensation due as reparation for the massacre of Saramaka villagers and in identifying the beneficiaries of that compensation.¹⁴⁸ Similarly, in

domestic legal systems. *See generally* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-11 (5th ed., Clarendon Press 1998). Especially where human rights are concerned, as developments in the field of indigenous peoples' human rights demonstrate, there can be considerable overlap between what might be understood to constitute general and customary international law. In any event, both categories establish legal obligations even for states that have not ratified or acceded to the treaties in which the norms or principles may be found.

146. *Awasi Tigni Case*, *supra* note 120, at ¶ 151.

147. *Id.* ¶ 164.

148. *Aloboetoe et al. Case (Reparations)*, Inter-Am. Ct. H.R., Sept. 10, 1993, (Ser. C) No. 15, ¶¶ 55-63 (1993). According to the Inter-American Court, to calculate the compensation it had to "take Saramaka custom into account. That custom will be the basis for the interpretation of those terms, to the degree that it does not contradict the American

Hopu v. France, the Human Rights Committee identified the relevant indigenous custom to define the familial relations and privacy interests that were deemed protected in the context of that case.¹⁴⁹

These cases affirm that indigenous custom and customary law are important aspects of the contemporary human rights regime as it concerns indigenous peoples. Indigenous custom and customary law are themselves critical elements of indigenous culture and as such, are to be protected by the cultural integrity norm, and they are also instrumental to the process of fulfilling other human rights norms in particular contexts.

Indigenous custom and customary law exist as part of indigenous peoples' own institutions of self-governance, which are at least partly rooted in historical patterns of social and political interaction and control. These systems often include, in addition to customary standards of conduct, dispute resolution and adjudicative mechanisms developed over centuries.¹⁵⁰ Raja Devashish Roy's article on the people of the Chittagong Hill Tracts of Bangladesh details the dynamic system of customary law and traditional authorities that regulate matters among these people and the mechanisms by which this system has been adapted to contemporary realities. He also explains how customary law practices have been substantially incorporated within the larger state legal system, although not without difficulties, especially in regards to issues concerning land and natural resources. Autonomous indigenous justice systems that apply customary law along with written codes have existed *de jure* within other state legal systems, including perhaps most notably that of the United States.¹⁵¹ Other indigenous self-governance systems, while not formally recognized within dominant state legal regimes, exist *de facto* and continue to regulate the lives of members of indigenous communities and provide continuity and cohesion for those communities.

The principle of self-determination joins other human rights precepts, including that of cultural integrity, to uphold the right of indigenous peoples to maintain and develop their own customary law systems of self-governance. The common article 1 of the international human rights covenants states, "All 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

Convention." *Id.* ¶ 62.

149. *See supra* notes 80-81 and accompanying text.

150. *See* Instituto Indigenista Interamericano and Instituto Interamericano de Derechos Humanos, *Entre ley y la costumbre: El Derecho consuetudinario indigena en America Latina* (1990) (a compilation of studies on indigenous customary laws and institutions in Latin America).

151. *See generally* FEDERAL INDIAN LAW: CASES AND MATERIALS 373-682 (4th ed., David H. Getches et al. eds., West Publishing 1998) (materials on institutions of tribal self-government, including tribal courts, and the scope of their jurisdiction within the U.S. legal framework).

development.”¹⁵² Although there is a good deal of debate concerning the precise scope and meaning of self-determination, it is possible to identify a central concept that is widely accepted in international discourse. That is the idea that human beings, individually and collectively, should be in control of their own destinies and that the structures of government should be devised accordingly.¹⁵³ The U.N. Human Rights Committee has advanced the principle that the right of self-determination applies to indigenous peoples in relation to the self-determination provision in article 1 of the International Covenant on Civil and Political Rights. In commenting upon Canada’s fourth periodic report under the Covenant, the Committee stated that the right of self-determination affirmed in article 1 protects indigenous peoples, *inter alia*, in their use and control of traditional lands and resources.¹⁵⁴ The committee has also invoked the right of self-determination in examining reports from Australia, Norway, and Mexico as they relate to indigenous peoples.¹⁵⁵

By virtue of the principles of self-determination and cultural integrity, any diminishment in the authority or altering of *de facto* or *de jure* indigenous institutions of autonomous governance should not occur unless pursuant to the consent or acquiescence of the affected groups. To the contrary, states are enjoined to uphold the existence and free development of indigenous institutions. Hence, ILO Convention No. 169 upholds the right of indigenous peoples to “retain their own customs and institutions”¹⁵⁶ and requires that “the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.”¹⁵⁷ Similarly, the Draft U.N.

152. International Covenant on Economic, Social and Cultural Rights, *supra* note 92, art. 1(1); International Covenant on Civil and Political Rights, *supra* note 31, art. 1(1).

153. *See generally*, ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW, *supra* note 3, at 75-85.

154. *Concluding Observations and Recommendations of the Human Rights Committee: Canada*, Apr. 7, 1999, U.N. Doc. CCPR/C/79/Add.105, ¶ 8 (1999).

155. *See Concluding Observations of the Human Rights Committee: Australia*, July 24, 2002, U.N. Doc. A/55/40, ¶¶ 506-508 (admonishing Australia that, in connection with article 1, ¶ 2 of the covenant, it should “take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources”); *Concluding Observations of the Human Rights Committee: Norway*, Nov. 1, 1999, U.N. Doc. CCPR/C/79/Add.112 17, ¶ 17 (expressing its expectation that Norway “report on the Saami people’s right to self-determination under article 1 of the Covenant, including paragraph 2 of that article”). *See also Concluding Observations of the Human Rights Committee: Mexico*, July 27, 1999, U.N. Doc. CCPR/C/79/Add.109, ¶ 19 (urging “appropriate measures . . . to increase [indigenous] participation in the country’s institutions and the exercise of the right to self-determination”). *See generally* General Comment No. 12 – The Right of Self-Determination (art. 1), Hum. Rts. Comm., 21st Sess., in COMPILATION OF GENERAL COMMENTS AND RECOMMENDATION ADOPTED BY THE HUMAN RIGHTS TREATY-BODIES 121-22, Apr. 26, 2001, HRI/GEN/1/Rev.5 (2001).

156. ILO Convention No. 169, *supra* note 6, art. 8(2).

157. *Id.* art. 9.

Declaration on the Rights of Indigenous Peoples states: “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognised human rights standards.”¹⁵⁸

Independent of the extent to which indigenous peoples have retained *de facto* or *de jure* autonomous institutions from previous eras, they generally are entitled to develop autonomous governance appropriate to their circumstances on the grounds that they are instrumental to securing their cultural survival. In general, autonomous governance for indigenous communities is considered fundamental to their ability to control the development of their cultures, including their use of land and resources. In the context of indigenous Hawaiians, for example, Michael Dudley and Keoni Agard echo the demand for “nationhood” and “sovereignty” – that is, some form of autonomous political status for Native Hawaiians – as a means of ensuring the education of children in Hawaiian language, reclaiming Native Hawaiian spiritual heritage and connection with the natural world, and, in general, for the natural evolution of Hawaiian culture cushioned from the onslaught of outside influences that have thus far had devastating effects.¹⁵⁹

Autonomous governance for indigenous peoples, furthermore, is a means of enhancing democracy overall. Because of their subordinate positions within states, indigenous communities and their members typically have been denied full and equal participation in the political processes that have sought to govern them.¹⁶⁰ Even as indigenous individuals have been granted full rights of citizenship and overtly racially discriminatory policies have diminished, indigenous groups still typically constitute economically disadvantaged minorities within the states in which they live.¹⁶¹ This condition is one of political vulnerability. To devolve governmental authority onto indigenous communities is to diminish their vulnerability in the face of powerful majority or elite interests and to enhance the responsiveness of government to the unique interests of indigenous communities and their members. Hence, the draft U.N. Declaration on the Rights of Indigenous Peoples states:

Indigenous peoples, as a specific form of exercising their right

158. Draft United Nations Declaration, *supra* note 4, art. 33.

159. MICHAEL KIONI DUDLEY & KEONI KEALOHA AGARD, *A HAWAIIAN NATION: A CALL FOR HAWAIIAN SOVEREIGNTY* 89-99 (vol. 2, Na Kane O Ka Malo Press 1990).

160. The *U.N. Indigenous Study*, *supra* note 90, observes that “[v]arious factors, economic and social ones for the most part, everywhere influence the effectiveness of political rights.” *Id.* Add. 4, ¶ 255. The Study concludes that political “representation of indigenous peoples remains inadequate and is sometimes purely symbolic.” *Id.* Add. 4, ¶ 261.

161. *See* BURGER, *supra* note 91, at 17-33 (describing “life at the bottom” for the world’s indigenous peoples); *see also* *U.N. Indigenous Study*, *supra* note 90, Add. 4, ¶¶ 54-190 (describing social and economic conditions of indigenous peoples).

to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.¹⁶²

The Proposed American Declaration on the Rights of Indigenous Peoples recognizes “the right to autonomy or self-government” in similar terms.¹⁶³ Although differing in their willingness to accept such a formulation of a “right to autonomy,” states increasingly have expressed agreement that indigenous peoples are entitled to maintain and develop their customary laws and other traditional institutions, and to enjoy autonomous governmental or administrative authority appropriate to their circumstances.¹⁶⁴

VI. PARTICIPATION AND CONSULTATION

While cultural integrity and self-determination precepts uphold the development of indigenous customary law and autonomous institutions, they also uphold rights of effective participation of indigenous peoples in all decisions that affect them. Because indigenous peoples typically have important linkages to the larger society that they wish to maintain under conditions of equality, and because they ordinarily will continue as part of the states that have been constructed around them, effective self-determination and self-government for indigenous peoples means not just maintaining local customary law and autonomous institutions, but also participating in the larger political order. In one way or another, each of the articles that follow in this volume identifies the negative

162. Draft U.N. Declaration, *supra* note 4, art. 33.

163. See Proposed American Declaration, *supra* note 5, art. XV(1).

164. See, e.g., 1991 Revised Working Paper, *supra* note 52, at 89 (proposed language by Argentina for U.N. Declaration on Indigenous Rights); *Information Received from Governments*, U.N. Doc. E/CN.4/Sub.2/AC.4/1991/1(1991) (comments from Mexico on first revised text of indigenous rights declaration); *Report on First Round of Consultations on Inter-American Instrument*, *supra* note 53, at 293-98 (comments by Costa Rica, Mexico, Peru, Colombia, Canada, Chile, and Guatemala); *Report of the Chair, Special meeting of the Working Group to prepare the Draft American Declaration on the Rights of Indigenous Peoples held in Washington D.C., Apr. 2-6*, *supra* note 116, at 66 (proposal submitted by the United States stating that “States should recognize . . . a broad range of autonomy for indigenous peoples in managing their local and internal affairs”); *Report of Rapporteur, Special meeting of the Working Group to prepare the Draft American Declaration on the Rights of Indigenous Peoples held in Washington D.C., Mar. 11-15, 2002*, *supra* note 116, at 11-12 (comments from states linking the self-government provisions on the proposed American declaration to the principle of “internal” self-determination).

effects of government decisions – in relation to natural resources, civil administration, and administration of justice – that are taken without effective and meaningful participation by the indigenous peoples concerned.

The draft U.N. Declaration on the Rights of Indigenous Peoples affirms the overwhelmingly accepted view that “[i]ndigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making which may affect their rights,”¹⁶⁵ a view affirmed in similar terms in the proposed American declaration.¹⁶⁶ Likewise, ILO Convention No. 169 requires effective means by which indigenous peoples “can freely participate . . . at all levels of decision-making” affecting them.¹⁶⁷

It is evident that this requirement applies not only to decision-making within the framework of domestic or municipal processes but also to decision-making within the international realm. United Nations bodies and other international institutions increasingly have allowed for, and even solicited, the participation of indigenous peoples’ representatives in their policy-making and standard-setting work in areas of concern to indigenous groups.¹⁶⁸ The U.N.

165. Draft U.N. Declaration, *supra* note 4, art. 19.

166. Proposed American Declaration, *supra* note 5, art XV (2). Canada, Chile, Costa Rica, and various indigenous peoples’ organizations have stressed the importance of this right in commenting on the proposal for an inter-American instrument on indigenous rights. See *Report on First Round of Consultations on Inter-American Instrument*, *supra* note 53, at 282-83.

167. ILO Convention No. 169, *supra* note 6, art. 6.1(b).

168. Thus, indigenous peoples and their organizations have been permitted to participate actively in discussions within the United Nations concerning the development of an indigenous rights declaration and related topics. See 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, 676-85 (1990), reprinted in *INTERNATIONAL LAW AND INDIGENOUS PEOPLES* (S. James Anaya ed., 2003). The U.N. sub-commission’s Working Group on Indigenous Populations solicited written commentary from indigenous peoples in the course of developing the draft U.N. declaration, and the group allowed any indigenous representative attending its meetings to participate in the discussion of the declaration. The Commission on Human Rights, which is now considering the draft declaration, established a special procedure for indigenous representatives to participate in its drafting working group, a procedure that is designed to provide for greater participation by non-state entities than that ordinarily allowed in the commission’s proceedings. See U.N. Commission on Human Rights, Resolution 1995/32 of Mar. 3, 1995 (Annex). Similarly, the International Labour Organization relaxed its rules of procedure in order to allow indigenous groups limited direct participation in the development of ILO Convention No. 169 of 1989. See Swepston, *supra* note 113, at 686-87. From the start, indigenous peoples have participated in the deliberations of the OAS working group established to discuss the Proposed American Declaration on the Rights of Indigenous Peoples. See *Report on the First Round of Consultations Concerning the Future Inter-American Legal Instrument on the Rights of Indigenous Populations*, *supra* note 53; *Propuestas Presentadas por los Estados y los Representantes de los Pueblos Indígenas sobre los Artículos Considerados en las Sesiones Especiales del Grupo de*

Permanent Forum on Indigenous Issues, which was established to give indigenous peoples a greater voice within the U.N. system, and which is constituted in part by indigenous persons, is now perhaps the principal manifestation of a general acceptance of indigenous participation within relevant international spheres.¹⁶⁹

In the context of indigenous-state relations, there are now requirements for consultation that are expected to be applied whenever the state makes decisions that may affect indigenous peoples. ILO Convention No. 169 in its article 6 affirms the duty of governments to “[c]onsult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.”¹⁷⁰ Article 15 of the convention makes clear that among the many situations in which this consultation requirement applies are those in which natural resource or other development projects are proposed for areas that are within traditional indigenous territories, even when the resources at stake are not, under state law, owned by the indigenous peoples concerned.¹⁷¹ ILO authorities have interpreted the convention to mean that the

Trabajo para Preparar el Proyecto de Declaración Americana de Derechos de los Indígenas, 11 -15 de marzo de 2002, O.A.S. Doc. EA/Ser.K/XVI, GT/DADIN/doc.71 /02 (2002).

169. See Economic and Social Council Res. E/RES/2000/22, July 28, 2000, (establishing the Permanent Forum). Another example of indigenous participation at the international level is the Arctic Council. The council is a high level intergovernmental forum, instituted September 19, 1996 in Ottawa, Canada, to consider the common concerns and challenges of the governments and peoples of the Arctic. Members of the Council are Canada, Denmark, the Russian Federation, Finland, Iceland, Norway, Sweden, and the United States. The following indigenous organizations have status as “permanent participants,” with the right to participate and be consulted within the Arctic Council: the Inuit Circumpolar Conference, the Saami Council, the Aleut International Association, the Arctic Athabaskan Council, and the Gwich’in Council International. Similarly, other organizations with an interest in indigenous issues, such as the International Working Group on Indigenous Affairs (IWGIA) and the Association of World Reindeer Herders, can attend the Council’s activities as observers.

170. ILO Convention 169, *supra* note 6, art. 6(1)(a). Also relevant in this regard is article 7(1) of the convention, which recognizes “the right [of indigenous peoples] to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.”

171. See *id.* art. 15. The Governing Body of the ILO, through tripartite *ad hoc* committees created to analyze complaints of violations of the convention, has warned against a lack of adequate consultative processes in various cases in which states have endeavored to develop natural resources on traditional indigenous territories. See *Report of the Committee Set Up to Examine the Representation Alleging Non-observance by Bolivia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Bolivian Central of Workers (COB)* I.L.O. Doc. GB.274/16/7, Mar. 1999, (signaling need to correct lack of consultation prior to granting of

consultations are not required to lead to agreement with indigenous peoples in all instances.¹⁷² Nonetheless, the convention stipulates that the 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”.¹⁷³

This requirement that agreement should at least be an objective of the consultations means that the consultations cannot simply be a matter of informing indigenous communities about the measures that will affect them. Consultation processes must be crafted to allow indigenous peoples the genuine opportunity to influence the decisions that affect their interests. This requires governments to engage indigenous peoples in the discussions about what the outcomes of those decisions should be before they are taken. It also requires procedural safeguards to account for indigenous peoples’ own decision-making mechanisms, including relevant customs and organizational structures, and ensuring that indigenous peoples have access to all the information and relevant expertise needed.¹⁷⁴

concessions for logging on traditional indigenous lands in Bolivian Amazon region); *Third Supplementary Report of the Committee Established to Examine the Representation Alleging Non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Single Confederation of Workers of Colombia (CUT)*, GB. 276/17/1, GB 282/14/3, ¶ 86 (Nov. 2001) (specifying that Colombia was required to adequately apply the convention’s consultation provisions prior to authorizing oil development in an area outside the U’wa reserve, and rejecting the government’s position that the provisions applied only in regard to areas regularly and permanently occupied by indigenous communities); *Report of the Committee Set Up to Examine the Representation Alleging Non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL)* (Ecuadorian Confederation of Free Union Organizations), I.L.O. Doc. GB.282/14/2, Nov. 2001, (lack of consultation prior to oil exploitation within Shuar territory in Amazon region).

172. *See id.* ¶ 39; Statement of the International Labor Office, summarized in *Report of the Committee on Convention No. 107*, International Labor Conference, Provisional Record 25, 76th Sess., at 25/12, ¶ 74 (1989).

173. ILO Convention 169, *supra* note 6, art. 6(2) (emphasis added). International Labor Organization officials have affirmed that “consultations with indigenous and tribal peoples are compulsory: prior to any exploration or exploitation of mineral and/or other natural resources within their lands; when it might be necessary to remove indigenous or tribal communities from their traditional lands and resettle them somewhere else, and prior to the design and launching of vocational training programmes for them.” MANUELA TOMEI & LEE SWEPSTON, *INDIGENOUS AND TRIBAL PEOPLES: A GUIDE TO ILO CONVENTION NO. 169* ¶ 8 (Int’l Labor Org. 1996).

174. Such is the interpretation of the consultation provisions of ILO Convention No. 169 provided by the relevant ILO officials, as manifested in TOMEI & SWESTON, *supra* note 173, § 1, an ILO publication whose authors are among the organization’s principal officials in charge of applying the convention. This interpretation is also advanced by the *ad hoc* ILO committees charged with examining complaints. For example, in finding Ecuador in violation of article 6 for its failure to adequately consult the Shuar people with regard to oil

Further, as pointed out by ILO supervisory bodies, the objective of consultations should take into account the convention's other provisions and its general mandate that governments develop, "with the participation of the peoples concerned, coordinated and systematic action to protect their rights and to guarantee respect for their integrity."¹⁷⁵ Thus, in addition to the procedural safeguards that apply, and whether or not agreement is to be achieved, the consultations should lead to decisions that are consistent with indigenous peoples' substantive rights. This puts a burden on a government to justify, in terms consistent with the full range of applicable international norms concerning indigenous peoples, any decision that is contrary to the expressed preferences of the affected indigenous group.

development that would affect 70% of the Shaur territory, the relevant ILO committee stated:

the concept of consulting the indigenous communities that could be affected by the exploration or exploitation of natural resources includes establishing a genuine dialogue between both parties characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord. A simple information meeting cannot be considered as complying with the provisions of the Convention. In addition, Article 6 requires that the consultation should occur beforehand, which implies that the communities affected should participate as early as possible in the process, including in the preparation of environmental impact studies [I]f an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention.

Report of the Committee Set Up to Examine the Representation Alleging Non-observance by Ecuador, CEOSL, *supra* note 171, ¶¶ 38, 44. See also accord, *Report of the Committee Set Up to Examine the Representation Alleging Non-observance by Bolivia*, COB, *supra* note 171, ¶ 40; *Report of the Committee Set Up to Examine the Representation Alleging Non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169)* made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association (ADESMAS), I.L.O. Doc. GB.282/14/4, ¶ 61 (Nov. 2001).

175. Convention No.169, *supra* note 6, art. 2(1), cited in *Report of the Committee Set Up to Examine the Representation Alleging Non-observance by Colombia, Made by CUT and ADESMAS*, *supra* note 174, ¶ 58 (in which the committee found that the government had not adequately consulted some Embera-Katio and Zenu communities affected by the construction of a hydroelectric dam, construction which involved the diversion of a river and affected the economic and cultural sustainability of those communities). See also *Third Supplementary Report of the Committee Set Up to Examine the Representation Alleging Non-observance by Colombia, Made by CUT*, *supra* note 109, ¶ 77 (affirming that "the requirement for prior consultation must be viewed in the light of one of the fundamental principles of the Convention," that is, the right of indigenous peoples to decide their own priorities with respect to development projects [art. 7.1] and the corresponding obligation of governments to evaluate the socio-cultural impact of these projects [art. 7.3]).

The requirements of consultation and participation incorporated in Convention No. 169 are strongly rooted in general human rights principles that are expressed in other international instruments, as have been manifested by the U.N. Committee on the Elimination of Racial Discrimination (CERD) and the Human Rights Committee. In connection with the Convention on the Elimination of All Forms of Racial Discrimination, CERD has called upon states to ensure that “indigenous peoples have equal rights in respect of effective participation in public life and no decisions directly relating to their rights and interests are taken without their informed consent.”¹⁷⁶ In the same vein, the U.N. Human Rights Committee has understood the norm of cultural integrity, as incorporated into the International Covenant on Civil and Political Rights through its article 27, to require the “effective participation” of indigenous peoples in any decision that may affect their cultural attributes, including decisions concerning cultural ties with land and natural resources.¹⁷⁷

With their strong normative foundations, the basic elements of the consultation provisions of Convention No. 169 have been generally accepted within various spheres of international and domestic practice, independent of specific treaty obligations imposed by this or other international conventions. For example, the World Bank, which itself is a subject of international law within its realm of competency,¹⁷⁸ includes “informed participation” by indigenous peoples and “direct consultation” with them among the “central activities” that are specified by its Operational Directive 4.20 and must be undertaken in connection with any Bank-funded project that may affect the interests of these peoples.¹⁷⁹

176. See CERD General Recommendation on Indigenous Peoples, *supra* note 20, ¶ 4 (d).

177. See General Commentary 23 (50) to Article 27, *supra* note 71, ¶ 7.

178. See Daniel Bradlow, *The World Bank, the IMF and Human Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 63 (1996) (arguing that the World Bank is a subject of international law because it has rights and obligations that are determined by international law).

179. See World Bank, Operational Directive O.D. 4.20 – Indigenous Peoples, ¶ 8, Sept. 2001 (currently under review). The emphasis on the requirement of participation and consent by indigenous peoples and other particularly vulnerable social groups is especially obvious in the World Bank's recent policy pronouncements. The new Operational Policy of the Bank regarding natural habitats requires consultation with “affected groups,” including especially indigenous peoples, before and after conducting environmental impact studies. World Bank, *Operational Policy 4.04., Natural Habitats*, ¶¶ 15, 17 (June 2001). In regard to the construction of dams, the official position of the Bank is to require “free and significant consultation with indigenous groups directly affected.” *World Bank Position with Respect to the World Commission on Dams* (Dec. 2001), quoted in World Bank, *Summary of Consultations with External Stakeholders regarding the World Bank Draft Indigenous Peoples Policy (Draft OP/BP 4.10)*, Annex C, at 12 (Apr. 18, 2002). A similar policy has been adopted with respect to involuntary resettlement resulting from the Bank's development projects, which pays special attention to the participation of indigenous peoples and accords priority to their preferences in resettlement strategies. World Bank,

Beyond the context of international development assistance, the draft U.N. and OAS declarations include provisions that clearly incorporate minimum requirements of consultation that approximate or exceed the mandates of Convention No. 169.¹⁸⁰ It is evident that there is a broad acceptance of minimum

Operational Policy O.P. 4.1, Involuntary Resettlement (Dec. 2001), ¶¶ 7-11.

In practice, however, the Bank's actions have not always been faithful to these principles. A study by the Bank itself carried out in 1992 made clear that more than a third of the Bank's projects affecting indigenous communities had not taken into account Operational Directive 4.10 on indigenous peoples, including that part of the directive mandating consultation with affected communities. See John Swartz and Jorge Uquillas: *Aplicación de la Política del Banco sobre Poblaciones Indígenas (OD 4.20) en América Latina (1992-1997)*, World Bank, Regional Office for Latin America and the Caribbean, at 2 (1999). A later, independent study, based on an evaluation of seven specific Bank projects, concluded that the affected indigenous communities perceived the consultation as "often" superficial and "normally limited to brief visits to the field" that were ineffective because they "contradicted the gradual and consensual collective decision-making processes common in indigenous cultures"; Thomas Griffiths & Marcus Colchester, *Report of a workshop on Indigenous Peoples, Forests and the World Bank: Policies and Practice*, May 9-10, 2002, Program for Forest Peoples, Centre for Information on Multilateral Development Banks, at 32 (2000). But despite these significant shortcomings, the study also noted that the existence of the World Bank directive "has been important to promote changes in the practice of some countries and to mitigate the adverse effects of development plans on indigenous peoples." *Id.* at 3.

180. Among the relevant provisions of the Draft U.N. Declaration, *supra* note 4, are the following: art. 19 ("Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures"); art. 20 ("Indigenous peoples have the right to participate fully ... in devising legislative or administrative measures that may affect them [and] States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures"); art. 30 ("Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources"); Article 37 ("States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration"). The Proposed American Declaration, *supra* note 5, includes the following relevant provisions, among others: art. XIII ("Indigenous peoples are entitled to information on the environment, including information that might ensure their effective participation in actions and policies that might affect their environment"); art. XV ("Indigenous populations 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"); art. XVII ("The States shall promote the inclusion, in their national organizational structures, of institutions and traditional practices of indigenous peoples"); and art. XXI ("Unless exceptional circumstances so warrant in the public interest, the States shall take necessary measures to ensure that decisions regarding any plan, program or proposal affecting the rights or living conditions of indigenous people are not made without the free and informed consent and

requirements of consultation among states and others participating in the discussions on drafts, even while certain disagreement persists about the particular wording that should make its way into the declarations.¹⁸¹ It can also be observed that, in their communications to international institutions about relevant developments, states usually make reference to consultations undertaken with the indigenous peoples affected by the developments,¹⁸² which further manifests an acceptance of the principles of prior consultation included in Convention No. 169. Whether or not states are, in fact, engaging in adequate consultations and allowing

participation of those peoples”).

181. See, e.g., *Comments by the Delegation of Canada on Articles VII through XVIII and on the Issue of Self-determination in the Proposed American Declaration on Indigenous Rights*, Mar. 14, 2002, O.A.S. Doc. OEA/Ser.K/XVI, GT/DADIN/doc.69/02 (“Canada supports the principle that indigenous individuals have the right to participate in the general political processes of the state in which they live, without discrimination, consistent with international standards”); *Comments of the Delegation of Guyana*, Mar. 15, 2002, O.A.S. Doc. OEA/Ser.K/XVI, GT/DADIN-73/02 (2002) (“I wish to reiterate Guyana’s support for, and commitment to both informing and consulting with indigenous communities on environmental and all other issues related to the affairs of Guyana.”); *Proposal of the Delegation of the United States*, Mar. 13, 2002, O.A.S. Doc. OEA/Ser.K/XVI GT/DADIN/doc.66/02 rev. 1 (“Where a national policy, regulation, decision, legislative comments or legislation will have substantial or direct effects for indigenous peoples, States should consult with indigenous peoples prior to the taking of such actions, where practicable and permitted by law.”). See also *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32*, Dec. 10, 1996, U.N. Doc. E/CN.4/1997/102 (1996) (summarizing government comments on the Draft U.N. Declaration); comments by delegation of Mexico. *Id.* ¶ 44 (stating that indigenous peoples “have the right to participate in economic, cultural, social and political development”); comments by delegation of Canada, *id.* ¶ 199 (referencing articles 18 and 19 of the Draft U.N. Declaration and supporting indigenous peoples’ “participation in State decisions which directly affected certain areas of particular concern to indigenous peoples”); comments by the delegation of Argentina concerning articles 19 and 20 of the U.N. draft declaration, *id.* at ¶ 205 (supporting the participation of indigenous peoples in decision-making processes, and citing the relevant provisions of the Argentinian constitution in this regard); proposal of the delegation of Brazil on article 20 of the U.N. draft declaration, *id.* at ¶ 214 (“States shall consult the peoples concerned, whose informed opinion shall be expressed freely, before implementing and adopting those measures”); comments by the U.S. delegation on article 19, *id.* ¶ 221, (supporting the right of indigenous peoples to participate effectively at the local and national levels “particularly with respect to decisions directly affecting them”).

182. See, e.g., *Report of the Working Group on Indigenous Populations on its 19th Session*, U.N. Doc. E/CN.4/Sub.2/2001/17, ¶¶ 35-37 (Aug. 2001) (interventions of Canada, Chile and New Zealand regarding the participation of indigenous peoples in the design and implementation of policies that affect them.); *Report of the Working Group on Indigenous Populations on its 20th Session*, U.N. Doc. E/CN.4/Sub.2/2002/24, ¶¶ 51-52 (Aug. 2002) (information about positive measures taken by the governments of Canada and Finland toward guaranteeing the participation of indigenous peoples in government programs affecting them).

for sufficient indigenous participation in relevant processes, it is apparent that they generally acknowledge certain minimum standards in this regard.

As already suggested, indigenous participation and consultation are to be upheld along with institutions of autonomous governance, therefore requiring the development of nuanced political orders that accommodate both the inward- and outward-looking community structures of indigenous peoples. International law does not require or allow for any one particular form of structural accommodation for all indigenous peoples – indeed, the very diversity of indigenous cultures and their surrounding circumstances belie a singular formula. The underlying objective here, however, is to allow indigenous peoples to be genuinely associated with all decisions affecting them through institutions and consultative arrangements that reflect their specific cultural patterns. Self-determination, furthermore, requires that such institutions and arrangements in no case be imposed upon indigenous peoples but rather be the outcome of procedures that defer to their preferences among justifiable options.

VII. CONCLUSION

The contemporary human rights regime concerning indigenous peoples advances, on the one hand, cultural integrity and autonomy and, on the other, participatory engagement. This dual thrust reflects the view that indigenous peoples are entitled to be different but are not necessarily to be considered *a priori* unconnected from larger social and political structures. Rather, indigenous groups – whether characterized as communities, peoples, nations, or other – are appropriately viewed as simultaneously distinct from, yet part of, larger units of social and political interaction, units that may include indigenous federations, the states within which they live and the global community itself.

The political philosophy for the North American Iroquois Confederacy, or the Haudenosaunee, is expressed in the Great Law of Peace, which describes a great tree with roots extending in the four cardinal directions to all peoples of the earth. All are invited to follow the roots to the tree and join in peaceful coexistence and cooperation under its great long leaves.¹⁸³ The Great Law of Peace promotes unity among individuals, families, clans, and nations while upholding the integrity of diverse identities and spheres of autonomy.¹⁸⁴ Similar ideals have been expressed by leaders of other indigenous groups in contemporary appeals to international bodies¹⁸⁵ and are implicit throughout this study. These

183. See PAUL WALLACE, *THE IROQUOIS BOOK OF LIFE: WHITE ROOTS OF PEACE* 25-30 (Clear Light Pub. 1994); Oren R. Lyons, *The American Indian in the Past, in EXILED IN THE LAND OF THE FREE* 13, 14, 37-39 (Oren R. Lyons & John C. Mohawk eds., 1992).

184. See *id.*

185. See, e.g., *Living History: Inauguration of the International Year of the World's Indigenous People*, 3 *TRANSNAT'L L. & CONTEMP. PROBS.* 165-222 (1993) (statements by indigenous leaders).

ideals challenge previously dominant Western conceptions of the culturally homogenous and legally monolithic state, and they hold out hope for political ordering that simultaneously embraces unity and diversity on the basis of equality. Such is the multicultural model and its challenge for the modern state.

