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Indigenous Peoples' Rights to Water Under International Norms

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ABSTRACT

In this article, Dean Getches examines the nature of international law as it relates to indigenous water rights and evaluates the kinds of claims that native peoples might assert when they are deprived of access to water. Around the world, indigenous peoples have experienced depletion or pollution of their traditional water sources caused by the uses made by dominant, non-native societies. As a result, native peoples’ ability to perform water-dependent vocations like farming and fishing, and to perpetuate cultures and spiritual practices requiring water is limited. While a few countries recognize water rights of indigenous peoples in
their domestic laws, the author focuses on the potential for asserting claims under international law, the primary source of protection where domestic law is lacking or non-existent. In a thorough assessment of the sources of law and types of water rights claims that can be made under international law, the author identifies six types of rights that exemplify ways in which claims can be framed and the various international law instruments and norms that can serve as the basis for those claims. However, because these claims are large and complex in nature, the assistance of lawyers and experts in international law is vital to efforts to advance the development of international law as an instrument for protecting indigenous water rights.

I. INTRODUCTION

Indigenous peoples throughout the world have seen their traditional water sources exploited to produce economic benefits for the dominant, non-native society. Depletion and pollution of water sources for development by non-native enterprises and individuals have often limited the ability of native peoples to carry on water-dependent vocations like farming and fishing, as well as to perpetuate cultures that may depend on traditional subsistence activities and spiritual practices requiring water. In addition, national governments typically have created water law systems that foster non-native uses and allow depletion or pollution of water supplies on which indigenous peoples depend.

Native communities may have rights under domestic law that they have not yet fully asserted. A few countries have begun to recognize indigenous water rights of native peoples either as a construct of domestic law or under indigenous norms.¹

The subject of indigenous rights under domestic water laws of various countries is beyond the scope of this paper although ultimately, domestic laws may be the most fruitful means of securing protection for water resources claimed by native peoples. This article is concerned with the potential for asserting claims under international law for deprivation of indigenous water uses, which may be the only or primary source of protection where domestic law is lacking or non-existent.

¹ The United States, for example, has a judicially created system of "reserved water rights" that ostensibly recognizes paramount rights in Indian tribes within the dominant water rights system. See David H. Getches, Indian Water Rights Conflicts in Perspective, in INDIAN WATER IN THE NEW WEST 7 (Thomas R. McGuire et al. eds., 1993). The application of tribal norms and direct tribal control of water allocation and use is limited under this system. See DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 854–59 (4th ed. 1998).
Nearly all indigenous populations share a common set of problems stemming from their social and political position as non-dominant, colonized, or conquered populations. As colonial powers extended their control, the indigenous populations often suffered. Colonizers extracted, developed, or despoiled local natural resources in their quest for riches. Under the guise of “civilizing” native groups, which were often seen as primitive, colonizers systematically imposed their cultural and political identities upon indigenous populations, stripped them of many of their ancestral lands and resources, and deprived them of their traditional ways of life.

In arid or semi-arid environments, the need for water to survive and make a living from the land is particularly acute. These include many of the areas of the Americas where indigenous groups are still located, from the deserts and plains of the United States and Mexico to the altiplano of South America’s Andean region. Many native peoples of the Americas have managed to cling to their cultural heritage despite having been driven into remote areas by colonialists and the European settlers who followed. The white newcomers considered those lands to be unproductive or undesirable. Survival—both economic and cultural—for once-isolated indigenous societies is becoming increasingly difficult because the growth of non-native populations and economies is now putting greater pressure on the remaining natural resources, including water.

There is no body of international law that specifically protects indigenous peoples’ ability to prevent overuse or misuse of water by others or to ensure their access to water. However, several multinational accords and international norms relate to the conduct, practices, and policies of dominant governments with respect to indigenous populations and individuals. Potential indigenous claims to rights in water—and in land and natural resources—can be derived from international human rights guarantees, environmental protection commitments, and other accepted principles. The fact that water has not been specifically addressed in these accords is partly because international law only recently has begun to comprehend the unique nature of the natural resource claims of indigenous peoples. Furthermore, indigenous groups or individuals have rarely asserted claims to lands and natural resources (except under the domestic laws of a few countries). It is likely that more claims will be brought as international human rights law is read to include indigenous rights to water and other natural resources.
II. THE NATURE OF INTERNATIONAL LAW

A. Formal Agreements

Although international law contains no express protections for indigenous peoples’ interests in water, indigenous claims could fit within several categories of protection that are mentioned in human rights and other instruments covering rights to property, environmental protection, subsistence, cultural preservation, racial discrimination, and self-determination. Various agreements therefore could be the basis under international law for indigenous peoples to claim protections for water and other natural resources.

A body of international human rights law as applied to the rights of indigenous peoples has emerged over the last fifty years. In 1948 the Organization of American States General Assembly took the first step in accepting Article 39 of the Inter-American Charter of Social Guaranties.2 The Charter required American states to take “‘necessary measures’ to protect indigenous peoples’ lives and property, ‘defending them from extermination, sheltering them from oppression and exploitation.’”3 Since this regional recognition of indigenous rights in 1948, various multilateral and bilateral agreements have been adopted in an effort to protect indigenous peoples’ rights.

One of the most important accords is International Labour Organisation Convention No. 169 on Indigenous and Tribal Peoples of 1989 (I.L.O. No. 169).4 The basic theme of I.L.O. No. 169 is embodied in the Convention’s preamble which recognizes, “the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to... develop their identities, languages and religions, within the framework of the States in which they live.”5 Professor James Anaya explains that upon this premise, “[t]he Convention includes extensive provisions advancing indigenous

5. Id. pmbl., para. 5, 28 I.L.M. at 1384.
cultural integrity, land and resource rights, and nondiscrimination in social welfare spheres; in addition, it generally enjoins states to respect indigenous peoples’ aspirations in all decisions affecting them.  

Several other international conventions primarily relating to human rights or, more recently, to environmental protection, are potential sources of indigenous rights relating to land and resources, environmental quality, subsistence, culture, racial discrimination, and self-determination or participation in decisionmaking. These are discussed in the next section. Some international tribunals charged with carrying out international agreements and domestic courts of some countries have upheld the application of these international laws to protect various interests of indigenous peoples. Yet no courts have yet extended the reach of international law to protection of access to water for indigenous peoples. The possibilities for such claims are explored in this paper.

B. Informal or Customary International Law

Besides formal, binding agreements, a variety of norms that could apply to indigenous water rights have been accepted by the nations of the world. For instance, “Agenda 21” adopted at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, provides a set of standards for countries in their use and conservation of natural resources. Nearly all the nations of the world have accepted these standards. One standard requires the full participation of the public, especially water-user groups and indigenous people and their communities.

But not all the sources of rights discussed in this paper have been widely adopted by countries of the world. Some are merely draft documents that have not yet been presented to the United Nations or other international organizations for their consideration. Nevertheless they remain helpful sources in attempting to find the norms that should guide international conduct toward indigenous peoples. Article 38 of the Statute of the International Court of Justice states that custom is among the primary sources of international law:

8. Id. ch. 18.9(c).
Article 38(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.  

Customary international law, included in paragraph b, exists where there is a general consensus among states concerning legal practices and norms in a particular field. If a common understanding exists, states may expect other states to act in conformity with the general consensus. It is arguable that such a consensus presently exists concerning the rights of indigenous peoples:

[I]t is evident that indigenous peoples have achieved a substantial level of international concern for their interests, and there is a substantial movement toward a convergence of international opinion on the content of indigenous peoples' rights, including rights over lands and natural resources. Developments toward consensus about the content of indigenous rights simultaneously give rise to expectations that the rights will be upheld, regardless of any formal act of assent to the articulated norm.  

Based largely on the content of international human rights conventions and customs apart from domestic laws, John Alan Cohan argues that "the international community now regards indigenous peoples as having environmental rights that rise to the status of international norms" and that "because indigenous peoples' way of life and very existence depends on their relationship with the land, their human rights are inextricable from environmental rights."  


10. Anaya & Williams, supra note 2, at 54.

environmental rights can include "the right of indigenous peoples to control their land and other natural resources... to maintain their traditional way of life."\(^\text{12}\)

As paragraph c of Article 38 provides, the general principles of the domestic laws of countries can also constitute customary international law. However, this is not a rich source of principles of indigenous water rights. Only "a few countries, the United States among them, have made substantial efforts to protect the heritage of their indigenous populations."\(^\text{13}\) In the United States, this protection includes the right to adequate amounts of water.\(^\text{14}\)

International development agencies have also incorporated indigenous rights into their policies. The rules and policies of these agencies provide a further demonstration that such rights have been accepted as international norms.

Criticism of World Bank projects led the Bank to adopt special requirements for projects affecting indigenous peoples. Operational Procedure 4.10 states that "in Bank-assisted projects which affect indigenous peoples, the Borrower takes into account their individual and collective rights to use and develop the land that they occupy, to continue to have access to natural resources vital to their subsistence, to the sustainability of their cultures, and to their future development."\(^\text{15}\)

Although these provisions note the significance of indigenous lands and resources, the provisions do not prohibit encroachment on indigenous interests in resources. Nevertheless, they do refer to these interests as "rights" and require that the Borrower "takes into account" such rights.\(^\text{16}\)

Operational Directive 4.20 provides more specifically that "the borrower should prepare an indigenous peoples development plan" to insure that indigenous peoples do not suffer adverse effects from Bank funded projects.\(^\text{17}\) However, both internal evaluations and independent

\(\text{original.}\)

12. Id.


17. WORLD BANK OPERATIONAL MANUAL, OPERATIONAL DIRECTIVE ON INDIGENOUS PEOPLES, OD 4.20, para. 13 (1991), at
reviews of Bank projects reveal that Operational Directive 4.20 was applied in fewer than half the projects and that compliance was weak and highly variable. Although the Bank’s directives on indigenous peoples include detailed guidelines and benchmarks, they contain no provisions for redress, dispute resolution, or compensation. In response to these findings, the World Bank’s Board revised the policy and on November 29, 2004 posted a revised draft for public comment. The Board plans to replace Operational Directive 4.20 with the improved policy. The new Directives could serve as a norm for other international development agencies that fund projects in indigenous territories. Additionally, the World Bank Group now requires participation from all stakeholders, a requirement which some have interpreted to require free, prior, and informed consent from affected communities to agree to a project before it is implemented. This is intended to improve development by providing communities with information that will allow them to negotiate with developers and governments. However, in practice free, prior, and informed consent is not always required by World Bank projects and is not clearly mandated by the bank’s policies.

The Inter-American Development Bank (IDB) also has promulgated an Operational Policy on Indigenous Peoples “to ensure social inclusion and equality of opportunity for indigenous peoples.” Operational Policy 2.4 states that the policy should include “[s]afeguards for the individual and collective rights of indigenous peoples as recognized in national and international law, including consideration of indigenous customs and uses.” Although the policy does not specifically mention protection of water rights, it broadly states that “lands and related natural resources”


20. Id.


22. Id. at 67.


24. Id. para 2.4.
should be protected.\textsuperscript{25}

\textbf{C. Enforcement of International Law}

1. \textit{International Tribunals}

Assuming that international agreements and norms include protections that could be invoked to support indigenous claims related to water, it nevertheless may be difficult to find a forum to hear such claims. Professor Robert Williams writes that "the International Court of Justice and many other more effective and high-profile forums of international law are available only to states—a term which under present conceptions of international law, does not include indigenous peoples."\textsuperscript{26}

Some tribunals created to carry out agreements protecting human rights allow individuals and groups to bring claims before them. These include the United Nations Committee on Human Rights. Similar entities, such as the Inter-American Commission on Human Rights, exist to enforce and interpret regional agreements. The threshold issue is whether a claim is admissible according to the protections of the relevant instrument and the rules under which they operate. It is not always possible to have a claim heard by these bodies, but indigenous peoples have been successful in gaining access to pursue their natural resources claims in a number of recent cases.\textsuperscript{27}

In July 2002, the Inter-American Commission took a substantial step towards providing for indigenous peoples' rights when it released findings that the United States had violated international human rights by depriving the Western Shoshone Indians of ancestral lands claimed by the federal government where some tribal members continued to graze cattle.\textsuperscript{28} Yet the essentially advisory nature of such rulings was shown by the reaction of the United States when the U.S. Department of State rejected the Commission's findings because it determined that the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{25} Id.
\item \textsuperscript{28} Inbal Sansani, \textit{American Indian Land Rights in the Inter-American System: Dann v. United States}, 10 No. 2 HUM. RTS. BR. 2, 2 (2004).
\end{itemize}
\end{footnotesize}
Indians' land claims, as asserted by certain tribal members, the Dann sisters, had been litigated to finality in U.S. courts without success.\textsuperscript{29} Having rejected the Commission’s recommendations, the United States government seized and confiscated livestock from the federal land, stating that the claim was “fundamentally, not a human rights claim, but an attempt by two individual Indians to reopen the question of collective Western Shoshone tribal property rights to land.”\textsuperscript{30}

2. Domestic Courts

National courts and administrative tribunals may also apply international law. Therefore, the utility of international agreements and norms for indigenous peoples varies among countries, based on the degree to which their courts accept international law as a source for their rules of decision. This acceptance is especially limited in U.S. courts. The United States has not ratified many of the potentially applicable agreements. Moreover, U.S. courts rarely apply international law even when the United States has subscribed to particular instruments.

Over the past 200 years, United States judges have developed a series of rules and practices that minimize the role of international law in domestic litigation. Considered collectively, these rules and practices embody a thoroughgoing, deeply rooted provincialism—an institutional, almost reflexive, animosity toward the application of international law in U.S. courts. As a consequence, international law plays almost no part in the judicial business of the United States. It is rarely discussed in American cases, and almost never provides the rule of decision upon which court judgments turn.\textsuperscript{31}

The courts of other nations are more hospitable to claims brought under international law. Several decisions of national courts enforcing international law are discussed in this paper.

3. Free Trade Issues

Special treaties and tribunals to ensure free trade have emerged, creating a separate and currently influential body of international law. This raises a collateral concern about the enforceability of international law to protect indigenous rights to natural resources when to do so would inhibit international trade and investment. Some of the special trade

\textsuperscript{29} Id. at 5.
\textsuperscript{30} GETCHES ET AL., supra note 1, at 294.
\textsuperscript{31} Patrick M. McFadden, Provincialism in United States Courts, 81 CORNELL L. REV. 4, 5 (1995).
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courts interpret bilateral and multilateral agreements to elevate free trade above other values and interests. Thus, for example, the World Trade Organization (WTO) has been reluctant to allow signatories to the General Agreement on Tariffs and Trade to adopt measures an individual country believes to be necessary to protect species covered by the Convention on Trade in Endangered Species if it would inhibit free trade.\(^{32}\)

If one country tries to limit the importation of goods because they are produced in a manner that harms indigenous rights, will the WTO or a similar body allow such a restriction? Although the confrontation has not yet arisen, it is possible that the WTO and other entities, such as the tribunals enforcing the North American Free Trade Agreement and similar agreements, will subordinate the interests and rights of indigenous peoples to the promotion of free trade. This often has been the pattern in cases where states have attempted to restrict importation of goods produced in ways that offended national environmental laws. The trade treaties have been said to reflect "a disturbing lack of balance between the protection of private interests and the need to promote and protect the public welfare."\(^{33}\) Similarly, indigenous people may not prevail when their rights under international law conflict with the private interests furthered by free trade agreements.

Conflicts between indigenous rights and free trade could arise in other ways. For example, an international company could invest in the development and transfer of water that causes harm to indigenous cultures and economies. If the national government attempts to restrict water development for the sake of affected peoples—particularly after the same government has granted a concession to the company allowing it to use the water—a trade court could see it as an expropriation in

\(^{32}\) E.g., GATT Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna, 30 I.L.M. 1594, 1623 (1991) (concluding that U.S. prohibitions on imported tuna from Mexico that are not dolphin-friendly and the prohibitions of the Marine Mammal Protection Act are contrary to Article XI:1 of GATT and are not justified by Article XX(b) and Article XX (g)); GATT Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna, 33 I.L.M. 839, 899 (1994) (concluding that U.S. import restrictions on tuna are inconsistent with the GATT prohibition on quantitative restrictions); WTO Appellate Body Report, U.S.—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998) (concluding that the U.S. import prohibitions of shrimp products harvested with fishing technology that adversely affects sea turtles are not justified under Article XX of the GATT 1994).

conflict with free trade principles protecting international investments. This arguably would entitle the company to compensation.

It may be advisable for indigenous peoples and their allies to take the initiative and use the free trade regime as a vehicle to enforce their rights. Some Indian nations in Canada together with several environmental groups attempted an experiment in the affirmative use of trade law. Joined by the United States, they brought a complaint before the WTO asserting that Canada effectively subsidized exports of wood by failing to accommodate and compensate for the interests of indigenous peoples in the timber resources that are cut from their aboriginal lands. If Canada respected the economic and cultural rights of the indigenous peoples, whose aboriginal lands were being logged, the price of timber would be higher. Therefore, disregard of the tribes’ land and resource rights resulted in an unfair price for timber and the challengers argued that this would, in turn, enable importing countries to impose a tariff. In April 2004 the WTO decided the case without considering protections for indigenous peoples derived from other international agreements in calculating subsidies. Nevertheless, the affirmative use of trade law to enforce indigenous resource rights may be an option for peoples affected by uncompensated resource exploitation in their territories without their consent if it results in the exportation of products.

### III. Types of Indigenous Water Rights Claims Under International Law

The many international agreements and potential sources of customary international law that could be sources of indigenous rights to water can be roughly divided into categories that correspond with the kinds of claims that indigenous people might assert when they are deprived of access to water. Agreements and norms support claims that

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Indigenous Peoples' Rights to Water could fit within several categories.

A. Protections for Indigenous Lands and Resources

Because indigenous populations are usually tied inextricably to their lands for sustenance, cultural identity, and spirituality, their demands for the recognition of indigenous land rights are frequently closely linked to demands for human rights protections. Some international environmental agreements also mention indigenous rights to land and resources.

When speaking of indigenous land rights it is important to establish the premise that land rights include water. Sources of international law do not always make this explicit, but several instruments, including declarations arising out of some international conferences, establish the connection between land and water. The Declaration of Principles for the Defense of Indigenous Nations and People of the Western Hemisphere was developed and circulated by indigenous participants at the Non-Governmental Organization Conference on Discrimination Against Indigenous Populations, Geneva, 1977. The Declaration said in Article 10 that “[t]he land rights of an indigenous people include . . . full rights and interior and coastal waters.” Article 11 went on to state that:


39. Id. art. 10.
It shall be unlawful for any State to make or permit any action or course of conduct with respect to the territories of an indigenous nation or group which will directly or indirectly result in the destruction or deterioration of an indigenous nation or group through the effects of pollution of earth, air, water, or which in any way depletes, displaces or destroys any natural resources or other resource under the dominion of, or vital to the livelihood of an indigenous nation or group.\footnote{Id. art. 11.}

A second premise is that land rights of indigenous peoples are not limited to ownership rights. They extend to traditional use and occupancy of lands and resources. The American Convention on Human Rights\footnote{The convention has been ratified by 25 countries. OAS, DEP'T LEGAL AFFAIRS & SERVS., B-32: AMERICAN CONVENTION ON HUMAN RIGHTS “PACT OF SAN JOSE, COSTA RICA,” at http://www.oas.org/juridico/english/Sigs/b-32.html (last visited Apr. 9, 2005).} (IACHR) also recognizes that indigenous peoples’ rights to land and resources do not derive from formal state recognition, but from traditional use and occupation.\footnote{Fergus MacKay, supra note 16, at 598.} This understanding is based in large part upon the realization that “‘[c]ertain indigenous peoples maintain special ties with their traditional lands, and a close dependence upon the natural resources provided therein—respect for which is essential to their physical and cultural survival.’”\footnote{Martin Wagner, The International Legal Rights of Indigenous Peoples Affected by Natural Resource Exploitation: A Brief Case Study, 24 HASTINGS INT’L & COMP. L. REV. 491, 497 (2001) (quoting Report on the Situation of Human Rights in Ecuador, Organization of American States, Inter-American Commission on Human Rights, at 106, OEA/Ser.L/V.II.96, doc. 10 rev. 1 (Apr. 24, 1997)).} MacKay observes that:

According to the IACHR, indigenous peoples’ property rights, including ownership, derive from their own forms of land tenure, traditional occupation, and use, and exist absent formal recognition by the state. This is consistent with aboriginal title jurisprudence in most common law states and with international instruments in general. The IACHR has related territorial rights on a number of occasions to cultural integrity, thereby recognizing the fundamental connection between indigenous land tenure and resource security and the right to practice, develop, and transmit culture free from unwarranted interference. In 1997, for instance, the IACHR stated that: “For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers to both its capacity for providing the resources which sustain life, and to ‘the geographical space necessary for the cultural and social reproduction of the
Human rights agreements include strong protections for indigenous land rights. Article 13 of I.L.O. No. 169 provides that indigenous and tribal peoples are to enjoy full human rights that, in turn, include rights to use land. The land rights provisions of I.L.O. No. 169 are framed by Article 13 that refers to lands or territories that “they occupy or otherwise use.” It goes on to say that “[t]he use of the term ‘lands’ in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.” Article 14 states that the possessory rights of native peoples established by use and occupancy must be protected:

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities . . . .

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

The recognized rights include the right of native peoples “to participate in the use, management and conservation of these resources.” Finally, the Convention requires states to provide penalties for unauthorized intrusion upon or use of indigenous lands.

The Convention only binds signatory states but its impact may extend farther. A distinguished commentator argues that, “[i]n addition to creating treaty obligations among ratifying states, Convention No. 169 is properly viewed as reflecting a new and still developing body of customary international law.” According to this approach, whether or not a particular country has signed Convention No. 169 is immaterial—it

45. I.L.O. No. 169, supra note 4, art. 13, 28 I.L.M. at 1387.
46. Id.
47. Id. (emphasis added).
48. Id. art. 14, 28 I.L.M. at 1387.
49. Id. art. 15, 28 I.L.M. at 1387.
50. Id. art. 18, 28 I.L.M. at 1388.
51. I.L.O. No. 169 has been ratified by 17 countries. INT’L LABOR ORG., c 169 RATIFIED 17 INSTRUMENT(S), at http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?c169 (last visited Apr. 9, 2005).
52. Anaya, supra note 6, at 8.
may be bound by customary international law’s recognition of indigenous peoples’ property rights in natural resources that they have traditionally used.

The Union of Huichol Indigenous Communities of Jalisco successfully used I.L.O. 169 to secure land title to which had been illegally adjudicated in the 1960s by the Mexican Government. Although the Community brought the case under Article 13 and 14, the ILO Committee of Experts found that Mexico had violated Article 2 which prevents governments from discriminating against indigenous peoples and requires them to “promote the economic, social, and cultural rights of those people.” 53 In addition, the Committee emphasized the importance of Article 4 which instructs governments to protect persons and cultures of the people affected by a project. 54

Indigenous land and resource rights are also protected by various human rights instruments of the Organization of American States (OAS). The American Convention on Human Rights of 1978 is binding upon the signatory states of the OAS. 55 Although the Convention does not specifically mention indigenous peoples, it includes “general human rights provisions that protect traditional indigenous land and resource tenure” including “provisions explicitly upholding the rights to property.” 56 This instrument has provided one of the rare examples where the guarantees of an international convention have been applied to vindicate indigenous rights to natural resources.

The Awas Tingni Community successfully used the American Convention on Human Rights to defend their traditional lands in the Atlantic coast region of Nicaragua. 57 Although Nicaraguan law generally recognized that indigenous people had certain rights in the lands they traditionally used and occupied, it did not recognize indigenous land ownership and treated these untitled lands as state lands. The Nicaraguan

54. Id.
56. Anaya & Williams, supra note 2, at 41.
government granted a foreign company rights to construct roads and to exploit timber on traditional Awas Tingni lands that threatened damage to the environment and to social and cultural integrity.

After failing to obtain protection for its rights in domestic courts, the Awas Tingni Community filed a petition with the Inter-American Commission on Human Rights asserting rights to their communal lands and resources. Ultimately the Inter-American Court considered the case and delivered its judgment in 2001. The court held that the American Convention on Human Rights includes the right of indigenous peoples to hold their customary lands and resources under the protection of domestic governments. The court resolved that Nicaragua "violated the right to property protected by Article 21 of the American Convention on Human Rights to the detriment of the members of the Mayagna (Sumo) Community of Awas Tingni in connection with Articles 1(1) and 2 of the Convention..." It directed that Nicaragua "must adopt the... measures required... for delimitation, demarcation, and titling of the property of" the Awas Tingni and do so "in accordance with their customary law, values, customs and mores." This decision exemplifies the possibility of invoking the protections of individual rights found in international human rights instruments to sustain the collective land and resource rights of indigenous peoples when they are ignored by domestic law.

An earlier OAS instrument, the American Declaration on the Rights and Duties of Man was accepted in 1948. The American Declaration is "the principal instrument for determining the applicable substantive rights for those [OAS] countries [not signatories to the American Convention on Human Rights] in proceedings before the Inter-American [Court]." Like the American Convention on Human Rights, the American Declaration does not specifically mention indigenous people, but rather provides general human rights provisions upholding the right to property and other basic human rights of individuals. The same principle adopted by the Court in the Awas Tingni case arguably could be invoked to extend the individual rights contained in the Declaration to secure collective rights based on indigenous customary use and occupancy.

The Proposed American Declaration on the Rights of Indigenous Peoples was approved by the Inter-American Commission on Human Rights at its 95th session, February 26, 1997. Article XVI provides that

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58. Id.
59. Id. Operative para. 2.
60. Id. para. 164.
61. Anaya & Williams, supra note 2, at 41.
62. See Proposed American Declaration on the Rights of Indigenous Peoples, Inter-
indigenous law should be made an integral part of a nation's legal system and Article XVII provides that indigenous practices are to be included in national organizational structures.\textsuperscript{63} It follows that the traditional ownership of land and resources must be recognized by national governments. Professors Anaya and Williams argue that:

Excluding indigenous property regimes from the property protected by the American Convention and American Declaration would perpetuate the long history of discrimination against indigenous peoples. Such discriminatory application of the right to property would be in tension with the principle of non-discrimination that is part of the Inter-American human rights system's foundation.\textsuperscript{64}

It should be noted that indigenous peoples will have difficulty protecting their property rights in lands and natural resources if the extent of those lands is uncertain. For this reason, the Inter-American Commission on Human Rights long ago cited the rights of indigenous peoples under the American Declaration to support its decision that Brazil should demarcate the lands of the Yanomami Indians.\textsuperscript{65} The laws of Brazil recognized the rights of Indian communities to possess the lands they traditionally occupied and gave them the exclusive use of natural resources within those lands. When the government began a program of building highways and allowing widespread mining, however, the occupation and development of lands in area of the Yanomami caused profound social, economic, cultural, and environmental harm to the people and land. The Yanomami had violent conflicts with miners and in some cases highway workers and miners drove the Indians out of their villages. Without demarcation of the Yanomami territory, their rights to protect lands and resources from illegal occupation or exploitation by others were mostly theoretical.

In 1988, Brazil revised its constitution and ordered the demarcation of all indigenous territories by 1993.\textsuperscript{66} However, in 1996 the Brazilian

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\textsuperscript{64} Id. arts. XVI, XVII.


government issued a decree delaying the demarcation of new reserves and effectively impeded the indigenous rights that were guaranteed under the new constitution.\textsuperscript{67} The decree states that cities and non-Indians can challenge demarcation and suspend Indian property claims. Although the Yanomani have secured some victories, at present they have gained control of only a quarter of their original lands,\textsuperscript{68} lands which remain threatened by mining interests, politicians, and the Brazilian military.

Demarcation becomes important when others compete for rights to indigenous lands, waters, or other resources. But if demarcation does not occur until conflict arises, the political and economic forces opposed to indigenous rights are more likely to use their power to prevent full recognition of those rights by the government. If a government has already granted rights to exploit indigenous lands to others, as in the Awas Tingni case, the lack of demarcation will make it more difficult for the indigenous people to challenge the government action. Therefore, it is beneficial for indigenous groups to have the extent of their traditional territories determined before others seek to exploit their resources.

\textbf{B. Environmental Protection}

Three kinds of international agreements or norms potentially protect indigenous rights to environmental quality relating to use and control of water. First, the right to environmental protection is implicit in international instruments specifically acknowledging indigenous land rights such as those discussed in the preceding section. Second, environmental rights can be derived from human rights guarantees. Because the way of life and the very existence of indigenous peoples usually depend on their relationship with the land, their human rights are inextricable from environmental rights. Thus, human rights instruments that are silent on the subject may be sources of rights to environmental protection that would extend to water resources. Finally, the emergence of international law directly protecting the environment has special significance for indigenous peoples. When these protections are considered together it is reasonable to conclude that the international community has accepted norms that provide support for the rights of indigenous people to protect, use, and manage water resources.\textsuperscript{69}

\begin{footnotesize}
\begin{enumerate}
\item[69.] Cohan, \textit{supra} note 11, at 154.
\end{enumerate}
\end{footnotesize}
One of the most important instruments protecting the human rights of indigenous peoples is I.L.O. No. 169. Article 15 and paragraph 4 of Article 7 require states to safeguard indigenous peoples’ rights concerning the environment and natural resources of indigenous lands. Article 7 requires governments to “take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.” And Article 15 provides that, “[t]he rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded.”

The first major international agreement specifically addressing the environment was the Stockholm Declaration (“Declaration”) emanating from the 1972 United Nations Conference on the Human Environment. The Declaration recognized in Principle 5 that “[t]he non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.” Although it did not deal specifically with the rights of indigenous peoples, the Declaration can be read to imply that indigenous peoples have a right to an equitable share of a state’s waters.

In 1992, the international environmental community adopted the Rio Declaration reaffirming and updating the principles set forth in the Stockholm Declaration; a new consensus was reached concerning international environmental policies to protect the world’s ecosystems and biological diversity. Principle 22 of the Declaration recognized that: “Indigenous People and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.” Further, “the Rio principles reflect an evolution in awareness of the important unique nature of the environmental problems

70. See generally I.L.O. No. 169, supra note 4.
71. Id. arts. 7, 15, 28 I.L.M. at 1386. 1387.
72. Id. art. 7, 28 I.L.M. at 1386.
73. Id. art. 15, 28 I.L.M. at 1387.
75. Id. princ. 5, 11 I.L.M. at 1418.
77. Id. princ. 22, 31 I.L.M. at 880.
faced by indigenous groups and communities.”\textsuperscript{78}

Agenda 21, also adopted at the United Nations Conference on Environment and Development in Rio in 1992, was “essentially a plan of action for carrying out the principles in the Rio Declaration.”\textsuperscript{79} Chapter 26 of Section 3 of Agenda 21 deals with the role of indigenous people and their communities:

Indigenous people and their communities have a historical relationship with their lands and are generally descendants of the original inhabitants of such lands. In the context of this chapter the term “lands” is understood to include the environment of the areas which the people concerned traditionally occupy. Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. Their ability to participate fully in sustainable development practices on their lands has tended to be limited as a result of factors of an economic, social and historical nature. In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.\textsuperscript{80}

Chapter 26.3 of Agenda 21 also calls for “[r]ecognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate.”\textsuperscript{81} By recognizing that “traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities,”\textsuperscript{82} Agenda 21 would support the rights of indigenous peoples to water needed to maintain indigenous culture.

Chapter 26.4 of Agenda 21 recognizes the cultural importance of indigenous environmental controls: “Some indigenous people and their communities may require, in accordance with national legislation, greater

\textsuperscript{79} Id. at 383.
\textsuperscript{80} Agenda 21, \textit{supra} note 7, ch. 26.1.
\textsuperscript{81} Id. ch. 26.3.
\textsuperscript{82} Id.
control over their lands, self-management of their resources, participation in development decisions affecting them, including, where appropriate, participation in the establishment or management of protected areas.\textsuperscript{83}

The Convention on Biological Diversity is another instrument adopted by nearly all the nations of the world at the Rio conference in 1992.\textsuperscript{84} Its attention to indigenous peoples was largely directed at protecting their property interests in biological resources. However, one writer argues that the Convention could assist indigenous peoples, at least indirectly, in resisting environmentally damaging dam construction in their territories.\textsuperscript{85} He cites an analogous 1995 ruling that plans to build a paved road in wild areas within Daisestuzan National Park would breach the Japanese government’s obligation “not to destroy biodiversity” under the Convention on Biological Diversity.\textsuperscript{86}

The Rio conference strived to balance economic development and environmental protection and also to respect the sovereignty of states. Therefore the international commitments coming out of the conference stressed the autonomy of states in resource development decisions. Principle 2 of the Rio Declaration (in language similar to Principle 21 of the Stockholm Declaration) says that:

\begin{quote}
States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.\textsuperscript{87}
\end{quote}

This conclusion could limit claims seeking to apply international law to protect indigenous peoples’ rights to natural resources, including water. However, the general statement in Principle 2 arguably is subordinate to the specific protections for the rights of indigenous peoples in Principles 10, 22, and 23.

\begin{itemize}
\item \textsuperscript{83} Id. ch. 26.4.
\item \textsuperscript{84} Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.
\item \textsuperscript{85} Morihiro Ichikawa, Protection of Ecological and Cultural Values of Watersheds Under the Convention on Biological Diversity and the International Covenant on Civil and Political Rights (paper presented at conference \textit{Allocating and Managing Water for a Sustainable Future: Lessons From Around the World}, 2002) (on file at Natural Resources Law Center, University of Colorado School of Law, Boulder, Colo.).
\item \textsuperscript{86} Id.
\item \textsuperscript{87} \textit{Rio Declaration}, supra note 76, princ. 2, 31 I.L.M. at 876.
\end{itemize}
C. Subsistence Rights

Several international instruments on human rights and civil rights protect the rights of people to seek and acquire basic subsistence. Because access to water is vitally important to the quest for subsistence by most indigenous peoples these instruments are another potential source of rights to use and control water resources.

The United Nations International Covenant on Civil and Political Rights (ICCPR) states in Article 1 section 2 that a people cannot be deprived of its own means of subsistence, and in Article 27 that “ethnic minorities . . . shall not be denied the right, in community with the other members of their group, to enjoy their own culture.” The Human Rights Committee was established to determine complaints made pursuant to the ICCPR. The Committee’s decisions recognize broad protections for traditional uses of natural resources because:

[Indigenous peoples’ subsistence and other traditional economic activities are an integral part of their culture, and interference with those activities can be detrimental to their cultural integrity and survival. By necessity, the land, resource base, and the environment thereof also require protection if subsistence activities are to be safeguarded . . . [Thus, the Committee has said that] “necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands” and that “securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities . . . must be protected under Article 27.”

It appears that there are at least two limitations to the potential protections for water use rights under Article 27. One is that the activity would have to be a traditional cultural activity rather than a use of water for modern economic development. The other is that the impact on culture would have to be significant, not incidental or minor.

A case decided by the Committee in 1996 illustrates the

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applicability, and the limits, of Article 27. In Länsman v. Finland Sámi reindeer herders in northern Finland challenged plans of the national government to allow logging and road construction in a 3000 hectare area used by the Muotkatunturi Herdsmen’s Committee as winter pasture and spring calving grounds. The claim was rejected because the logging was not of a large enough scale to threaten the survival of traditional reindeer husbandry and therefore it did not constitute a violation of Article 27. The decision stated that “[m]easures that have a certain limited impact on the way of life and the livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under Article 27.”

Another vehicle for seeking access to water resources through international protections for subsistence uses is the United Nations International Covenant on Economic, Social, and Cultural Rights (ICESCR). Although the ICESCR does not directly address indigenous people or land and natural resource rights, several of the articles can be applied to indigenous water rights. For example, Article 1 states that “[i]n no case may a people be deprived of its own means of subsistence.” Article 11 includes a right to an adequate standard of living and the right to share in efficient agrarian systems.

Article 12 contains a right to a secure, healthy, and ecologically sound environment, which arguably could include access to sufficient amounts of clean water. Indigenous peoples could attempt to use these provisions to claim that they are entitled to water sufficient to irrigate crops upon which they rely for an adequate standard of living and to potable water and other environmental conditions related to their subsistence. The “healthy environment” provision of the ICESCR is so sweeping and so general, however, that it is difficult to imagine its being enforced against a state in the absence of other more specific guarantees.

92. Id. para. 10.3.
94. ICESCR, supra note 93, art. 1, 993 U.N.T.S. at 5.
95. Id. art. 11, 993 U.N.T.S. at 7.
96. Id. art. 12, 993 U.N.T.S. at 8.
D. Cultural Identity

Respect for indigenous culture is found in several international instruments. For instance, Principle 20 of the Vienna Declaration, adopted by the 1993 United Nations World Conference on Human Rights, "recognizes the inherent dignity and the unique contribution of indigenous people . . . and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being."97 Presumably, state actions that erode the cultural uniqueness of indigenous peoples would be contrary to the Declaration. But as discussed in the preceding sections, international norms can be applied to relate essential protections for land and resource rights to the cultural survival of indigenous peoples.

For instance, I.L.O. No. 169 frames its requirements ensuring indigenous peoples' rights to ownership of traditionally used natural resources in terms of cultural integrity. Article 2 specifies that the mandated action should include measures aimed at "[p]romoting the full realization of social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions."98

Some international agreements speak primarily of indigenous peoples' rights to cultural integrity and prohibit government actions that would erode or destroy traditional culture. These prohibitions could be interpreted to extend to depletions or contamination of water sources that result in deprivation of traditional water uses such as agriculture or spiritual purposes, or that would render it impossible for indigenous peoples to continue community life in their historical territory. Scholars have observed that:

[U]nder international law, the states' obligation to protect indigenous peoples' right to cultural integrity necessarily includes the obligation to protect traditional lands because of the inextricable link between land and culture in this context. Thus, rights to lands and resources are property rights that are prerequisites for the physical and cultural survival of indigenous communities . . . . 99

In one decision, the Mexican National Human Rights Commission

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98. I.L.O. No. 167, supra note 4, art. 2, 28 I.L.M. at 1385.
99. Anaya & Williams, supra note 2, at 53.
applied several articles of I.L.O. No. 169 and the Mexican Constitution
to protect the cultural survival of the Cucupá people. The Cucupá are
an indigenous community living in the Colorado River Delta region
whose population has declined from several thousand to fewer than 200
people. The government’s management of the land, waters, and
fisheries of the delta over the last fifty years has led to the near-
extinction of the Cucupá community and has damaged the delta’s
environmental health in an area with great biodiversity values that has
been designated a biosphere reserve under the United Nations Man and
the Biosphere Program. This destructive management led Defenders of
Wildlife to petition the Commission on behalf of the Cucupá people and
argue that the government owed a duty to ensure them a decent living
through improved management.

The Mexican Commission cited several sections of I.L.O. No. 169
for the “obligation of governments to recognize, protect and respect
cultural values and practices of indigenous peoples, such as their
environment, especially their spiritual and cultural relation with the
lands.” It then ordered Mexico’s natural resources agency, Secretario
de Medio Ambiente y Recursos Naturales (SEMARNAT), to update the
biosphere reserve management plan to ensure the cultural, ecological,
and economic needs of the Cucupá people are fulfilled. It also ordered
SEMARNAT to develop a social development program for the
Cucupá. The Commission required the agricultural agency, Secretario
de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación
(SAGARPA), to grant additional fishing permits to the Cucupá. This
decision is an example of an indigenous people using international
human rights law in a domestic tribunal to force government institutions
to promote the economic and cultural survival of indigenous
communities through improved management of and access to natural

100. COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS, RECOMENDACIÓN (DECISION
LETTER) 8/2002 (Apr. 19, 2002),
DECISION LETTER].

101. Frank Clifford, Plotting a Revival in a Delta Gone to Dust Border: Decades of
Colorado River Diversions Have Left Mexico Area Dry, L.A. TIMES, Mar. 24, 1997, at

102. Complaint for Declaratory and Injunctive Relief, Defenders of Wildlife v.
Norton, 257 F.Supp.2d 53 (D.C. Cir. 2003) (No. 00-1544), at

103. DECISION LETTER, supra note 100.

104. Id.

105. Id.

106. Id.
resource. As of February 2005, however, the government agencies had not implemented the Commission’s recommendations.\textsuperscript{107}

Article 27 of the ICCPR guarantees indigenous people the right to enjoy their cultures. The United Nations Human Rights Committee has interpreted Article 27 of the ICCPR to include the protection of cultural integrity.\textsuperscript{108} In the \textit{Lubicon Lake Band} case\textsuperscript{109} the provincial government of Alberta, Canada granted leases for mineral exploration and timber harvesting within the aboriginal territory of the Lubicon Lake Band. The Human Rights Committee found that this violated the cultural integrity guarantees of Article 27 of the ICCPR. Extensive extractive resource development by outsiders, combined with the government’s historical failure to assure the band a land base, had threatened the band’s way of life and culture.\textsuperscript{110}

Another case involved the indigenous Ainu of Japan. When the Japanese government constructed a dam in an area where Ainu ceremonial places had been, two Ainu sued. The Sapporo District Court held that the construction impaired the Ainu culture and that the government had violated the Ainu’s right to enjoy their indigenous culture under the ICCPR.\textsuperscript{111} Morihiro Ichikawa argues that it is possible to construe Article 27 of ICCPR as securing Ainu fishing rights and water rights as a part of their culture.\textsuperscript{112}

Native peoples can also benefit indirectly from national cultural protection laws that do not refer to indigenous culture. For instance, Australia enacted a statute prohibiting dam construction planned by the State of Tasmania in an area listed as a World Cultural and National
Heritage site under the World Heritage Convention. The dam’s proponents challenged this national law, but the Australian High Court upheld the legislation, saying that the Convention imposed an obligation on Australia to take appropriate measures for the preservation of the site.

The United Nations Draft Declaration on the Rights of Indigenous Peoples ("Draft Declaration") does not yet bind any nation but it does reflect emerging norms. Article 21 says that “[i]ndigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities." The Draft Declaration has been negotiated and debated for many years and scholars believe that its provisions demanding respect for traditional practices, cultural integrity, and economic uses of lands reflect an accepted international norm that will be useful in asserting indigenous rights to natural resources.

Several declarations arising out of international conferences are also useful in determining the attitudes and norms of the international community concerning indigenous cultural rights. While they are not "hard law" in the sense that they are likely to be applied by international or domestic tribunals to require or prevent particular actions of a country, they can assist in interpreting and applying principles found in formally adopted instruments and can provide evidence of the acceptance of norms which are themselves "soft law" or customary law which is an accepted source of international law.

The Declaration of Principles of Indigenous Rights adopted by the Fourth General Assembly of the World Council on Indigenous Peoples called more directly for legal recognition of indigenous cultural rights and related them to water by declaring in Principles 10 and 11 that “[i]ndigenous people have inalienable rights over their traditional lands and resources” including rights to “coastal economic zones.” And Principle 13 states that “[n]o action or process shall be implemented which directly and/or indirectly would result in the destruction of land,

116. Williams, supra note 26, at 689–90.
Indigenous Peoples' Rights to Water

air, water, glaciers, animal life, environment or natural resources, without
the free and well informed consent of the affected indigenous people."\textsuperscript{118}

In March 2003, the Third World Water Forum was held in Japan, bringing participants from 182 countries. More than one hundred new commitments on water were made, including the Indigenous Peoples Water Declaration through which indigenous participants committed to forming a network that will encourage local communities to protect their water rights. Principle 11 states that "[s]elf-determination includes the practice of our cultural and spiritual relationships with water, and the exercise of authority to govern, use, manage, regulate, recover, conserve, enhance and renew our water sources, without interference."\textsuperscript{119}

E. Racial Discrimination

Destroying or inhibiting access to indigenous natural resources, including water, can be a form of racial discrimination. The United Nations International Convention on the Elimination of All Forms of Racial Discrimination of 1966 (CERD) has been widely accepted by the nations of the world.\textsuperscript{120} The U.N. Committee on the Elimination of Discrimination established by the U.N. Convention, has observed:

[In many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and... have lost their land and resources to colonists, commercial companies and State enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardized.\textsuperscript{121}

The Convention recognizes the right of communal property ownership for indigenous peoples and so the failure of a government to

\textsuperscript{118} Id. princ. 13.


respect communal ownership therefore can violate its provisions. MacKay explains that:

[U]nder Article 5 of the CERD, for instance, states-parties are obligated to recognize, respect and guarantee the right “to own property alone as well as in association with others” and the right to inherit property, without discrimination. Failure to recognize and protect indigenous property ownership and inheritance systems and rights is discriminatory and denies equal protection of the law.\(^\text{122}\)

In Australia, indigenous peoples’ rights received little legal recognition until the last decade. The 1992 *Mabo* decision of the Australian High Court recognized the existence of native title to land after finding that the doctrine used to deny such title in the past was racially discriminatory.\(^\text{123}\) In 1975 the Australian Parliament passed the Racial Discrimination Act\(^\text{124}\) in order to implement CERD, and after that date state extinguishment of native title was subject to legal challenge as racial discrimination.

Rights under native title include certain traditional uses such as hunting, fishing, and gathering. Although rights can be lost when native people sever their connection with the land or by extinguishment when the government grants the land to others, it seems clear that Aborigines have interests in the lands and waters still held by the Crown. The Native Title Act of 1993 confirmed that native title could be claimed in waters as well as lands. This opens the possibility that Aborigines could claim rights to use the waters of Crown lands for everything from irrigation to fishing to cultural and spiritual uses.

A recent case supports the conclusion that Aboriginal communities can assert rights to traditional uses of water. In the *Spinifex* case the Federal Court confirmed an agreement between the parties that gave native title holders a right to take water for the purposes of satisfying their personal, domestic, social, cultural, religious, spiritual, or non-commercial communal needs, including the observance of traditional laws and customs.\(^\text{125}\) However, a claim to water for irrigation might not fare as well. There is a common assumption that historical practices of Aboriginal communities did not include irrigation and it is possible that the state will deny water rights for non-traditional uses. In contexts other than water, however, the courts have said that they will not limit the

\(^{124}\) Racial Discrimination Act, 1975 (Austl.).
rights under native title strictly to the customary uses that prevailed in ancient times but will allow, at least, "the maintenance of the ways of the past in changed circumstances."\textsuperscript{126}

A serious problem with native rights to water in Australia, even for demonstrably traditional uses, is that they are subordinate to all of the rights that have been granted to others by the state under water legislation.\textsuperscript{127} The courts have not determined whether this is racially discriminatory. Furthermore, the very enactment of legislation allocating water rights to others may pose problems for indigenous peoples seeking to assert rights to water.

\textit{F. Right of Self-Determination}

Ultimately, the most important right for indigenous peoples may be to govern the allocation, use, and protection of natural resources. State systems of water law often allow for uses that are damaging to indigenous cultures and that compete with native values ranging from economic to spiritual. By controlling the waters in their territories indigenous peoples can effect decisions that ensure that their own needs are met. Moreover, protecting the dignity of indigenous institutions strengthens indigenous cultures. Maintaining native community control of water is often difficult, however, because states may consider it a threat to their sovereignty as well as to their ability to promote national economic development.

The entire issue of native self-determination is confused by different conceptions, ranging from the idea that mere participation in state decision-making processes is sufficient, to native claims that they are entitled to complete political independence.\textsuperscript{128} States are cautious in endorsing abstract indigenous self-determination principles and therefore the number and scope of sources of international law on this point are limited.

Some international law sources appear to support the self-determination of indigenous peoples, including their right to control water and other natural resources and the obligation of states to respect native laws and customs concerning water use. In addition, multiple provisions of international law insist that states consult with affected


\textsuperscript{127} Ngalpil v. Western Australia, F.C.A. 1140 (2001), \textit{available at} 2001 WL 954177.

native communities when they make decisions. Nevertheless, provisions relating to self-determination are fewer and less specific than the international law provisions protecting the other potential sources of rights related to water.

An important example of an instrument validating indigenous self-determination is I.L.O. No. 169. The Preamble frames the agreement in terms of indigenous peoples’ right “to exercise control over their own institutions, ways of life and economic development.” The agreement goes on to provide that “[g]overnments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.”

Another instrument, the International Covenant on Economic, Social and Cultural Rights (ICESCR), states in Article 1:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.

The Proposed American Declaration on the Rights of Indigenous Peoples was approved by the Inter-American Commission on Human Rights at its 95th session, February 26, 1997. Like I.L.O. No. 169, it contains more elaborate and specific protections for indigenous land rights than are found in human rights accords. It has strong provisions relating to indigenous self-determination. Although it remains a proposed agreement, the American Declaration includes the fullest elaboration of the important elements of native control of resources. Several articles support the rights of indigenous peoples to self-government and to have their laws recognized within the state legal system. Article XVI says that indigenous laws should be incorporated into domestic law:

1. Indigenous law shall be recognized as a part of the states’ legal system and of the framework in which the social and economic development of the states takes place.

2. Indigenous peoples have the right to maintain and reinforce their

129. I.L.O. No. 169, supra note 4, pmbl., para. 5, 28 I.L.M. at 1384.
130. Id. art. 2(1), 28 I.L.M. at 1385.
131. ICESCR, supra note 93, art. 1, 993 U.N.T.S. at 5.
132. Proposed Declaration, supra note 62.
indigenous legal systems and also to apply them to matters within their communities, including systems related to such matters as conflict resolution, crime prevention and maintenance of peace and harmony.

3. In the jurisdiction of any state, procedures concerning indigenous peoples or their interests shall be conducted in such a way as to ensure the right of indigenous peoples to full representation with dignity and equality before the law. This shall include observance of indigenous law and custom and, where necessary, use of their language.133

Among the provisions related to natural resources, Article XVIII states that:

1. Indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property.

2. Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.

* * * *

4. Indigenous peoples have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands . . . 134

In a properly presented claim before the Inter-American Commission the Draft Declaration could be a potent source of rights to apply traditional indigenous rights and practices to allocate, manage, and use water.

Under the auspices of the United Nations Economic and Social Council, Commission on Human Rights, the Working Group on Indigenous Populations has produced a Draft Declaration on the Rights of Indigenous Peoples.135 The draft has gone through several iterations. It contains provisions relating to lands and other resources. Article 26 includes language especially protective of indigenous peoples’ right to apply customary law in managing their lands and waters:

Indigenous peoples have the right to own, develop, control and use

133. Id. art. XVI.
134. Id. art. XVIII.
the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.\textsuperscript{136}

By specifically including "waters" within the lands and territories the Draft Declaration also supports the argument that water resources are within the scope of international treaties and conventions securing indigenous rights to traditional land or territory.

Finally, Principle 5 of the Declaration of Principles of Indigenous Rights of the World Council on Indigenous Peoples states that "[t]he customs and usages of the indigenous peoples must be respected by the nation-states and recognized as a legitimate source of rights."\textsuperscript{137}

\section*{IV. CONCLUSION}

International law provides several grounds for asserting indigenous rights to water. Although there is a dearth of precedent for using international law to pursue indigenous water rights claims, there is a small but growing number of cases in which native peoples have used international law to protect their rights to other natural resources such as timber or minerals.

The six types of rights that are identified in this paper illustrate different ways that such claims could be framed and some of the international law instruments and norms that could be the bases of those claims. For instance, indigenous peoples could invoke international law when a government takes action that deprives them of quantities of water or pollutes water within their traditional territories. Claims could also arise from denial of access to water for traditional uses or commercial uses by tribes and groups. These claims are more likely to succeed if the boundaries of traditional use areas are defined and specifically include particular rivers and other bodies of water. The Inter-American


\textsuperscript{137} Declaration of Principles, supra note 117, princ. 5.
Commission on Human Rights recognized in the case of the Yanomami that legal rights in land are relatively meaningless without the demarcation of aboriginal territory.

Indigenous groups asserting international law claims need not confine them to rights under a single instrument. It is likely that they will need to allege several grounds under various instruments. For instance, the Carrier Sekani Tribal Council of Canada submitted a claim to the Inter-American Human Rights Commission arising out of the provincial government's decision to allow companies to cut the timber resources in the lands that they have traditionally occupied.\textsuperscript{138} The tribe claimed that this violates its rights to property, cultural integrity, self-determination and consultation, equality under the law, and to have their rights secured by the state under the Proposed American Declaration on the Rights of Indigenous Peoples and the Draft United Nations Declaration on the Rights of Indigenous People.\textsuperscript{139} The Carrier Sekani Tribal Council, however, is now confronted by a new provincial government in British Columbia that is less friendly to indigenous claims, dimming the prospects of revised treaty protocols being more favorable to it.\textsuperscript{140} Thus, the tribe may have to return to the Commission if its rights are disregarded.\textsuperscript{141} Nevertheless, the Commission's acceptance of the claim sets a precedent for using a similar process for the assertion of future claims. Through this process British Columbia was forced to engage in discussions of interim forestry measures with the Carrier Sekani, a step that likely could not have been achieved under domestic law alone.

This article has concentrated on international law remedies for violation of indigenous water rights, but it is important to emphasize that there are remedies under the domestic laws of some countries and that the two bodies of law should be considered complementary to one another. Individual countries may have specific statutes and constitutional provisions that speak to indigenous rights to land and

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\item \textsuperscript{138} See Amended Petition and Response to the Inter-American Human Rights Commission submitted by the Chiefs of the Member First Nations of the Carrier Sekani Tribal Council against Canada, Case No. 12.279, Mar. 1, 2000.
\item \textsuperscript{140} E-mail from Robert A. Williams, E. Thomas Sullivan Professor of Law and American Indian Studies, Co-Director, Indigenous Peoples Law and Policy Program, James E. Rogers College of Law, University of Arizona, to David H. Getches, Dean and Raphael J. Moses Professor of Natural Resources Law, University of Colorado School of Law (Dec. 31, 2002, 10:29:37 MST) (on file with author).
\item \textsuperscript{141} ld.
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water. In addition, domestic laws in Latin American countries may include rights of customary use of resources pertaining to all campesinos and not limited to indigenous groups. Indigenous people are often considered campesinos although not all campesinos may be able to assert rights as members of a native tribe or group. It is beyond the scope of this article to identify the specific domestic laws that could be useful in each country, but these sources of law should be explored in each case, as they may be stronger than international norms in some states, or at least more familiar to domestic courts. Except in a few countries, it has been rare for indigenous peoples to attempt to use domestic law approaches to advance their rights to water and other natural resources. If and when they seek the aid of the law in asserting water rights in domestic courts and administrative tribunals, indigenous peoples and their lawyers should consider citing both domestic and international law sources.

The array of possibilities for using international law, as well as domestic law, to establish and protect indigenous water rights is large and complicated. The most promising legal approaches and the most appropriate legal forums for particular indigenous groups to protect their water rights will vary. Therefore, indigenous peoples require access not only to lawyers who know the laws of the particular country but also to experts in international law. If groups in one country bring claims that are not strong or properly presented, and those claims fail, it could harm the efforts of other groups. Thus, it would be wise for indigenous groups from several countries to coordinate regional or international efforts to find the best cases to advance the development of international law as a tool for securing indigenous water rights.