

# Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis

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Wounded Knee, the Trail of Tears, the Siege of Cusco<sup>1</sup>—these words, vessels of meaning, capture only a tiny fragment of the history of suffering, actual and cultural genocide, conquest, penetration, and marginalization<sup>2</sup> endured by indigenous peoples<sup>3</sup> around the world.<sup>4</sup> The focus of the Interna-

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1. Hernando Pizarro's 1536–1537 siege of Cusco culminated in the killing of all captured Indian women; the right hands of several hundred captured male noncombatants were cut off, and the victims were released to demoralize the rest; the beautiful Inca city was razed. See John F. Guilmartin, Jr., *The Cutting Edge: An Analysis of the Spanish Invasion and Overthrow of the Inca Empire*, in *TRANSATLANTIC ENCOUNTERS: EUROPEANS AND ANDEANS IN THE SIXTEENTH CENTURY* 40, 44 (Kenneth J. Andrien & Rolena Adorno eds., 1991). The bloody massacres of Native Americans in the mid-19th century are chronicled in the stark prose of Dee Brown. See DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* (1970). The Trail of Tears of the "Five Civilized Tribes" with its countless deaths, trauma and misery represented the nadir of the United States policy of removal. See GRANT FOREMAN, *INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS* (1953); ANGIE DEBO, *AND STILL THE WATERS RUN* (1972).

2. See generally VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* (1969); ROBERT JAULIN, *LA PAIX BLANCHE: INTRODUCTION À L'ETHNOCIDE* (1972); FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM AND THE CANT OF CONQUEST* (1975); *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIALIZATION AND RESISTANCE* (M. Annette Jaimes ed., 1992); THOMAS R. BERGER, *A LONG AND TERRIBLE SHADOW. WHITE VALUES, NATIVE RIGHTS IN THE AMERICAS. 1492–1992* (1991); Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986).

3. Professor James Anaya has defined this term to mean "living descendants of preinvasion inhabitants of lands now dominated by others, . . . culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest." S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3 (1996). This conceptualization is controversial, and will be discussed in detail in Part III.A. I suggest that indigenous peoples be defined as groups traditionally regarded, and self-defined, as descendants of the original inhabitants of lands with which they share a strong, often spiritual bond. These peoples are, and desire to be, culturally, socially and/or economically distinct from the dominant groups in society, at the hands of which they have, in past or present, suffered a pervasive pattern of subjugation, marginalization, dispossession, exclusion and/or discrimination.

4. At present, 300 million people around the world are estimated to be indigenous. Julian Burger, *In-*

tional Decade of the World's Indigenous People<sup>5</sup> is to honor the memory of the victims, but also to celebrate the survivors and their values. The global community recognition implied in this dedication testifies to the success of indigenous peoples' refusal to accept the alternatives of dying or living the lives of the conquerors. The Indian way of life has not merely survived; it is back as the foundation of a strong identity<sup>6</sup> which has forced itself to the top of the international agenda. Its values could be, and increasingly are, sought-after models<sup>7</sup> for a world drifting slowly, but seemingly inexorably, into alienation. Beyond the cultural sphere, indigenous peoples have reentered the arena of power. Under the battle cries of human rights and self-determination, they have become recognized actors in the world constitutive process.

This Article is designed to review the legacy of conquest in various arenas around the planet, and to arrive at a transnationally valid conclusion, if possible, on the status of indigenous peoples under domestic law (Part I); to describe the actors and trends in decision-making in international indigenous law (Part II); and to appraise these developments with particular focus on the issues of conceptualization of indigenous peoples, their claims to self-determination, unique collective rights, as well as innovative avenues of enforcement (Part III).

## I. THE LEGACY OF CONQUEST: A REVIEW

It bears repeating that the process of colonization has left so-called indigenous peoples defeated, relegated to minor spaces, reservations, bread-crumbs of land conceded by the dominant society. Indians were separated from their sacred land, the land of their ancestors, and from their burial grounds with which they shared a deeply spiritual bond. Deprived of traditional environments, they were not only politically, but economically, culturally,

*digenous Peoples and the United Nations*, in HUMAN RIGHTS OF INDIGENOUS PEOPLES 3, 16 (Cynthia Price Cohen ed., 1998), up from 250 million in 1990. Cf. JULIAN BURGER, THE GAIA ATLAS OF FIRST PEOPLES 18 (1990).

5. The Decade extends from 1995 to 2004. Adopted by the United Nations General Assembly in its resolution 48/163, G.A. Res. 48/163 (1993) (proclaiming the "International Decade of the World's Indigenous People" commencing Dec. 10, 1994), as implemented by G.A. Res. 50/157 (1995), G.A. Res. 51/78 (1997), and U.N. Commission on Human Rights resolution 1997/32. 1993 had already been declared the "International Year of the World's Indigenous People." G.A. Res. 45/164 (1990).

6. One yardstick may be the number of U.S. citizens who identify themselves as Native Americans. This figure increased more than threefold in the span of a generation: while 523,591 declared themselves Indians in the census of 1960, the census of 1990 saw that number increase to 1,878,285. Joane Nagel, *American Indian Ethnic Renewal: Politics and the Resurgence of Identity*, 60 AM. SOC. REV. 947 (1995). Professor Nagel's detailed sociological study attributes the marked increase not to simple population growth or a change in definitions, but to the combined effect of three factors: "federal Indian policy, American ethnic politics, and American Indian political activism." *Id.* For an earlier account, see STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE (1988). Similar phenomena occur in other countries with significant indigenous populations, as documented below.

7. Modern environmentalism's inspiration by indigenous respect for, and oneness with, nature is one important example of such beneficial transfer of Indian culture and spirituality. For an enlightening study of earlier contributions of Indian culture to the Western way of life, see JACK WEATHERFORD, INDIAN GIVERS: HOW THE INDIANS OF THE AMERICAS TRANSFORMED THE WORLD (1988).

and religiously dispossessed. They became entrapped peoples, "nations within."<sup>8</sup> They aspire to extricate themselves from the trap, and to live lives of self-defined dignity and happiness. Indigenous peoples all over the world claim the right to live freely on their ancestral lands, to celebrate their culture and deeply felt spirituality, and to move from cultural to economic autonomy and to political self-government, including the ultimate option of secession.

Despite the European powers' successes on the battlefield, the legal systems of the conquerors often had a hard time justifying the conquest in the terms of the constitutive myths of the community. Catholic Spain had Francisco de Victoria rationalize the duty of the Indians to welcome the Iberian "guests," *inter alia*, with the New Testament admonition to "love thy Neighbor" and to be hospitable to strangers.<sup>9</sup> His view of the essential humanity of Indians and their natural rights, however, did not fit nicely with the atrocities committed by these self-invited guests, and his fellow Dominican Bartolomé de las Casas argued for better treatment of the beaten people.<sup>10</sup> By contrast, the British colonization relied much less on brute force and the destruction of indigenous political structures and society; its subjugation strategies included to a much larger degree the mechanisms of negotiation and persuasion.<sup>11</sup> Nevertheless, the hands of its government, and those of its successor governments have not been free from blood.

The history of conquest and the meanderings of legal status of the subjugated, but resurgent, indigenous nations are retraced in the following over-

8. VINE DELORIA, JR. & CLIFFORD M. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* (1984). See also AUGIE FLERAS & JEAN LEONARD ELLIOTT, *THE 'NATIONS WITHIN.' ABORIGINAL-STATE RELATIONS IN CANADA, THE UNITED STATES, AND NEW ZEALAND* (1992).

9. FRANCISCO DE VITTORIA, *DE INDIS ET DE IURE BELLI RELECTIONES* 153 (J. Bate trans., *Classics of International Law Series*, 1917). Cf. ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 100-01 (1990).

10. BARTOLOMÉ DE LAS CASAS, *HISTORY OF THE INDIES: SELECTIONS* (George Sanderlin ed. & trans., 1971). Cf. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 10 (1996). The Dominicans Francisco de Vitoria (died 1546) and Bartolomé de Las Casas (1474-1566) were united in their rejection of Juan Ginés de Sepúlveda's (1490-1573) justification of the Spanish conquest by a theory of "world domination by the Pope or the Emperor and the Aristotelian theory of natural inequality among individuals and peoples." Instead, based on natural law theories of St. Thomas Aquinas, they recognized the claims of indigenous communities to be regarded as subjects of the law of nations with inalienable rights often infringed upon by the colonists. See Antonio Truyol y Serra, *History of the Law of Nations, Regional Developments: Latin America*, 7 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 231-32 (Rudolf Bernhardt ed., 1984); Glenn T. Morris, *In Support of the Right of Self-Determination for Indigenous Peoples under International Law*, 29 *GERMAN Y.B. INT'L L.* 277, 280-88 (1986). See also Greg C. Marks, *Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas*, 13 *AUSTRALIAN Y.B. INT'L L.* 1 (1992).

11. See Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 *N.Y.U. REV. L. & SOC. CHANGE* 217, 227-44 (1993). This author expounds upon his insight in a later article this way:

How were American Indian lands taken? The answer is not, as it turns out, by military force. The wars, massacres, Geronimo and Sitting Bull—all that was really just cleanup. The real conquest was on paper, on maps and in laws. What those maps showed and those laws said was that Indians had been "conquered" merely by being "discovered."

Steven Paul McSloy, "Because the Bible Tells Me So:" Manifest Destiny and American Indians, 9 *ST. THOMAS L. REV.* 37, 38 (1996) [hereinafter McSloy, "Because the Bible Tells Me So"].

view of the attitudes of representative domestic political and legal systems toward indigenous peoples in their midst. It is imperative to delimit what, exactly, constitutes an "indigenous people." This definitional issue has come to the fore, and has been pressed at the level of the United Nations Human Rights Commission as it strives to delimit the scope *ratione personae* of the Draft United Nations Declaration on the Rights of Indigenous Peoples.<sup>12</sup> The arguments for and against the various conceptualizations advanced are discussed in the context of international efforts, at Part III.A. The outcome of that discussion, and the orienting notion for our comparative inquiry, is that indigenous peoples are best defined as groups traditionally regarded, and self-defined, as descendants of the original inhabitants of lands with which they share a strong, often spiritual bond. These peoples are, and desire to be, culturally, socially and/or economically distinct from the dominant groups in society, at whose hands they have suffered, in past or present, a pervasive pattern of subjugation, marginalization, dispossession, exclusion and discrimination. Contrary to widely held expectations, they and their cultures have survived and are making their presence known in the Americas, Asia, Africa, Australia, the Pacific, and even on the launching pad of colonization, the continent of Europe.

#### A. *The United States of America*

The United States of America is built on the rock of a fiercely moralistic myth, the right to self-determination and the right to secede from a sovereign who mistreats and violates the natural rights of the people who consider themselves a community. The Declaration of Independence is the textual expression of that primordial feeling.<sup>13</sup> This founding myth, set against the stark economic interest and, sometimes, evangelizing fervor of the European settlers, has resulted in a profound ambivalence about the treatment of American Indians. This ambivalence manifested itself over time in paradoxes in the law that range from the authoritative assertion of "tribal sovereignty"<sup>14</sup> to

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12. Working Group on Indigenous Populations, Report of the Working Group on Indigenous Populations on Its Eleventh Session, U.N. Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 45th Sess., Annex I, Agenda Item 14, at 50-51, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993), *reprinted in* 9 ST. THOMAS L. REV. 212 (1996).

13. In its timeless prose, it stated:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that *whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . . (emphasis added).*

14. For a recent reaffirmation by the highest levels of the U.S. Government, see The Honorable Ada Deer, Assistant Secretary for Indian Affairs and Director of the Bureau of Indian Affairs:

Tribal sovereignty is a concept and a reality that is as old as tribes themselves. That's tens of thousands of years! . . . While our nation has its share of shameful incidents and periods regarding its First Americans, tribes still retain their basic sovereignty that is strengthened by hundreds of years of constitutional backing, executive orders, and court rulings. Indigenous



the practice of making treaties with Indian nations<sup>15</sup> to the federal government's establishment of a trusteeship over Indian lands<sup>16</sup> to the designation of Indian tribes as "domestic dependent nations."<sup>17</sup> While the courts of the conqueror could not deny the fact that the federal government and even some states in contravention of a federal statute of 1790<sup>18</sup> had entered into treaties with Indian nations just as with other nation-states,<sup>19</sup> they pro-

peoples in other countries look to the United States for inspiration and leadership in their quest to attain similar recognition and respect. We must treasure our sovereignty and fight off all those who want to end what the framers of the Constitution of the United States so clearly intended when they placed Indian tribes along with foreign nations and states in its first Article.

Ada Deer, *Tribal Sovereignty in the Twenty-First Century*, 10 ST. THOMAS L. REV. 17, 23 (1997). Chief Justice Marshall came to a very similar result: "[Indian tribes did not] surrender [their] independence—[their] right to self-government." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560–61 (1832). His brethren of a later generation sustained this view: "The tradition of Indian sovereignty . . . is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

The scholarly community has only recently become intrigued with the complexity and apparent paradox of "tribal sovereignty" within a sovereign state, and federal Indian law in general. See Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996); Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1756 (1997); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996). See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1469–70 (2d ed. 1988); Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991). For an excellent earlier analysis, see CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 53–63, 171–73 (1987). For a counterpoint, see Note, *Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty*, 79 CORNELL L. REV. 404 (1994).

15. See Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 569–80 (1995). Compare DOROTHY V. JONES, *LICENSE FOR EMPIRE: COLONIALISM BY TREATY IN EARLY AMERICA* (1982), with Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963 (1996).

16. The doctrine had its genesis in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831): "Their [the Indian nations'] relation to the United States resembles that of a ward to his guardian." Compare Wiessner, *supra* note 15, at 589–90.

17. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 12, 13 (1831). Compare:

[i]f the metaphor "domestic dependent nation" were interpreted literally, all the powers of this nation would have to be derived from the entity upon which it is allegedly dependent, i.e., the United States of America. It is undisputed that tribal governments are not subject to the United States Constitution as such, as any component government would be, say, in a federal system. The tribal governments' authority predates, and survives, the United States constitutional system. It exists outside that framework, and it is through treaties, the vehicle of communication between independent nations, that this largely autonomous entity has conferred rights to the United States.

Wiessner, *supra* note 15, at 588.

18. *Cf. County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). This test case, won by the Oneida Indian Nation of New York, affected only 900 acres sold to Oneida and Madison Counties. The new suit, filed after thirteen years of futile negotiations with the State of New York, contends that state and local governments unlawfully acquired 270,000 acres of land in central New York from the Indians. The Federal Government has joined the Oneida Nation in this litigation in hopes to promote a settlement. James Dao, *Anxiety Growing Over Indian Claim in New York State*, N.Y. TIMES, Jan. 13, 1999, at A1, A22.

19. Chief Justice Marshall was particularly clear in *Worcester*:

claimed the "plenary power of Congress to regulate Indian affairs."<sup>20</sup> This United States rationale leaves Indian tribes at the mercy of the federal government, which has exercised its discretion swinging wildly from extreme to extreme. Before and, for a brief time after independence, Indian nations were often considered useful allies in the fight against other contestants for their land. As a consequence, they were implicitly recognized as so-called "subjects of international law," and solemn treaties, mostly of friendship and commerce, were concluded with them and were ratified by the Senate according to constitutional procedure.<sup>21</sup> In the early nineteenth century, the content of the treaties changed; under the spirit of the "Manifest Destiny,"<sup>22</sup>

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The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, adopted and sanctioned the previous treaties with the Indian nations, and consequently *admits their rank among those powers who are capable of making treaties.* The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. *We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.*

31 U.S. (6 Pet.) at 559-60 (emphasis added).

20. The plenary power of Congress was expressed most strongly in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903), in which the Court stated that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government," but that has not remained the last word. In *United States v. Antelope*, 430 U.S. 641, 648 (1977), the Supreme Court formulated: "[t]he power of Congress over Indian affairs may be of a plenary nature: But it is not absolute." Cf. KIRKE KICKINGBIRD ET AL., *INDIAN TREATIES* 36-37 (1980); Wiessner, *supra* note 15, at 588-89. See also Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195 (1984).

Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996) compares a territorial sovereign's plenary power under international law to exclude foreigners to the alleged colonial sovereign's power to control "foreigners" already present, i.e., indigenous peoples. *Id.* at 52-74; Frickey, *supra* note 14, at 1766 n.76. This analogy is fundamentally mistaken: indigenous persons are, for the most part, citizens of the countries in which they reside. In the United States, the Citizenship Act of 1924 naturalized "a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *provided* that the granting of citizenship under this subsection shall not otherwise affect the right of such person to tribal or other property." 43 Stat. 253, 8 U.S.C.A. § 1401(a)(2). Indigenous persons thus partake in all the prescriptive regimes that international and domestic legal processes have developed for their protection and empowerment, under the heading of "human rights," since 1945, in the international system, and under the heading of "civil rights" in the United States. Citizenship "means something," and is not subject to the "plenary power" of any sovereign agent, including Congress. On this substantive concept, and content, of citizenship, see SIEGFRIED WIESSNER, *DIE FUNKTION DER STAATSGEHÖRIGKEIT* 396-97 (1989); Note, *The Functionality of Citizenship*, 110 HARV. L. REV. 1814 (1997).

21. Although the U.S. government and Indian tribes entered into more than 800 treaties between 1778 and 1871, the Senate only ratified 372. See ARLENE HIRSCHFELDER, *THE NATIVE AMERICAN ALMANAC* 53, 54 (1993). It is well documented that the Indian tribes believed that each treaty became effective upon the solemn exchange of documents at the end of the negotiations with the U.S. officials. President Washington urged the First Senate to ratify the treaties "to ensure peace on the Western frontier, to provide for an orderly westward expansion, and, most important, to establish the treaty-making authority of the new national government over Indian affairs." Richard A. Monette, *Treaties*, in *ENCYCLOPEDIA OF NORTH AMERICAN INDIANS* 643 (Frederick E. Hoxie ed., 1996).

22. As William Gilpin formulated in 1846: "The untransacted destiny of the American people is to subdue the continent—to rush over this vast field to the Pacific Ocean . . . to establish a new order in human affairs." (quoted in CORNELL, *supra* note 6, at 37-38. See also CHARLES M. SEGAL & DAVID C. STINEBACK, *PURITANS, INDIANS, AND MANIFEST DESTINY* (1977), and Steven Paul McSloy, "Because the Bible Tells Me So," *supra* note 11, at 38.

these treaties were mostly in the character of capitulations of the defeated Indian nations, sacrificing even more Indian land to the voracious appetite of the white settlers pushing westward. Those treaties, moreover, were often honored only in their breach. In 1871, the Congress put a stop to the practice of concluding treaties with the Indians altogether without, however, invalidating the treaties concluded before that time.<sup>23</sup> A policy of forced assimilation followed, with allotment of traditionally communal property of the Indian nations to individual Indians, resulting in substantial net loss of territory to Indian nations.<sup>24</sup>

In this century, federally recognized tribes were "terminated"<sup>25</sup> as part of a Congressional resolution in 1953;<sup>26</sup> this policy only came to an end in the 1970s under the Nixon and Ford administrations.<sup>27</sup> Subsequent federal laws and policies gradually improved the lot of the Native Americans. Under the battle-cry of "tribal sovereignty," Indian nations were allowed to set up their own courts with a significant range of jurisdiction<sup>28</sup> and strengthen their other governmental bodies under their own constitutions, often following the Anglo-American model.<sup>29</sup> Economic development was encouraged by the use of tax incentives<sup>30</sup> and the generation of revenues by permitting gaming activities on reservations.<sup>31</sup> Now, more than 50 tribes operate more than 100 bingo halls and casinos within the territorial confines of nineteen states, and they take in \$6 billion a year.<sup>32</sup> Indian housing became a priority of the Department of Housing and Urban Development,<sup>33</sup> and health care

23. For further details and references about this history, see Wiessner, *supra* note 15, at 575–83.

24. General Allotment (Dawes) Act, ch. 119 (1887). In the 1880s, Indian tribes controlled approximately 138 million acres of land; by 1943, this number had been reduced to 48 million. FELIX S. COHEN, *FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* 138 (Rennard Strickland ed., 1982).

25. For a good account of the termination policy and its victims, see DENNIS MCAULIFFE, JR., *THE DEATHS OF SYBIL BOLTON: AN AMERICAN HISTORY 176–77* (1994). See also DONALD L. FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY 1945–1960* (1986).

26. See H. Con. Res. 108, 83d Cong. (1953).

27. President Nixon repudiated the termination policy in his Message to Congress Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363, at 2 (1970). Congress' response is reflected in the Indian Self-Determination and Education Act of 1975, 25 U.S.C. § 450 (1975) Cf. Michael C. Walsh, Note, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181 (1982–83). The success of this movement is due to Native Americans' determined resistance to assimilation. Nell Jessup Newton, *Let a Thousand Policy-Flowers Bloom: Making Indian Policy in the Twenty-First Century*, 46 ARK. L. REV. 25, 27–28 (1993).

28. See, most recently, the Indian Tribal Justice Act of 1993, 25 U.S.C. § 3601 (1993). For an eloquent presentation of tribal justice by the Chief Justice of the Navajo Nation, see The Hon. Robert Yazzie, "Hozho Nahasdlii"—*We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117 (1996).

29. This tradition goes back to the Indian Reorganization Act of 1934, 25 U.S.C. § 461 (1934), as expanded and modified by the Indian Self-Determination Act of 1975, *supra* note 27, and the Tribal Self-Governance Determination Project Act of 1991, 25 U.S.C. § 450, (1991).

30. Cf. the Indian Tribal Government Tax Status Act of 1982, 26 U.S.C. § 7871 (1982).

31. See Indian Gaming Regulatory Act of 1988, 1 U.S.C. § 1166 (1988).

32. See MCAULIFFE, *supra* note 25, at 184.

33. Indian Housing Act of 1988, 42 U.S.C. § 1437 (1988). One of the most fervent supporters and admirers of Indian culture was a senior Housing and Urban Development attorney, who worked in the field of Indian housing. Susan Jane Ferrell was killed in the Oklahoma City bombing of April 19, 1995.

services were improved as well. President Clinton appointed a Native American leader, the Honorable Ada Deer, to head the Bureau of Indian Affairs. After conferring with Indian leaders in the White House, Clinton made a solemn pledge to respect tribal sovereignty.<sup>34</sup> Attorney General Janet Reno organized listening sessions with tribes in Albuquerque, and, in a bid to reaffirm and strengthen the Clinton Administration's "government-to-government" relationship with the Indian nations, she established an "Office of Tribal Justice" within the Department of Justice which coordinates federal Indian policy with a view toward maximizing, to the extent politically feasible, Indian self-determination.<sup>35</sup> Beyond the Executive Branch, the Indian Child Welfare Act of 1978,<sup>36</sup> the Native American Languages Act of 1990,<sup>37</sup> and the Native American Graves Protection and Repatriation Act of 1990<sup>38</sup> are examples of Congress' growing sensitivity toward issues of Indian self-preservation and self-determination.<sup>39</sup>

She left us her article, entitled *Indian Housing: The Fourth Decade*, published at 7 ST. THOMAS L. REV. 445 (1995).

34. President Clinton made this statement to the Indian leaders assembled at the White House:

This then is our first principle: respecting your values, your religions, your identity, and your sovereignty. This brings us to the second principle that should guide our relationship: We must dramatically improve the Federal Government's relationship with the tribes and become full partners with the tribal nations.

I don't want there to be any mistake about our commitment to a stronger partnership between our people. Therefore, in a moment, I will also sign an historic Government directive that requires every executive department and agency of Government to take two simple steps: first, to remove all barriers that prevent them from working directly with tribal governments, and, second, to make certain that if they take action affecting tribal trust resources, they consult with tribal governments prior to that decision.

William J. Clinton, Remarks to American Indian and Alaska Native Tribal Leaders, Apr. 29, 1994, 30 Weekly Compilation of Presidential Documents, No. 18, 941, 942 (May 9, 1994).

35. Cf. Indian Tribal Justice Act, *supra* note 28. For details of implementation, see Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes (visited Feb. 16, 1999) <<http://www.usdoj.gov/otj/sovtrb.html>>, and Mission of the Office of Tribal Justice (visited Feb. 16, 1999) <<http://www.usdoj.gov/otj/mission.html>>. Attorney General Janet Reno stated that the entire Executive Branch shall "operate within a government-to-government relationship with federally recognized tribes. . . . Central to tribal sovereignty is the capacity for self-management through enhanced law enforcement and tribal justice mechanisms." Attorney General Janet Reno (speech to the American Indian Sovereignty Symposium, Tulsa, Oklahoma) (June 7, 1994) <<http://www.usdoj.gov/otj/okspch.html>>.

Broad powers of self-government as such, however, do not make the tribes the third layer of a "triadic" federal structure, cf. Frickey, *supra* note 20, at 31.

36. See Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 (1978).

37. See Native American Languages Act of 1990, 25 U.S.C. § 2901 (1990).

38. See Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. § 3001 (1990). This statute has satisfied many Native Americans who wanted to give peace to the souls of their ancestors whose bones were displayed in museums and scientific institutions. For an insightful glimpse into the work of the Native American commissions on repatriation, and their spiritual motivation, see Connie Hart Yellowman, "Naevahoo'obsteme"—*We Are Going Back Home: The Cheyenne Repatriation of Human Remains—A Woman's Perspective*, 9 ST. THOMAS L. REV. 103 (1996). For a constitutional perspective, see Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291 (1996).

39. It is hoped that the changes in the political direction of Congress brought by the 1994 and 1996 elections will not significantly affect its stance toward Native American issues. If the "new federalism" is motivated by the desire to move decisionmaking power down the vertical axis (cf. Siegfried Wiessner,

As stated above,<sup>40</sup> according to 1990 census data, 1,878,285 persons identified themselves as American Indians. This number is up from 523,591 in 1960 and greatly increased from the population low reached in 1890.<sup>41</sup> This massive individual "ethnic switching"<sup>42</sup> has been attributed to Federal Indian policy, American ethnic politics, and American Indian political activism following Alcatraz<sup>43</sup> and Wounded Knee.<sup>44</sup> Still, some facts, figures and demographics remain deeply troubling: 31% of the total American Indian population, and 51% of Indians residing on reservations, live below the official government poverty level; while only 13% of the total United States population is in this predicament. In 1997, of the 554 federally recognized tribes, 306 tribes (55%) are defined as small and needy, i.e., with 1500 or fewer members, and without sufficient funds to operate without further federal support. Twenty-two percent of Indians live on reservations or trust land. Tribes currently control a land base of only 100 million acres. Over 40% of American Indians are under the age of twenty. Their educational level remains significantly below that attained by the mainstream American population.<sup>45</sup>

With American Indians, mixed heritage is the norm: a *Washington Post* journalist of Osage heritage recently stated that "you could probably put all the full-blood Indians in the continental United States on a 747 and still have some empty seats."<sup>46</sup> The U.S. Government now allows federally recognized tribes to decide who their proper members are; however, a tribe seeking first time recognition must meet a variety of specific criteria.<sup>47</sup>

*Federalism: An Architecture for Freedom*, 1 NEW EUROPE L. REV. 129-42 (1993)), then blockgranting of monies to tribal governments, given proper accounting, might be as effective and empowering as the present practice of blockgranting of federal monies to states.

40. See census data, *supra* note 6.

41. See Deer, *supra* note 14. In contrast, a commonly accepted figure for the Indian population on the territory of what was to become the United States only prior to 1492 is five million to seven million. See *id.*

42. Nagel, *supra* note 14.

43. See ADAM FORTUNATE EAGLE, ALCATRAZ! ALCATRAZ! THE INDIAN OCCUPATION OF 1969-1971 (1992).

44. Cf. BROWN, *supra* note 1.

45. See Deer, *supra* note 14.

46. McAULIFFE, *supra* note 25, at 177.

47. 25 C.F.R. Ch. I § 83 (1998) lists the Bureau of Indian Affairs' "Procedures for Establishing That An Indian Group Exists As an Indian Tribe." A member of an Indian tribe is defined as:

an individual who meets the membership requirements of the tribe as set forth in its governing document or absent such a document, has been recognized as a member collectively by those persons comprising the tribal governing body, and has consistently maintained tribal relations with the tribe or is listed on the tribal rolls of that tribe as a member, if such rolls are kept.

*Id.* § 83.1. Mandatory criteria for federal acknowledgment are, *inter alia*:

- (a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900 . . . .
- (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present . . . .
- (c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present . . . .

The Supreme Court, after Chief Justice Marshall and his pathbreaking opinions, particularly *Worcester v. Georgia*,<sup>48</sup> has not been overly friendly to Indians. Most recently, in *Employment Division, Department of Human Resources v. Smith*,<sup>49</sup> it changed its previous strict scrutiny standard of interpretation of the free exercise clause of the First Amendment<sup>50</sup> to deny Indians an exception from state drug laws to smoke peyote in religious ceremonies. It took a constitutionally controversial, and now invalidated, act of Congress to restore the original test.<sup>51</sup> The Court also shielded state governments from suit by Indian tribes under the Indian Gaming Regulatory Act.<sup>52</sup> In sum, the Executive Branch and Congress have led the way to preserve Native American self-determination and cultural heritage. The Supreme Court has provided the theme of tribal sovereignty in a series of early decisions; after that, it has been a retarding, if not retrogressive force.

### B. Canada

Other former British colonies had slightly different ways of dealing with the people who were there first, although the outcomes are similar. The British authority over Canadian<sup>53</sup> territory, for example, was not considered established by conquest; a Royal Proclamation of 1763 recognized Indian territorial rights as "pre-existing rights." The process of concluding peace and friendship treaties with Indian nations began in the 1640s. Land surrender treaties first were entered into in 1790. In the period from 1871 to the 1920s, land cession treaties were signed covering roughly one-half of the country; and adhesions to existing treaties were signed up to the 1950s. While Canada never formally declared an end to treaty-making, such

(d) A copy of the group's present governing document including its membership criteria . . .

(e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity . . .

*Id.* § 83.7.

48. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

49. See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). For a perceptive critique, see Robert N. Clinton, *Peyote and Judicial Political Activism: Neo-Colonialism and the Supreme Court's New Indian Law Agenda*, 38 FED. B. NEWS & J. 92 (1991).

50. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

51. The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1993). The Supreme Court recently invalidated this statute as an improper exercise of Congress's power under section 5 of the Fourteenth Amendment: it was held to interfere with the Supreme Court's ultimate power to interpret the Constitution, an argument sounding in separation of powers, and to intrude impermissibly into the states' authority to regulate issues of health and welfare, an argument sounding in federalism. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

52. This ruling was based on the Court's interpretation of the Eleventh Amendment. *Cf. Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996). For a discussion of the various positions, see Mark J. Wolff, *Gaming and Indian Sovereignty*, SOVEREIGNTY SYMPOSIUM VIII, Section VII (1995).

53. For the following account, see ABORIGINAL PEOPLES AND THE LAW: INDIAN, METIS AND INUIT RIGHTS IN CANADA (Bradford W. Morse ed., 1989); ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUITY, AND RESPECT FOR DIFFERENCE (Michael Asch ed., 1997); Douglas Sanders, *Aboriginal Rights in Canada: An Overview*, 2 L. & ANTHROPOLOGY 177-93 (1987). For an interesting reinterpretation of the Royal Proclamation, see Borrows, *infra* note 269.

agreements simply were not used to establish its sovereignty over various territories. In fact, in the last territories added, British Columbia, Northwest Territories, Northern Québec, the Inuit and Yukon areas, Canada established itself unilaterally, just as the United States had in California, Alaska, and Hawaii. In 1867, the Canadian parliament obtained its jurisdiction over "Indians, and Lands reserved for Indians."<sup>54</sup> In the Indian Act of 1876, the powers of tribal self-government were defined very narrowly. Although the Canadian government did not duplicate the early twentieth-century assimilation and termination policies of its neighbor south of the border, its courts, for a long time, did not honor the treaties concluded with the Indian tribes or "bands," as is the preferred local designation. In *R. v. Syliboy* (1929),<sup>55</sup> hunting and fishing rights of the Indians in Nova Scotia were held to be unenforceable, because Indians were not independent powers legally capable of concluding a treaty.<sup>56</sup> In the mid-1960s, the Supreme Court held in *R. v. George* that Indian treaty rights to hunt migratory birds were overridden by general federal regulation.<sup>57</sup>

Indian claims for self-government and recognition of their traditional culture and rights increased dramatically in the 1970s. A landmark Supreme Court case, *Calder v. Attorney General for British Columbia* (1973),<sup>58</sup> heralded a breakthrough in their favor. In *Calder*, three judges agreed with the claim of the Nishga Indians that they had retained their ownership of traditional territories.<sup>59</sup> Although the Nishga Indians technically had lost, then Minister of Indian Affairs, now Prime Minister, Jean Chrétien, recognized that the Supreme Court was inching closer to deciding in favor of the claimed aboriginal rights claims. The government thus negotiated large land settlements with the First Nations, including a 1975 agreement with the James Bay Cree Indians in Northern Québec.<sup>60</sup>

In the early 1980s, important indigenous rights were protected at the level of the Canadian Constitution. The 1982 Constitution Act included section 25 of the Canadian Charter of Rights and Freedoms<sup>61</sup> which stipulated that:

54. CONSTITUTION ACT, 1867, § 91(24) (originally the British North America Act, 1867).

55. *See R. v. Syliboy* [1929] 1 D.L.R. 307. It should be noted, however, that this decision emanated from a Nova Scotia County Court. It did not reflect the law in Ontario or Prairie provinces where treaties could, and did, afford legally protected rights to hunt and fish. ABORIGINAL PEOPLES AND THE LAW, *supra* note 53.

56. *See Syliboy*, *supra* note 55, at 313-14.

57. *See Regina v. George* [1966] S.C.R. 267. The rights were not considered terminated, however. They still effectively overrode provincial law, and they have been "resurrected" and accorded full legal respect since 1982 under section 35 of the Constitution Act, 1982.

58. *See Calder v. Attorney General for British Columbia* [1973] S.C.R. 313.

59. Another three judges found that the aboriginal title had been extinguished by colonial legislation without compensation; the seventh judge dismissed the appeal for procedural reasons. *Id.*

60. ABORIGINAL PEOPLES AND THE LAW, *supra* note 53; ABORIGINAL AND TREATY RIGHTS IN CANADA, *supra* note 53; DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW 987 (4th ed. 1998).

61. CAN. CONST. (Constitution Act, 1982) sched. B (Canadian Charter of Rights and Freedoms)

guarantees in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including a) any rights or freedoms recognized by the Royal Proclamation of October 7, 1763 and b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

In addition, section 35 states, in relevant part:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis people of Canada . . . .

Based on this constitutional foundation and the policy underlying it, the Canadian Supreme Court, in *Simon v. The Queen* (1985),<sup>62</sup> overruled the *Sylbooy* decision, stating that the extinguishment of Indian treaty rights required strict proof of intent. Still, there is controversy over the meaning of the term "existing" aboriginal rights in section 35. The Supreme Court of Canada showed further signs of growing sensitivity to Native rights in *Sparrow v. R.* (1990).<sup>63</sup> Based on testimony from an anthropologist,<sup>64</sup> the Court recognized the Indian's "aboriginal right" to fish. The Court found that the Fisheries Act's intention to extinguish this right was not "plain and clear." In addition, the Court developed a prima facie test for the justification of interference with an existing aboriginal right.

In 1992, a constitutional amendment that would have accorded Indians greater rights of self-government, was defeated by Canada's voters. This was a digression from the progress made.<sup>65</sup> The enlargement of the scope of Indian self-government is, however, still ongoing policy. Rather than through constitutional changes, those rights now are enacted through legislation

[hereinafter Canadian Charter of Rights and Freedoms]; see L.C. Green, *Aboriginal Peoples, International Law and the Canadian Charter of Rights and Freedoms*, 61 CAN. B. REV. 339 (1983); Brian Slattery, *The Constitutional Guarantee of Aboriginal and Treaty Rights*, 8 QUEEN'S L.J. 232 (1982-83).

62. See *Simon v. The Queen* [1985] S.C.R. 387.

63. See *Sparrow v. R.* [1990] S.C.R. 1075. An Indian was charged with fishing with a drift net longer than that permitted by the terms of his band's Indian food fishing license. *Id.*

64. One might ask whether a tribal elder wouldn't have been the more appropriate witness on this point. In the United States context, the need to hear and honor authentic indigenous voices has been stressed recently by Robert A. Williams, Jr., "The People of the States Where They Are Found Are Often Their Deadliest Enemies:" *The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 987-97 (1996); Vine Deloria, Jr., *supra* note 15. For a discussion of the intrinsic difficulties of communicating indigenous practices and values, see Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 628-30.

65. See Brad W. Morse, *A View from the North: Aboriginal and Treaty Issues in Canada*, 7 ST. THOMAS L. REV. 671, 678 (1995). Interestingly, the author, then Chief of Staff of the Canadian Minister of Indian and Northern Affairs, agreed with the claims of First Nations that their right to self-determination was inherent and required no constitutional codification above and beyond the recognition of aboriginal and treaty rights provided for in section 35 of the Constitution Act, 1982. See *id.* at 679.



based on treaty-type agreements between Indians and the government. In fact, treaty-making with First Nations was reestablished in 1973 as a matter of policy and has led to six major treaties in the early 1990s.<sup>66</sup> These treaties have supported the First Nations' drive toward political and economic self-determination. As early as in 1986, the Sechelt Indian Band Self-Government Act, for example, transferred local government powers to the band as well as ownership over their original land of over 2500 acres.<sup>67</sup>

On April 1, 1999, the Northwest Territories were split in two, forming the new Canadian territory of Nunavut.<sup>68</sup> This was the principal effect of the 1993 Nunavut Land Claims Agreement<sup>69</sup> between the Inuit of the Northwest Territories and the Canadian federal government and the Nunavut Act<sup>70</sup> both signed by the Prime Minister on May 25, 1993. Nunavut constitutes the farthest-ranging Canadian recognition yet of claims to aboriginal self-government, in response to longstanding Inuit claims for an Inuit-run territory.<sup>71</sup> Although the government will be chosen by all the citizens of this new territory regardless of ethnicity, the Inuit will have preponderant influence, since they make up eighty-five percent of the population of Nunavut.<sup>72</sup>

In terms of socio-economic status, the 630 federally recognized First Nations in Canada, numbering approximately 1.2 million people, still trail the

66. The treaties negotiated in British Columbia were facilitated by a tripartite commission consisting of representatives of the federal, the provincial and First Nation governments, and they involve forty-seven separate negotiating tables representing over 120 First Nations. An umbrella treaty for the Yukon Territory along with two bills confirming agreements with four First Nations on self-government and land claims were ratified by Parliament in 1994, and land claims settlements were reached regarding the MacKenzie Valley and the Eastern Arctic. See Morse, *supra* note 65, at 675–76, 682. These agreements followed the 1975 treaty with the James Bay Cree Indians, see GETCHES, *supra* note 60, at 987–88, and treaties with the indigenous peoples in Northeastern Québec (1978) and the Western Arctic (1984). INDIAN AND NORTHERN AFFAIRS CANADA, 1995–1996 PERFORMANCE REPORT (1996); REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES (1996). For a critical review of the 1975 James Bay Cree and Northern Québec Agreement, see Third Progress Report, *infra* note 199, ¶¶ 87–98.

67. See GETCHES, *supra* note 60, at 1001–02.

68. Alexandra Kersey, *The Nunavut Agreement: A Model for Preserving Indigenous Rights*, 11 ARIZ. J. INT'L & COMP. L. 429 (1994). In the Inuit language, "Nunavut" means "our land." *Id.* at 436. See also Anthony DePalma, *A New State for Inuit: Frigid but Optimistic*, N.Y. TIMES, Jan. 29, 1999, at A1, A4.

69. Canada, Indian Affairs and Northern Development, Agreement Between the Inuit of The Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (Ottawa: Minister of Supplies and Services) Ch. 29 (1993) (Can.), available at <<http://www.inac.gc.ca/pubs/nunavut/index.html>>. Via that agreement, the Inuit also acquired title to 352,191 square kilometers of land, equalling almost four percent of the territory of Canada. *Id.* scheds. 19-2 to -7.

70. *Id.* Ch. 28 (1993) (Can.).

71. Since the Canadian government, in 1973, announced its willingness to negotiate land claims with the First Nations, the Inuit have insisted on coupling their claims to title with claims to political self-determination, i.e., an Inuit-run territory. In 1982, the Northwest Territories held an official plebiscite on the proposed split. 57 per cent of the territory's citizens voted "yes"; within the proposed new Inuit territory, the vote in favor was over 80%. Kersey, *supra* note 68, at 435–38.

72. Jeffrey Wutzke, *Dependent Independence: Application of the Nunavut Model to Native Hawaiian Sovereignty and Self-Determination Claims*, 22 AM. INDIAN L. REV. 509, 539 (1998). The author engages in a thoughtful analysis of the transferability of the Nunavut experience to the unique context of Hawaii. See also Matthew C. Miller, *An Australian Nunavut? A Comparison of Inuit and Aboriginal Rights Movements in Canada and Australia*, 12 EMORY INT'L L. REV. 1175 (1998).

other parts of the population of Canada significantly. Although they receive over five billion dollars (Canadian) per year from the federal government, in the words of a high-ranking federal government official, aboriginal people in Canada face a situation that is "tragically similar to the situation in the U.S.A. Aboriginal people are on the bottom of every list where it's a bad place to be, such as regarding life span, income and so forth, and on the top of the list, where that is the worst place to be, such as concerning unemployment, suicide, diabetes and the like."<sup>73</sup>

### C. New Zealand

In New Zealand, the traditional view is that the indigenous people, the Maori,<sup>74</sup> had no legally recognizable rights to their lands and fisheries after the British annexation; Maori property rights, if any, existed "at the sufferance" of the Crown. Still, in 1840, the British Crown, through Captain Hobson, and the "confederated and independent chiefs of New Zealand" signed the Treaty of Waitangi.<sup>75</sup> According to its English text, this treaty granted the Crown "sovereignty" in exchange for the tribes' "full, exclusive and undisturbed possession of their lands and estates."<sup>76</sup> The Maori text characterizes the powers of the Crown as *kawanatanga*, signifying rights of government somewhat short of sovereignty, and calls the Maori's retained rights *rangatiratanga*, the Native term for chiefs' authority, i.e., their power to own, use and manage Maori lands and other resources according to Maori ways.<sup>77</sup> Similar to the Canadian *Syliboy* case,<sup>78</sup> an 1877 decision in the case of *Wi Parata v. Bishop of Wellington*<sup>79</sup> had declared the Treaty of Waitangi not legally binding, since the Maori were not sovereign and according to the prevailing jurisprudence of John Austin, property rights could only be

73. Morse, *supra* note 65, at 674.

74. Like other First Nations, the Maori population has fluctuated from European contact to the present. Prior to European colonization, there were 125,000 to 135,000 Maoris in New Zealand. By 1840, due to diseases, upon contact, their number had dwindled to 90,000, and, by 1886, to 42,650. David Williams, *Aboriginal Rights in Aotearoa (New Zealand)*, 2 L. & ANTHROPOLOGY 423, 423 (1987). Today, the Maori population has risen again, constituting 15% of New Zealand's population of 3.5 million. See Farnsworth, *infra* note 88.

75. The English text is to be found in the Treaty of Cession between Great Britain and New Zealand, signed at Waitangi, 5/6 February 1840, 89 PARRY'S CONSOLIDATED TREATY SERIES 473 [1839-1840] [hereinafter Treaty of Waitangi]. See also CLAUDINE ORANGE, *THE TREATY OF WAITANGI* (1987); PAUL MCHUGH, *THE MAORI MAGNA CARTA. NEW ZEALAND LAW AND THE TREATY OF WAITANGI* (1991). Aside from the Treaty, an additional challenge to the traditional view emanates from *R. v. Symonds*, (1847) NZPCC (NZSC), per Chapman, J., which did recognize Maori rights.

76. Treaty of Waitangi, *supra* note 75, arts. 1, 2.

77. See J.P.A. Pocock, *Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi*, Remarks at the Iredell Memorial Lecture, Lancaster University (Oct. 10, 1991) (excerpted in GETCHES, *supra* note 60, at 1003.). See also Michael C. Blumm, *Native Fishing Rights and Environmental Protection in North America and New Zealand: A Comparative Analysis of Profits A Prendre and Habitat Servitudes*, 8 WISC. INT'L L.J. 1, 30-32 (1989).

78. See *supra* note 55.

79. 3 JUR. (N.S.) 72 (1877).

granted by the sovereign.<sup>80</sup> Contrary to this ruling, the doctrine of aboriginal title maintained that the Crown took title (both public and private, *imperium* and *dominium*) subject to preexisting property rights enjoyed by tribal peoples. Those rights could only be extinguished by voluntary sale or relinquishment by tribal owners or through passage of expropriatory legislation.<sup>81</sup> Maori land was dispossessed through, essentially, two legislative acts: the 1862 Maori Land Act, transforming Maori customary rights of occupation into Crown-recognized freehold interests that could be and were sold to non-Maori inhabitants,<sup>82</sup> and the 1909 Native Land Act, expressly making Maori title unenforceable against the Crown.<sup>83</sup> Still, "non-territorial" Maori rights were arguably untouched by this legislation, chief among them fishing rights. The Treaty of Waitangi Act of 1975<sup>84</sup> accorded some effect to the Treaty: it created the Waitangi Tribunal with the charge to investigate legislative or executive actions that violate the principles of the Treaty, to report findings, and to make pertinent recommendations.<sup>85</sup> Despite its lack of enforcement powers, the Tribunal's recommendations have influenced actions of New Zealand's three governmental branches. In a recent water rights case, *Huakina Development Trust v. Waikato Valley Authority*,<sup>86</sup> the High Court of New Zealand declared the Treaty of Waitangi to be part of the "fabric of New Zealand society" and justified its reliance on the Tribunal by reference to that institution's expert understanding of Maori cultural and spiritual values in the context of the Treaty.<sup>87</sup> The New Zealand government uses the Treaty as a source of a "trust-like" relationship between itself and the Maori. Still, the claims of the Maori regarding self-government and ownership of land are far from settled, and violent actions such as the March 1997 sledgehammer attack on the America's Cup by an indigenous protester have called world attention to an angry new generation of Maori.<sup>88</sup>

80. See GETCHES, *supra* note 60, at 1004 (quoting Pocock, *supra* note 77).

81. PAUL MCHUGH, *THE MAORI MAGNA CARTA*, *supra* note 75, at 97, 135.

82. The equivalent of the U.S. General Allotment Act, *supra* note 24.

83. See GETCHES, *supra* note 60, at 1006.

84. *See id.*

85. Cf. P.B. TEMM, *THE WAITANGI TRIBUNAL: THE CONSCIENCE OF THE NATION* (1990); P.G. MCHUGH, *The Constitutional Role of the Waitangi Tribunal*, 1985 N.Z.L.J. 224.

86. *Huakina Development Trust v. Waikato Valley Authority* [1987] 2 N.Z.L.R. 188.

87. *See id.*

88. See Clyde H. Farnsworth, *A New, Angry Generation of Maori Agitates for Justice in New Zealand*, INT'L HERALD TRIBUNE, Mar. 21, 1997, at 4. Compare also an earlier report by Terry Hall on Maori anger over unsettled claims in New Zealand, *The Burden of Times Past*, FIN. TIMES WEEKEND, Apr. 8-9, 1995, at 11.

New Zealand's Justice Minister Douglas Graham has conceded that "[a] big rip-off occurred," and, as minister for Treaty of Waitangi negotiations, he predicted that the major Maori claims would be settled by the year 2000. "More than 400 claims have come from thirty-seven tribes and hundreds of subtribes and even individual families. Not everyone wants money. Some families simply want burial grounds protected." Farnsworth, *supra*.

### D. Australia

Unlike the United States, Canada, and New Zealand, Australia did not enter into treaties with its indigenous peoples.<sup>89</sup> Aboriginal lands were acquired on the basis of an enlarged *terra nullius* doctrine, maintaining that the acquisition of New South Wales and other areas of Australia since the first settlement in 1788 was undertaken by occupation, by the very act of British subjects' taking possession of the territories in the name of the Crown.<sup>90</sup> Since indigenous inhabitants of a settled colony had no recognized sovereign, they were considered to be without laws, and the English common law was imposed.<sup>91</sup> The occupier's law did not recognize the aboriginal inhabitants' proprietary interest in land.<sup>92</sup> This doctrine of the Crown's exclusive, universal and absolute beneficial ownership of all the lands in the Australian colony, meaning that all the land belonged to the Crown until the Crown chose to grant it, was reaffirmed in Australian case law as late as 1975.<sup>93</sup>

The Australian High Court's 1992 decision of *Mabo v. Queensland*,<sup>94</sup> marked a revolutionary departure from this foundational reasoning. In a 6-1 opinion, the Court concluded that "the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands."<sup>95</sup> Justice Brennan's opinion, with ample references to international and comparative law, called the denial of tribal title to the Murray Islands in the Torres Strait a "discriminatory denigration of indigenous inhabitants, their social organization and habits."<sup>96</sup> Speaking for the Court, he continued:

[t]he fiction by which the rights and interests of indigenous inhabitants in land were treated as nonexistent was justified by a policy which has no place in the contemporary law of this country. . . . Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indige-

89. See BRADFORD W. MORSE, *ABORIGINAL SELF-GOVERNMENT IN AUSTRALIA AND CANADA* 7-8 (Institute of Government Relations ed., 1984).

90. Chief Justice Stephen of the Supreme Court of New South Wales stated this proposition most clearly in *Attorney-General v. Brown*, (1847) 1 Legge 312, at 316-18, referred to in *Mabo v. Queensland*, *infra* note 94, Brennan, J., ¶ 25.

91. "At the moment of its [i.e., New South Wales'] settlement, the colonists brought the common law of England with them." *Brown*, *supra* note 90, at 316.

92. Besides the Crown, "there is no other proprietor of such lands." *Id.*

93. In *The Seas and Submerged Lands Case, New South Wales v. The Commonwealth*, (1975) 135 C.L.R. 337, at 438-39, Justice Stephen formulated: "That originally the waste lands in the colonies were owned by the British Crown is not in doubt." *Cf. Mabo v. Queensland*, *infra* note 94, Brennan J., ¶ 27, with further references.

94. See *Mabo v. Queensland*, (1992) 107 A.L.R. 1 <[http://www.austlii.edu.au/au/cases/cth/high\\_ct/175clr1.html](http://www.austlii.edu.au/au/cases/cth/high_ct/175clr1.html)>. For further discussion of the *Mabo* case, see *ESSAYS ON THE MABO DECISION* (1993).

95. *Id.* Mason, C.J. & McHugh, J., ¶ 2.

96. *Id.* Brennan, J., ¶ 39.

nous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.<sup>97</sup>

In its recasting of the common law, emboldened by the 1986 Australia Act, the Court squarely relies on the inspiration of international law, in particular, the United Nations Covenant on Civil and Political Rights<sup>98</sup> and its prohibition of unjust discrimination.<sup>99</sup> As in Canada, Native title may be surrendered voluntarily or extinguished as per the Crown's sovereignty, but only if the intention to do so is "clear and plain,"<sup>100</sup> referring, *inter alia*, to the Canadian decisions in *Calder and Sparrow*.<sup>101</sup> The Court ruled that the annexation of the Murray Islands in 1879 did not purport to extinguish Native title.<sup>102</sup>

Before that judicial turnaround occurred, the 1976 Aboriginal Land Rights (Northern Territory) Act<sup>103</sup> had been passed, responding to the claims of Australian Aborigines by recognizing traditional claims to land in the Northern Territory based on spiritual ties.<sup>104</sup> In 1989, the Lands Acquisition Act,<sup>105</sup> in a more encompassing scheme, allowed the government to compel the sale of land to meet Native claims.<sup>106</sup> The Native Title Act of 1993<sup>107</sup> sets up a mechanism to determine whether Native title exists over particular areas of land or waters, and it also addresses claims of compensation.<sup>108</sup> The Act is administered by the National Native Title Tribunal, which is, in essence, a negotiating, mediating and research body whose determinations are not binding.<sup>109</sup> Rather, contested claims will be decided, with binding force, by the Federal Court of Australia.<sup>110</sup> Meanwhile, the Australian High Court is continuing its jurisprudence in the vein of the

97. *Id.* ¶ 42.

98. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, reprinted in 6 I.L.M. 368 (1967).

99. Brennan, *supra* note 94.

100. *Id.* ¶ 75.

101. *Id.*

102. *Id.* ¶ 77.

103. 1976 Aboriginal Land Rights (Northern Territory) Act (visited Feb. 16, 1999) <[http://www.austlii.edu.au/au/legis/cth/consol\\_act/alrta1976444/](http://www.austlii.edu.au/au/legis/cth/consol_act/alrta1976444/)> [hereinafter Aboriginal Land Rights Act]

104. To that end, the government was empowered to "establish Aboriginal land trusts to hold title to land in the Northern Territory for the benefit of Aborigines entitled by Aboriginal tradition to the use or occupation of the land concerned." *Id.* § 4(1).

105. To be found at <[http://www.austlii.edu.au/au/legis/cth/consol\\_act/laa1989192/](http://www.austlii.edu.au/au/legis/cth/consol_act/laa1989192/)>.

106. *Id.* §§ 16, 41.

107. Available at (visited Feb. 16, 1999) <<http://www.austlii.edu.au/au/legis/cth/consolact/ntal993147/>>. See also KENT MCNEIL, COMMON LAW ABORIGINAL TITLE (1989); H. MCRAE, ABORIGINAL LEGAL ISSUES (1991).

108. Aboriginal Land Rights Act, *supra* note 103, §§ 10–54.

109. *Id.* § 108. The Tribunal "is not bound by technicalities, legal forms or rules of evidence." *Id.* § 109(3).

110. The Federal Court holds exclusive jurisdiction over Native title, except for the High Court of Australia. *Id.* § 81.

*Mabo* decision. In *The Wik Peoples v. The State of Queensland*,<sup>111</sup> the Court held that pastoral leases did not extinguish Native title.

While progress on the land front is definite and tangible,<sup>112</sup> discrimination against Aborigines continues, and there is the peculiar phenomenon of a disproportionately high number of arrests and deaths of Aboriginal persons while in the custody of the Australian government.<sup>113</sup>

As in the United States, Canada, and New Zealand, the numbers of people identifying themselves as indigenous show a markedly upward trend. Estimates put the Aboriginal population between 1911 and 1966 at 80,000 to 100,000.<sup>114</sup> The census of 1981 showed 159,897 indigenous persons in Australia.<sup>115</sup> In the 1996 census, 386,000 Australians classified themselves and their children as indigenous, up 55% from 1986.<sup>116</sup>

### E. Brazil

Brazil's policies regarding the role and functions of tribal communities have set important trends for Latin America. Indians, most of them inhabitants of the tropical rainforest of the Amazon, numbered 1.1 million at the time of conquest. By 1970, their numbers had dropped to 120,000. Now, estimates are of a total Brazilian Indian population of about 250,000 divided into 200 tribes and speaking 170 languages.<sup>117</sup> In Brazil, Indians do not enjoy any "inherent right" of "self-government." They are considered to be

111. 134 A.L.R. 637 (1996) <<http://www.austlii.edu.au/au/cases/cth/highct/unrep299.htm>>.

112. For a recent summary, see Maureen Tehan, *Customary Title, Heritage Protection, and Property Rights in Australia: Emerging Patterns of Land Use in the Post-Mabo Era*, 7 PAC. RIM L. & POL'Y J. 765 (1998).

113. While human rights generally enjoy a great degree of respect in Australia, over 100 Aborigines have died in government custody since 1989, and Aborigines' rates of arrest and mistreatment are "several times larger than those for non-aborigines." *Human Rights in Australia*, (visited Feb. 16, 1999) <<http://www.derechos.org/human-rights/occa/>>.

114. Claire Miller, *Indigenous Numbers Increase By 55%*, THE AGE, June 4, 1998, <<http://www.theage.com.au/daily/980604/news/news18.html>>. Only a 1967 referendum had abolished the constitutional provision that people with more than 50% Aboriginal "blood" be excluded from population counts. *Id.*

115. Garth Nettheim, *Australian Aborigines and the Law*, 2 L. & ANTHROPOLOGY 371 (1987). The breakdown is 144,665 Aborigines and 15,232 Torres Strait Islanders.

116. Miller, *supra* note 114. The overall population growth in Australia in the decade from 1986 to 1996 was only 12%. This national surge in the indigenous population is explained by "a greater willingness on the part of people with mixed ancestry to declare their heritage, rather than an indigenous baby boom." Those people may have shied away from identifying themselves or their children as indigenous "in the days of assimilation, when children could be forcibly removed." Today, "with increasing action to enhance the status and rights of indigenous people in the community, it is likely that their desire to identify with the indigenous community has increased." *Id.*

117. L. Roberto Barroso, *The Saga of Indigenous Peoples in Brazil: Constitution, Law and Policies*, 7 ST. THOMAS L. REV. 645, 648 (1995) (referring to Darcy Ribeiro's estimate that there were roughly 1.1 million Indians at the time of Portuguese arrival in Brazil, and using demographics based on a 1993 estimate by the Centro Ecumenico de Documentação e Informação (CEDI) for the present population figure of 250,000). As to the estimate of 120,000 Indians in 1970, see Marc Pallemarts, *Development, Conservation, and Indigenous Rights in Brazil*, 8 HUMAN RTS. Q. 374 (1986).

"relatively incapacitated," legally minor under the guardianship of the Brazilian state, and subject to a special regime of tutelage.<sup>118</sup>

The tutelage is exercised by Fundação Nacional do Índio (FUNAI), the Brazilian government agency for Indian affairs. The role of FUNAI is, presumably, to protect Indians' interests, but this protection was carried out in an exclusivist way, under the guiding light of a national policy of assimilation.<sup>119</sup> Indians could not legally own land or initiate legal proceedings in their own right to defend their precarious rights of "possession" and "usufruct" of lands.<sup>120</sup> The old Brazilian Constitution postulated: "The Union shall have the power to legislate upon . . . incorporation of forest-dwelling aborigines into the national community."<sup>121</sup> The Statute of the Indian states the assimilationist goal of "integrating them, progressively and harmoniously, in the national communion."<sup>122</sup> This model of development has been considered, just like the model in neighboring Venezuela, to be paternalistic and ethnocentric.<sup>123</sup>

Relying partly on Vitoria's naturalist theory of international law,<sup>124</sup> Brazil recognized the right to primordial occupation of land. While, under the pre-1988 Constitution, lands occupied by "forest-dwelling aborigenes" were part of the "patrimony of the Union,"<sup>125</sup> i.e., property of the federal government, those lands were inalienable and it was prescribed that the Indians "shall have permanent possession of them, and their right to the exclusive usufruct of the natural resources and of all useful things therein existing [was] recognized."<sup>126</sup> Many other statutes, however, undermine this advantageous legal starting-point. The national government owns all the minerals and hydropower resources wherever found.<sup>127</sup> Brazil also claims forest areas to be vacant land owned by the government.<sup>128</sup> To have their rights recog-

118. Estatuto do Índio (Statute of the Indian), Law No. 6.001 of December 19, 1973 cited in Barroso, *supra* note 117, at 652. Interestingly, if an entire indigenous community has "demonstrated its integration into the national community," the President may, upon request of its members, declare its "emancipation." Individual Indians who fulfill the same criterion, may also request their emancipation before a court. See Barroso *supra* note 117, at 653.

119. Pallemmaerts, *supra* note 117, at 379; Carneiro da Cunha, *Aboriginal Rights in Brazil*, 2 L. & ANTHROPOLOGY 55 (1987). Now, the Brazilian Constitution of 1988 confers upon the Public Ministry and its head, the Procurator-General, the function of defending the legal rights and interests of Indians in court. Constituição Federal [Constitution] [C.E.] of October 5, 1988, English translation at III CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1998), art. 232. See also Barroso, *supra* note 117, at 655-56.

120. Lee Sweptson, *The Indian in Latin America: Approaches to Administration, Integration and Protection*, 27 BUFFALO L. REV. 715, 723, 732 (1978).

121. Constitution of the Federal Republic of Brazil, art. 8, XVII, o (as amended 1969), as cited in Pallemmaerts, *supra* note 117, at 379.

122. Statute of the Indian, *supra* note 118, art. 1.

123. Pallemmaerts, *supra* note 117, at 380, 399.

124. See *supra* note 9.

125. Constitution, art. 4(4), cited in Pallemmaerts, *supra* note 117, at 380.

126. Constitution, art. 198, cited in Pallemmaerts, *supra* note 117.

127. 1988 Constitution, *supra* note 117, art. 176.

128. *Id.* at 382-83, referring to the doctrine of *terra devolutas* open to appropriation.

nized, forest-dwellers<sup>129</sup> have to seek recognition of their title from a government agency that is also in charge of economic development. Also, land reform measures such as land grants to individuals threaten the lands communally held by indigenous peoples.<sup>130</sup> The Brazilian Constitution of 1988, prompted by a 1985 communication from the Inter-American Commission on Human Rights,<sup>131</sup> reduces the role of FUNAI. Interventions on Indian land can no longer be authorized by the Executive Branch, but they require approval by Congress. Also, the Indians' rights to their cultures and languages as well as access to the judicial system and their original rights to land have been recognized.<sup>132</sup> Art. 231 provides:

- (1) Lands traditionally occupied by Indians are those inhabited by them permanently; those used for their productive activities; those indispensable for the preservation of the environmental resources necessary for their well-being; and those lands necessary for their physical and cultural reproduction, according to their uses, customs and traditions.
- (2) Indians are entitled to the permanent ownership of the lands traditionally occupied by them including the exclusive fruition or enjoyment of existing soil resources, rivers and lakes.

The Yanomami are the largest indigenous nation in the Amazon.<sup>133</sup> Nine thousand of them live in the Brazilian state of Roraima, 12,000 across the border in Venezuela. They occupy a territory the size of Washington State, and lived undisturbed in relative isolation until the 1980s. As many indigenous peoples, they believe that the natural and the spiritual world are a

129. "Forest-dweller" or *silvícola* is a term used co-extensively with the word "Indian" in the Statute of the Indian, *supra* note 118, arts. 1, 3. See also Comment, *Land and the Forest-Dwelling South-American Indian: The Role of National Law*, 27 BUFFALO L. REV. 759 (1978).

130. Pallemarts, *supra* note 117, at 384-85.

131. The Inter-American Commission of Human Rights concluded that:

by reason of the failure of the Government of Brazil to take timely and effective measures in behalf of the Yanomami Indians, a situation has been produced that has resulted in the violation, injury to them, of . . . the right to life, liberty, and personal security . . . ; the right to residence and movement . . . ; and the right to the preservation of health and to well-being

. . . .

Resolution No. 12/85, Case No. 7615 (Brazil), Inter-Am. C.H.R. 24, 31 (Mar. 5, 1985), OEA/ser.LJ/V/II.66, doc.10 rev.1 (1985), available at <[http://www.wcl.american.edu/r-American/english/annual/1984\\_85/res1285.html](http://www.wcl.american.edu/r-American/english/annual/1984_85/res1285.html)>.

The Commission recommended, *inter alia*, that "the Government of Brazil . . . proceed to set and demarcate the boundaries of the Yanomami Park." *Id.*

132. See *Indian Rights in the New Brazilian Constitution*, 13(1) CULTURAL SURVIVAL Q. 6 (1989); Márcio Santilli, *Notes on the Constitutional Rights of the Brazilian Indians*, 13(1) CULTURAL SURVIVAL Q. 13 (1989).

133. AMAZONAS: MODERNIDAD EN TRADICIÓN (Antonio Carrillo & Miguel A. Perera eds., 1995) provides a good overview of indigenous issues in the Amazon within the policy context of sustainable development. As to the demographics and institutions of the Yanomami, see Marcus Colchester, *Sustentabilidad y Toma de Decisiones en el Amazonas Venezolano: Los Yanomamis en la Reserva de la Biosfera del Alto-Orinoco-Casiquiare*, in AMAZONAS, *supra*, at 141, 149-60. See also NAPOLEON A. CHAGNON, *YANOMAMÖ: THE FIERCE PEOPLE* (3d ed. 1983).



unified force.<sup>134</sup> Their life in peace ended in the late 1980s when gold, diamonds, and tin were discovered in their territory.<sup>135</sup> Between 40,000 and 80,000 miners poured in, killing, burning houses and the forest, bringing epidemic diseases and environmental and moral destruction.<sup>136</sup> The new federal policy heralded by the 1988 Constitution was supposed to stem this tide.

According to the federal policy, ten percent of Brazil's territory was slated for demarcation as Indian land. An October 1993 deadline for demarcating these Indian lands has come and gone. Nearly one-half of Brazil's Indian lands still need to be demarcated. FUNAI President Sydney Possuelo started a serious effort to protect indigenous peoples from economic interests encroaching on their habitat, in particular, gold-mining interests.<sup>137</sup> He was dismissed in May 1993.

Brazil's internal politics also did not help. In May 1992, President Collor de Mello signed a decree ordering the demarcation of 9.66 million hectares of Yanomami territory.<sup>138</sup> FUNAI and the Federal Police began to expel the invaders, reducing their number to approximately 300 in July 1992. In December 1992, President Collor was impeached and government vigilance came to an end. In the spring of 1993, the miners returned. Approximately 11,000 of them are now back in full force. Out of despair about being driven out of their life-sustaining environment, some Yanomami are killing themselves, committing the first known suicides in Yanomami history.<sup>139</sup>

The government of Fernando Henrique Cardoso has, lamentably, given in to some of the pressures of powerful groups opposed to the new federal pol-

134. Cf. Kenneth I. Taylor, *Body and Spirit Among the Sanumá (Yanoama) of North Brazil*, in *SPIRITS, SHAMANS AND STARS: PERSPECTIVES FROM SOUTH AMERICA* (David L. Browman & Ronald A. Schwarz eds., 1979).

135. For a detailed study of the Yanomami plight, see Gail Goodwin Gomez, *Indigenous Rights and the Case of the Yanomami Indians in Brazil*, in *HUMAN RIGHTS OF INDIGENOUS PEOPLES* 185 (Cynthia Price Cohen ed., 1998).

136. See Catherine Alès, *Tierras Sagradas, Territorios Amenazados: Los Yanomamis Más Allá de su Doble*, in *AMAZONAS*, *supra* note 133, at 205, 207.

137. According to Professor Barroso, Sydney Possuelo "played a decisive role in the demarcation of the Yanomami reserve." The then FUNAI President defined his position once as follows:

[W]e caused so much confusion to the Indians that have been contacted and every time we approach isolated Indians we bring so much trouble and so many changes to their style of life, by creating needs, introducing diseases, that they only lose with such contacts. We should keep away from them for as long as possible.

Interview with Sidney Possuelo, *Jornal do Brasil*, Nov. 24, 1991, at 12, *cited in* Barroso, *supra* note 117, at 664.

138. Decree No. 25, May 25, 1992, *cited in* Barroso, *supra* note 117, at 662 n.62.

139. Telephone Interview with Professor Gail Goodwin Gomez, visitor to the Amazon Indians for the last 20 years (Jan. 10, 1996). Professor Goodwin-Gomez stated that the health situation of the Yanomami has never been worse than at this point. The Indians decry the "devastating effects of continued invasion by gold miners who pollute the rivers and forests, and introduce disease. Since 1987, nearly 25% of the Yanomami population has been wiped out by contagions carried by the unwanted colonists." Rainforest Action Network (Jan. 25, 1996) <[http://www.ran.org/info\\_center/pressrelease/brazil-reverses.html](http://www.ran.org/info_center/pressrelease/brazil-reverses.html)>. See also *Yanomami in Peril*, Interview with Davi Kopenawa Yanomami, 13(9) *MULTINATIONAL MONITOR* (Sept. 1992), reproduced at <<http://www.halcyon.com/pub/WDP/Americas/yanomami.txt>>.

icy on Indian lands.<sup>140</sup> Its Decree No. 1775 of January 8, 1996,<sup>141</sup> was liable to stop, if not roll back, demarcation of Indian land.<sup>142</sup> It afforded private commercial interests, in essence, miners, loggers, farmers, local state governments, and corporations, the right to formally contest the boundaries of Indian lands not yet demarcated.<sup>143</sup>

At the time of the passing of Decree No. 1775, of the 554 indigenous areas slated to be demarcated, registered and guaranteed by October 5, 1993, only 210 were fully registered. The new decree casts a legal cloud over the remaining 344 territories. At the decree's April 1996 deadline, 1066 challenges had been made to the demarcation of specific Indian lands. FUNAI dismissed all of these challenges, with the exception of eight. Minister of Justice Nelson Jobim referred those eight claims back to FUNAI for reconsideration.<sup>144</sup> On December 20, 1996, Minister Jobim awarded 540,000 acres of land claimed by the Macuxi tribe to miners and ranchers who had illegally invaded the reserve.<sup>145</sup> By the end of 1998, however, a Presidential decree recognized title to the Macuxi with respect to all the territory they claimed.<sup>146</sup> It is feared that the decree may even open up presidentially approved and demarcated areas to legal challenge,<sup>147</sup> including the gold-rich lands of the Yanomami. Injunctions to reverse indigenous land titles have already been filed. The effects of Decree No. 1775, moreover, extend beyond the courtroom and the suites of government. In the first few weeks after it became law, eight Indian territories were reported to have been invaded,

140. The opposition stems primarily from "logging companies, small time miners (*garimpeiros*), the states within which the Indian lands lie, and certain factions of the military." Karen E. Bravo, *Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the United States and Australia*, 30 COLUM. J. L. & SOC. PROBS. 529, 565 n.218 (1997).

141. *Id.* at 569, with further reference.

142. *Genocide Decree Attacks Indian Rights*, Rainforest Action Network, Action Alert 118 (Mar. 1996) <[http://www.ran.org/info\\_center/aa/aa118.html](http://www.ran.org/info_center/aa/aa118.html)>. Decree #22 of 1991 had ensured the primacy of indigenous rights to their ancestral lands based on aboriginal habitation alone. Parties with "secondary" title would be compensated for their losses. Ostensibly in response to a Brazilian Supreme Court case brought by an agribusiness firm occupying the land of the Guarani Indians, and arguing, with Brazil's Minister of Justice, Nelson Jobim, that Decree #22 is unconstitutional because it does not provide for an adversarial process, President Fernando Henrique Cardoso, on January 8, 1996, signed Decree No. 1775 into law. By affording private commercial interests the "right to contest" Indian land demarcations, it was argued to effectively annul Decree #22. *Id.* See also Molly O'Meara, *Brazil's "Genocide Decree,"* WorldWatch, Sept. 19, 1996, available at 1996 WL 13656285, cited in Bravo, *supra* note 140, at 556 n.157.

143. Bravo, *supra* note 140.

144. Diana Jean Schemo, *Brazil Indefinitely Postpones Ruling on Indian Land Claims*, N.Y. TIMES, Oct. 11, 1996, at A5.

145. *Brazil to Award Miners, Ranchers Title to Indian Lands*, Dow Jones Commodities Service, Dec. 28, 1996, available in WESTLAW, 12/28/96, DJCOMS 12:11:00, cited in Bravo, *supra* note 140, at 570 n.263. For details, see Steve Schwartzman, *A Sinister Decision*, (Mar. 7, 1997) <[http://www.ran.org/rancampaigns/brazil/fact\\_raposa.html](http://www.ran.org/rancampaigns/brazil/fact_raposa.html)>.

146. Fax communication by Dr. Osvaldo Kreimer, Organization of American States (Feb. 19, 1999) (on file with author).

147. *Brazil: Amnesty International Fears for Indigenous Communities' Safety After Brazilian Decree on Indigenous Lands* (Jan. 24, 1996) <<http://www.amnesty.it.ailib/aipub/1996/AMRJ21900396.htm>>.

primarily by pirate mahogany loggers and gold miners.<sup>148</sup> The decree has been called a "recipe for tragedy," only encouraging illegal invasions, and resulting in massacres, selective killings, abductions and other serious assaults on the original inhabitants and guardians of the Amazon.<sup>149</sup>

By February 1999, however, 315 indigenous areas have now been demarcated and registered. These areas cover 738,344 square kilometers, i.e., 79.4% of all Indian lands. The Brazilian government claims that Decree #1775 has given these Indian titles heightened legal protection and has made the process more transparent.<sup>150</sup>

#### F. *Other Countries of Latin America*

Unlike 150 years ago in the United States, however, any possible replay of "Manifest Destiny"<sup>151</sup> in Brazil will not go unnoticed and unaddressed by the world community.<sup>152</sup> Indigenous peoples have increasing support worldwide, in the heartland and the capitals of the conquering nations.

One comparatively bright spot, regarding governmental policy favoring Indian political and economic autonomy is *Colombia*. The indigenous sector in this country is significant, encompassing approximately 800,000 persons, divided into 81 different communities, and scattered throughout 27 of the

148. *Genocide Decree*, *supra* note 142.

149. Amnesty International summarizes:

Since the decree was passed, on 8 January 1996, several new invasions of indigenous lands have been reported. In the past unscrupulous local politicians and economic interests in many states, often backed by state authorities, have stimulated the invasion of indigenous lands by settlers, miners and loggers, playing on uncertainty about the demarcation process. This has resulted in violent clashes and killings. The authorities at all levels have consistently failed to protect the fundamental human rights of members of indigenous groups or bring those responsible for such attacks to justice . . . .

Partial figures indicate that, during the last five years, at least 123 members of indigenous groups have been murdered by members of the non-indigenous population in land disputes. With few exceptions, no-one [sic] has been brought to justice for such killings. For example, to date no one has been brought to trial for the massacre of 14 members of the Ticuna tribe in Amazonas in 1988, and for the massacre of 14 members of the Yanomami village of Haximu on the Brazil/Venezuelan border in 1993.

*Brazil: Amnesty International*, *supra* note 147.

150. See *A Ação do Governo Federal*, FUNAI—Fundação Nacional do Índio na Internet [FUNAI's Official Internet Site] <<http://www.funai.gov.br>> (visited Mar. 7, 1999)

151. See *supra* note 22.

152. The world is on notice. See Action for Citizenship Committee, *Roraima, Brazil: A Death Warning*, 13(4) CULTURAL SURVIVAL Q. 59 (1989). Earlier warnings had gone unheeded. In 1980, for example, the Fourth Russell Tribunal on the Rights of Indians in the Americas concluded that the Yanomamis "face a high probability of genocide unless immediate protective action is taken." See Shelly Kellman, *The Yanomamis: Their Battle for Survival*, 36 J. INT'L AFF. 15, 36 (1982). Beyond Cultural Survival, a good number of international and domestic organizations are monitoring the situation in Brazil. Action ranges from letter-writing campaigns coordinated via the Internet, to the National Forum for the Defence of Indigenous Rights' petitioning the Attorney General's office to challenge the constitutionality of Decree #1775 in light of Article 231, in *Brazil: Amnesty International*, *supra* note 149, and to Members of U.S. Congress' letter to the World Bank urging it to "insist that the Brazilian Government comply with the original loan agreements and honor the demarcation of indigenous lands." *Congressional letter to World Bank re indigenous rights in Brazil*, (Apr. 15, 1996) <<http://bioc09.uchscsa.edu/natnet/archive/nl/9604/0109.html>>.

32 political subdivisions of the state.<sup>153</sup> The 1991 Constitution,<sup>154</sup> drafted with significant indigenous input, constituted a major breakthrough. It recognizes and protects the ethnic and cultural diversity of the Colombian nation.<sup>155</sup> This was a marked departure from integrationist or assimilationist schemes. It affords indigenous communities a high degree of political and administrative autonomy;<sup>156</sup> respect for their institutions of self-government is guaranteed, including indigenous courts applying traditional customary standards.<sup>157</sup> Their collective property rights are recognized, in particular, collectively owned and inalienable *resguardos*.<sup>158</sup> Native languages and dialects are made official in indigenous territories;<sup>159</sup> education in these territories is to be bilingual and must be directed to preserve and develop indigenous cultural identity.<sup>160</sup> On the national level, the indigenous peoples are represented by at least two senators in a special national district and a number of representatives fixed by law. They participate in key decisions concerning the exploitation of natural resources within their territories<sup>161</sup>, and the drafting of the national plan.<sup>162</sup> They also will receive transfers from the national budget and from the oil and mineral resources exploitation royalties.<sup>163</sup> The judicial system, in particular, the newly created Constitutional Court using the innovative writ of protection for human rights (*acción de tutela*) was instrumental in making this prescriptive scheme a reality.<sup>164</sup> Still,

153. 1995 Internet statistics list 700,000 indigenous persons in Colombia, making up 1.99% of the population. See also the following website: *Latin America and the Caribbean*, <<http://www.bsos.umd.edu/cidcm/mar/tabela.htm>> (visited Nov. 25, 1998).

154. Political Constitution of Colombia, GACETA CONSTITUCIONAL No. 127 of 10 October 1991, reprinted in IV CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., Peter B. Heller & Marcia W. Coward trans., 1995).

155. *Id.* art. 7.

156. *Id.* arts. 246, 286, 321, 329.

157. *Id.* arts. 246, 330.

158. *Id.* art. 329.

159. *Id.* art. 10.

160. *Id.* arts. 10, 68.

161. *Id.* art. 330.

162. *Id.* arts. 340, 341.

163. *Id.* art. 357.

164. In the case of the Paso Ancho community, for example, the Constitutional Court has ruled that there is a right to the creation of indigenous territories called *resguardos*, constitutionally protected through the principle of ethnic and cultural diversity. T-118, May 12, 1993, Judgment by Eduardo Cifuentes Muñoz (mimeo), at 10, a holding reaffirmed in T-257/93, Judgment by Alejandro Martínez. The Court, upon *acción de tutela* by the indigenous community of Cristianía and to the surprise of a somewhat fatalistic nation, recognized a right to communal integrity and stopped a highway construction project through indigenous land. T-428, June 24, 1992, Judgment by Ciro Angarita Barón, GACETA JUDICIAL, No., at 479. Coal mining in the border area to Venezuela, adversely affecting the Wayúu community, was ordered to be undertaken in a way so as to protect the indigenous peoples' right to life, physical integrity, and a healthy environment. T-528, September 18, 1992, Judgment by Fabio Marón Díaz, GACETA JUDICIAL, No., at 363. In a case in which the entire tropical forest ecosystem was put at risk by the activities of a wood production company, the Court upheld a lower court order for both the wood company and the overseeing agency to pay the costs of an environmental impact study, as well as reforestation and repairs. T-380, September 13, 1993, Judgment by Eduardo Cifuentes Muñoz (mimeo). It stated expressly that the right to cultural integrity did not belong to the members of the community but to the community as a whole. Other communities would not benefit from this extension since their

there are counterforces, the “fog of war” with narcoterrorism, and ONIC (Organización Nacional Indígena de Colombia), founded in 1982 as the leading force of indigenous empowerment in the country, has to continue its strenuous efforts to protect the rights and interests of the first peoples of Colombia.<sup>165</sup>

Another place of cautious hope is *Venezuela*,<sup>166</sup> at least at the federal level of government. The Constitution of 1961, in Article 77, establishes the principle of special protection for the indigenous peoples in order to facilitate their inclusion in the life of the nation.<sup>167</sup>

Making use of this rather oblique provision, the Venezuelan Supreme Court recently invalidated the political structuring of the federal state of Amazonas as unconstitutional and ordered a reorganization that will consider the legitimate interests of the indigenous communities in that state.<sup>168</sup> Issuing an order of execution of that judgment, on December 10, 1997, the Supreme Court ordered the Legislative Assembly of the State of Amazonas to abstain from any action to give legal effect to its draft law on the political-territorial restructuring of the State that was written without the indigenous communities participating. Unfortunately, the State legislature, on December 17, 1997, decided to go ahead and publish the law. This action of defiance of the Supreme Court order is now under attack in the very same court.<sup>169</sup>

frame of mind was individualistic. *Id.* at 14–15. For indigenous people the Court said, the right to life includes a right to collective subsistence, and the protection against individual forced disappearance includes a right to protection against ethnocide. *Id.* at 23. On the other hand, individual Indios did receive due process protection against expulsion decisions by their community. T-254, May 30, 1994, Judgment by Eduardo Cifuentes Muñoz. For further insights, see FUERO INDÍGENA COLOMBIANO (Roque Roldán Ortega et al. eds., 3d. ed. 1994). For details, see overview of Colombian Constitutional Court jurisprudence on “ethnic minorities” provided by Osvaldo Kreimer (on file with author).

165. ONIC is not only exercising leadership of Colombia’s indigenous peoples, cf. *Recuento y cronología general de las movilizaciones indígenas*, (Sept. 1996) <<http://www.conectar.com/uwal/movilizaciones.html>>; it has become a hemispheric actor as well, cf. *La Organización Nacional Indígena de Colombia—ONIC, el Movimiento de Autoridades Indígenas de Colombia—AICO, el Consejo Regional Indígena de Cauca—CRIC, frente a la II Asamblea del Fondo para el Desarrollo de los Pueblos Indígenas de América Latina y el Caribe*, <<http://abyayala.nativeweb.org/declarations/fondo2.html>>.

166. According to 1995 statistics published on the Internet, indigenous people in Venezuela number 340,000, i.e., 1.58% of the country’s population. *Latin America and the Caribbean*, *supra* note 153.

167. “La ley establecerá el régimen de excepción que requiera la protección de las comunidades de indígenas y su incorporación progresiva a la vida de la nación.” Cf. René Kuppe, *The Indigenous Peoples of Venezuela and the National Law*, 2 L. & ANTHROPOLOGY 113 (1987).

168. The decision announced by the Supreme Court in Case No. 748 on December 5, 1996, declares unconstitutional, as violative of Article 77 of the Venezuelan Constitution, the Law Regarding the Political-Territorial Division of the State of Amazonas, published at LA GACETA OFICIAL DEL ESTADO AMAZONAS, número 3, Extraordinaria del 24 de septiembre de 1994. Article 77, in the interpretation given by the Court,

consagra un deber constitucional de protección a la especificidad indígena a las variables históricas ambientales, de ordenamiento territorial, de seguridad y defensa y de la integración del espacio amazónico, al derecho político y representativo de los pueblos y comunidades indígenas.

Case No. 748 (1996). For an analysis of the critical parameters for such indigenous self-determination, see Miguel Plonczak, *El potencial de la autogestión para el desarrollo de las comunidades indígenas organizadas en el Edo. Amazonas, Venezuela*, in *AMAZONAS*, *supra* note 133, at 127.

169. See Oficina de Derechos Humanos Vicariato de Puerto Ayacucho & ORPIA, Acción Urgente, De-

Thirty-five to forty percent of the population of Ecuador is estimated to be indigenous. The country's unity forced by the ruling *criollo* elite was based on *mestizaje*, common religion and language.<sup>170</sup> Assimilationist and paternalistic policies characterized the actions of the government, resulting in efforts to "launder" the indigenous people by underreporting their number,<sup>171</sup> or by referring to them as "minorities."<sup>172</sup> For the ten indigenous nationalities exclusion is the reality, as recognized by the Inter-American Commission for Human Rights in its 1997 report on the human rights situation in Ecuador.<sup>173</sup> They are shockingly poor, but no longer forgotten. Some of them have managed to maintain their identity or are struggling to maintain it, largely by avoiding contact with the outside world.<sup>174</sup> Organized now on a national level, in the Confederation of Indian Nationalities of Ecuador (CONAIE) established in 1986, they are pressing the interrelated demands of plurinationality, territoriality, and self-determination.<sup>175</sup>

Most of Peru's indigenous people reside in its Highland Andean regions. They speak predominantly Quechua or Aymara and number approximately 9 million, which equals thirty-eight percent of the country's population.<sup>176</sup> As in other places, they constitute the poorest and least influential stratum of society.<sup>177</sup> They earn whatever income they derive from agricultural and heavy industrial work. Many suffer from severe health problems due to the lack of water and sanitation facilities,<sup>178</sup> and illiteracy is high.<sup>179</sup> Historically, the Spanish, in the 1600s, recognized the pre-colonial social units of

sacato de la Asamblea Legislativa del Estado Amazonas (Venezuela) a la decisión de la Corte Suprema de Justicia sobre la División Político Territorial, Junio de 1988 (on file with the author).

170. Francisco Lopez Bermudez, *Indigenous Peoples and International Law: The Case of Ecuador*, 10 ST. THOMAS L. REV. 175, 186-87 (1997).

171. *Id.* at 187. The author refers to the country's official statistics on indigenous people, as communicated to United Nations agencies. They fluctuated widely, from 50% in 1976 to 18.5% in 1985. *Id.* at 187-88. The 35-40% estimate is the one offered by the Inter-American Commission on Human Rights. *Id.*

1995 statistics published on the Internet list 4,608,000 indigenous people (38.98% of all Ecuadoreans) in the highlands of the country, while another 120,000 (1.02%) live in the lowlands. *Latin America and the Caribbean*, *supra* note 153.

172. Jennifer E. Brady, *The Huaorani Tribe of Ecuador: A Study in Self-Determination for Indigenous Peoples*, 10 HARV. HUM. RTS. J. 291, 307 (1997).

173. Bermudez, *supra* note 170, at 195.

174. Brady, *supra* note 172, at 293.

175. *Id.* at 190-93.

176. Pamela Burke, *Highland Indigenous People of Peru*, (Aug. 14, 1995) <<http://www.bsos.umd.edu/cidcm/mar/hindperu.htm>>. There are also lowland indigenous people generally residing in the Amazon regions of the country. They number about 477,000, equaling two percent of the population of Peru. *Latin America and the Caribbean*, *supra* note 153.

177. Donna Macisaac, *Peru*, in *INDIGENOUS PEOPLE AND POVERTY IN LATIN AMERICA: AN EMPIRICAL ANALYSIS* 165, 169 (George Psacharopoulos & Harry Anthony Patrinos eds., 1994) ("A correlate of poverty is being indigenous."). See also *id.* at 171: "At 79 percent, most of the indigenous population is poor and 55 percent is extremely poor . . . . Indigenous people are one and a half times as likely to be poor than are non-indigenous people, and almost three times as likely to be extremely poor."

178. Burke, *supra* note 176.

179. Illiteracy rates for indigenous people are 5.2%, while those of non-indigenous people are quoted at 0.3%. Macisaac, *supra* note 177, at 179.

the Indians of the Andes called *ayllus*.<sup>180</sup> The borders of these communities, or *pueblos de reducción*, were protected by the colonial administrators. The Peruvian government, in 1854, renounced this scheme and sold many indigenous lands. The Peruvian Constitutions of 1920, 1933, and 1980 again protected communal lands. In 1926, fifty-nine indigenous communities were recognized. This number has increased, and the communities have been accorded a large measure of internal autonomy.<sup>181</sup> The 1979 Constitution, while establishing Spanish as Peru's official language, recognized the right of all Peruvians to use their own language in dealings with the authorities, if need be, through interpreters.<sup>182</sup> It also recognized the right of people to adhere to their own cultural identities as well as bilingual education.<sup>183</sup>

Judging by percentages of population, *Bolivia* is the most indigenous of all the countries in the Americas. 4.44 million indigenous people, most of them speaking Quechua and Aymara, live in the *altiplano*, or Andean region of the country. They constitute fifty-five percent of all Bolivians.<sup>184</sup> The *indios* are highly discriminated against. A nineteenth-century decree by de facto President Mariano Melgarejo forced Indians to sell their traditional communal land to rich newcomers, the *hacendados*;<sup>185</sup> in 1950, the latter owned ninety-two percent of all the land in Bolivia. Indians were forced to work that land, and they were not allowed to vote or otherwise participate in government. The National Revolutionary Movement (MNR), which assumed power in 1953, gave them citizenship and the right to vote, but denied

180. The *ayllu* was the Inca empire's basic social/political unit. Originally a self-sufficient kinship group, an extended family, Inca emperor Pachacuti (1438–1471) converted the *ayllu* to a larger entity based on residence rather than blood relationship, retaining, however, its characteristic feature of an internal moral code and responsibility for each other. Charles Lacombe, *To Heal Society, Follow the Path of the Enlightened Inca*, MIAMI HERALD, Mar. 14, 1992, at 21A. The Indian Council of South America explained the concept this way to the United Nations Human Rights Commission:

[V]oy expresar los conceptos básicos de lo que es una sociedad originaria de los Andes: el ayllu . . . . El ayllu es derecho a tierra, o sea a tener un lugar en el mundo, como lo tienen las plantas y los animales. El sistema de parcelación de la tierra para obtener el mínimo necesario para la vida o sea el tupu, nos lleva a consideraciones extremadamente importantes, debido a que se efectuaba dentro del marco de estricta justicia, porque todo comunario tenía una porción de tierra buena, otra regular, mala y yerma, eso es justo; el ayllu nace de la búsqueda de justicia.

Consejo Indio de Sud America, Intervención sobre el Punto 4: Declaraciones Generales, por: Raimundo Mamani Baltazar, Palacio de las Naciones (el 31 de julio de 1998) <<http://www.puebloindio.org/ONUinfo/GTPI98mamani.htm>> [hereinafter Consejo Indio de Sud America].

181. Burke, *supra* note 176.

182. María Isabel Remy, *The Indigenous Population and the Construction of Democracy in Peru*, in INDIGENOUS PEOPLES AND DEMOCRACY IN LATIN AMERICA 107, 120 (Donna Lee Hewitt ed., 1994).

183. Burke, *supra* note 176. In fact, Chapter 1, Paragraph 19 of the Constitution states that "[t]he state recognizes and protects the ethnic and cultural plurality of the Nation." Remy, *supra* note 182, at 120.

184. Pamela Burke, *Highland Indigenous People of Bolivia*, dated (Aug. 14, 1995) <<http://bsos.umd.edu/cidcm/mar/hindbol.htm>>. In addition, 200,000 indigenous persons equaling 2.48% of the population reside in the country's lowlands. *Latin America and the Caribbean*, *supra* note 153.

185. Consejo Indio de Sud America, *supra* note 180: "En Bolivia en el siglo XIX se produjo una contra marcha histórica, allí el Presidente defacto Mariano Melgarejo, por Decreto obliga a las comunidades del altiplano a vender su tierra a los nuevos ricos, quienes compran todo incluido sus habitantes que se convierten en pongos, o sea esclavos."

them many other political rights, and tried to assimilate them. In the 1960s, an indigenous movement started, taking its inspiration and name from the former Aymara leader, Tupac Katari, who had led the 1781 uprising against the Spanish colonizers. This Katarista movement was quite successful in the 1970s, and, from 1989 to 1991, Carlos Palenque, an Aymara Indian, was elected mayor of La Paz and El Alto. His new party, *Conciencia de Patria*, became the rallying point of indigenous and rural peasants. In 1991, the Bolivian government not only signed ILO Convention No. 169, but it also passed a national law protecting the rights of indigenous people. On May 13, 1992, President Paz Zamora granted the indigenous people in the Andean region 1 million hectares of land.<sup>186</sup> In 1993, Victor Hugo Cárdenas, a former Katarista leader, became the first Indian Vice-President of Bolivia, via an alliance with MNR President Sanchez de Losada.<sup>187</sup> In 1994, a constitutional reform designated Bolivia a "multiethnic, pluricultural society" and allowed the indigenous people to assume the ownership of their traditional lands. While progress on the political front is undeniable, social discrimination and economic distress are likely to persist, partly due to the fact that Bolivia is the Western Hemisphere's second poorest country.<sup>188</sup>

Bolivia's neighbor to the south, *Chile*, reports, as of 1995, only 598,000 indigenous people, making up 4.2% of the population.<sup>189</sup> The largest group of them, comprising over 570,000 persons, is the Mapuche. In violation of a 1641 peace treaty between the Spanish and the Mapuches,<sup>190</sup> the Chilean government granted or sold Mapuche lands to European settlers. Now, the Mapuches primarily live south of Santiago on reservations established by the government in the 1800s, and thirty percent live in urban areas. They are the poorest sector of Chile's society, and they continue to cling to their customs, language, religion and traditions.<sup>191</sup> On the basis of 2000 meetings with indigenous communities and the work of a Special Commission of Indigenous Peoples (CEPI), the Chilean government has tried to move beyond the history of oppression and neglect.<sup>192</sup> Towards this end, it passed a *Ley*

186. Burke, *supra* note 184.

187. Xavier Albó, *And from Kataristas to MNRistas? The Surprising and Bold Alliance between Aymaras and Neoliberals in Bolivia*, in *INDIGENOUS PEOPLES AND DEMOCRACY IN LATIN AMERICA* 55 (Donna Lee Van Cott ed., 1994).

188. Burke, *supra* note 184.

189. *Latin America and the Caribbean*, *supra* note 153.

190. The Mapuches had successfully fought off attempts to conquer them—both by the Incas and the Spanish. Their fierce resistance to Spanish rule, later an inspiration to Chilean revolutionaries such as Bernardo O'Higgins, forced the Spanish into the very rare mode of entering into a treaty, i.e., the Peace Treaty of Quillín. This agreement recognized the Mapuches as an independent nation and established the river Bío-Bío as the permanent frontier between both countries—a border informally respected by the Chilean government until the 1880s. JOSÉ BENGOA, *HISTORIA DEL PUEBLO MAPUCHE: SIGLO XIX Y XX* 139 (1985). See also *infra* note 263.

191. Pamela Burke, *Indigenous People in Chile* (Aug. 29, 1995) <<http://www.bsos.umd.edu/cidcm/mar/indchi.htm>>.

192. The Western European settlers' concepts of property and the indigenous peoples' ideas about land were diametrically opposed to each other. The Mapuches' relationship to their land is central to their way of life. In fact, their name means "People of the Earth." Land for the Mapuches is multidimensional,



*Indígena* in October 1993 that legally recognizes indigenous peoples and proclaims their rights to self-identification, to their culture, and to the lands they historically occupied and possessed.<sup>193</sup> It also affords protection for sacred sites and establishes a special fund (*Fondo de Tierras y Aguas*) for the financing of mechanisms to resolve disputes over land and water as well as a fund for the development of indigenous persons (*Fondo de Desarrollo Indígena*).<sup>194</sup>

On March 25, 1998, *Paraguay* signed a friendly settlement agreement with the indigenous organization *Tierra Viva*, according to which 21,884.44 hectares of land in the Chaco will be returned to the indigenous communities of Laménxay and Riachito. This agreement, reached at the initiative of the Inter-American Human Rights Commission, terminates Case No. 11,713 before it and constitutes the first restoration of indigenous land via the Inter-American human rights system.<sup>195</sup>

*Nicaragua's* Political Constitution<sup>196</sup> adopted by the Sandinista government<sup>197</sup> in the mid-1980s recognized the communal property and cultural rights of the indigenous peoples of the Atlantic Coast.<sup>198</sup> Further legislation in 1987 also created autonomous political regions for the indigenous communities of the Atlantic Coast.<sup>199</sup> Still, problems persist. The Nicaraguan government's thirty-year concession to a Korean-owned company to log a large area of tropical rain forest in the Atlantic Coast region inhabited by indigenous communities has been attacked in domestic court as well as before the Inter-American Commission on Human Rights.<sup>200</sup> In June 1998,

metaphysical as well as physical. It extends "upward to the sky, downward to the center of the earth, and outward beyond the physical space to the spiritual," reflecting the essence of their cosmology of good and evil. Kevin J. Worthen, *The Role of Indigenous Groups in Constitutional Democracies: A Lesson from Chile and the United States*, in HUMAN RIGHTS OF INDIGENOUS PEOPLES 235, 241-42 (Cynthia Price Cohen ed., 1998), an excellent case study on Chile.

193. See Ley Indígena, Establece normas sobre protección, fomento y desarrollo de los indígenas. Ley No. 19.253 (5 de octubre 1993) <<http://www.congreso.cl/biblioteca/leyes/otras/indig.htm>>.

194. See *id.* arts. 13, 21.

195. Organization of American States, Inter-American Commission on Human Rights, Press Communiqué No. 04/98 (Mar. 25, 1998) (on file with author).

196. POLITICAL CONSTITUTION OF THE REPUBLIC OF NICARAGUA, Nov. 19, 1986, as amended July 4, 1995, reprinted in XIII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., Anna I. Vellvé Torres trans., 1998).

197. For background, see Note, *Ethnic Minorities and the Sandinist Government*, 36 J. INT'L AFF. 155 (1982).

198. See POL. CONST. OF THE REPUBLIC OF NICARAGUA, *supra* note 196, arts. 89, 180.

199. Statute of Autonomy for the Atlantic Coast Regions of Nicaragua, Law No. 28, Sept. 7, 1987, 238 LA GACETA 2833 (1987), reprinted in DOCUMENTS ON AUTONOMY AND MINORITY RIGHTS 386 (Hurst Hannum ed., 1993). It should be noted that until the 1950s, the "de facto autonomy of the Atlantic Coast," a former British protectorate and kingdom of the Misquitá, was "never explicitly challenged by the Nicaraguan State." Miguel Alfonso Martínez, Special Rapporteur, Study On Treaties, Agreements And Other Constructive Arrangements Between States And Indigenous Populations: Third Progress Report, ¶ 124, U.N. Doc. E/CN.4/Sub.2/1996/23 (1996) [hereinafter Third Progress Report]. For details on Nicaragua's autonomous regions, see HÉCTOR DÍAZ POLANCO, INDIGENOUS PEOPLES IN LATIN AMERICA 119-25 (1997).

200. See S. James Anaya, *The Awás 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). See also

the Inter-American Commission decided to file a complaint with the Inter-American Court of Human Rights against the government of Nicaragua, charging it with a violation of the indigenous community's traditional rights to their land. The petitioning community of Awas Tingni<sup>201</sup> asked the Court to declare that its land and resource rights were violated, and to order the government of Nicaragua to take measures to demarcate and legally guarantee its communal rights to land as a model for all the other indigenous communities in the Atlantic Coast region.<sup>202</sup>

Similarly, the Toledo Maya Cultural Council in *Belize* challenged the Government's authority to grant logging concessions in their ancestral lands before the Inter-American Commission on Human Rights. On February 16, 1999, the Mayas and the government of Belize signed an agreement to negotiate a friendly settlement of this claim.<sup>203</sup>

In *Guatemala*, on December 29, 1996, "the guns may have finally fallen silent."<sup>204</sup> The peace accord signed that day between the government and the *guerrilleros*, many of them Maya Indians, proclaimed to put an end to this country's long, bloody, and "forgotten" civil war which left at least 100,000 persons killed, 40,000 disappeared, about 250,000 children orphaned, and more than one million people driven from their homes. The final accords signed guarantee, *inter alia*, Indian rights and land reform.<sup>205</sup> At this point, the ultimate success of this experiment in national reconciliation cannot be known. The wounds are deep: the military government had, for a long time, perceived the indigenous peoples as a threat to the national security of Guatemala and, to remove this threat, killed, tortured or "disappeared"<sup>206</sup> many of their members. The situation is not helped by the fact that the indigenous people are the poorest of the poor. They also have the lowest education level, the least access to health services, to water and to sanitation. In October 1992, the Nobel Peace Prize was awarded to Mayan leader Rigoberta Menchú—an honor then largely ignored by Guatemalan government

Julia Preston, *It's Indians vs. Loggers in Nicaragua*, N.Y. TIMES, June 25, 1996, at A5 ("The underlying issue is the future of woodlands throughout Central America, which are being razed at a rate of 1160 square miles each year . . .").

201. The Miskito, Sumo, and Rama are groups indigenous to the sparsely populated East of Nicaragua, its Atlantic Coast. The petitioner, Awas Tingni, is one of the many traditionally autonomous indigenous communities in the tropical forests of this region. It identifies itself as Sumo Indian. Anaya, *supra* note 200, at 157, 158.

202. *Nicaragua is Sued Before the Inter-American Court of Human Rights*, INDIAN RIGHTS HUMAN RIGHTS, The Indian Law Resource Center Newsletter, Winter News 1999, Vol. 6, No. 1, at 1.

203. Belize-Maya Friendly Settlement Agreement (e-mail message from Steve Tullberg, Indian Law Resource Center, Feb. 26, 1999) (on file with author).

204. See Larry Rohter, "Hard Part" Ahead After Guatemala's 36-Year War, INT'L HERALD TRIB., Dec. 30, 1996.

205. The text of the Agreement on Identity and Rights of Indigenous Peoples between the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG), signed at Mexico City on March 31, 1995, is available at <<http://www.un.org/Depts/minugua/paz7.htm>> [hereinafter Agreement on Identity and Rights].

206. Pam Burke, *Indigenous People of Guatemala* (July 17, 1995) <<http://www.bsos.umd.edu/cidcm/mar/indguat.htm>>.

officials.<sup>207</sup> Land is the primary issue to the 3.942 million indigenous people in Guatemala, most of whom are Mayans, who constitute 37.12% of the population of about 10.5 million.<sup>208</sup> Communally held land was a key element of Mayan culture. Colonization deprived indigenous peoples of their sacred territory, and the indigenous peoples were forced into higher and less accessible elevations. Most indigenous peoples do not own title to the lands they farm; the successors to the *encomendero* do.<sup>209</sup> The implementors of the peace accords will not only have to address this situation; they have to overcome the legacy of Guatemala's persistent refusal, since its days of independence, to legally recognize any special rights or interests of indigenous peoples.<sup>210</sup> Still, the 1995 UN-sponsored Agreement on Identity and Rights of Indigenous Peoples references a State obligation under the Guatemalan Constitution to

give special protection to cooperative, communal or collectively-held lands; [the Constitution] recognizes the right of indigenous and other communities to maintain the system of administration of lands which they hold and which historically belong to them; and lays down the obligation of the State to provide State lands for the indigenous communities which need them for their development.<sup>211</sup>

Moreover, "[r]ecognizing the particularly vulnerable situation of the indigenous communities, which have historically been the victims of land plundering, the Government undertakes to institute proceedings to settle the claims to communal land formulated by the communities and to restore or pay compensation for those lands."<sup>212</sup> Furthermore, the Constitution is to be reformed "in order to define and characterize the Guatemalan nation as being of national unity, multi-ethnic, multicultural and multilingual."<sup>213</sup> Maya and other indigenous communities are given the right to local self-government in accordance with their traditional customary norms, and should participate meaningfully in the decisions of the nation.<sup>214</sup>

*Mexico* is the battleground where it appears that indigenous peoples have taken up arms against the ruling elites. Eighty-five percent of the Mexican

207. Richard N. Adams, *A Report on the Political Status of the Guatemalan Maya*, in *INDIGENOUS PEOPLES AND DEMOCRACY IN LATIN AMERICA* 155, 170–71 (Donna Lee Van Cott ed., 1994).

208. *Latin America and the Caribbean*, *supra* note 153.

209. Burke, *supra* note 206.

210. Adams, *supra* note 207, at 156.

211. Agreement on Identity and Rights, *supra* note 205, Part IV.E.3. In addition, the "Government shall adopt or promote measures to regularize the legal situation with regard to the communal possession of lands by communities which do not have the title deeds to those lands, including measures to award title to municipal or national lands with a clear communal tradition." *Id.* Part IV.E.5.

212. *Id.* Part IV.E.7.

213. *Id.* Part IV.A.

214. *Id.* Part IV.B, D, & E.

population is *mestizo*,<sup>215</sup> while more than ten million Mexicans are considered *indios*, primarily because of their language.<sup>216</sup> These indigenous peoples, divided into fifty-three different Indian ethnic groups or *etnias*, have suffered degradation and severe deprivation of values. The Indian past is "in many ways glorified," but there is an enormous gap between the Mexican myth and its "operational code."<sup>217</sup> The movement embodied by the *Ejército Zapatista de Liberación Nacional (EZLN)* in the Mexican State of Chiapas unites men and women from the Tojolobal, Tzeltal, Tzotzil, and Chol communities, all with Mayan roots, in the desire to confront the situation head-on. The uprising has not only military, but political and spiritual dimensions, and has garnered considerable support, both inside and outside of Mexico. It started on January 1, 1994.<sup>218</sup> The year before, thousands of *indios* died needlessly in that very state; they had experienced "physical and spiritual hunger, lack of medical services, and a century and a half of discrimination."<sup>219</sup> Their reasons for revolt were outlined in a document called the *Declaración de la Selva Lacandona*. Their demands include autonomy, the democratization of the country's political life, the rule of law, and certain aspects of social justice.<sup>220</sup> Negotiations, begun with much hope, have stalled, and the reaction to the uprising has become ever more violent. The "first post-modern revolution,"<sup>221</sup> quite unlike previous or contemporary revolutionary or guerrilla movements in Latin America and beyond, professes not to aspire to take power for itself, having "neither the desire nor the capacity" to impose its program on the rest of the country. Instead, it aims at creating a "democratic space" where differences between competing political visions can be resolved.<sup>222</sup> The Zapatista revolt rises from Mexico's half-forgotten past to defend itself against government modernization policies<sup>223</sup> that took

215. "Mestizo" has been defined as "the offspring of a Spaniard and an American Indian." THE OXFORD ENGLISH DICTIONARY 661 (2d ed. 1989).

216. Cf. Margarita Gonzalez de Pazos, *The Chiapas Uprising and the Negotiating Process*, 7 ST. THOMAS L. REV. 685 (1995), as updated in *Mexico Since the Mayan Uprising: Government and Zapatista Strategies*, 10 ST. THOMAS L. REV. 159 (1997). 1995 statistics list 2.628 million Mayans (3.17% of the population); 751,000 Zapotecs (0.89%); and 7.296 million other indigenous peoples (8.64%). *Latin America and the Caribbean*, *supra* note 153.

217. Gonzalez de Pazos, *The Chiapas Uprising and the Negotiating Process*, *supra* note 216, at 685, with reference to JOSÉ EMILIO ORDINEZ CIFUENTES ET AL., *DERECHOS INDÍGENAS EN LA ACTUALIDAD* (UNAM ed., 1994) and CARMELO VINAS MEY, *EL RÉGIMEN JURÍDICO Y DE RESPONSABILIDAD EN LA AMÉRICA INDIANA* (1993). For the difference between "myth" and "operational code," see W. MICHAEL REISMAN, *FOLDED LIES* (1979).

218. HÉCTOR DÍAZ POLANCO, *supra* note 199, at 148-49.

219. Gonzalez de Pazos, *The Chiapas Uprising and the Negotiating Process*, *supra* note 216, at 692.

220. *Id.* at 692-93. The social justice demands pertain primarily to demands for land, housing, health care, labor and education. Margarita Gonzalez de Pazos, *Mexico Since the Mayan Uprising*, *supra* note 216, at 159.

221. Ana Carrigan, *Chiapas: The First Post-Modern Revolution*, 19 FLETCHER F. WORLD AFF. 71 (1995).

222. *Id.* at 71-72.

223. Cf. Frances Schreiber, *Mexico on the Eve of Salinas: The Laws and Policies of Foreign Investment*, 1 ST. THOMAS L. F. 23 (1988).

scant account of Indian needs to the point of threatening Indian survival.<sup>224</sup> Needless to say, the movement faces a difficult road ahead.

### G. Other Areas of the World

The phenomenon of indigenous renaissance is not limited to the Western hemisphere. Far too little is known of the indigenous groups in Africa, Asia, the Pacific and even Europe. Asia<sup>225</sup> has its own share of resurgent original inhabitants, in areas ranging from Siberia<sup>226</sup> to China,<sup>227</sup> to the Philippines<sup>228</sup> and Indonesia,<sup>229</sup> to name a few.<sup>230</sup> Even in *Japan*, a country perceiving itself as monoethnic for a long time, a court has just recognized the Ainu as an indigenous minority group with special rights.<sup>231</sup> On May 8, 1997, the Japanese legislature enacted a law designed to protect and preserve Ainu culture and to disseminate knowledge about Ainu tradition. It affects a small number of people (24,000), clearly distinct from Japanese both ethnically and linguistically. In the past, the Ainu were banned from hunting and fishing, their traditional way of life. The new law restoring their cultural rights is seen as atonement for the "shameful decimation" of Ainu society and the disintegration of Ainu culture.<sup>232</sup>

224. Carrigan, *supra* note 221.

225. See INDIGENOUS PEOPLES OF ASIA (R.H. Barnes et al. eds., 1995); see also Owen J. Lynch, *Legal Challenges Beyond the Americas: Indigenous Occupants in Asia and Africa*, 9 ST. THOMAS L. REV. 93 (1996).

226. See Jens Dahl, *Indigenous Peoples of Asian Russia*, in INDIGENOUS PEOPLES OF ASIA, *supra* note 225, at 77.

227. See Nicholas Tapp, *Minority Nationality in China: Policy and Practice*, in INDIGENOUS PEOPLES OF ASIA, *supra* note 225, at 195.

228. Charles McDonald, *Indigenous Peoples of the Philippines: Between Segregation and Integration*, in INDIGENOUS PEOPLES OF ASIA, *supra* note 225, at 345. For an overview of their status and rights, see Karen E. Bravo, *Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the United States and Australia*, 30 COLUM. J. L. & SOC. PROBS. 529, 556-64 (1997). See also Owen J. Lynch, *Native Title, Private Right and Tribal Land Law: An Introductory Survey*, 57 PHILIPPINE L.J. 268 (1982). The indigenous peoples of the Philippines have been organized nationally, since 1987, in the Federation of Indigenous Peoples of the Philippines (KAMP). Cf. Federation of Indigenous Peoples of the Philippines (KAMP) (visited Feb. 16, 1999) <<http://www.geocities.com/CapitolHill/Lobby/46771/kamp.htm>>.

229. See R.H. Barnes, *Being Indigenous in Eastern Indonesia*, in INDIGENOUS PEOPLES OF ASIA, *supra* note 225, at 307.

230. For other examples, see, for example, Harald O. Skar, *Nepal, Indigenous Issues, and Civil Rights: The Plight of the Rana Tharu*, in INDIGENOUS PEOPLES OF ASIA, *supra* note 225, at 173; Martin Smith, *A State of Strife: The Indigenous Peoples of Burma*, in INDIGENOUS PEOPLES OF ASIA, *supra* note 225, at 221; Signe Howell, *The Indigenous People of Peninsular Malaysia: It's Now or Too Late*, in INDIGENOUS PEOPLES OF ASIA, *supra* note 225, at 273.

231. On March 27, 1997, the Sapporo District Court ruled that a "regional government acted illegally by expropriating land to build a dam without considering its cultural significance to the Ainu," MIAMI HERALD, Mar. 29, 1997, at 16A. In so doing, the government not only violated the Ainu's minority rights under Article 27 of the International Covenant of Civil and Political Rights; it violated the Ainu's rights as "indigenous people." Kingsbury, *infra* note 384, at 438. See also Katarina Sjöberg, *Practicing Ethnicity in a Hierarchical Culture: The Ainu Case*, in INDIGENOUS PEOPLES OF ASIA, *supra* note 225, at 373.

232. Law Enacted to Protect Ainu Culture, Tradition, June 19, 1997, at <<http://www.embjapan.con.org/Ott/Jbr/jbrif65.htm>>.

In contrast, the Anthropological Survey of *India* recently recorded 4835 indigenous communities scattered over thirty-two states and Union Territories.<sup>233</sup> Many of these groups are hunter-gatherers, shifting cultivators, fishermen, and peasants. Their territorial resources are marginal and they live in remote areas of the country. These tribal peoples are reported to be socially oppressed and economically exploited.<sup>234</sup> Between 1951 and 1990, nearly 18.5 million persons, the vast majority of them indigenous, were forcibly displaced by gigantic development projects such as dams, mines, industrial and commercial projects, as well as sanctuaries.<sup>235</sup> One example is the building of the Sardar Sarovar dam in the state of Gujarat. It will submerge 39,134 hectares of land and displace 66,675 indigenous people. The World Bank had conditioned its 1985 credit and loan agreement regarding this project upon adequate resettlement and rehabilitation for the ousted persons. An independent review conducted in 1991 and 1992 concluded that these conditions were not complied with, and the final installment of the World Bank loan was cancelled.<sup>236</sup> Politically, tribal groups, numbering about 50 million people, have been uniting since the 1930s under the term *adivasi*, the Hindi word for *aborigine*.<sup>237</sup> For purposes of legislation, social reformers grouped the *adivasi* and the *harijans* (untouchables) together as "backward communities"—a historical mistake and anachronism.<sup>238</sup> In any event, the March 18, 1998, National Agenda for Governance presented by the new government of India promises that "[t]he interests of Scheduled Castes, Scheduled Tribes and Backward Classes will be adequately safeguarded by appropriate legal, executive and societal efforts and large-scale education and empowerment."<sup>239</sup>

The Pacific islands are home to an estimated 15 million indigenous people.<sup>240</sup> *Fiji*, in particular, presents the example of a state in which the indigenous people, originally a strong minority, now a slight demographic majority, have been guaranteed, after the coup of May 14, 1987, pre-eminent political power.<sup>241</sup>

233. ANTHROPOLOGICAL SURVEY OF INDIA, People of India Project, cited in Deepak Kumar Behera, "So-Called Development" and Its Impact on the Human Rights of Indigenous People in India, in HUMAN RIGHTS OF INDIGENOUS PEOPLES 109 (Cynthia Price Cohen ed., 1998).

234. Behera, *supra* note 233, at 109–10.

235. *Id.* at 111. See also *Special Focus: Displaced Tribal Peoples*, in South Asia Human Rights Documentation Centre, Human Rights & Human Rights Instruments in India (last modified Mar. 8, 1996) <<http://hri.ca/partners/sahrdc/india/fulltext.shtml>>.

236. Behera, *supra* note 233, at 113–14.

237. Crispin Bates, "Lost Innocents and the Loss of Innocence": Interpreting Adivasi Movements in South Asia, in INDIGENOUS PEOPLES OF ASIA, *supra* note 225, at 103, 105. See also Sharad Kulkarni, *Law, Tribal Communities, and Social Justice in India*, 3 L. & ANTHROPOLOGY 1 (1988).

238. Bates, *supra* note 237, at 106.

239. National Agenda for Governance, ¶ 30 (Mar. 18, 1998) <<http://www.indianembassy.org/special/nafg.htm>>.

240. INTERNATIONAL WORKING GROUP FOR INDIGENOUS AFFAIRS (IWGIA), THE INDIGENOUS WORLD 1995–96 4–5 (1996).

241. Under the Constitution of 1990, the President of Fiji is appointed by the Bose Levu Vakaturaga, the Great Council of [Indigenous] Chiefs; the President appoints the Prime Minister, another Fijian; and

Also, in *Papua New Guinea*, indigenous groups are not a minority. Its population of 4.3 million is mainly of Melanesian descent; their ancestors came to the island more than 50,000 years ago.<sup>242</sup> The country's 1975 Constitution recognizes the customary laws of the various indigenous groupings as binding parts of the national legal system.<sup>243</sup> About ninety-seven percent of the country's land has remained in customary, communal ownership.<sup>244</sup> The government, in 1995, proposed the registration of customary title in order to facilitate foreign investment. Due to widespread rioting and demonstrations it had to postpone that project indefinitely. However, the State owns gold, silver, and all other minerals below the surface of the land. Mining has become the most important source of income for the country, aside from foreign aid. The concept of the State's subsurface mineral rights is, however, hard to reconcile with the indigenous peoples' notion of the land.<sup>245</sup> Also, indigenous village courts, in their quest for restorative justice, at times run head-on into Western concepts of procedural and substantive due process of law.<sup>246</sup>

*Africa* is not neatly divided into monoethnic entities, and the oppression of indigenous communities occurs there as well.<sup>247</sup> The !Kung of the Kalahari Desert,<sup>248</sup> the Ogoni People of Nigeria,<sup>249</sup> and the Maasai of Kenya<sup>250</sup>

the Fijians hold the absolute majority of seats in both Houses of Parliament. Eighty-three percent of the land in Fiji is still owned by Fijians, and the Native Lands Trust Act provides for its inalienability. At the time of the indigenous coup, the Fijian population was 46.0% Fijians, 48.7% descendants of immigrants from East India, and the rest others. According to the latest census of August 25, 1996, the Fijians now constitute 51.1%, the Indo-Fijians comprise 43.6%, with Chinese, Solomon Islanders, Rotumans, Europeans, and people of mixed race making up the balance. Nehla Basawaiya, *Status of Indigenous Rights in Fiji*, 10 ST. THOMAS L. REV. 197 (1997).

242. Alice de Jonge, *The Human Rights of Indigenous Peoples in Papua New Guinea*, in HUMAN RIGHTS OF INDIGENOUS PEOPLES 127, 128 (Cynthia Price Cohen ed., 1998).

243. de Jonge, *supra* note 242, at 129–30, referring to Section 9 in connection with Schedule 2 of the Constitution of the Independent State of Papua New Guinea ("custom" being "underlying law"). See also Daniel Weisbrot, *Papua New Guinea's Indigenous Jurisprudence and the Legacy of Colonialism*, 10 U. HAW. L. REV. 1 (1988).

244. de Jonge, *supra* note 242, at 130.

245. de Jonge, *supra* note 242, at 138–42. The author quotes a longtime resident and researcher of Papua New Guinea as saying:

[T]he indigenous person has a psychological attachment to his land transcending the purely economic and legal arrangements of the super-imposed alien culture . . . . His land is the place where he was born, where he was subjected to primary enculturation, where he has lived the most important aspects of his life, where the values of his cultural-linguistic group have been constantly reinforced, and where, in most instances, he may die . . . . It is the place where his children and his children's children will follow. At the psychological level it is clearly an extension of the concept of self.

B.G. Burton-Bradley, *The Psychological Dimension*, in PROBLEMS OF CHOICE: LAND IN PAPUA NEW GUINEA'S FUTURE 32, 32 (Peter G. Sack ed., 1974).

246. de Jonge, *supra* note 242, at 155–61.

247. For further references, see Lynch, *supra* note 225, at 95. See also Michael J.C. Olmesdahl, *Aboriginal Peoples and South African Law*, 3 L. & ANTHROPOLOGY 277 (1987).

248. The !Kung of the Kalahari Desert, (visited Dec. 3, 1998) <<http://www.ucc.uconn.edu/~epsadm03/kung.html>>. See also MARJORIE SHOSTAK, NISA: THE LIFE AND WORDS OF A !KUNG WOMAN (1981).

249. Factsheet on the Ogoni Struggle, (visited Dec. 3, 1998) <<http://www.gem.co.za/ELA/ogoni.fact.html>>.

250. The Maasai Tribe, (visited Dec. 3, 1998) <<http://www.nmmnh-abq.mus.nm.us/nmmnh/maa->

all face a difficult struggle to maintain their traditional way of life and need outside allies, including nongovernmental organizations, the media, and the World Bank.

Finally, our *tour du monde* comes full circle in the Arctic regions of Norway, Sweden, and Finland. There, the Sami<sup>251</sup> constitute an indigenous people within the heartland of colonial exploration and exploitation, the Continent of Europe. They are actually scattered into four separate countries: Of their estimated total of 60,000 persons, 40,000 are living in Norway, 15,000 in Sweden, 4000 in Finland, and 1500 to 2000 in Russia.<sup>252</sup> In the Sami worldview, man and nature are inseparable.<sup>253</sup> The Sami, or Lapps, regard the reindeer as the basic guardian of their culture, language, and identity. They are known to the world as reindeer-herders, even though only a small minority of them actually engage in this profession. The others have maintained other traditional subsistence lifestyles or have adapted to modernity.<sup>254</sup> The "vital statistics" of the Sami were not long ago comparable to those of people in "underdeveloped countries;" the poor living standards coincided with high infant mortality rates among the herding population. The remedy for this situation was seen in a thirty percent reduction in the herding labor force and modern ranching.<sup>255</sup> "Immemorial" rights to herding, hunting and fishing were, however, recognized by law, and the Norwegian Supreme Court even found in favor of rights of Swedish Sami to certain Norwegian grazing areas;<sup>256</sup> the Swedish Supreme Court reciprocated in 1981.<sup>257</sup> Violent Sami protests and hunger strikes against a dam construction threatening valuable herding zones alerted the world to the Sami issue. Following the recommendations of national Sami Rights Commissions, Norway, Sweden, and Finland each created a Sami parliament, a *Sameting*.<sup>258</sup> The Sami has received increased status and financial support; the extent of the "immemorial rights" of Sami has been legislated, but remains subject to controversy.<sup>259</sup>

sai.html>.

251. The Sami people are considered members of the Finno-Ugric ethnic group, and have in the past inhabited large areas of northern Scandinavia. Cf. M. JONES, *THE SAMI OF LAPLAND* (1982). They can be reached at their own website: *The Saami: People of the Sun and Wind* <<http://www.sametinget.se/english/index.html>>.

252. Hugh Beach, *The Saami of Lapland*, in *POLAR PEOPLES: SELF-DETERMINATION AND DEVELOPMENT* (1994). The website of the Sami Nation refers to 85,000 Sami, 20,000 of which live in Sweden. Throughout the site, the terms "Sami" and "Saami" are used interchangeably. See *supra* note 251.

253. See *supra* note 251.

254. Frank Orton & Hugh Beach, *A New Era for the Saami People of Sweden*, in *HUMAN RIGHTS OF INDIGENOUS PEOPLES* 91, 92 (Cynthia Price Cohen ed., 1998).

255. *Id.* at 96.

256. *Id.* at 97 (referring to *Altevatn Case*, L. nr. 42, nr. 8/1966 (1966)).

257. Orton & Beach, *supra* note 254, at 97 (referring to *Taxed Mountain Case* ("Skattefja Ilisma!"), NJA 1981 s.1 (1981)).

258. Orton & Beach, *supra* note 254, at 101-06 (referring to *Taxed Mountain Case* ("Skattefja Ilisma!"), NJA 1981 s.1 (1981)). As to issues, function and structure of this institution, see its website (visited Feb. 16, 1999) <<http://www.sametinget.se>>.

259. *Id.* Significantly, only Norway has ratified ILO Convention No. 169, Sweden and Finland have



### H. Conclusion

Despite a variety of differences in the local contexts, we may conclude that there are significant similarities in status, and convergent, if not common trends in the domestic legal treatment of indigenous peoples.

Native communities still occupy the bottom rung of the ladder of economic and social status in the countries in which they reside. Their physical and spiritual survival is threatened by outside encroachment—private and, sometimes, public action. There is, however, a clearly discernible trend toward legal recognition of the special spiritual bond between indigenous peoples and their land, the demarcation and legal guarantee, if not return of lands of traditional indigenous use, and a recognition of Native title conferring the right to, at least, use the resources of nature in the traditional, communal ways (hunting, fishing, for example).

Nation-states are wary of granting the option of political independence, a right to secession, to indigenous peoples on their territory. While, sometimes, the concept of a “government-to-government” relationship between Indian tribes and the established nation-states has been proclaimed, the nation-states and their governments have stopped short of accepting indigenous communities as co-equal sovereigns. In particular, a three-layer federal structure, a “triple” or “triadic sovereignty” of federal, state, and tribal governments has not yet been achieved. However, an increasing range of autonomy is granted to internal indigenous decisionmaking processes. This recognition of self-rule, albeit limited, covers, in particular, issues of membership, structures and processes of authority and control, as well as manifestations of culture and spirituality.

To the extent feasible, and increasingly, Indian treaties concluded in the distant past are honored. New treaty-making and negotiating mechanisms (via commissions, for example) are being explored and implemented. Despite some troubling, but relatively marginal exceptions, the gains made by indigenous communities are probably too far advanced and entrenched for the clock to be turned back to the policies of assimilation and termination.

To help cement these gains domestically, the development of international prescriptions could only help. They might not only seal progress in the common law countries of North America and Oceania, they could provide the necessary sword to fight for a proper regime of protection and empowerment of indigenous populations.

## II. TOWARD INTERNATIONAL INDIGENOUS LAW: THE RENASCENCE OF THE FIRST NATIONS

Surprisingly perhaps, international law has found little reflection or recognition in the domestic decision-making processes regarding indigenous

communities. In the United States, the title of Felix Cohen's seminal treatise, the 1942 *Handbook of Federal Indian Law*,<sup>260</sup> indicates the popular location of Indian law as just another subdivision of (domestic) federal law, albeit an especially complicated one. This state of things is about to change. The resurgence of indigenous communities worldwide, and a thorough analysis of the roots of the legal relationship between Indian tribes or nations and the country in which they reside will restore the complex mix of international and domestic prescriptions applicable to the unique story of attempted conquest and survival that constitutes the Indian experience.

### A. Treaty Law

The Trail of Broken Treaties, to borrow the pained formulation by Vine DeLoria, Jr.,<sup>261</sup> is a historical fact matched in its brutality and disrespect only by the Trail of Tears<sup>262</sup> and other genocidal acts perpetrated on the Sons and Daughters of the Sun. The fact, however, that treaties were signed, approved, and ratified, is relevant and provides much of the legal armament of indigenous peoples today. The pattern of acquiring lands and securing peace and friendship as well as regulating trade by way of formal treaty<sup>263</sup> was followed in North America by, among others, the Dutch,<sup>264</sup> the French,<sup>265</sup>

260. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (reprinted 1971) (1942).

261. The sad history of broken treaties between the United States and Native American tribes is chronicled in VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES* (1974). See also Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601, 610 (1975) ("There are numerous accounts of threats, coercion, bribery, and outright fraud by the negotiators for the United States."), citing authorities such as GRANT FOREMAN, *INDIAN REMOVAL* 198, 236 (1953); WILLIAM HAGAN, *AMERICAN INDIANS* 55-56 (1961); SAMUEL MORISON, ET AL., *THE GROWTH OF THE AMERICAN REPUBLIC* 439-40 (6th ed. 1969); G. HARMON, *SIXTY YEARS OF INDIAN AFFAIRS* 174, 188-91, 197, 361 (1941). President Andrew Jackson is reported to have "specifically authorized bribery in treaty negotiations with Indians." Wilkinson & Volkman, *supra*, at 610 n.42, referring to D'ARCY McNICKLE, *THE INDIAN TRIBES OF THE UNITED STATES* 39 (1962). See generally J. KINNEY, *A CONTINENT LOST—A CIVILIZATION WON* 37-38, 44-45, 52, 71, 93-94 (1937); FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* 63 (Rennard Strickland ed., 1982).

262. See *supra* note 1.

263. In-depth research on the subject is reflected in the United Nations-commissioned Miguel Alfonso Martínez, Special Rapporteur, Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations: First Progress Report, U.N. Doc. E/CN.4/Sub.2/1992/32 (1992) [hereinafter First Progress Report]; Second Progress Report, U.N. Doc. E/CN.4/Sub.2/1995/27 (1995); Third Progress Report, *supra* note 199.

264. See 1 *EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789* 1-30 (Alden T. Vaughan ed., 1979). The Dutch West India Company, following the "discovery" of Delaware Bay on its behalf by explorer Henry Hudson, inter alia, purchased lands in this area in 1629 from the Indians, to establish a settlement at Swanendale, part of the colony of New Netherland. Similarly, Sweden chartered the New Sweden Company to colonize the Delaware region. It also bought land from the Native Americans, entering into a treaty with the Indians at Tennakonck in 1654. See *id.* at 2-3, 25-27.

265. French settlement in the Northeastern part of the continent started early, with Jacques Cartier coming to Micmac territory in 1534. The British and the French competed for centuries for territory and trading rights in the Northeast. Shifts in possessions between the two occurred, inter alia, via the Treaty of Breda (1667) and the Treaty of Utrecht (1713). Indigenous nations became involved in this struggle. The Hurons, for example, sided with the French, and the Haudenasaunee, or League of the Iroquois, held the balance of power in North America for a long time among the colonists, the British, and the French.

the British, the early American colonists,<sup>266</sup> and even the Spanish.<sup>267</sup> Trendsetters were the British, who established an extended treaty system on the North American Continent.<sup>268</sup> In a Royal Proclamation of 1763, the British Empire prohibited the grant of land claimed by Indians until the Indian title lapsed by sale or a treaty of cession.<sup>269</sup> Interestingly, in the ensuing battles over colonial land between the British, the French, the Spanish, and the Dutch, treaties were made with particular Indian nations to make them useful allies in fights among the colonizing peoples dividing up the pie of North America. This harnessing of Native Americans in battles of strangers over their land continued long after the Declaration of Independence of 1776. On July 13, 1787, the United States passed the North-West Ordinance, which stated, *inter alia*:

The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they

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One author concludes that had the Haudenosaunee not sided ultimately with the British, "people in the United States might speak French today." STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 3 (1992).

266. See *supra* note 263.

267. In Mexico, Central America, and South America, neither the Spanish nor the Portuguese appear to have pursued an express treaty policy with respect to indigenous peoples. Both colonial powers relied on the authority of the papal bulls mentioned *supra* note 10. The United Nations Indigenous Treaty Study has, however, uncovered a broad history of Spanish treaty-making, one that is especially well documented for the peripheral zones of the Spanish Empire, including parts of Central America and the so-called Cono Sur (Araucania, Chaco, and Patagonia). Third Progress Report, *supra* note 199, ¶ 22. In particular, Spain entered into a large number of agreements with the Mapuche, including the Peace of Quilín, establishing a border between the Spanish colony and Mapuche territory and the Negrete *Parlamentos*, peace agreements with the same tribe of 1726 and 1803 agreements. Third Progress Report, *supra* note 199, ¶¶ 153, 155, 158. Also, where Spain had to compete with other European powers such as England and France, she "was often compelled to make treaties with indigenous nations," referring to the southern part of North America (Nueva Vizcaya) and Nicaragua. Third Progress Report, *supra* note 199, ¶ 22. In North America, Martínez reports that the Spaniards, at the end of the 18th century, were involved in "intrigues" with the Five Civilized Tribes "in order to unite them into barrier States against the United States," leading to treaties with the Chickasaws and Choctaws in 1784. This limited practice "seems to be nothing more than a reflection of a form of diplomacy chosen by the Anglo-Americans in their dealings with indigenous nations there." First Progress Report, *supra* note 263, ¶ 203. See also Vine Deloria, Jr., *Introduction, in INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW, A CHRONOLOGICAL LIST OF TREATIES AND AGREEMENTS MADE BY INDIANS* 1 (1973).

268. See DOROTHY V. JONES, *LICENSE FOR EMPIRE: COLONIALISM BY TREATY IN EARLY AMERICA* 10–18 (1982); First Progress Report, *supra* note 263, ¶ 177 ("Britain actually was the only colonial Power which conducted a consistent treaty policy with extra-European peoples.").

269. See Stephan Verosta, *History of the Law of Nations, 1648 to 1815, in 7 ENCYCLOPEDIA OF PUBLIC INT'L LAW*, *supra* note 10, at 160, 164. Challenging the traditional interpretation of the Proclamation as a unilateral prescriptive statement, John Borrows emphasizes the active role played by First Nations in its genesis and other contemporary events and documents, in particular, the Treaty of Niagara of 1794. In this treaty, which constitutes the interpretive context of the Royal Proclamation, the Crown and over 2000 Chiefs established a relationship based on principles of peace, friendship, and mutual respect, obligating the Crown to ensure that aboriginal and treaty rights of the indigenous peoples, in particular, their rights of self-government, were not undermined. John Borrows, *Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government, in ABORIGINAL AND TREATY RIGHTS IN CANADA*, *supra* note 53, at 155–72.

never shall be invaded or disturbed, unless in just and lawful wars authorised by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.<sup>270</sup>

This doctrine was embodied in an act of Congress of August 7, 1789.<sup>271</sup> Its actual impact faded away with the consolidation of the United States of America as a result of the second war by the Americans against the British and their allies, the northwestern tribes under Tecumseh, the War of 1812. Subsequently, treaties between the United States and Indian tribes were largely used to confine Indian tribes to even smaller patches of land—in exchange for solemn guarantees that this would be a final determination as to what land the white man would desire and receive.<sup>272</sup>

Indigenous nations had to fight an uphill battle for their agreements with the new rulers of European origin to be recognized as prescriptions of international law. This is evident in Professor Max Huber's 1928 arbitral award in the *Island of Palmas Case*.<sup>273</sup> He concluded that treaties entered into by the island's indigenous authorities and the Dutch East India Company were not, "in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties."<sup>274</sup> The 1926 *Cayuga Indians* award went so far as to say that an Indian tribe "is not a legal unit of international law."<sup>275</sup>

In international law, these conclusions are no longer, if they ever were, tenable. Importantly, treaties of the United States of America with Indian Nations were entered into the same way, observing the same formalities and

270. An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, 32 J. CONTINENTAL CONGRESS 340–41 (July 13, 1787).

271. *See* An Act to Provide for the Government of the Territory Northwest of the River Ohio, 1 Stat. 50 (1789).

272. Senator Sam Houston, in 1854, described the perpetual nature of reservations allocated in treaties between the U.S. Government and Indian nations in the following terms: "As long as water flows, or grass grows upon the earth, or the sun rises to show your pathway, or you kindle your camp fires, so long shall you be protected by this Government, and never again be removed from your present habitations." CONG. GLOBE, 33d Cong., 1st Sess. 202 (1854).

273. *See* *Island of Palmas Case* (United States v. Netherlands), 2 R.I.A.A. 829 (1928).

274. *Id.* at 831, 858.

275. *Cayuga Indians (Great Britain) v. United States*, 6 R.I.A.A. 173, 176 (1926). The logic behind this reasoning is revealed in the following paragraph leading to the consideration of the Cayuga Nation as an entity of New York(!) law:

So far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law within whose territory the tribe occupies the land, and so far only as that law recognizes it. Before the Revolution all the lands of the Six Nations in New York had been put under the Crown as "appendant to the Colony of New York," and that colony had dealt with those tribes exclusively as under its protection . . . New York, not the United States, succeeded to the British Crown in this respect at the Revolution. Hence the "Cayuga Nation," with which the state of New York contracted in 1789, 1790 and 1795, so far as it was a legal unit, was a legal unit of New York law.

*Id.* at 176–77.

undergoing the same procedural treatment as agreements with any foreign nation-state.<sup>276</sup> At the time of their conclusion, all of the American Indian treaties prior to 1871 appeared to have had the nature, as well as force and effect of international legal obligations. Not only the Indian Nations, but the Executive and the Legislative Branches of the United States Government conducted themselves in full accordance with the formalities and contents of international and domestic law when entering into and approving those compacts.<sup>277</sup> The Judicial Branch of the United States Government worked its way up to final recognition of the international law character of these commitments in Chief Justice Marshall's famed trilogy of Indian law cases: *Johnson v. M'Intosh*,<sup>278</sup> *Cherokee Nation v. Georgia*,<sup>279</sup> and *Worcester v. Georgia*.<sup>280</sup> Later case law<sup>281</sup> and administrative practice<sup>282</sup> confirmed this understanding. Treaties between Indian Nations and the United States Government are thus subject to the prescriptive regime of international law, as far as validity, interpretation and other legal ramifications are concerned.<sup>283</sup> The treaty-making practices of other nations might yield similar or different outcomes.<sup>284</sup>

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276. See Wiessner, *supra* note 20.

277. The identity of treatment of agreements with European states and treaties with Indian nations did not come about by chance. It was deliberate. On September 17, 1789, President George Washington sent the following message to the Senate:

It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or commissioners, not to consider any treaty negotiated and signed by such officers as final and conclusive, until ratified by the sovereign or government from whom they derive their powers. This practice has been adopted by the United States respecting their treaties with European nations, and I am inclined to think it would be advisable to observe it in the conduct of our treaties with the Indians . . . .

1 ANNALS OF CONG. 83 (Joseph Gales ed., 1789).

The Senate appointed a special committee to investigate the issue of ratification. While the committee opined that "formal ratification" of treaties with Indian Nations was "not expedient or necessary," *id.* at 84, the full Senate decided to heed the President's counsel and resolved to "advise and consent" that the President ratify the respective treaty with several Indian Nations. *Id.* at 87; COHEN, *supra* note 260, at 71.

278. 21 U.S. (8 Wheat.) 543 (1823).

279. 30 U.S. (5 Pet.) 1 (1831).

280. 31 U.S. (6 Pet.) 515 (1832).

281. See *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876) (power to make treaties coextensive with that to make treaties with foreign nations). The parallel with foreign states was also drawn in *Menominee Tribe v. United States*, 39 U.S. 40 (1968) and *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

282. "It was decided very early that compacts entered into with Indian tribes required ratification by the Senate and had the same status, force and dignity as agreements with sovereign nations." LIST OF DOCUMENTS CONCERNING THE NEGOTIATION OF RATIFIED INDIAN TREATIES 1801-1869 1 (National Archives ed., reprinted 1975) (1949).

283 See Wiessner, *supra* note 20, at 593.

284. Cf. IAN BROWNLIE, TREATIES AND INDIGENOUS PEOPLES (1992) (focusing on the Treaty of Waitangi).

## B. Customary International Law

### 1. The Need for Specific Prescription

Traditional international law, in its positivist frame, permitted only nation-states to act and hold legal rights and duties. The horrors of the Nazi Holocaust prompted a rethinking of the virtually unlimited discretion states had regarding the treatment of their own citizens. The United Nations Charter put human rights and self-determination of peoples first, making them a *raison d'être* of the new worldwide organization of governments.<sup>285</sup> The 1948 United Nations Declaration<sup>286</sup> articulated these rights, and the 1966 United Nations Covenants<sup>287</sup> as well as regional instruments<sup>288</sup> codified them in legally binding agreements. There are also more specialized conventions prohibiting all forms of racial discrimination, genocide and torture, and those ensuring the human rights of women and children.<sup>289</sup> These treaties ensure religious freedom,<sup>290</sup> guarantee self-determination of peoples,<sup>291</sup> and even protect the right of minorities to the preservation and enjoyment of their cultural heritage.<sup>292</sup> The issue is whether these protections are sufficient to meet the needs of indigenous peoples, or whether separately formulated, tailor-made responses by the international community to their plight are necessary or appropriate.

It is clear that virtually all indigenous peoples share a common set of problems resulting from the tortured relationship between the conqueror and the conquered. First, Indian freely shared, not exclusively controlled land was taken away. Second, the conqueror's way of life was imposed. Third, political autonomy was drastically curtailed. Fourth, indigenous peoples have often been relegated to a status of extreme poverty, disease, and despair. Five basic claims of indigenous peoples arise from this condition: (1) traditional lands should be respected or restored, as a means to their physical, cultural, and spiritual survival; (2) indigenous peoples should have the right to practice their traditions and celebrate their culture and spirituality with all its implications; (3) they should have access to welfare, health, edu-

285. U.N. CHARTER, arts. 1(2), (3), 55, 56, 73.

286. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., 67th plen. mtg., U.N. Doc. A/810 (III) (1948).

287. International Covenant on Economic, Social and Cultural Rights, entered into force Jan. 3, 1976, 999 U.N.T.S. 3, reprinted in 6 I.L.M. 360; International Covenant on Civil and Political Rights, entered into force Mar. 23, 1976, 999 U.N.T.S. 171, reprinted in 6 I.L.M. 368.

288. Cf. the human rights conventions of Europe, the Americas, and Africa.

289. One of those treaties, the 1980 Convention on the Rights of the Child, recognizes expressly the rights of indigenous children. See Convention on the Rights of the Child, G.A. Res. 25 (XLIV), 44 U.N. GAOR, Supp. No. 49, U.N. Doc. A/RES/44/25 (1989), reprinted in 28 I.L.M. 1448 (1989). For an account of its legislative history by one of the Convention's drafters, see Cynthia Price Cohen, *Development of the Rights of the Indigenous Child Under International Law*, 9 ST. THOMAS L. REV. 231, 234-44 (1996).

290. Cf., e.g., Article 18 of the International Covenant on Civil and Political Rights, *supra* note 287.

291. Article 1(1) of both United Nations human rights covenants affirms the right of "all peoples" to self-determination. See *supra* note 287.

292. Cf., e.g., Article 27 of the International Covenant on Civil and Political Rights, *supra* note 287.

cational and social services; (4) conquering nations should respect and honor their treaty promises; and (5) indigenous nations should have the right to self-determination.

A number of these issues have been addressed, albeit incompletely for some, in present statements of international prescription. This goes for the right to physical survival, social and economic rights, to the extent they are accepted, and the general freedom of religion. What is missing in the broad-based international human rights instruments, however, is a specific protection of the distinctive cultural and group identity of indigenous peoples as well as the spatial and political dimension of that identity, their way of life. The clearest example of the "general human rights gap" is the indigenous peoples' need for their lands based on deep, often spiritual ties. Other such distinctive claims are those for the return of sacred remains, artifacts and sites, and their demand of governments to keep their word and honor their treaty obligations. It is hard to find these Indian-specific protections in the existing human rights covenants. The 1966 Covenants do not mention property rights at all, neither do they refer to contractual rights.<sup>293</sup> The protection of sacred objects could only be seen covered, with quite a stretch, by the general right to the free exercise of religion. The Genocide Convention<sup>294</sup> is not worded broadly enough to encompass acts of cultural extinction, the withdrawal of the land, material and immaterial space and other spoliation of the environment leading to the "spirit death"<sup>295</sup> of an Indian nation. The Coordinator of the Indian Nations Union has stated the problem most eloquently:

When the government took our land . . . they wanted to give us another place . . . . But the State, the government, will never understand that we do not have another place to go. The only possible place for [indigenous] people to live and to re-establish our existence, to speak to our Gods, to speak to our nature, to weave our lives, is where our God created us. . . . We are not idiots to believe that there is possibility of life for us outside of where the origin of our life is. Respect our place of living, do not degrade our living conditions, respect this life. . . . [T]he only thing we have is the right to cry for our dignity and the need to live in our land.<sup>296</sup>

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293. In the *Lubicon Lake Band* case, however, the Human Rights Committee found a violation of Article 27 of the International Covenant of Civil and Political Rights due to the historical failure to assure the band a land base to which it had a strong claim, combined with exploitative resource development by outsiders in the face of miserable economic conditions of the band members. *Ominayak v. Canada*, Communication No. 167/1984, Annex IX.A, at 27, UN Doc. A/45/40 (1990). See also *Kitok v. Sweden*, Communication No. 197/1985, at 221, UN Doc. A/43/40 (1988).

294. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 78 U.N.T.S. 277.

295. Sandra C. Ruffin, *Postmodernism, Spirit Healing, and the Proposed Amendments to the Indian Child Welfare Act*, 30 MCGEORGE L. REV. (forthcoming, Spring 1999).

296. Ailton Krenak, World Commission on Environment and Development (WCED) Public Hearing,

Because many of these cries were not heard, the concerns were not addressed domestically, the problem grew into such dimensions that international governmental action, spurred by collective action of indigenous peoples and non-governmental groups acting in their support, was finally coming to pass.

## 2. The Role of the International Labor Organization (ILO)

Interestingly, it was a specialized agency of the United Nations, the International Labor Organization (ILO), that first addressed indigenous concerns. Its first attempt, however, launched in 1957, proved to be guided by highly questionable policy goals. ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries<sup>297</sup> placed little value on indigenous cultures as such, focusing instead on the goal of integration and assimilation rather than on the protection of the unique characteristics and lifestyles of indigenous populations.<sup>298</sup> In 1986, the ILO changed direction, and started to draft a new agreement which was adopted in 1989, as ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries.<sup>299</sup> As of the fall of 1997, the Convention has been ratified by ten countries, including Norway, Mexico, Bolivia, Colombia, Costa Rica, Denmark, Guatemala, Honduras, Panama, and Peru.<sup>300</sup> The convention has as its basic theme the right of indigenous people to live and develop by their own designs as distinct communities. It ensures indigenous peoples' control over their legal status, lands, internal structures, and development in environmental security. It guarantees indigenous peoples' rights to ownership and

Sao Paulo (Oct. 28–29, 1985), *quoted in* WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* 4–19 (1987).

297. See International Labor Organization Convention (No. 107) Concerning Indigenous and Tribal Peoples in Independent Countries, *entered into force* June 2, 1959, 328 U.N.T.S. 247.

298. Significantly, this treaty has drawn little support; it was ratified by only 27 states. The Convention, in particular, was not ratified by the United States, Canada, the USSR, Australia, or New Zealand. The "assimilationist" policies of this treaty are now regarded with reserve. The Australian Government, for example, stated that the Convention's "emphasis on 'integration' does not . . . accord with the Government's policy of recognizing the fundamental right of Aborigines to retain their identity and traditional life style where desired." BROWNLEE, *supra* note 284, at 64, with further references.

299. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, *adopted* June 27, 1989, *reprinted in* 28 I.L.M. 1382 (1989). [hereinafter ILO Convention No. 169]

300. As of June 1993, the ratifications by key Latin American countries such as Mexico, Bolivia and Colombia had brought approximately 12 million Indians, about 40% of all the Indians of the Americas, under the protective shield of the Convention. Russel L. Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, at 45 n.51 (1994). This number has increased dramatically, with ratification by countries rich in indigenous population, such as Guatemala and Peru. The ratification by Guatemala in 1996 is particularly noteworthy, since this step was one of the critical demands by the Indian negotiators in the peace process. In Argentina and Fiji, the parliaments approved the convention, but the instrument of ratification has not been submitted. The Netherlands, Russia and the Philippines are expected to ratify it, but certain Latin American countries probably will not take that step. Sweden and Finland are concerned about the interpretation of land rights provisions (art. 14). Lee Swepston, *The ILO Indigenous and Tribal Peoples Convention (No. 169): Eight Years After Adoption*, in HUMAN RIGHTS OF INDIGENOUS PEOPLES 17, 32–34 (Cynthia Price Cohen ed., 1998).



possession of the total environment they occupy or use, but it does not recognize their right to secede.<sup>301</sup> On the other hand, it does not exclude it either.<sup>302</sup>

### 3. The Role of the United Nations

In 1982, responding partly to increasing international cooperation between indigenous peoples, through non-governmental organizations such as the World Council of Indigenous Peoples and the International Indian Treaty Council,<sup>303</sup> the United Nations Economic and Social Council (ECOSOC) established a "working group" charged with the task of drafting a universal declaration on the rights of indigenous "populations."<sup>304</sup> Progressing with the typical "lightning speed" of United Nations bodies, the Working Group on Indigenous Populations finally agreed on a draft Declaration on the Rights of Indigenous Peoples in 1993.<sup>305</sup> Similar to the Founders of the United States Constitution, the members of the Working Group went beyond their designated mandate by drafting a Declaration on the Rights of Indigenous "Peoples."<sup>306</sup> Established nation-states did not appear to support that terminology, fearing that their territorial integrity might be

301. See Swepton, *supra* note 300, at 36. Cf. Article 1(3) of the Convention: "The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law." ILO Convention No. 169, *supra* note 299, art. 1(3).

302. Compare the following statement of Lee Swepton, an influential ILO official:

Certainly the argument that the convention limits the right to self-determination of these groups can be rejected without detailed consideration. This right, if it exists for them, remains to be defined in international law, by the United Nations in particular. Will the usage in the ILO convention have the effect of limiting that discussion? This is highly unlikely, as the UN will take account of the ILO's adoption of these phrases as only one element in an extremely complex debate . . . .

It is more likely that the effect will be a positive one for increasing the recognition in international law of the right of these peoples to separate and continued existence.

Lee Swepton, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY U.L. REV. 677, 694 (1990).

303. For background on the development of the "indigenous voice" in the world social and constitutive processes, see FRANKE WILMER, *THE INDIGENOUS VOICE IN WORLD POLITICS* (1993), and Douglas Sanders, *The Legend of Deskaheh: Indigenous Peoples as International Actors*, in *HUMAN RIGHTS OF INDIGENOUS PEOPLES* 73 (Cynthia Price Cohen ed., 1998).

304. See Sanders, *supra* note 303, at 77, for further references.

305. See Working Group on Indigenous Populations, Report of the Working Group on Indigenous Populations on its eleventh session, U.N. Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 45th Sess., Annex I, Agenda Item 14, at 50-51, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993), reprinted in 9 ST. THOMAS L. REV. 212 (1996).

306. In its 1996 meeting, the Working Group finally "decided to recommend that the Sub-Commission and its parent bodies consider the renaming of the Working Group on Indigenous Populations as the "Working Group on Indigenous Peoples." Working Group on Indigenous Populations, *Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on its fourteenth session*, U.N. Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 48th Sess., Agenda Item 14, ¶ 176, U.N. Doc. E/CN.4/Sub.2/1996/21 (1996). A week after this report was published, however, a "corrigendum" was issued with this curt mandate: "Delete paragraph 176 and renumber the remaining paragraphs accordingly." No explanation was given. U.N. Doc. E/CN.4/Sub.2/1996/21/Corr.1 (1996).

endangered by claims to external self-determination whose rightful claimants were designated as "peoples" under the U.N. Charter's Articles 1, 2, 55, 56, and 73.<sup>307</sup> Limiting their support for self-determination to colonized entities overseas ("salt-water doctrine"),<sup>308</sup> nation-states wanted to define away any potential identification of legally protected claims of indigenous peoples with those of colonized communities.<sup>309</sup> Thus, the "International Decade of the World's Indigenous People" deliberately kept the word "people" in the singular.<sup>310</sup>

Nevertheless, the text of the 1993 Draft Declaration on the Rights of Indigenous Peoples by the U.N. Working Group on Indigenous Populations embodies the most affirmative intergovernmental response yet to the claims of indigenous peoples. Beyond recognition of the right to self-determination,<sup>311</sup> it formulated an array of tailor-made collective rights, such as the right to maintain and develop their distinct political, economic, social and cultural identities and characteristics as well as their legal systems and to participate fully, "if they so choose," in the political, economic, social and cultural life of the State.<sup>312</sup> They were guaranteed the right not to be subjected to genocide<sup>313</sup> or ethnocide, i.e., action aimed at or affecting their integrity as distinct peoples, their cultural values and identities, including the dispossession of land, forced relocation, assimilation or integration, the imposition of foreign lifestyles and propaganda.<sup>314</sup> The stated rights guaranteed to Indians as groups, not only as individual persons, include the right to observe, teach

307. See *supra* note 285.

308. Under Principle IV of U.N. General Assembly Resolution 1541(XV) of December 15, 1960, a right to a "full measure of self-government" applies only "in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it." By requiring that "salt water" separate the people claiming self-determination under the United Nations Charter from the metropolitan area of the nation-state, traditional state actors intended to deny the right to secede to peoples living in the confines of the contiguous metropolitan territory, thereby vitiating potential claims of "nations within"—be they the Kurds, the Basques, or, as in most cases, indigenous peoples.

309. In fact, it may be concluded that the only indigenous group benefiting from the "salt-water doctrine" of decolonization were the Inuit, or Eskimo, people of Greenland. After a long struggle, they obtained a quite extensive version of home rule from Denmark which released them, *inter alia*, from membership in the European Union. However, Greenland stopped short of secession. Its Premier Lars Emil Johansen applauded, in an address to the United Nations General Assembly, his people's "free partnership" with Denmark which showed that "it was possible to change the world so that indigenous people—without dissolving the national States to which they belonged—could take their independent and rightful place on the world scene." Lars Emil Johansen, *quoted in Representatives of World's Indigenous Peoples Address Assembly at Start of International Year*, U.N. PRESS RELEASE, No. GA/8450, at 5-6 (Dec. 10, 1992). See also Gudmundur Alfredsson, *Greenland and the Law of Political Decolonization*, 25 GERMAN Y.B. INT'L L. 290, 300 (1982). For a critical assessment, see Third Progress Report, *supra* note 199, ¶¶ 184-209.

310. See *supra* note 5.

311. Working Group on Indigenous Populations, 1993 Draft Declaration on the Rights of Indigenous Peoples. Article 3 states broadly: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

312. *Id.* arts. 4, 8, 19, 20.

313. *Id.* art. 6.

314. *Id.* art. 7.

and practice tribal spiritual and religious traditions;<sup>315</sup> the right to maintain and protect manifestations of their cultures, archeological-historical sites and artifacts;<sup>316</sup> the right to restitution of spiritual property taken without their free and informed consent,<sup>317</sup> including the right to repatriate Indian human remains;<sup>318</sup> and the right to protection of sacred places and burial sites.<sup>319</sup> Further listed are the rights to maintain and use tribal languages, to transmit their oral histories and traditions,<sup>320</sup> to education in their language and to control over their own educational systems.<sup>321</sup> They are afforded the right to maintain and develop their political, economic and social systems,<sup>322</sup> and to determine and develop priorities and strategies for exercising their right to development.<sup>323</sup> Their treaties with States should be recognized, observed and enforced.<sup>324</sup> Last, but not least, the Draft Declaration supports the right of indigenous people to own, develop, control, and use the lands and territories which they have traditionally owned or otherwise occupied and used, including the right to restitution of lands confiscated, occupied or otherwise taken without their free and informed consent, with the option of providing just and fair compensation wherever such return is not possible.<sup>325</sup> The document, in particular, goes beyond ILO Convention No. 169 in its statements on self-determination, land and resource rights, as well as political autonomy.<sup>326</sup>

As important as the substantive provisions of this draft are, the procedure through which it was produced was at least as significant. It was developed, "[t]o a large extent, . . . out of a partnership between experts and indigenous people."<sup>327</sup> The Working Group continues its work, and increasing numbers of indigenous people from different parts of the world attend its meetings. The Working Group has grown into "one of the largest regular human rights meetings organized by the United Nations,"<sup>328</sup> and has made indigenous peoples a permanent presence within that worldwide governmental organization.

The Draft Declaration has survived the enhanced involvement of governments as it moves up the United Nations hierarchy to its final destination, the General Assembly. In 1994, the Sub-Commission adopted it without

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315. *Id.* art. 13.

316. *Id.* art. 12.

317. *Id.*

318. *Id.* art. 13.

319. *Id.*

320. *Id.* art. 14.

321. *Id.* art. 15.

322. *Id.* art. 21.

323. *Id.* art. 23.

324. *Id.* art. 36.

325. *Id.* arts. 25-27.

326. ANAYA, *supra* note 3, at 53.

327. Julian Burger, *The United Nations Draft Declaration on the Rights of Indigenous Peoples*, 9 ST. THOMAS L. REV. 209, 210 n.6 (1996).

328. *Id.* at 209.

amendment and sent it to the U.N. Commission on Human Rights.<sup>329</sup> The first intergovernmental meeting at the level of the Commission, held in November 1995, also did not result in any changes, although some governments voiced concern about the language on self-determination for indigenous peoples, as well as on indigenous rights over lands and resources.<sup>330</sup> A second session of this group in October 1996, proved to be more difficult as opposition to collective rights and self-determination increased.<sup>331</sup> Over 100 indigenous organizations, however, have been admitted to participate in the sessions of the Commission's working group, and their influence will be felt.<sup>332</sup> In any event, the General Assembly has requested that the Declaration be adopted before the end of the International Decade of the World's Indigenous People in 2004.<sup>333</sup>

#### 4. The Role of the Organization of American States (OAS)

Despite the fact that indigenous peoples are significant actors in many states of the Americas, the OAS has begun drafting international protections for indigenous peoples only in the 1990s.<sup>334</sup> It has, however, quickly caught up with, indeed overtaken, the United Nations Working Group. In 1989, the OAS General Assembly recommended that the Inter-American Commission on Human Rights prepare an instrument to protect the rights of indigenous peoples. In 1991, the actual development of that instrument began, and in September 1995, under the presidency of Professor W. Michael Reisman, the first draft<sup>335</sup> was sent to governments, hundreds of indigenous

329. U.N. ESCOR, 45th Sess., 35th mtg. at 2, U.N. Doc. E/CN.4/Sub.2/1993/SR.35 (1994).

330. Burger, *supra* note 327, at 210.

331. *Id.* at 210-11.

332. *Id.* at 211.

333. *Id.*

334. Still, decisionmaking processes on the Inter-American level dealt with the "indigenous issue" from their very beginning. In 1933, the 7th American International Conference called for a hemispheric congress to study the problem. The first such "Indianist congress" held in Mexico in 1940 resulted in the establishment of the Inter-American Institute in 1942. The Inter-American Commission on Human Rights analyzed the human rights situation of indigenous peoples in country reports on Bolivia, Brazil, Chile, Colombia, Guatemala, and Surinam as well as in special reports on the Miskito Indians in Nicaragua and the "Communities of Peoples in Resistance" in Guatemala. For details, see Osvaldo Kreimer, *The Future Inter-American Declaration on the Rights of Indigenous Peoples: A Challenge for the Americas*, in HUMAN RIGHTS OF INDIGENOUS PEOPLES 63, 64-65 (Cynthia Price Cohen ed., 1998).

In two individual cases, *Gangaram Panday* and *Aloboetoe*, the Commission addressed attacks on members of indigenous communities by forces of the Surinam government. Annual Report of the Inter-American Commission on Human Rights 1992-93, OEA/Ser.L/V/II.83, doc. 14, corr.1, Mar. 12, 1993 at 23. The Commission referred these cases to the Inter-American Court of Human Rights. The Court found that there had been violations of rights under the Inter-American Convention, and that, in determining the scope of persons entitled to reparations, the indigenous group's traditional rules of inheritance applied. *Aloboetoe et al. v. Suriname*, Judgment of September 10, 1993, reprinted in 14 HUM. RTS. L.J. 413 (1993); Annual Report of the Inter-American Commission on Human Rights (1995), OAS/Ser.L/V/III.33, doc. 4, Jan. 22, 1996, at 1.

335. Draft of the Inter-American Declaration on the Rights of Indigenous Peoples, Inter-American C.H.R., 1278th sess., OEA/Ser/L/V/II.90, Doc.9 rev.1 (Sept. 21, 1995).

organizations, individual experts, and other entities for comments.<sup>336</sup> Taking that feedback into account, at its ninety-fifth regular session, the Inter-American Commission for Human Rights approved the Proposed American Declaration on the Rights of Indigenous Peoples.<sup>337</sup> This proposal was submitted to the General Assembly and to its Permanent Council. The Commission also made the draft public so it could be considered by the governments, peoples, and interested organizations, with the expectation that it could be finally approved by the member countries at the 1998 General Assembly, in commemoration of the Organization's fiftieth anniversary.<sup>338</sup> This date has, however, been slightly pushed back. The Declaration is not scheduled to be passed at the June 2000 meeting of the OAS General Assembly.<sup>339</sup>

The draft offers some interesting counterpoints to the United Nations proposal. First, it defines the personal scope of the document, without, however, spelling out the meaning of the term "indigenous people" itself.<sup>340</sup> The Preamble states that indigenous peoples constitute an "organized, distinctive and integral segment of their population and are entitled to be part of the national identities of the countries of the Americas."<sup>341</sup> Separatism and secession, options of "external" self-determination, are expressly rejected.<sup>342</sup>

On the other hand, indigenous peoples are designated a "subject of international law."<sup>343</sup> "Internal" self-government, the formulation and application of indigenous law,<sup>344</sup> and self-identification are broadly allowed and promoted, and forced assimilation is forbidden.<sup>345</sup> The draft also states that the living conditions of Indians are "generally deplorable"<sup>346</sup> and offers as

336. See Osvaldo Kreimer, *The Beginnings of the Inter-American Declaration on the Rights of Indigenous Peoples*, 9 ST. THOMAS L. REV. 271, 272-73 (1996).

337. Proposed American Declaration on the Rights of Indigenous Peoples, Inter-American C.H.R., 1333d sess., OEA/Ser/L/V/II.95, Doc. 6 (Feb. 26, 1997), reprinted in 6 INT'L J. CULTURAL PROP. 364 (1997) [hereinafter OAS Draft Declaration].

338. See Annual Report of the Inter-American Commission on Human Rights (1997).

339. Osvaldo Kreimer, Resultados de la Reunión de Expertos Gubernamentales sobre la Declaración Americana sobre los Derechos de los Pueblos Indígenas (OEA [OAS], Washington 10-12 de febrero de 1999) (on file with author).

340. Article 1(1) of the Proposed Declaration states that "[t]his declaration applies to indigenous peoples as well as peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations." Further, "self identification as indigenous shall be regarded as a fundamental criterion for determining the peoples to which the provisions of this declaration apply." OAS Draft Declaration, *supra* note 337, art. 1(2).

341. OAS Draft Declaration, *supra* note 337, Preamble § 1.

342. *Id.* art. 1(3): "The use of the term 'peoples' in this instrument shall not be construed as having any implication with respect to any other rights that might be attached to that term in international law." So as to remove any doubt, Article XXV affirms: "Nothing in this instrument shall be construed as granting any right to ignore boundaries between states." OAS Draft Declaration, *supra* note 337.

343. OAS Draft Declaration, *supra* note 337, Preamble, at 7.

344. Compare *id.* arts. XV, XVI.

345. *Id.* art. V.

346. *Id.* Preamble, at 2.

one of several remedies the "right to development."<sup>347</sup> The centrality, in fact the sacredness of the environment to indigenous peoples is recognized, and respect for it is to be promoted by way of indigenous culture and ecology.<sup>348</sup> Indians, in turn, are to be given the right to a safe and healthy environment, including a prohibition on the introduction and deposit of radioactive and other toxic waste on their lands.<sup>349</sup> Education is to take place, if so desired by the peoples themselves, in indigenous language, and it should incorporate indigenous content.<sup>350</sup> Traditional collective systems for the control and use of land are to be recognized, and indigenously used property should, in principle, be returned.<sup>351</sup> Maximum priority is to be accorded the demarcation of properties and areas of indigenous use.<sup>352</sup>

Intrusion of illegal miners and farmers are mandated to be stopped by state authorities.<sup>353</sup> Also, racism and abuses of indigenous peoples by security forces should come to an end.<sup>354</sup> Rights that can only be enjoyed when exercised collectively are also recognized,<sup>355</sup> including the profession and practice of spiritual beliefs and the use of indigenous language. Intellectual property rights are another important focus.<sup>356</sup> Finally, indigenous persons are given the right to recognition, observance, and enforcement of treaties concluded with states or their successors<sup>357</sup>—a right long contested and denied. Conflicts and disputes over such treaties, which cannot otherwise be settled, should be submitted to "competent bodies." This appears to be, at first blush, a regressive departure from the reference to "competent international bodies" included in the 1995 Draft,<sup>358</sup> especially in light of the envisioned role of the United Nations Permanent Forum of Indigenous People.<sup>359</sup> Still, in an international legal system whose prescriptions are subject to enforcement by domestic as well as international institutions, recourse to both domestic courts and international bodies holds greater promise, in the

347. *Id.* art. XXI(1).

348. *Id.* Preamble, at 3.

349. *Id.* art. XIII(6).

350. *Id.* art. IX.

351. *Id.* art. XVIII, (key element of the Draft).

352. *Id.* art. XVIII(8).

353. The first sentence of Article XVIII(8) states: "The states shall take all measures, including the use of law enforcement mechanisms, to avert, prevent and punish, if applicable, an intrusion or use of those lands by unauthorized persons to take possession or make use of them." *Id.* art. XVIII(8)

354. The Preamble "[r]eaffirms that the armed forces in indigenous areas shall restrict themselves to the performance of their function and shall not be the causes of abuses or violations of the rights of indigenous peoples." *Id.* Preamble, at 6.

355. *Id.* Preamble, at 8.

356. Article XX grants indigenous peoples, inter alia, the "right to the recognition and the full ownership, control and protection of their cultural, artistic, spiritual, technological and scientific heritage, and legal protection for their intellectual property through trademarks, patents, copyright and other such procedures as established under domestic law . . ." *Id.* art. XX.

357. *Id.* art. 32.

358. Draft of the Inter-American Declaration on the Rights of Indigenous Peoples, *supra* note 335, art. XXII.

359. As proposed in G.A. Res. 48/163 (1994). As to its potential mandate, see Part III.D *infra*.

aggregate, for the enforcement and observance of the substantive rights involved.

In sum, the Proposed American Declaration on the Rights of Indigenous Peoples is a major step toward a more effective system of protection of indigenous rights not only in the Western hemisphere, but beyond. It reflects a growing consensus on the minimum threshold of legally enforceable claims of indigenous communities. It relies more on the remedy of empowerment and self-help than on governmental action to remove the plight of the First Nations. It places a high value on individual choice. It is conservative and, in a way, anti-Wilsonian, in that it excludes the option of secession. On the other hand, internal autonomy of indigenous nations is promoted, over a wide array of societal issues. The Declaration goes against traditional Western thought in its affirmation of the rights of groups. Its respect for indigenous spiritual beliefs and practices as constitutive of identity is reflected in a dramatic legal recognition of the traditional indigenous, inclusive ways of dealing with nature, in the use of land, air, water and other living and non-living resources of the planet.

### 5. The Role of the World Bank

The World Bank has become increasingly concerned about the effects of Bank-financed development projects on indigenous and tribal communities. In February, 1982, it issued a brief operational policy statement outlining procedures for protecting the rights of "tribal peoples."<sup>360</sup> It vowed that:

[a]s a general policy the Bank will not assist development projects that knowingly involve encroachment on traditional territories being used or occupied by tribal people, unless adequate safeguards are provided. In those cases where environmental and/or social changes promoted through development projects may create undesired effects for tribal people, the project should be designed so as to prevent or mitigate such effects.<sup>361</sup>

That first concern with protecting small isolated tribes such as Indians in the Amazon from the adverse effects of development later changed to a more extensive promotion of conditions to Bank investments that take into ac-

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360. Tribal Peoples in Bank-Finances Projects, Operational Manual Statement 2.34, February 1982, cited in Shelton H. Davis, *The World Bank and Indigenous Peoples* (visited Feb. 16, 1999) <<http://wbln0018.worldbank.org/essd/kb.nsf...860066fc9e418525668f00680803?OpenDocument>>.

361. *Id.* ¶ 4. The World Bank's purported assumption of "inevitability of development" lies at the heart of an eloquent critique of the 1982 statement. Professor John H. Bodley, an anthropologist, would recommend, instead, that the World Bank rule out funding of projects that "disturb or displace isolated, fully traditional tribal groups" or projects "in states where tribes are denied a political voice within their national government and where state governments deny tribes full communal control over their traditional resource base." John H. Bodley, *The World Bank Tribal Policy: Criticisms and Recommendations* (June 29, 1983) <<http://www.halcyon.com/pub/FWDP/International/wrldbank.txt>>. See also *id.* VICTIMS OF PROGRESS (2d ed. 1982).

count the interests of indigenous peoples broadly defined, including, wherever possible, the active participation of indigenous peoples in the development process itself. This new policy is formulated in Operational Directive 4.20 of September 17, 1991.<sup>362</sup> In its definitional section, this document notes the diversity of indigenous peoples, but identifies them as:

in particular geographical areas by the presence in varying degrees of the following characteristics: (a) a close attachment to ancestral territories and to the natural resources in these areas; (b) self-identification and identification by others as members of a distinct cultural group; (c) an indigenous language, often different from the national language; (d) presence of customary social and political institutions; and (e) primarily subsistence-oriented production.<sup>363</sup>

The Bank's objective is to ensure that the development process "fosters full respect for [indigenous people's] dignity, human rights, and cultural uniqueness, [and] . . . that indigenous peoples do not suffer adverse effects during the development process, . . . and that they receive culturally compatible social and economic benefits."<sup>364</sup> Between the policy of insulation of indigenous communities from the modern world and the approach of acculturation or assimilation, the Bank purports to steer a middle course, proclaiming that:

the strategy for addressing the issues pertaining to indigenous peoples must be based on the *informed participation* of the indigenous peoples themselves. Thus, identifying local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate use of experienced specialists are core activities for any project that affects indigenous peoples and their rights to natural and economic resources."<sup>365</sup>

In implementing this policy, the World Bank's country and sector departments should maintain information on trends in government policies and institutions that deal with indigenous peoples.<sup>366</sup> This could be easily incorporated into the existing practices of the World Bank. For example, the World Bank provides technical assistance to develop the borrowers' abilities

362. World Bank Operational Directive 4.20, Indigenous Peoples (September 17, 1991) <<http://www.worldbank.org/html/fpd/em/power/wbpolicy/420OD.stm>> [hereinafter World Bank 4.20].

363. *Id.* ¶ 5.

364. *Id.* ¶ 6.

365. *Id.* ¶ 8.

366. *Id.* ¶ 11. One outcome of this policy has been most helpful empirical research. For a useful example published in the World Bank's Regional and Sectoral Studies series, see *INDIGENOUS PEOPLES AND POVERTY AND LATIN AMERICA. AN EMPIRICAL ANALYSIS* (George Psacharopoulos & Harry Anthony Patrinos eds., 1994).



to address pertinent issues,<sup>367</sup> and it requires that the borrower prepare an indigenous peoples development plan for an investment project that affects indigenous peoples.<sup>368</sup> That plan should contain, *inter alia*,

[an] assessment of (i) the legal status of the groups covered by this OD, . . . ; and (ii) the ability of such groups to obtain access to and effectively use the legal system to defend their rights. Particular attention should be given to the rights of indigenous peoples to use and develop the lands they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wildlife, and water) vital to their subsistence and reproduction.<sup>369</sup>

Similar policies are promoted by the Asian Development Bank and the Regional Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean.<sup>370</sup>

### III. APPRAISAL

Today, many of these proposed or actual prescriptions, coinciding, as they do, with domestic state practice as documented above, have created a new set of shared expectations about the legal status and rights of indigenous people that has matured and crystallized into customary international law.<sup>371</sup> While the specific ramifications of these prescriptions are still evolving and remain somewhat ambiguous, there is widespread agreement and concordant practice, both in international and domestic law, that (a) indigenous peoples are vulnerable groups<sup>372</sup> worthy of the law's heightened concern; (b) that indigenous peoples are entitled to practice their traditions, to celebrate their culture and spirituality, to protect their language, and to maintain their sacred places and artifacts; (c) that they are, in principle, entitled to demarcation, ownership, development, control, and use of the lands which they have traditionally owned or otherwise occupied and used; (d) that they have, or should be given, powers of self-government, including the administration of their own system of justice; and (e) that governments are to honor and faithfully observe their treaty commitments to indigenous nations. The draft declarations, in their tortuous way through the channels of the United Nations and the Organization of American States, have encountered virtually

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367. World Bank 4.20, *supra* note 362 ¶ 12.

368. *Id.* ¶ 13.

369. *Id.* ¶ 15(a).

370. Lee Swepston, *The ILO Indigenous and Tribal Peoples Convention (No. 169): Eight Years After Adoption*, *supra* note 300, at 35.

371. ANAYA, *supra* note 3, at 49–58.

372. Cf. Siegfried Wiessner, *Faces of Vulnerability: Protecting Individuals in Organic and Non-Organic Groups*, in *THE LIVING LAW OF NATIONS* 217 (Gudmundur Alfredsson & Peter Macalister-Smith eds., 1996). Indigenous peoples, characterized by the will to live together as a community, would be a typical "organic group." *Id.* at 221.

no government opposition regarding these issues. With respect to these claims, a consensus has emerged, and has been translated, with whatever imperfections, into widespread, virtually uniform state practice.<sup>373</sup>

The controversial issues are the following: (a) how should we conceive of "indigenous peoples"?; (b) what is, and what should be, the international community's response to the claim of self-determination?; (c) what is the proper perspective regarding the issue of group or collective rights in the context of indigenous culture?; and (d) what are the prospects and best proposals for enforcement of any catalogue of indigenous rights?

### A. *The Issue of Definition*

The concept of "indigenous people" has, perhaps surprisingly, eluded easy delimitation. The United Nations Working Group, in its 1993 Draft Declaration, consciously decided to forego any attempt at a definition;<sup>374</sup> the Inter-American Human Rights Commission, in presenting its 1997 Proposed American Declaration on the Rights of Indigenous Peoples, abandoned an effort in an earlier draft at delimiting the term.<sup>375</sup> The lack of success in this endeavor is not due to a lack of effort. J. Martínez Cobo, first United Nations Special Rapporteur on the issue of discrimination against indigenous peoples, offered what is perhaps the most widely acclaimed definition:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their

373. The legal and policy landscape has significantly changed since 1991 when a discerning observer could only state the emergence of a "norm" of "recognition of indigenous issues in the abstract, without specifying a program of action through which these needs can be met." Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 158-64 (1991).

374. The Chairperson-Rapporteur stated in a recent report that it is her "considered opinion . . . that the concept of 'indigenous' is not capable of a precise, inclusive definition which can be applied in the same manner to all regions of the world." Working Group on Indigenous Populations, Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people," U.N. ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 14th Sess., at 5, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996) [hereinafter Concept Paper Daes].

375. See OAS Draft Declaration, *supra* note 337. The earlier draft of September 18, 1995, *supra* note 335, had offered two alternative definitions:

Art. I (1). In this Declaration indigenous peoples are those who embody historical continuity with societies which existed prior to the conquest and settlement of their territories by Europeans. (alternative 1) [as well as peoples brought involuntarily to the New World who freed themselves and re-established the cultures from which they have been torn]. (alternative 2) [as well as tribal peoples whose social cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations].

ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>376</sup>

This understanding presupposes the historical event of a community suffering invasion or colonization; the group's self-identification as distinct from other parts of the national society; a present non-dominant status of the community; and the group's determination to preserve its ancestral lands.

Martínez Cobo's definition could be seen as underinclusive:

(1) Focusing on the "historic continuity with pre-invasion and pre-colonial societies," a mandatory link to the phenomena of European colonization and invasion might be established that would limit the concept of indigenous communities largely to peoples in the Americas and Oceania, potentially leaving out indigenous peoples in Africa, Asia and other places that are oppressed by equally "original" inhabitants of neighboring lands that have now become the dominant groups of their society.<sup>377</sup>

(2) The group's necessary determination "to preserve ancestral territories" could be used to exclude indigenous peoples forcibly or non-forcibly removed from their land who now find themselves residing in urban areas, but who maintain their indigenous identity. For example, this definition would not include the Wayúu, now living a desolate life in the outskirts of Maracaibo, Venezuela, distant from their traditional forest dwellings in the border region between Colombia and Venezuela, come to mind.<sup>378</sup>

(3) Emphasis on the present state of indigenous peoples as "non-dominant sectors of society" certainly covers the experience of most indigenous communities around the globe. Still, inclusion in the definition could exclude from the protective scope of relevant international declarations those indigenous groups that have recently achieved preeminence in a nation-state, such as the indigenous Fijians.<sup>379</sup> Should they be excluded?

The International Labor Organization, in its Convention No. 169, defines the personal scope of application as including both

tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or par-

376. STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS ¶ 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3 (1986).

377. Cf. Concept Paper Daes, *supra* note 374, ¶ 64, at 20.

378. See *supra* note 167 and accompanying text.

379. See *supra* note 241.

tially by their own customs or traditions or by special laws or regulations;<sup>380</sup>

[and] . . . peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographic region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.<sup>381</sup>

The difference between "indigenous" and "tribal" communities, according to this definition, is minimal since indigenous peoples are defined as not only encompassing descendants of the inhabitants of the territory "at the time of conquest or colonization," but also descendants of people residing there at the time of "establishment of present state boundaries."<sup>382</sup> The test, thus, for tribal as well as indigenous peoples, is largely reduced to the factor of objective distinctiveness in social, cultural and economic conditions. As it stands now, the Proposed American Declaration on the Rights of Indigenous Peoples dovetails the ILO Convention's blend of "indigenous peoples" and "distinct" societies.<sup>383</sup>

This definition potentially sweeps into the fold of indigenous peoples certain distinctive minority groups that have had a certain longevity of residence in a nation-state, dating back to the foundation of that state. A good example would be the Hungarian ethnic minority in Romania. Such a stretch would make it overinclusive. In the discussion of the Draft United Nations Declaration at the level of the working group established by the Human Rights Commission, some governments, notably in Asia, have demanded a definition prior to negotiating the individual rights listed. Among the demands of governments is a definition which includes only those indigenous groups who have suffered from colonization by people from other regions of the world, not from invasion by their neighbors.<sup>384</sup> Indigenous peoples in the Working Group would seem to prefer the flexibility of

380. ILO Convention No. 169, *supra* note 299, art. 1(1)(a).

381. *Id.* art. 1(1)(b).

382. Concept Paper Daes, *supra* note 374, ¶ 28, at 10-11.

383. Omitting the word "tribal," Article 1(1) of the Proposed Declaration reads:

This Declaration applies to indigenous peoples as well as peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

OAS Draft Declaration, *supra* note 337, art. 1(1).

384. Concept Paper Daes, *supra* note 374, ¶ 61, at 19. Such a definition would exclude several tribal peoples in Asia, for example, from the reach of the Declaration. Countries promoting such a restrictive definition include China, India, Bangladesh, Myanmar and, for the most part, Indonesia. Benedict Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414, 417-18 (1998).

the absence of a formal definition. Instead, they focus on self-identification as an essential component of any definition which might be adopted.<sup>385</sup>

The argument that a definition would provide clarity about the scope *ratione personae* of the proposed declaration appears to make some degree of intuitive sense. Despite the fact that, as deconstructionist theory<sup>386</sup> has taught us, words can have a multitude of meanings, if any, and the use of further words to "clarify" what we would like to say, may, at times, only result in further confusion—words, and at least halfway reliable agreement about what they signify, are still necessary elements of any process of communication, including the process that communicates authoritative decisions with control intent.<sup>387</sup> Thus they are essential to the process of law. The fact that both ILO Convention No. 169 and the Proposed American Declaration have succeeded in delimiting their scope of application *ratione personae* makes it more difficult to argue that a definition of the range of beneficiaries of the United Nations Declaration cannot be achieved. The fact that a definition is feasible, however, is not determinative of the issue at hand. Definitions ought not to be sought for definition's sake. The determinative issue should be: What do we want to achieve with this conceptual delimitation?<sup>388</sup> More specifically, in value-oriented inquiry: does adding a definition contribute, in the aggregate, to a public order of human dignity?<sup>389</sup>

If definitions are sought in order to exclude certain communities commonly regarded as indigenous from the protective reach of international instruments, the search for a definition in itself appears tainted. On the other hand, formal definitions might help to protect indigenous peoples against governments who deny their existence.<sup>390</sup>

385. Concept Paper Daes, *supra* note 374, ¶ 35, at 12. Still, indigenous peoples must have some conception about who is part of their fold, given the fact that they put the number of indigenous persons around the globe at 300 million (*cf.* Concept Paper Daes, Mr. Hatano, member of UN Working Group, *supra* note 374, ¶ 40, at 14.)

386. *Cf.* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE (Drucilla Cornell, Michel Rosenfeld & David Gray Carlson eds., 1992); JACQUES DERRIDA, OF GRAMMATOLOGY (1994). *See also* DERRIDA AND DECONSTRUCTION (Hugh J. Silverman ed., 1989); GEOFFREY H. HARTMAN, SAVING THE TEXT: LITERATURE, DERRIDA, PHILOSOPHY (1981) JONATHAN LOESBERG, AESTHETICISM AND DECONSTRUCTION: PATER, DERRIDA AND DE MAN (1991); MARK WIGLEY, THE ARCHITECTURE OF DECONSTRUCTION: DERRIDA'S HAUNT (1993); DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER (Diane P. Michelfelder & Richard E. Palmer eds., 1989).

387. As to the conception of law as a process of communication, see W. Michael Reisman, *The View from the New Haven School of International Law*, 86 PROC. AM. SOC'Y INT'L L. 118 (1992); Siegfried Wiessner, *International Law in the 21st Century: Decisionmaking in Institutionalized and Non-Institutionalized Settings*, 23 THESAURUS ACROASIMUM 113 (1997).

388. The functional character of a definition has been emphasized by, *inter alia*, Walter Wheeler Cook: [A]ny concept . . . is a tool which lawyers use, judges use, in determining what ought to be done in a concrete situation. As I see it, the same word is used in dealing with a great variety of situations . . . I do not believe you can determine the exact scope of any legal concept unless you know what you are trying to do with it.

3 Proc. Am. L. Inst. 226 (1925).

389. For guidance, see MYRES S. MCDUGAL, HAROLD D. LASSWELL, & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980).

390. This argument has been made forcefully by some indigenous representatives from Asia. Concept

Should, then, such a definition be provided, as a matter of policy? The concept of “peoples”<sup>391</sup> as holders of the right to self-determination and the concept of “minorities” are not authoritatively defined either. This omission, however, did not significantly affect the success of the enterprise of decolonization or the international protection of ethnic and other minority groups. Drawing on her years of experience as Chairperson-Rapporteur of the U.N. Working Group on Indigenous Populations, Professor Erica-Irene Daes counsels against a formal definition. She still offers a set of “factors” she considers “relevant to the understanding” of the term “indigenous:”

- (a) [p]riority in time, with respect to the occupation and use of a specific territory;
- (b) [t]he voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- (c) [s]elf-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
- (d) [a]n experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.<sup>392</sup>

Professor Daes’s first criterion, priority in time, might find support in the common usage of the term. A glance at a college dictionary would tell us that “indigenous” people are people “originating in or characteristic of a particular region or country.”<sup>393</sup> The root concept is the Latin *indigenae*, indicating persons born in a particular place, as opposed to *advenae*, persons who arrived from elsewhere.<sup>394</sup> Why not simply use priority in time as the sole defining criterion?

The problem with this reference is the fact that this element is empirically framed, referring to facts of history that may be false. The find, in 1996, of a 9000-year-old skeleton along the bank of the Columbia River in Kennewick, Washington with what physical anthropologists called “Caucasoid features” and a genetic makeup similar to Eurasians has stirred a debate

Paper Daes, *supra* note 374, ¶ 38, at 13–14.

391. Compare the views of David Makinson:

The two Covenants proclaiming the right of all peoples to self-determination entirely avoid any clarification of what is to count as a people and what is only an ethnic group, cultural community, religious collectivity, or such like. The political needs of the time did not require such clarification. All that was needed was a tacit agreement that inhabitants included within the borders of European colonies in Africa and other regions of the world did constitute peoples—a most dubious assumption given the extraordinary diversity of languages and cultures within some of these borders, and given the well-known historical vagaries of the original delineation of some of the borders by the colonial powers.

David Makinson, *Rights of Peoples: A Logician's Point of View*, in *THE RIGHTS OF PEOPLES* 69, 74 (James Crawford ed., 1988)

392. Concept Paper Daes, *supra* note 374, ¶ 69, at 22.

393. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 663 (2d ed. 1997).

394. Concept Paper Daes, *supra* note 374, ¶ 10, at 5.

as to who were the first inhabitants of the New World.<sup>395</sup> A reasonable functional definition of indigenous peoples in light of their status as a presently and/or historically vulnerable group would have to avoid the pitfalls of such a narrowly empirical definition. To properly designate, in light of its purpose, the intended beneficiaries of the draft legal instrument, one might best refer to them as “peoples that have traditionally been regarded as the original inhabitants of a particular territory.” That formulation is subjective to a degree and, unlike Daes’ scientific hypothesis, not subject to empirical falsification. It also coincides with domestic formulations that refer to long-time identification as an indigenous entity on a substantially continuous basis.<sup>396</sup>

Professor Daes’s suggested factors of voluntary distinctiveness, self-identification and recognition, as well as the experience of oppression make eminent sense. What should be added is the element of indigenous peoples’ strong ties to their ancestral lands, whether they are presently able to reside on these territories or not.<sup>397</sup>

Indigenous communities are thus best conceived of as peoples traditionally regarded, and self-defined, as descendants of the original inhabitants of lands with which they share a strong, often spiritual bond. These peoples are, and desire to be, culturally, socially and/or economically distinct from the dominant groups in society, at the hands of which they have suffered, in past or present, a pervasive pattern of subjugation, marginalization, dispossession, exclusion and discrimination.<sup>398</sup>

395. Douglas Preston, *The Lost Man*, NEW YORKER, June 16, 1997, at 70–81. The skeleton is now claimed for further research by anthropologists, and for burial by the Umatilla Indians, a local tribe, as well as for study and “eventual interment” by the Asatru Folk Assembly, a self-described “major indigenous, pre-Christian, European religion.” The anthropologists have sued the Army Corps of Engineers, who presently holds the remains, claiming that the skeleton is *not* that of a “Native American” under the Native American Graves Protection and Repatriation Act (NAGPRA), *supra* note 38. In a decision of June 27, 1997, the federal district court in Oregon dismissed the Army Corps’ motion for summary judgment, and vacated the Corps’ initial decisions on the applicability of NAGPRA and the turning over of the remains to the Umatilla Tribe. Denying also, without prejudice, the plaintiffs’ request for an order allowing them to start research on the skeleton immediately, the court remanded the matter to the Corps for further consideration in light of an extensive list of questions, including the issue of whether the remains are to be considered “of, or relating to a tribe, people, or culture that is indigenous to the United States,” 25 U.S.C. § 3001(9). Pending resolution of this controversy, the Corps was ordered to retain custody of the remains and to “store them in a manner that preserves their potential scientific value.” *Bonnichsen v. United States*, 969 F.Supp. 628 (D. Or. 1997).

396. Compare the United States’ test for indigenous groups aspiring to federal recognition, *supra* note 47.

397. Compare the statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr. M. Dodson: “Above all and of crucial and fundamental importance is the historical and ancient connection with lands and territories.” Concept Paper Daes, *supra* note 374, ¶ 35, at 12.

398. This definition is largely compatible with the combination of essential requirements and relevant indicia advanced by Professor Kingsbury in his recent analysis, prompted by the politically difficult situation in Asia. He lists as “essential requirements” of an indigenous people self-identification as a distinct ethnic group; historical experience of, or contingent vulnerability to, severe disruption, dislocation or exploitation; long connection with the region; and the wish to retain a distinct identity. As “strong indicia,” he mentions nondominance in the national (or regional) society (ordinarily required); close cultural affinity with a particular area of land or territories (ordinarily required); historical continu-

### B. Self-Determination

Nation-states are reluctant, to say the least, to respond affirmatively to the claims of Indian populations that they qualify as "peoples" entitled to the right of self-determination solemnly prescribed in the United Nations Charter,<sup>399</sup> the 1966 International Covenant on Civil and Political Rights,<sup>400</sup> and recently proclaimed as *erga omnes* obligation of all states under customary international law.<sup>401</sup> Established states in the "New World," born largely from conquest, be it on paper or on the battlefield, fear the specter of secession. The indigenous peoples' claim of self-determination may mean a variety of things:

- (1) "external" self-determination, i.e., the right of peoples to freely determine their international status, including the option of political independence;
- (2) "internal" self-determination, the right to determine freely their form of government and their individual participation in the processes of power;
- (3) their rights as "minorities" within a given nation-state structure to special rights in the cultural, economic, social and political sphere (limited autonomy).

The response to these claims by established nation-states has been mixed. While some important members of the international establishment appear to move toward even greater rights of limited autonomy, the world commu-

ity (especially by descent) with prior occupants of land in the region. "Other indicia" would include socioeconomic and sociocultural differences from the ambient population; distinct objective characteristics such as language, race, and material or spiritual culture; regarded as indigenous by the ambient population or treated as such in legal and administrative arrangements. Kingsbury, *supra* note 384, at 455. The definition suggested above has the advantage of appropriate inclusivity, brevity, and precision—virtues for the purposes of delimiting the scope *ratione personae* of an international document conferring rights—while Professor Kingsbury's formulation, especially in its treatment of the group's ties to the land and priority of occupation, would seem to provide a more flexible basis for negotiations between States and communities whose recognition as indigenous may have been initially denied.

399. U.N. CHARTER, arts. 1, 2, 55, 56, 73.

400. Common Articles 1(1) of both the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights stipulate: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

For a very similar formulation, see the *Declaration on the Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

401. The judgment in the *Case Concerning East Timor (Portugal v. Australia)*, 1995 I.C.J. 90, 102 (June 30), summarizes the relevant jurisprudence of the Court:

In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable.

The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, ¶¶ 52–53, at 31–32; *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, ¶¶ 54–59, at 31–33); it is one of the essential principles of contemporary international law.

*Id.* ¶ 29.



nity of States seems to be united in the rejection of the option of full sovereignty and political independence.

The battle of the "s" (as in "peoples") is far from over. The U.N. Working Group on Indigenous Populations, taking advantage of the particular drive and influence of indigenous peoples' movements in its midst, has passed the bâton in the race toward the adoption by the U.N. General Assembly of a Declaration on the Rights of Indigenous "Peoples" to the Commission on Human Rights. There, the influence of nation-states will be far more pronounced, and formulations foreclosing any option of political independence might be discussed, similar to the language of the Proposed American Declaration. In a decision of July 20, 1990, the *Mikmaq* ruling, the U.N. Human Rights Committee also refused to extend its jurisdiction to the claims of indigenous peoples to self-determination since it was not considered an "actionable" right.<sup>402</sup>

To transcend this battle and the prevailing dichotomy between internal and external self-determination in the context of indigenous peoples, Professor James Anaya has suggested a reconceptualization of self-determination. He proposes a substantive concept of "constitutive" self-determination, which requires "minimum levels of participation" in processes of "creation, alteration or territorial expansion of governmental authority," coupled with "ongoing" self-determination, mandating a "governing order under which individuals and groups are able to make meaningful choices touching upon all spheres of life on a continuous basis."<sup>403</sup> Since colonialism violated both of these principles, a "remedial" aspect of the principle of self-determination would come into play, which he sees implemented by the U.N. process of decolonization, allowing, *inter alia*, for the option of political independence.<sup>404</sup> In the extra-colonial context, the remedies, in Professor Anaya's view, "need not entail the formation of new states," although secession "may be an appropriate remedial option in limited contexts where substantive self-determination for a particular group cannot otherwise be assured or where there is a net gain in the overall welfare of all concerned."<sup>405</sup>

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402. This was so even though self-determination was a right granted "peoples" under Articles 1 of both U.N. human rights covenants of 1966. According to the Committee, what was actionable were individual rights to participation in the political process as guaranteed by Article 25, and minority rights to preservation of culture, religion, and language under Article 27. In its final decision of December 3, 1991, looking at Article 25 of the Covenant, the Committee found that the Mikmaq Indians had no rights different from those of other individuals within the Canadian system of government. *A.D. v. Canada*, Report of the Human Rights Committee, 39 U.N. GAOR Supp. No. 40, at 200, U.N. Doc. A/39/40 (1984). Cf. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 60 (1992).

403. ANAYA, *supra* note 3, at 81-82.

404. *Id.* at 83-84.

405. *Id.* at 84-85, with reference, *inter alia*, to LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 222, 223 (1978) (arguing for secession in extreme cases of oppression); Ved Nanda, *Self-Determination Outside the Colonial Context: The Birth of Bangladesh in Retrospect*, in SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS (Yonah Alexander & Robert A. Friedlander eds., 1980) (justifying secession in cases of persistent patterns of human rights abuses against

The controversy over self-determination and group rights of indigenous peoples<sup>406</sup> is clouded by semantics. The battle over the political independence option of self-determination, the right to secede, is one that has to take into account recent successful divorces of countries in Eastern Europe, the breakup of the Soviet Union, the velvet dissolution of the unhappy marriage between the Czechs and the Slovaks, and the fragmentation of Yugoslavia. The salt-water doctrine of self-determination has been at least weakened, if not eliminated, by these powerful incidents of intra-mainland secession. In particular, the recent world community recognition of the unilateral secessions from the Socialist Federal Republic of Yugoslavia<sup>407</sup> as well as the establishment of Eritrea<sup>408</sup> as an independent state would appear to bolster a claim of peoples to break away from established nation-states outside and beyond the colonial context.<sup>409</sup> Even the companion doctrine of *uti possidetis*

a group).

Similarly, Professor Erica-Irene Daes, has commented:

This requirement [of working within a national political system] continues unless the national political system becomes so exclusive and non-democratic that it no longer can be said to be representing "the whole people." At that point, and if all international and diplomatic measures fail to protect the peoples concerned from the State, they may perhaps be justified in creating a new State for their safety and security. Indeed, in such a state of affairs, legal arguments cease to have any real significance since peoples will defend by whatever means they can. Continued government representivity and accountability is therefore a condition for enduring enjoyment of the right of self-determination, and for continued application of the territorial integrity and national unity principles.

"Self-determination" is a continuing dynamic right, in the sense that it can be reawakened if, at any moment, representative democracy fails and no alternatives exist for the defence of fundamental rights and freedoms.

Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples, U.N. ESCOR, 45th Sess., Agenda Item 14, at 4, U.N. Doc. E/CN.4/Sub.2/1993/26/Add.1 (1993) [hereinafter Daes Explanatory Note].

406. For a special pleading in favor of self-determination for indigenous peoples, see Morris, *supra* note 10. See also Catherine J. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199 (1992); Barsh, *supra* note 300.

407. For the factual record regarding the complex interactive process of establishment of these new actors in international law, see Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992); Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L.J. 29 (1995). For a recent evaluation, see Dominic McGoldrick, *Yugoslavia—The Responses of the International Community and of International Law*, 49 CURRENT LEGAL PROBS. 375 (1996).

408. Minasse Haile, *Legality of Secessions: The Case of Eritrea*, 8 EMORY INT'L L. REV. 479 (1994); Robert McCorquodale, *The Eritrean Question: The Conflict Between the Rights of Self-Determination and the Interests of States* [book reviews], 54 CAMBRIDGE L.J. 187 (1995). Cf. Note, *The Southern Sudan: A Compelling Case for Secession*, 32 COLUM. J. TRANSNAT'L L. 419 (1994) (asserting a "unique African right to self-determination" [emphasis added], but basing this claim on criteria that can readily be universalized, i.e., the identity of the Southern Sudanese as a people, "the systematic discrimination and abuse they have suffered, the regional cohesion they have displayed, and the repeated refusal of the Khartoum regime to implement compromise alternatives to secession").

409. Professor Thomas M. Franck concludes that "the international system does not recognize a general right of secession," but it "does not prohibit secession" either. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 163-65 (1995). Then-U.N. Secretary-General Boutros Boutros-Ghali stated in his 1992 *Agenda for Peace*: "The United Nations has not closed its door. Yet if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve." An Agenda for

has been called in question.<sup>410</sup>

History cannot be frozen. If any traditional criteria of "people" exist, indigenous groupings may very well meet them. They have their own language, culture, traditions, identity—they answer, in the affirmative, to "*le plébiscite de tous les jours*."<sup>411</sup> They might not want to choose political independence, but should they not at least be afforded the option?<sup>412</sup> In addition, the monadic nature of the nation-state has waned, and formalistic concepts of sovereignty have lost much of their heuristic value in an increasingly interdependent world.<sup>413</sup> Considered in comprehensive context, taking into account the interests and concerns of both the indigenous peoples and the states in which they reside, the option should be granted if, in the aggregate, it promotes the values of a public order of human dignity.<sup>414</sup> In most

Peace, Report of the Secretary-General, ¶ 17, U.N. Doc. S/24111 (1992), reprinted in 31 I.L.M. 953, 959. See also Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991); Lawrence S. Eastwood, Jr., *Secession: State Practice and International Law after the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE J. COMP. & INT'L L. 299 (1993).

410. Steven R. Ratner, *Drawing A Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590 (1996). Compare with the decision of the International Court of Justice in the Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali), 1986 I.C.J. 554, 563–67 (Dec. 22, 1986); and the assessment of the Badinter Arbitration Commission established by the European Union to legally evaluate the Yugoslav situation. Conference of Yugoslavia Arbitration Commission, Opinions on Questions Arising from the Dissolution of Yugoslavia, Jan. 11, 1992, and July 4, 1992, 31 I.L.M. 1488 (1992). For thorough analysis, see Matthew C. R. Craven, *The European Community Arbitration Commission on Yugoslavia*, 66 BRIT. Y.B. INT'L L. 333 (1995). Compare also the debate between Professor W. Michael Reisman and this author (Siegfried Wiessner) on the issue of postcolonial secession and the principle of *uti possidetis*, 87 PROC. AM. SOC'Y INT'L L. INST. 258–59, 264–65 (1993).

411. ERNEST RENAN, QU'EST-CE QU'UNE NATION? (1882).

412. Compare a long-time observer's similar query:

Why should these peoples be denied what others enjoy when we are talking about peoples or nations with their own identities, territories, and political institutions who used to exercise internal and external control until they were reduced to dependency? Why should they not be subject to decolonization as well as overseas peoples and countries? These questions also bring to mind the so-called Belgian thesis from the 1950's which allowed the Belgian Government, arguably for the wrong reasons, to maintain that decolonization should not be limited to overseas possessions of the colonial powers.

These 'why-not' questions are especially pertinent because the concepts and principles employed to justify the dependency status of many of these peoples have been discredited. Today, it hurts the eye to see *terra nullius* and discovery used about territories which were inhabited at the time of colonization or later settlement. The inequality and the injustice inherent in such terminology is too blatant for comfort.

Gudmundur Alfredsson, *The Right of Self-Determination and Indigenous Peoples*, in MODERN LAW OF SELF-DETERMINATION 41, 46–47 (Christian Tomuschat ed., 1993).

413. Cf. Louis Henkin, *The Mythology of Sovereignty*, ASIL NEWSLETTER, March/May 1993, at 1. Absolute sovereignty as an unbounded freedom, legally or morally, to act has never been a reality in interstate or inter-people relations. Even the scholar who coined the concept, Jean Bodin, recognized the submission of the ruler of the republic to the highest authority, God. See 1 JEAN BODIN, LES SIX LIVRES DE LA RÉPUBLIQUE, ch. 8, at 182 (1576, reprinted 1986) (referring to the "*Prince souverain, qui n'est tenu rendre conte qu'à Dieu*"). In the aspiration to power, territorial communities are thus reduced to higher or lower levels of autonomy. W. Michael Reisman, *Autonomy, Interdependence, and Responsibility*, 103 YALE L.J. 401 (1993).

414. Compare the statement by Professor Reisman:

I think we would all agree that any changes . . . should be consistent with the basic code of international human rights. Secondly, the procedures by which these changes are accomplished should meet the emerging procedural requirements—what Professor Franck has called the

cases, both the preferences of indigenous communities and the aggregate interest as just defined will coincide, and indigenous needs and claims will be satisfied by the granting of various forms of autonomy. In cases of serious injustice, however, where there is no other remedy available, there should be at least a moral, if not a legal right, to secede.<sup>415</sup> The last-resort rationale has also been stressed by the Canadian Supreme Court in its recent opinion on the secession of Quebec.<sup>416</sup>

The indigenous peoples' struggles may run up against a variety of Western legal and social concepts and institutions. One is the concept of self-determination and possible secession, as detailed above. The other is the concept of group rights that back up "dangerous" intermediate forces between the government and atomized individuals.

### C. *The Issue of Collective Rights*

While individual rights are ascribed to an individual human being as such, who can invoke them in her own name, collective rights are ascribed to groups of people and can only be claimed by the collective entity and its authorized agents.<sup>417</sup> Rights of groups<sup>418</sup> go against the grain of traditional Western rights thought,<sup>419</sup> which is based on the paradigm of pitting the

emerging right to democratic consultation—or some approximation thereof. The selection of autonomy, self-governance, integration or independence should be based on a general conviction that the particular solution selected is the one that will yield the greatest advance in terms of human rights and minimum order for all those concerned.

W. Michael Reisman, 87 PROC. AM. SOC'Y INT'L L. 249 (1993).

415. ALLEN E. BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 27–85 (1990); Allen E. Buchanan, *The Right to Self-Determination: Analytical and Moral Foundations*, 8 ARIZ. J. INT'L & COMP. L. 41, 48 (1991); Allen E. Buchanan, *Federalism, Secession, and the Morality of Inclusion*, 37 ARIZ. L. REV. 53, 54 (1995). See also ANAYA, *supra* note 3; Daes Explanatory Note, *supra* note 405.

416. The Court concluded that "the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development." *Reference Re Secession of Quebec*, Aug. 20, 1998, ¶ 138, reprinted in 37 I.L.M. 1340, 1373 (1998). The Court did not find it necessary to rule directly on self-determination claims of Canada's indigenous peoples, since they were contingent on the secession of Quebec. It emphasized that "a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account." *Id.* ¶ 139, at 1374.

417. BUCHANAN, *supra* note 415, at 44.

418. For an introduction, see Thomas W. Pogge, *Group Rights and Ethnicity*, 39 NOMOS 187 (1997). See also Eugene Kamenka, *Human Rights, Peoples' Rights*, in THE RIGHTS OF PEOPLES, *supra* note 391, at 126; Gillian Triggs, *The Rights of Peoples and Individual Rights: Conflict or Harmony*, in THE RIGHTS OF PEOPLES, *supra* note 391, at 141.

419. The paradigm of this aversion to positive collective rights may be seen in the jurisprudence of the U.S. Supreme Court rejecting racial groups' claims to proportional representation in the political process. *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The individual is considered the paramount holder of rights; the Bill of Rights is considered "color-blind." Cf. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 1097 (1995) (affirmative action). Still, the empirical fact of special vulnerability of individuals based on voluntary or involuntary membership in certain groups (constituted by race, gender, alienage, etc.) has not been ignored by this Court, and has led to the employment of heightened, if not strict scrutiny standards with respect to differentiations based on such group characteristics. The equal protection

individual against the state on the basis of a mythical, entirely fictional social contract theory. Indian thinking, at least in their traditional stateless society,<sup>420</sup> is somewhat different: human beings, in their view, are born into a closely integrated network of family, kinship, social and political relations. One's clan, kinship and family identities are integral parts of one's personal identity; rights and responsibilities exist only within these networks. Indian society, thus, is horizontal, not vertical; it consists of a network of personal relationships. In the mind of indigenous people, their "nations" are not, like a Western nation-state, entities with distinct Hegelian existence separate and apart from their individual members. Members of tribal communities are existentially tied to each other in a network of deeply committed horizontal relationships.<sup>421</sup> Still, there are structures of authority within tribal groups, and there is a process of formation of a common will. This process of decision-making and its cultural, geographic, social and economic environment is what the ensemble of collective rights of indigenous peoples is designed to protect. Thus, in contrast to the entirely individualistic view, both the United Nations and the IACHR draft declaration on indigenous rights acknowledge certain collective entitlements. The relevant group rights protect culture, internal decisionmaking, and, in particular, control and use of land.

This recognition is indispensable in order to effectuate a workable system of protection of indigenous traditions and ways of life. To "individualize" these rights would frustrate the purpose they are supposed to achieve. Culture is a group phenomenon. It includes the tribal ways of life and the natural and spiritual environment in which these traditions are maintained and developed. Prescriptions aiming at preserving such phenomena assume, of necessity, a collective character. In defining and living its culture, the community will act as such, and may override individual members' predilections. Such "overrides" are, to be sure, just as state governments' political powers, limited by legitimate individual interests within the bounds of international human rights law.<sup>422</sup> Still, whether one calls the right one of "the group" or one of "the aggregate" of the "persons belonging to the group," as modern minority conventions do, the fact remains that the collective will in

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jurisprudence of "suspect classifications," starting with *Korematsu v. United States*, 323 U.S. 214 (1944), and powering *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny, is essentially group-sensitive. For a recent discussion of related issues, see *Symposium, Group Conflict and the Constitution: Race, Sexuality, and Religion*, 106 *YALE L.J.* 2313 (1997).

420. These insights stem from Aidan Southall, *Stateless Societies*, in 15 *INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCES* 157, at 167 (David L. Sills ed., 1968), with ample references. The difficulties with such across-the-board characterizations are pointed out by Lawrence Rosenn, *The Right to Be Different: Indigenous Peoples and the Quest for a Unified Theory*, 107 *YALE L.J.* 227 (1997).

421. Southall, *supra* note 420. See also SIEGFRIED WIESSNER, *DIE FUNKTION DER STAATSANGEHÖRIGKEIT* 90 (1989), with further references.

422. See *Lovell v. Canada*, Views of the U.N. Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. R. 6/24. See also BROWNLIE, *supra* note 284, at 99-100.

defining the group's identity and policy wins out over the individual aspiration.

Furthermore, to grant and specify rights to collectivities is not totally alien to Western constitutional practice. New Zealand,<sup>423</sup> for example, like Fiji,<sup>424</sup> grants its indigenous people a certain bloc of seats in Parliament. Canada expressly mentions "aboriginal rights" in its 1982 Charter of Rights and Freedoms,<sup>425</sup> and many other countries do offer constitutional protection to ethnic minorities, in line with article 27 of the International Covenant on Civil and Political Rights. The 1835 United States Treaty with the Cherokee Nation,<sup>426</sup> even though ultimately breached, guaranteed the Cherokee sanctuary and the right to exclusively govern themselves, after relocation from Georgia, in the supposed "Indian Country" of Oklahoma. Article VI of the U.S. treaty with the Delaware, the first treaty of the United States with any Indian nation, even envisioned that the Delaware and other tribes would ally with the United States, form a state, and send a delegate to Congress.<sup>427</sup>

Group rights in the context of indigenous peoples are thus necessary complements to the individual rights of their members. They are properly not conceived of as exclusive of, or displacing, individual rights, but as supplementing individuals' rights in pursuit of the common goal of a public order of human dignity.<sup>428</sup>

#### D. Enforcement

Treaties and provisions of these emerging prescriptive documents, to the extent they constitute norms of international law, partake in the general enforcement scheme of this area of jurisprudence. Like any other international law prescriptions, they are potentially invocable before international bodies, such as the United Nations Human Rights Committee. Indigenous peoples may also resort to the diplomatic, the economic, the ideological, and the

423. Electoral Act of 1993, No. 87, § 45 (1993).

424. *See supra* note 241.

425. Canadian Charter of Rights and Freedoms, *supra* note 60, art. 35(1).

426. Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478, *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 324 (Charles J. Kappler ed., 1903). This treaty was disregarded when, among other devices, "land runs" turned the supposed Indian territories into exclusively owned settlers' lands, paving the way for the State of Oklahoma and its admission to the Union on November 16, 1907. *See* KENNY A. FRANKS & PAUL F. LAMBERT, OKLAHOMA, THE LAND AND ITS PEOPLE, at 17-30 (1994); STAN HOIG, THE OKLAHOMA LAND RUSH OF 1889 (1989).

427.

And it is further agreed . . . should it . . . be found conducive for . . . both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress . . .

Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13, *reprinted in* 2 INDIAN AFFAIRS. LAWS AND TREATIES 3, art. VI (Charles J. Kappler ed. 1904). This 18th-century blueprint of co-determination, especially the ideas of an International Indian Council and an Indian delegate to Congress, was offered recently as a model for the 21st century. Kirke Kickingbird, *What's Past Is Prologue: The Status and Contemporary Relevance of American Indian Treaties*, 7 ST. THOMAS L. REV. 603, 628-29 (1995).

428. *Cf.* BUCHANAN, *supra* note 415, at 44.

military instrument, within the bounds of the modern law of war.<sup>429</sup> Since they lack the formal quality of states, indigenous peoples have no access, as parties in a contested proceeding, to the International Court of Justice.<sup>430</sup> Still, their legitimate concerns should be taken into account by the World Court to ensure that their legal interests are protected in any litigation that might affect them.<sup>431</sup> The better solution for addressing claims of Indian treaty or other indigenous rights violations would be to create a Permanent Forum for Indigenous People as envisioned by the United Nations Working Group.<sup>432</sup>

Consideration of establishment of this innovative institution is part of the objectives of the Decade of Indigenous People.<sup>433</sup> Its mandate, powers, structure, and location within the United Nations system are, however, far from being defined. Various governments as well as representatives of indigenous peoples have expressed the view, in recent discussions of the U.N. Working Group, that the Forum should have a broad mandate. It should cover human rights as well as cultural, political, economic, civil, social, environmental, developmental, and educational issues.<sup>434</sup> Indigenous representatives from Australia, in particular, stated that the Permanent Forum should be capable of receiving complaints about the abuse of human rights, in particular, those included in the future U.N. Declaration of the Rights of Indigenous Peoples.<sup>435</sup> According to the Asian Indigenous Caucus, it should be entrusted with the power to "take appropriate action to protect the human rights of indigenous peoples."<sup>436</sup> Institutionally, several governments supported the idea of placing the Forum at a high level within the United Nations structure, within the Economic and Social Council.<sup>437</sup> Many indigenous representatives would like to see it established at the highest possible level, at a minimum as a subsidiary body of the Economic and Social Council. One

429. Use of the military instrument might not be excluded in the rare instances in which an actual genocide occurs or is about to occur. Humanitarian intervention in the situation of a massive violation of fundamental human rights is a time-honored exception to the rule that prohibits the use of force. See Myres S. McDougal & Siegfried Wiessner, *Law and Minimum World Public Order: Introduction to the Reissue*, in MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR* xix, lii, n.77 (1994).

430. *Statute of the International Court of Justice*, June 26, 1945, 59 Stat. 1055, T.I.A.S. No. 993, art. 34(1).

431. To make up for this handicap, Professor W. Michael Reisman has suggested that the Court "try to develop functional equivalents for appearance by indigenous peoples." W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT'L L. 350, 361 (1995). "In every case in which an indigenous claim could have been lodged but for the standing impediment, the judges involved should raise the issue, so that the international *corpus juris* will advance, case by case, until the international legal system provides justice for all." *Id.* at 362.

432. Discrimination Against Indigenous Peoples, Report of the Working Group on Indigenous Peoples on its 14th Session (Geneva, 29 July–2 August 1996) at 31–33, 40, U.N. Doc. E/CN.4/Sub.2/1996/21 (1996) [hereinafter 1996 Working Group Report].

433. As listed in its programme of activities, G.A. Res. 50/157 (Dec. 21, 1995).

434. 1996 Working Group Report, *supra* note 432, ¶¶ 111, 117, at 31, 32.

435. *Id.* ¶ 129, at 32.

436. *Id.* ¶ 130, at 32.

437. *Id.* ¶ 126, at 31.

suggestion was made to name the institution the "United Nations Commission on the Status of Indigenous Peoples."<sup>438</sup> Many indigenous representatives emphasized that the Forum should consist of an equal number of members from governments and indigenous peoples on the basis of equal geographical distribution. Some indigenous persons found it useful to include independent experts as members.<sup>439</sup> Also, indigenous leaders have asserted that the forum should "have teeth" and be empowered to "take action" on serious violations of human rights of their people.<sup>440</sup>

The idea of a Permanent Forum of Indigenous People should be applauded for providing an important meeting ground between governments and indigenous peoples, as well as between indigenous peoples themselves. To leave its jurisdiction at this level, would, however, not transcend the power and authority of existing institutions. The Working Group on Indigenous Populations is, to a degree, already serving that function. The jurisdiction of the Permanent Forum would most usefully go beyond the concept of a place to meet and exchange ideas and information. It should be conceived as a body that responds to the aspirations of the indigenous peoples as recognized by nation-states. In particular, it could reinforce the domestic move toward negotiated solutions<sup>441</sup> of festering problems by providing a neutral, international ground for the drafting of agreements on controversial bilateral disputes over land, claims of breach of treaty, and assertions of violations of indigenous rights. Such a "good offices" or mediating function with respect to particular disputes between individual nation-states and indigenous peoples could, down the line, develop into an arbitral or adjudicative role if the world community gains trust in the good judgment of the body, and both potential parties to this possible conflict-settlement mechanism subject themselves to its jurisdiction. Thus, the Permanent Forum of Indigenous People could aspire to replicate the success that international panels of arbitration and mediation have enjoyed in the context of international business transactions.<sup>442</sup> Even if governments viewed the vest-

438. *Id.* ¶ 116, at 32.

439. *Id.* ¶ 118, at 32.

440. Julian Burger, *Indigenous Peoples and the United Nations*, in HUMAN RIGHTS OF INDIGENOUS PEOPLES 3, 16 (Cynthia Price Cohen ed., 1998) (referring to demands made at a pertinent 1995 workshop hosted by the government of Denmark).

441. See ANAYA, *supra* note 3, at 129-40. Regarding the United States, cf. Frickey, *supra* note 20, at 1780-84. On Canada, see REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES, *supra* note 66, Vol. 1, Pt. 7.

442. In *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972), the United States Supreme Court gave effect to an international choice-of-forum clause, arguing that "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630 (1985), even allowed for international arbitration of antitrust claims under U.S. law, reaffirming *Bremen* and interpreting it as "clearly eschew[ing] a provincial solicitude for the jurisdiction of domestic forums." The reasons motivating businesspeople to avoid the domestic tribunals of their respective home countries—the prevention of, at least perceived, "home court advantage"—would seem to apply equally to disputes between indigenous peoples and the states in which they reside.



ing of the Forum with the power of making binding decisions as too great an intrusion into their realm of sovereignty, they might still be amenable to conferring upon the Forum the measure of authority that regional human rights commissions and the United Nations Human Rights Committee enjoy, i.e., the power to receive complaints, to investigate them, to make findings of fact, and to attempt to bring about a friendly solution to the issues raised.<sup>443</sup> Such complaints could go specifically to the violations of international indigenous law, be it constituted by treaties or customary law or, ultimately, the United Nations Declaration on the Rights of Indigenous Peoples.

Beyond international law's own structures of enforcement, domestic legal systems should be looked at as the main engines of enforcing international law. In most domestic legal systems, the authoritative and controlling prescriptions of international law have been incorporated as standards of domestic legal systems, invited into the categorically different normative system of internal law through, usually, prescriptions of the highest rank, such as a constitutive document. In the United States, treaties, at least those of the "self-executing" kind, form part of the "supreme Law of the Land" as defined by the United States Constitution.<sup>444</sup> Customary international law is seen as

443. As to the jurisdiction of the U.N. Human Rights Committee to receive and consider individual complaints, see *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 59, U.N. Doc. A/6316, 999 U.N.T.S. 302 (1966). For the Inter-American system, compare Inter-American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, Doc. OEA/Ser.L./V/II.23 doc. rev. 2, arts. 44–51. As to the Council of Europe mechanism, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, arts. 25–32.

444. U.S. CONST. art. VI, § 2. Chief Justice Marshall, in *Foster and Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), introduced the heretofore unknown distinction between "self-executing" and "non-self-executing" treaties. This construction of the Supremacy Clause, originally based on the nature of the treaty—treaties of the "self-executing" kind were legislative in character, while the others contained only promises by the United States to take further action—ran against the text of the Constitution ("all Treaties . . . shall be the supreme Law of the Land") as well as President George Washington's interpretation of 1796 ("every Treaty [properly ratified] . . . thenceforward becomes the law of the land"), cited in JORDAN PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 51 (1996). Still, courts have followed Marshall's distinction and have declared a variety of international commitments, including the United Nations Charter, as non-self-executing, i.e., incapable of being invoked in United States courts without the presence of enabling or implementing legislation. See, e.g., *Sei Fujii v. California*, 217 P.2d 481 (Cal. App. 1950), *reb'g denied*, 218 P.2d 595 (Cal. Dist. Ct. App. 1950), *rev'd on this question but aff'd on other grounds*, 38 Cal.2d 718, 242 P.2d 617 (1952); *Manybeads v. United States*, 730 F. Supp. 1515 (1989). Sometimes, even when the treaty was of a clearly legislative character—an example being the International Covenant of Civil and Political Rights—the U.S. Government has seen fit to declare it non-self-executing in the process of ratification, thereby blocking a private cause of action in U.S. courts arising out of an alleged treaty violation. Cf. U.S. Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights, at 6–20, 102nd Cong., 2d Sess., Mar. 24, 1992, reprinted in 31 I.L.M. 645, 651–57 (1992). This practice has attracted domestic and international criticism. Cf. Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 516–18 (1991); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 631 (1991); Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1084 (1992); see also General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the Interna-

a standard of federal common law to be used by the courts either on the same level of normative strength as acts of Congress, or on a level just below.<sup>445</sup> Courts in the United States, as well as in other domestic systems, therefore, remain important battlegrounds<sup>446</sup> for the enforcement of international indigenous rights.

#### IV. CONCLUSION

Indigenous peoples around the world have come a long way. They have defeated expectations that they would simply vanish, assimilate, blend in, disappear in the mainstream, or maelstrom, of "modern" society. The First Nations have found their step again, and they have risen to become important actors in this "post-modern" social process.

This rise is not limited to a few places in the most affluent parts of the globe. As this analysis demonstrates, countries around the planet have given up on the age-old goal of "integrating" the original inhabitants of their territories into their modern way of life. In that vein, whether from genuine insight, or under more or less pressure, ruling elites have modified their laws throughout the Americas and beyond. They decided that indigenous peoples have a right to their distinct identity and dignity and to the governing of their own affairs—be they the "tribal sovereigns" in the United States, the Sami in Lapland, the *resguardos* in Colombia, or Canada's new province of Nunavut. This move toward recognition of indigenous self-government is

tional Covenant on Civil and Political Rights, CCPR/C/21/Rev.1/Add.6 (1994). The Restatement concludes, "In general, agreements that can be readily given effect by executive or judicial bodies, federal or state, without further legislation, are deemed self-executing, unless a contrary intention is manifest. Obligations not to act, or to act only subject to limitations, are generally self-executing," RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, Reporter's Note 5 (1987).

445. As Professor Jordan Paust has documented in an exhaustive review of relevant case law:

[customary international law] as 'law of the United States' within the meaning of several constitutional provisions, . . . is relevant both to the restraint and the enhancement of executive, congressional and judicial powers. Indeed, under Article III, section 2, clause 1 and Article VI, clause 2 of the Constitution, the judiciary is recognizably bound to identify, clarify and apply customary international law in cases otherwise properly before the courts, assuming that no unavoidable clash with some other constitutional requirement otherwise exists.

Jordan J. Paust, *International Law as Law of the United States* 9 (1996). Cf. also Restatement (Third) of the Foreign Relations Law of the United States § 111, Reporter's Note 4 (1987) ("Matters arising under customary international law also arise under 'the laws of the United States,' since international law is 'part of our law' . . . and is federal law"). See also *id.* at cmt. e; *id.* § 702, cmt. c.

Even critics of this stance agree:

The proposition that customary international law . . . is part of this country's post-*Erie* federal common law has become a well-entrenched component of U.S. foreign relations law. During the last twenty years, almost every federal court that has considered the . . . position has endorsed it. Indeed, several courts have referred to it as "settled." The . . . position also has the overwhelming approval of the academy.

Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816, 816-17 (1997) (suggesting, at 821, 873-76, "cautionary lessons for a democratic society increasingly governed by international law").

446. Cf. Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65 (1992).

accompanied by an affirmation of Native communities' title to the territories they traditionally used or occupied. Unthinkable only a few years ago, be it by virtue of a peace treaty in Guatemala, via a change of the constitution, as in Brazil, or by modification of the common law, as in Australia, domestic law now mandates in many countries the demarcation and registration of First Nations' title to the lands of their ancestors. Indigenous culture, language and tradition, to the extent it survived, is increasingly inculcated and celebrated. Treaties of the distant past are being honored, and agreements are fast becoming the preferred mode of interaction between indigenous communities and the descendants of the former conquering elites.

International law expectations build on this consolidated state practice. ILO Convention No. 169 and its emancipatory policy already covers a great number of indigenous peoples around the globe. Both on the regional and universal level, declarations on the rights and status of indigenous peoples are being finalized. They can, and should, be structured in such a way as to maximize for the intended beneficiaries the access to shaping and sharing of all the values humans desire. Coupled with the widespread practice of states specially affected by the issue, these efforts at international standard-setting do provide the requisite *opinio juris* for the identification of specific rules of a customary international law of indigenous peoples. They relate to the following areas:

First, indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life. Second, they hold the right to political, economic and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own system of justice. Third, indigenous peoples have a right to demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used. Fourth, governments are to honor and faithfully observe their treaty commitments to indigenous nations.

What is left are issues of balancing of rights, interests, and claims. They are by no means easy to resolve. What should be the exact scope of the aforementioned guarantees? What, precisely, ought to be protected? Is it just the traditional lifestyle, the ancient pattern of culture? Such an interpretation would run the risk of caging the members of these communities into a living museum, arguably an affront against the groups' and their individual members' dignity and freedom to choose a different way of life. Also, some historical manifestations of indigenous culture, such as the Aztec practice of human sacrifice to placate the Gods, may not appear worthy of protection. Should not the preservation of culture and the exercise of the right to self-determination be tempered and legally limited by fundamental individual human rights? Then again, who decides what values should prevail?

Another issue concerns the relationship between the indigenous group and its individual members. It would seem to be in line with modern conceptions of human rights to allow the individual member of the indigenous

community the choice of belonging to the group, sharing its traditions, living its way of life—or to leave and to join “modern” society. If it turns out that the attractions of the latter way of life are too great, i.e., too many members “defect,” the question then arises whether to let the indigenous culture disappear or to attempt to revitalize it and make it more attractive by financially supporting traditional lifestyles and communities, and celebrating them by creating a hospitable environment. The latter option of guaranteed governmental support may, however, create or perpetuate an unhealthy cycle of dependency and may be seen as paternalistic.

A last complex of issues arises from the return of traditionally indigenous lands from those who presently hold it, presumably with a fully recorded title. The redistributive schemes in post-Communist Europe might be of some help; then again, they are highly heterogeneous.

All of these issues and their resolution are extremely context-sensitive. Our common goal of constructing a public order of human dignity requires a responsible response to the value aspirations and claims of indigenous peoples as well as to conflicting claims. Social Darwinism cannot be the answer.