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KEYNOTE ADDRESS: INDIGENOUS PEOPLES AND THEIR MARK ON THE INTERNATIONAL LEGAL SYSTEM

*S. James Anaya**

Thank you very much Dean Burnett, I am truly humbled by that introduction. I want to thank the organizers, Russ and Rebecca, for their effort in putting all this together and for including me in this event.

I would like to think of today as somewhat of a celebration of the victory achieved by the Western Shoshone people just last week at the United Nations, with the leadership of Carrie Dann. In March of 2006, the Committee on the Elimination of Racial Discrimination (CERD) issued a decision under its Urgent Action Procedure directing the United States to cease violating Western Shoshone land rights.¹ I had not seen Carrie Dann since that decision came down. So many times we see each other and talk about how bad things are. She tells me how things are tough but also reminds me about the hope that persists, and today, things look a little better. We hope that the decision by the CERD will be more than just a piece of paper and will really make a difference in the lives of the Western Shoshone people.

The CERD decision represents that we are in a time when international law speaks concretely to the issues of Native Americans in this country and indigenous peoples around the world, and it does so not just from the standpoint of theory or proposal by a scholar writing some time ago. It not only speaks to these issues, but it also establishes certain standards of obligation for our government and other actors in the international arena. Those standards of obligation are increasingly favorable to indigenous peoples' claims, as we see in the Western Shoshone case. The CERD decision represents the interpretation of the fundamental human rights norm of non-discrimination in favor of indigenous peoples.

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* James J. Lenoir Professor International Human Rights Law and Policy, The University of Arizona Rogers College of Law. The author wishes to thank Rebecca Bratspies for her careful edit of the transcript of this speech and for her work in adding the useful footnote material.

1. Decision 1(68) (United States of America), CERD, 68th Sess., U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006) [hereinafter 2006 Dann Decision]. CERD urged the United States to "freeze . . . desist from . . . [and] stop" actions being taken or threatened to be taken against the Western Shoshone peoples. *Id.* ¶ 10.

This significant decision will have profound reverberations in the United States, and not just because the United States is on the receiving end of the CERD resolution. United States jurisprudence does not typically bring the norms of equality and non-discrimination into evaluation of Native American issues and claims. The classic Indian law in the United States, what we call federal Indian law doctrine, treats Indian rights as an exception to the norms of equality and non-discrimination, rather than their embodiment. The classic theory is that equal protection for Indians means that they are treated the same as other citizens. They do not have special rights, sovereignty, or “historical rights,” at least that is how I was taught in law school.

As a result, equal protection discussions within a constitutional framework stay away from Native Americans. Conversely, discussions of Native American rights stay away from a discussion of equal protection. From a human rights standpoint, however, this approach seems very counterintuitive. If I have learned anything from Carrie Dann, and I have learned many, many things, it is that the treatment of the Western Shoshone people, and indigenous peoples more generally, has been anything but based on equality. It has been discriminatory; thus, fleeing from this fundamental norm of non-discrimination is both a tactical and moral mistake. We cannot construct a notion of native rights in opposition to fundamental concepts of equality. They can only be constructed upon the fundamental notion and norm of equality, which is what the Western Shoshone people are doing. That is what people like Carrie Dann are doing and are teaching.

I have to confess that Carrie and her family put a lot of faith in me, and I still do not understand why. Very early on, when I was just a year out of law school, I had the privilege to represent Carrie Dann and her sister, Mary, in their struggles to force the United States to recognize Western Shoshone land rights.² I measure my legal career and development by how long I have been privileged to know Carrie. Much of what I have learned and much of my development and my thinking has been a result of the conversations that I have been privileged to have with her. And, thinking about the meaning of non-

2. A detailed explanation of the Dann litigation over grazing and land rights in Western Shoshone territory can be found in the Inter-American Commission's decision in favor of the Danns and the Western Shoshone. *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002), available at <http://cidh.org/annualrep/2002eng/USA.11140.htm> [hereinafter *Dann Case*]; see also Press Release, Indian Law Resource Ctr. (Apr. 15, 1998), <http://www.wsdp.org/ilrcpr.htm>; Univ. of Ariz. Rogers Coll. of Law, Indigenous Peoples Law & Policy Program — Western Shoshone, http://www.law.arizona.edu/Depts/iplp/advocacy_clinical/western_shoshone/default.htm (last visited Feb. 9, 2007).

discrimination has been essential to many of those discussions, and to much of the learning that I have derived from Carrie, others of her family, and the Western Shoshone people.

I mentioned the equality norm, because that is central to the work of the UN Committee on the Elimination of Racial Discrimination. CERD's function is to promote compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, and this Convention, of course, is constructed upon the fundamental human rights norm of equality and non-discrimination in the context of combating racial discrimination.³

Two decades ago, when the UN first began seriously considering indigenous issues, there was a tendency among advocates, and I would count myself among them, to stay away from this Convention, and to regard it as not really speaking to native issues. In part, this hesitation was motivated by the same concerns I alluded to earlier in the domestic legal context about the relationship between non-discrimination and the unique rights of indigenous peoples. There was, however, an additional concern. The wording of the Convention seems to promote a vision of equality based on assimilation. Under this form of equality, Native Americans would be viewed as individuals within the societies that now engulf them, holding the same rights as any other citizens, but no more. That vision of equality was the prevailing, liberal, Western thinking in the 1950s and 1960s, when the Convention was negotiated and signed.

Thus, international and domestic laws from that time period bear the imprint of a vision of equality that signified sameness, rather than diversity, and certainly had no room for the kind of diversity that would uphold, on a long-term basis, indigenous peoples as robust, self-governing communities. The model of diversity as equality was simply not part of basic equality notions, either domestically or internationally.

In its 2006 Western Shoshone decision, the Committee on the Elimination of Racial Discrimination rejected "sameness as equality" for a different concept of equality. The decision reflects a vision of equality that values difference and that sees equality not just in terms of the individual within a presumably homogeneous society, but also sees the individual as part of a group, part of a cultural group, and values that cultural group. This vision of equality considers equality as encompassing cultural integrity as well as individual integrity. Hence, the notion of equality promoted by the CERD

3. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106(XX), Annex, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014, 660 U.N.T.S. 195 (Dec. 21, 1965).

decision is precisely that notion of equality that indigenous peoples, people like Carrie Dann, have been promoting for years, indeed for generations.

This notion of equality does not treat indigenous peoples as though they were like everyone else in society. Equality instead means that indigenous peoples get to keep their languages and to live within their long-standing, self-governing institutions. Equality means that their property rights, their connection with territory, have to be valued just as much as the dominant society's connection with its property. That is the vision of equality promoted by indigenous peoples, and that is the vision of equality we now see permeating the interpretation of the Convention on the Elimination of Racial Discrimination in the 2006 Western Shoshone decision.

The 2006 Western Shoshone decision ruled in favor of the Western Shoshone people and condemned the United States for its treatment of them, essentially, for racial discrimination. The decision condemns the United States for perpetuating a racially discriminatory pattern involving policies over years, over decades, and over more than a century.⁴ And in light of this record, CERD calls upon the United States to cease and desist from such treatment.

This decision was quite dramatic. First of all, CERD accepted this notion of equality based on respect for cultural diversity, based on respect of the integrity of indigenous cultures. Second, CERD applied that norm to the United States for its treatment of an indigenous people, the Western Shoshone. Moreover, CERD did so in language far stronger than one is accustomed to seeing in a diplomatic forum.⁵ This decision clearly represents that international law applies to indigenous peoples today and does so through a model of equality that supports indigenous peoples' plan of self-determination.

There are a few other sources of existing international law that similarly support indigenous peoples, particularly in the context of indigenous peoples' land rights, such as the International Labor Organization Convention Number 169 on Indigenous and Tribal Peoples (ILO Convention No. 169).⁶ This

4. See 2006 Dann Decision, *supra* note 1, ¶ 8.

5. Of course, CERD had a lot of encouragement, and I would like to acknowledge Julie Fishel for her Herculean effort over the years in calling this matter to the attention of CERD. Ms. Fishel is the main lawyer advocating on behalf of, and with, the Western Shoshone people at the United Nations. It was her persistent advocacy that kept the United States' treatment of the Western Shoshone on CERD's radar screen. I think that they would have ignored the issue had it not been for Julie, but Julie just did not let them forget about this.

6. International Labour Organisation [ILO], Convention No. 169 Concerning Indigenous & Tribal Peoples in Independent Countries, arts. 13-19, June 27, 1989, 28 I.L.M. 1382 (entered

multi-lateral treaty has been ratified by most of the countries in the Western Hemisphere, with notable exceptions, including the United States. ILO Convention No. 169 incorporates this same equality norm and applies it in a context of indigenous peoples' land rights,⁷ cultural rights,⁸ and to a certain extent, rights over self-governance.⁹ Even though the United States is not a party to this Convention, the Convention has been influential in setting the tone internationally for policy considerations by various international agencies. The Convention serves as a benchmark for the basic human rights of indigenous peoples, even for countries that are not parties to it. As the Convention's name suggests, its purpose is to promote the integrity of indigenous peoples and indigenous groups. The Convention's preamble specifically sets forth the goal of promoting the development of indigenous peoples according to their own designs and promoting their ability to maintain their own cultures and ways of life in connection with their ancestral territories.¹⁰ The Convention also has very important land rights provisions.

Articles 13, 14, and 15 explicitly recognize indigenous peoples' rights of ownership over their traditional lands. These articles recognize that indigenous peoples have legally protected rights, arising from their traditional use and occupancy of land. These are not rights that flow from the state, but instead flow from traditional use and occupancy.¹¹ Article 13 sets the tone for all the land rights provisions that follow by explicitly acknowledging the cultural and spiritual connection that indigenous peoples have with their lands.

The earlier International Labour Organization Convention Number 107 (ILO Convention No. 107), which was adopted in 1957, did have certain protections for indigenous peoples in connections with their land rights,¹² but those protections were viewed as transitory. In other words, the Convention acknowledged that indigenous people existed and that their land rights should be protected, but only within an assimilationist model that presumed that such protections would be temporary.¹³ In assuming that indigenous and tribal

into force Sept. 5, 1991).

7. *Id.* arts. 13, 14, 15.

8. *Id.* arts. 5, 7, 27.

9. *Id.* arts. 8, 9, 17.

10. *Id.* pmbl.

11. *Id.* art. 13.

12. ILO, Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, arts. 13-15, June 26, 1957, 328 U.N.T.S. 247.

13. *See id.* pmbl. (referring to the "integration of indigenous and other tribal and semi-tribal populations").

peoples would dissipate from their lands and meld into the larger society, ILO Convention No. 107 embraced the classic, Western, liberal model of "equality as sameness." The United States' policy of terminating federal recognition of Indian tribes, of moving indigenous peoples off their lands, stemmed from that same vision of "equality as sameness." This illustrates a parallel again between what is going on internationally and what is going on domestically.

The more recent ILO Convention No. 169 represents the new generation of international standards, the new generation of thinking based upon a different vision of equality. Hence, the rights to land recognized in ILO No. 169 are not only more robust than in ILO Convention No. 107, they are framed within a recognition that indigenous peoples' land rights are essential to their cultural and spiritual survival. Land rights are to be valued and to be allowed to continue according to indigenous peoples' own designs. Thus, ILO Convention No. 169 is an important international treaty that represents an additional source of international law favorable to indigenous peoples' claims, including claims to rights over land.

Another multilateral treaty that serves as a source of international law in this area is the International Covenant on Civil and Political Rights,¹⁴ a treaty to which the United States is a party. In particular, Article 27 of the Covenant provides that minorities have the right "to enjoy their own culture."¹⁵ In interpreting this language, the UN Human Rights Committee has repeatedly concluded that, for indigenous peoples, this right to enjoy culture has to include economic and social relations, including relations with the land.¹⁶ That does not mean that every minority culture will necessarily share these characteristics; instead, every minority will differ according to the character of its culture. For an indigenous people, culture embraces all those things that make up its distinct character, including relationships with the land.

If we were to take a very formalistic view of Article 27, it would be hard to read robust land rights into the right to "enjoy their own culture," but that

14. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

15. *Id.* art. 27.

16. See U.N. Human Rights Comm., *Lubicon Lake Band v. Canada*, Commc'n No. 167/1984, Annex IX.A., U.N. GAOR, 45th Sess., Supp. No. 40, Vol. II, U.N. Doc. A/45/40 (Oct. 4, 1990); U.N. Human Rights Comm., *Länsman v. Finland*, Commc'n No. 511/1992, Annex, U.N. Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1992) (addressing claims by a tribe in Finland against the government for mining on their lands); U.N. Human Rights Comm., *Äärelä & Näkkäljärvi v. Finland*, Commc'n No. 779/1997, Annex, U.N. Doc. CCPR/C/73/D/779/1997 (Nov. 7, 2001) (addressing claims by a tribe in Finland against the government for allowing logging that disturbed herding lands).

is what the Human Rights Committee has done. In doing so, the Committee has taken the kind of interpretive approach that CERD adopted in its 2006 decision in favor of the Western Shoshone. I like to call this approach a “realist approach,” one that looks at the underlying policies and values that are represented in the treaty provisions and then applies those policies and values in the context of ongoing dynamics in order to interpret the relevant norm. That is what we see the Human Rights Committee and CERD doing with regard to these multi-lateral treaty provisions in ways that are increasingly dramatic.

I am not suggesting that the precise interpretations that these committees are giving to these treaty provisions are, in my view, or in the view of indigenous peoples, entirely acceptable. But, it seems clear that these international institutions are struggling with the outer boundaries of a robust right to culture and are trying to balance this right with the rights of the majority. The basic thrust of the interpretations appears to be in line with indigenous peoples’ demands with regard to lands and resources.

Yet another international treaty that is a source of international law, with regard to indigenous peoples, is the Charter of the Organization of American States (OAS Charter).¹⁷ Much like the United Nations Charter,¹⁸ the OAS Charter is a source of international obligation for states with regard to indigenous peoples.¹⁹ By virtue of being a party to these treaties and members to the institutions they create, states have an over-arching obligation to promote human rights. Of course, the United States is a party to the OAS Charter, and it is a member of the Organization of American States. It is also a party to the United Nations Charter and a member of the United Nations.

The OAS Charter, generally, like the UN Charter, commits states to promote human rights, but it does not specify what those rights are.²⁰ However, the American Declaration on the Rights and Duties of Man²¹ (American Declaration) is understood to accomplish the task of specifying the obligations that states are committed to under the OAS Charter. The

17. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 [hereinafter OAS Charter] (entered into force Dec. 13, 1951).

18. Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153.

19. OAS Charter, *supra* note 17, art. 111 (creating “an Inter-American Commission on Human Rights whose principal function shall be to promote the observance and protection of human rights”).

20. *Id.*

21. American Declaration of the Rights and Duties of Man, OAS Res. XXX, OEA/Ser.L/V/I.4 Rev (1948), available at <http://www.cidh.org/Basicos/basic2.htm>.

American Declaration is similar to the Universal Declaration of Human Rights,²² which serves the same role vis-à-vis the UN Charter. These two documents are declarations not treaties. Nevertheless, both declarations were adopted by the general assemblies of the two institutions and are understood to elaborate upon, and articulate, the human rights obligations that states generally assume under the charters of the organizations.

The United States is, therefore, bound to the articles in the American Declaration by virtue of its commitment under the OAS Charter to promote human rights. This is not just a matter of what scholars and advocates suggest, but rather, it is a matter of how states themselves interpret their duties under these agreements, and how the major international human rights organs interpret these declarations. In particular, the Inter-American Commission on Human Rights has taken the position that the American Declaration is the articulation of the specific human rights obligations that states assume upon ratifying the OAS Charter. Similarly, the UN Commission on Human Rights (the predecessor of the UN Human Rights Council) generally took the view that the Universal Declaration of Human Rights is an articulation of the human rights standards that all states generally are bound to uphold by virtue of being parties to the UN Charter.

In its yearly assessment of human rights conditions in countries around the world, the U.S. State Department applies the norms embodied in the Universal Declaration of Human Rights,²³ under the view that the Universal Declaration of Human Rights represents the human rights obligations that states are bound to uphold by virtue of being UN member countries.²⁴ Clearly, although they are not themselves treaties, the Universal Declaration of Human Rights and the American Declaration expound upon the legal obligations that derive from the charters of these two institutions.

The understanding that the American Declaration and the Universal Declaration represent binding obligations undergirds the application of the American Declaration to the situation of indigenous peoples in the Western Hemisphere. An example of that understanding is the Inter-American

22. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration].

23. The State Department Reports are available at U.S. Dep't of State, Human Rights Reports Home Page, http://www.state.gov/www/global/human_rights/hrp_reports_mainhp.html (last visited Feb. 9, 2007) (indicating that assessments are based on the Universal Declaration).

24. Universal Declaration, *supra* note 23.

Commission on Human Rights' use of the American Declaration in the case of *Dann v. United States*.²⁵

Carrie and Mary Dann filed a claim with the Inter-American Commission against the United States for violating their human rights as Western Shoshone people because of the years of denial of Western Shoshone traditional land rights. The United States government had issued the Dann sisters trespass notices for simply trying to make a life out of their land, as their ancestors had before them. The government's position was that the Danns were trespassing on U.S. land, while the Danns asserted that the land was part of Western Shoshone traditional lands and that Western Shoshone title to the lands had never been extinguished. The case went all the way to the U.S. Supreme Court. For virtually my entire legal career, I have been working on Western Shoshone issues and working with the Danns, and my first piece of federal litigation was working on the Dann case as it made its way up to the U.S. Supreme Court.²⁶ I like to say that I am one of the long list of distinguished lawyers who lost a case in the federal courts for the Danns.

The Supreme Court rejected the Dann's claim on the theory that the Western Shoshone had been paid for their land and their title had been extinguished. However, the Western Shoshone had never accepted the money purporting to compensate them for this land. Nevertheless, the Supreme Court used the fact of the payment, now sitting undistributed in a U.S. Treasury account, as a basis for precluding the Danns, and the Western Shoshone, from asserting that their title had never been extinguished. The U.S. Supreme Court refused to consider the merits of the case — whether or not the Western Shoshone people still had title to the lands in question. Often people mistakenly assume that the Supreme Court resolved the underlying ownership dispute, but it did not even consider that question. Instead, the Court merely decided that the Western Shoshone had been paid, but, the Western Shoshone had refused to accept the money. The United States basically took the money out of one pocket and put it in the other. As their trustee, the United States accepted the money on behalf of the Western Shoshone. It was because the United States, acting as trustee for the Western Shoshone, accepted payment over the objection of the Indians themselves that the Supreme Court concluded that, under the Indian Claims Commission Statute,²⁷ the Western Shoshone

25. *Dann Case*, *supra* note 2.

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

27. *Id.* at 41 n.2. Section 22(a) of the Indian Claims Commission Act states: "The payment of any claim . . . shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." Indian Claims Commission Act, ch.

can no longer claim rights on the lands. Ever since then, the federal government and other courts have treated Western Shoshone land rights as if they have been extinguished; however, the only court to have ever actually reached the merits, the Ninth Circuit, found that the rights had not been extinguished.²⁸

The bottom line is that the U.S. judicial system was entirely unresponsive with regard to the Western Shoshone people, and with the Dann sisters in particular. The United States continued to insist that the Danns were trespassers on their own land, on Western Shoshone land. Hence, without any further recourse within the domestic legal system, the Danns decided to take the case to the Inter-American Commission on Human Rights. They filed their complaint in the early 1990s, and it took a good ten years before the case was decided. I remember when I became involved in the case in the mid-nineties. It had already been going on for a few years, and I thought that I was going to push it through and wrap it up in just a couple of years. It took another five years, almost six, to be finally resolved by the Inter-American Commission on Human Rights. The Inter-American Commission issued a precedent-setting decision interpreting the United States' international obligation, in connection with the American Declaration and the OAS Charter, with regard to indigenous peoples, including the Western Shoshone people.²⁹

The Inter-American Commission on Human Rights focused on three articles from the American Declaration: the basic right to equality under Article 2, the right to property under Article 23, and due process rights under Article 18. The Commission accepted the argument that indigenous peoples' own connections with territory are a form of property protected by Article 23, and it concluded that to interpret the right to property otherwise would be contrary to Article 2, the right to equality. So there you see the interplay between equality and property: the notion that if the world is to treat indigenous peoples equally, it must regard their own property systems as valid. Hence, the Commission concluded that the right to property in the American Declaration must embrace indigenous peoples' land tenure systems.

Again, a formalistic reading of the relevant right, in this case the right to property, would lead one to conclude that it has nothing to do with indigenous rights. The right to property in Article 23 of the American Declaration is expressed in individualistic terms and clearly in accordance with Western

959, § 22(a), 60 Stat. 1049, 1055 (1946).

28. *United States v. Dann*, 706 F.2d 919, 927-33 (1983) (discussing that aboriginal title had not been extinguished), *rev'd on other grounds*, 470 U.S. 39 (1985).

29. 2006 Dann Decision, *supra* note 1.

concepts. During the litigation, many expressed this view to me, including many supporters of the Danns' claims. My standard retort was always, "Please give me a better idea." In the absence of a better idea, that's what we went with. But our argument about the interconnections between property and equality were ultimately accepted by the Inter-American Commission. In doing so, the Commission employed what I have called a "realist interpretation," one that looks at the underlying policies and underlying fundamental concepts, in connection with the fundamental concept of equality. Such an approach to Article 23 leads one necessarily to conclude that indigenous peoples' property systems are just as valid as anybody else's property system. Hence, the Inter-American Commission on Human Rights accepted and affirmed that the Western Shoshone system of property was property protected by the American Declaration, and, through the American Declaration, was protected by the OAS Charter. The Commission found the United States to be in violation of the Article 23 right to property, as well as in violation of the Article 2 right to equality, for its treatment of the Western Shoshone with regard to their traditional lands.

The Commission further found that the United States violated Article 18, which is styled the right to fair trial, and again, on a first blush reading of that article, it seems to not speak to these issues. But the Inter-American Commission looked at this right to fair trial as articulated in Article 18 and saw within it a basic due process norm. The Commission thus concluded that due process requires more than what the Western Shoshone were accorded in the claims proceedings that determined that they no longer had rights on their lands. Critically, the Commission concluded that regardless of whatever U.S. law had to say about this, under an international human right of due process, the Danns had been denied that right. The Inter-American Commission used the American Declaration as a source of international law outside of the U.S. legal system in order to judge the U.S. legal system as it had been applied in the context of the Western Shoshone. The Commission found that the domestic claims process had constituted a violation of the right to due process or the right to fair trial, the right to have one's interests fairly treated in any proceeding that is going to affect those interests. In sum, the Inter-American Commission found a violation to the right to equality under Article 2, in connection with the right to property, as well as a violation of the right to fair trial or to due process under Article 18.

This is an illustration of how the OAS Charter, in connection with the American Declaration, is a source of international law and international legal obligation favorable to indigenous peoples. We could also talk about the Universal Declaration of Human Rights in similar terms, because it also

includes various provisions guaranteeing the right to property, the right to equality, and the right to due process.

In addition to treaty-related sources of international law, we could also locate norms concerning indigenous peoples in customary or general international law. In the course of evaluating the rights to property under the American Declaration, the Inter-American Commission on Human Rights identified what it called “general principles” of international law that are applicable inside and outside of the Inter-American system, in other words, applicable globally. These general principles of international law can be seen as customary law — principles that are law not because of their grounding in a treaty but, rather, because they are basic principles that enjoy a certain level of consensus within the world. Specifically, ILO Convention No. 169 binds countries that are parties to that treaty to uphold certain land rights norms. However, countries will often point out that they are not parties to that treaty as a defense to calls that they recognize indigenous land rights. For example, that was Belize’s response to claims that Julie Fishel and I worked on in that country. However, all states are bound by customary and general principles of international law. These general principles of international law are applicable, as affirmed by the Inter-American Commission, to all states, unless they affirmatively and persistently object.

What I have tried to do, in my writing, is to identify various patterns of decisions and practice that one can observe throughout the world and see within those patterns increasing recognition of indigenous peoples’ rights over land. Too often, what I see are patterns of assimilating indigenous peoples into the dominant culture. That is not what governments say they are doing in the contemporary era, however. They talk about what they are doing to promote indigenous peoples’ group rights and cultures. When criticized for doing wrong by indigenous peoples, most governments do not defend themselves by claiming that they do not have to follow that norm. Instead, governments today claim to be trying hard to protect indigenous groups. In doing so, their rhetoric reinforces the norm because it concedes the existence of that norm. You just no longer hear states claiming that indigenous peoples do not have any land rights, for example. They just do not do that. They might be thinking that they can get away with denying land rights in their actual behavior (and they do that all too often), but their rhetoric concedes the existence of a series of norms upholding indigenous peoples’ land rights. In the kind of statements they make about the appropriate policy — what they are doing, what they see as the proper initiatives to be taken, what they see as the wrong kind of actions to be taken — in terms of land rights, states pretty much uniformly concede that indigenous people hold rights to traditional lands

(even though there is still a lot of controversy about the outer boundaries of those rights — as reflected in ongoing discussions about the UN Declaration on the Rights of Indigenous Peoples). These statements are so prevalent that, even nationally, courts, on occasion, have referred to them in adjudicating issues of claims concerning indigenous peoples.

The Inter-American Commission has, somewhat self-servingly, cited its own draft of a Proposed American Declaration on the Rights of Indigenous Peoples as evidence of new general principles upholding indigenous peoples' rights. However, it does not rely solely on the Proposed Declaration as grounding for its analysis. The Commission has cited various other things, including the UN Draft Declaration on the Rights of Indigenous Peoples. The Inter-American Court of Human Rights has also relied on these drafts in its adjudication of cases concerning indigenous peoples.

The interpretation of the right to property, which I just talked about in connection with the Dann case, was first litigated in the case concerning the Awas-Tingni community, another case in which I had the privilege of participating.³⁰ This case involved claims to traditional lands by Awas Tingni, an indigenous community in Nicaragua. In that case, the Inter-American Court interpreted the right to property to include indigenous peoples' land tenure. In doing so, members of the Court made specific reference to the same draft instruments that the Commission referenced in the Dann case. The judges on the Court saw the draft declarations as relevant to a contemporary, as they said, "evolutionary," understanding of what the right to property means. The Inter-American Court was conscious about its realist approach to interpretation, very conscious and explicit in saying that we have to interpret these instruments in an evolutionary way, taking into account the legal and formative and policy framework that feeds into customary international law or general principles of law.³¹

The result of the trend toward increasing international recognition of indigenous peoples' rights by international institutions is that the United States will be held increasingly responsible directly under international standards. This is significant because what these international bodies are doing is not simply looking at the conduct of states from the standpoint of domestic law, but consciously going outside domestic legal systems in order to judge the domestic legal system on the basis of international standards,

30. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 ¶¶ 2, 140-157 (Aug. 31, 2001), available at <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html> (judgment on merits and reparations of August 31, 2001).

31. *Id.* ¶¶ 146, 148.

which is precisely what the Inter-American Commission did in the Dann case and what CERD did in its decision on the Western Shoshone.

Remarkably, I remember when we were litigating the Dann case before the Inter-American Commission, the United States' response was consistently based on U.S. law. They just did not get it. For the purposes of the case before the Commission, it did not matter what the United States Supreme Court had said. The issue before the Commission was whether the United States had failed to apply basic human rights principles from the standpoint of international law. It is that evaluation process that allows for getting outside the framework that confines the domestic law, and for, instead, examining from a fundamental human rights standpoint, the character of U.S. treatment of indigenous peoples and the character of the entire federal Indian law apparatus upon which much of U.S. policy concerning Native Americans is based. This kind of international scrutiny has certain implications for U.S. foreign policy in connection with how the United States is going to be treated by the international community, and by international actors within the United Nations. Conceivably, we could see this scrutiny becoming quite a thorn in the side of the United States. If every time it tries to toot its horn about how great it is in the area human rights, the Dann case is thrown in its face, the United States must contend with being seen as a violator of human rights, in particular, human rights of indigenous peoples.

Related to this is the proposition that U.S. policy-makers need to be cognizant of these international standards in their domestic decision making precisely because the United States could be called to task for failing to take these international standards into account. I am talking about members of Congress and about executive officials who have the power to make decisions in conformity with international human rights standards. They should be made aware of the existence of these standards. It is not just a matter of indigenous peoples going before Congress with their pleas, and members of Congress responding by stating that "under law, you know there are no rights here, the rights have been extinguished, and Congress has plenary authority." No, no, no. It is instead a matter of going before Congress and arguing that, regardless of what domestic law says, the United States is under an international legal obligation to secure the land rights of the Western Shoshone people, and to protect the cultural integrity of the Western Shoshone and all other indigenous peoples in this country.

That is quite a different discourse that one can engage in with policy-makers and it is quite a different mind-set into which policy-makers should be forced — not a mind-set where their sole or primary parameters are what U.S. Indian law says, but parameters that also include the international standards.

These international standards have the potential to call the domestic legal apparatus to task. And then finally, there is the opportunity that the international standards will filter through judicial decision-making.

Many of you will be familiar with *Roper v. Simmons*,³² decided by the Supreme Court last term, in which the U.S. Supreme Court determined as a matter of law that the juvenile death penalty is invalid under the U.S. Constitution's prohibition of cruel and unusual punishment.³³ After this decision, it is unconstitutional to execute individuals who committed a capital crime before the age of eighteen. In concluding this, the Supreme Court reversed course from *Stanford v. Kentucky*,³⁴ in which the Court had upheld the juvenile death penalty, at least as to juveniles between the ages of sixteen and eighteen.³⁵ In interpreting the Eighth Amendment to prohibit the juvenile death penalty (in *Roper*), the Supreme Court referenced international standards.³⁶

The Court was sensitive to the fact that there is an international norm out there stating that it is impermissible to execute juvenile offenders. Now, we can debate whether that portion of the decision was just makeweight, and the extent to which the international consensus mattered to the Court; but the reference to the international norm is in the decision nonetheless. We see the justices, at least some of them, identifying the basic principles that were being applied internationally and using those principles to develop basic doctrines of United States constitutional law. The justices did so because international law has always been a source of authority within the architecture of constitutional governance in the United States. Yet, somehow, contemporary domestic law concerning Native Americans remains frozen in the international law of 200 years ago.

It seems very strange indeed that the country's founders relied on international law as a foundational element of the constitutional order and, yet, today, there is resistance to relying on international law to interpret the Constitution and other federal law as they relate to native peoples. You would think that rather than arguing about the federal Indian law of 200 years ago, more of us would be thinking, "Hey, we've got to modernize this," and why not modernize it in connection with its source, which is international law, as

32. *Roper v. Simmons*, 543 U.S. 551 (2005).

33. *Id.* at 575, 578.

34. *Id.* at 574 (stating that "*Stanford v. Kentucky* should be deemed no longer controlling on this issue"); *Stanford v. Kentucky*, 492 U.S. 361 (1989).

35. *Stanford*, 492 U.S. at 380.

36. *Roper*, 543 U.S. at 575-79.

evident in the much cited "trilogy" of Supreme Court opinions authored by Chief Justice John Marshall in the early nineteenth century.

So, it makes perfect sense to look to contemporary international norms, to come up with interpretations of domestic federal law doctrine, for example the trust doctrine. What does the trust doctrine mean? Well, 200 years ago it meant the obligation of the conqueror to take care of the presumably feeble, conquered, aboriginal peoples until they would disappear. With the power of conquest came the obligation to take some minimal care of the conquered. The contemporary trust doctrine should best be understood as an obligation to promote self-determination. Such an interpretation is not so inconsistent with the way trust notions have been thought of in modern times. Now in other contexts, if we take the international decolonization context, what does the trust notion mean there? The international community as a whole is deemed to have a trust responsibility toward colonized peoples, to non self-governing peoples. Now, is that trust responsibility a mandate to hold these colonized peoples down, to keep them in a state of pupilage, in a backwards state? No, it is to promote their self-determination, and their own ability to live by themselves. Surely the domestic trust responsibility concerning native peoples can be viewed in a similar fashion.

We could also take basic constitutional doctrine and reinterpret it in light of international standards concerning indigenous peoples. I began by pointing out how often we have seen equality juxtaposed against Indian rights and Indian law within this country. But, why not think of constitutional equal protection jurisprudence in light of the *Dann* case, of the CERD decision? Why not invigorate United States equal protection jurisprudence with this notion of equality that we see being applied internationally? Well, the best argument I can see for not doing it is that it has not much been done before. But, as Carrie taught me long ago, that's not a good reason for not doing anything.