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INDIGENOUS RIGHTS NORMS IN CONTEMPORARY INTERNATIONAL LAW

S. James Anaya*

I. INTRODUCTION: THE RE-EMERGENCE OF INDIGENOUS RIGHTS IN INTERNATIONAL LAW

Half a millennium ago the peoples indigenous to the continents now called North and South America began to experience change, a kind of change they had not experienced before. Europeans arrived and began to lay claim to their lands, frequently slaughtering the native children, women and men who stood in the way. For many of those who survived, the Europeans brought disease and slavery.¹

Not long after the genocidal patterns began, concerned European theologians and jurists questioned the legality and morality of the onslaught.² What

¹ The devastation of the early European contact has been extensively documented. See, for example, Julian Burger, Report from the Frontier 36-46 (1987), and sources cited therein. For a Native American person’s perspective, see Dee Brown, Bury My Heart at Wounded Knee (1970).

emerged from their lectures and writings were prescriptions designed to shape encounters with the peoples of the "New World". The dominant sixteenth century juridical view was expressed by the Spanish Dominican Francisco de Vitoria who, applying natural law precepts, challenged the Spanish claims to native lands. Vitoria argued that the Indians of the Americas were the true owners of their lands, with "dominion in both public and private matters," and upon this premise he set forth the rules by which the Europeans could validly acquire Indian lands or assert authority over them. To be sure, the rules were grounded in a European theocratic value system. But significantly, within the limitations of that value system, Vitoria essentially treated the Indians as having the same rights and duties as all of humanity.

Vitoria's lectures on the Indians established him among the oft-cited founders of modern international law. His prescriptions for the European encounters with the aboriginal peoples of the Western Hemisphere were building blocks for a system of principles and rules governing encounters among all peoples of the world. Conversely, subsequent theorists continued through the nineteenth century to include non-European aboriginal peoples as among the subjects of what came to be known as the "law of nations" and later "international law".

3. Francisco de Vitoria, On the Indians Lately Discovered (1532), published in Franciscus de Victoria, De Indis et de Iivre Belli Relectiones (Classics of International Law ed. 1917) (translation based on Boyer ed. 1557, Muñoz ed. 1565 & Simon ed. 1696) (using the Latin version of his name, "Franciscus de Victoria").

4. Id. at 127-28.

5. According to Vitoria, under the Roman jus gentium, the Indians were bound to allow foreigners to travel to their lands, trade among them and preach the gospel; failure to adhere to these rules could lead to "just" war and conquest. Id. at 151-56.

6. For a critical discussion of Vitoria and his application of the Roman jus gentium to the American Indians, see Robert A. Williams, Jr., The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought, 57 S. Cal. L. Rev. 1, 76-85 (1983).


10. See, e.g., Emmerich de Vattel, The Law of Nations or the Principles of Natural Law 38, 115-16 (III Classics of International Law ed. 1916) (1758) (criticizing "[t]hose European States which attacked the American Nations and subjected them to their avaricious rule... ").

Whatever protections the Europeans' law of nations afforded the non-Europeans, however, they were not enough to stop the forces of colonization and empire as they extended throughout the globe. Theorists eventually modified the law of nations to reflect, and hence legitimize, a state of affairs that consisted in the subjugation of indigenous peoples. Forgetting the origins of the discipline, theorists described the law of nations, or international law, as concerning itself only with the rights and duties of European and similarly "civilized" states and as having its source entirely in the positive, consensual acts of those states. Vitoria's admonishments concerning the American Indians were recast as statements of morality as opposed to law; international law moved to embrace what the "civilized" states had done, and what they had done was to invade foreign lands and peoples and assert sovereignty over them.

Since the human suffering of the first and second world wars, international law again has shifted but this time in retreat from the orientation in which theorists divorced law from morality and denied international rights to all but states. International law now contains among its constitutional elements precepts based on visions of a peaceful world order and the concept of human rights. These precepts nourish a powerful discourse that promotes standards of behavior through the prescriptive articulation of expectations and values of the human constituents of the world community, not by mere assessments of state conduct as in the positivist tradition. The United Nations, other modern international organizations and enhanced communications provide institutional support for the discourse. Under the rubric of human rights, particularly, it focuses directly on the welfare of individuals and, increasingly, of groups and hence extends the competency of international law beyond concern for relations among states only.


13. Westlake, for example, characterized Vitoria as one of "the worthy predecessors of those who now make among us the honorable claim to be 'friends of the aborigines.'" Westlake, supra note 12, at 136-38. The rights of indigenous peoples were thus taken out of the realm of international concern and were "left to the conscience of the state within whose recognized territorial sovereignty they are comprised." Id. at 137-38.


The modern discourse of peace and human rights is reminiscent of the classical era of naturalist jurisprudence in which law was determined on the basis of what ought to be rather than simply on the basis of what is. Much as the classical naturalist framework was invoked by Vitoria and others to address the rights of native peoples in the face of encroaching societies, the modern discourse of human rights is the vehicle by which international law has come to revisit the topic.

Within the last several years, concern for groups identified as indigenous has assumed a prominent place on the international human rights agenda. The conceptual category of indigenous peoples or populations has emerged within the human rights organs of international organizations and other venues of international discourse.16 The category is generally understood to include not only the native tribes of the American continents but also other culturally distinctive non-state groupings, such as the Australian aboriginal communities and tribal peoples of southern Asia, that similarly are threatened by the legacies of colonialism.17

The subject groups are themselves largely responsible for the mobilization of the international human rights program in their favor. During the 1970s, indigenous peoples organized and extended their efforts internationally to secure legal protection for their continued survival as distinct communities.


17. The U.N. Indigenous Study contains the following definition:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, considered themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

with historically based cultures, political institutions and entitlement to land.18

Indigenous groups and supportive international non-governmental organizations (NGOs) linked their concerns with general human rights notions in appeals to international bodies.19 These efforts coalesced into a veritable international campaign, aided by an increase of supportive scholarly writings from moral and sociological, as well as juridical, perspectives.20

Through the international human rights program, indigenous peoples and their supporters have been successful in moving states and other relevant actors to an ever closer accommodation of their demands. The traditional doctrine of state sovereignty, with its corollaries of territorial integrity, exclusive jurisdiction and non-intervention in domestic affairs, has hobbled the capacity of the international legal order to affirm indigenous peoples’ rights and to limit accordingly the action of states within their asserted spheres of control. Nonetheless, the movement toward ever greater international affirmation of indigenous rights, notwithstanding the traditional bounds of sovereignty, is apparent. Moreover, while the movement can be expected to continue as indigenous peoples continue to press their cause, there has already emerged a new constellation of international norms specifically concerned with indigenous peoples.

The recently adopted International Labour Organization Convention on Indigenous and Tribal Peoples, Convention No. 169 of 1989,21 is to date the most concrete manifestation at the international level of the growing responsiveness to indigenous peoples’ demands. Part II of this article discusses Convention No. 169 and argues that the Convention is at least partially

18. Among the major developments were several international conferences attended by indigenous peoples’ representatives, including the 1977 International Non-Governmental Organization Conference on Discrimination Against Indigenous Populations in the Americas, held in Geneva. Indigenous peoples’ representatives at the conference drafted and circulated a draft Declaration of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere. The Declaration, reprinted in National Lawyer’s Guild, Rethinking Indian Law, supra note 16, at 137-38, became an early benchmark for indigenous peoples’ demands upon the international community. See also infra note 44 (referring to later indigenous peoples’ draft declarations).


expressive of new norms of customary international law, norms generated by patterns of communicative behavior involving states and international organizations. The existence of customary norms concerning indigenous peoples is significant in that customary norms are generally binding upon the constituent units of the world community regardless of any formal act of assent to the norms.

After part II, the article synthesizes general human rights principles, relevant international practice, and ILO Convention No. 169 to discern further the existence, content and normative underpinnings of an emergent body of international indigenous rights law. Hence, part III identifies a general human rights norm of cultural integrity and discusses its development in favor of indigenous peoples. Part IV examines new indigenous land rights norms, particularly as they are articulated in Convention No. 169, and identifies them as corollaries of the norm of cultural integrity and also of generally accepted property precepts. Finally, part V discusses the longstanding human rights principle of self-determination and links it with Convention No. 169 and relevant international practice to discern a new self-determination norm specifically concerned with indigenous peoples.

II. INTERNATIONAL LABOUR ORGANIZATION
CONVENTION NO. 169

The new ILO Convention on Indigenous and Tribal Peoples represents a marked departure in world community policy from the philosophy underlying the only previously existing international instrument expressly addressing the topic: ILO Convention No. 107 of 1957. Adopted at a time when the dominant political elements in domestic and international circles placed little or no value on indigenous cultures, Convention No. 107 presumed a norm of assimilation. Except for its land rights provisions, Convention No.

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23. The adoption of ILO Convention No. 107, for example, corresponds to the "termination" period in the United States during which federal policy was to promote the assimilation of Indian cultures by terminating federal recognition of their tribal status.

107 came to be regarded as a dinosaur. Accordingly, in 1986, the ILO convened a "meeting of experts" which recommended that the Convention be revised. The meeting unanimously concluded that the "integrationist language" of Convention No. 107 is "outdated" and "destructive in the modern world." The discussion on the revision proceeded at the 1988 and 1989 sessions of the International Labour Conference, the highest decision-making body of the ILO. At the close of the 1989 session, the Conference adopted the new Convention No. 169 and its shift from the prior philosophical stand. As of February 1992, four states had already ratified the Convention (Norway, Mexico, Colombia and Bolivia), and ILO officials reported that several other ratifications were expected in the near future.

Convention No. 169 carries the basic theme of the right of indigenous peoples to live and develop by their own designs as distinct communities. The Convention has extensive provisions advancing indigenous cultural integrity, land and resource rights, and non-discrimination in social welfare spheres; in addition, it generally enjoins states to respect indigenous peoples' aspirations in all decisions affecting them. Indigenous rights advocates have expressed dissatisfaction with language in Convention No. 169, viewing it as not sufficiently constraining of government conduct in


27. Id. para. 46.


29. The ILO has reported that among the countries indicating favorable dispositions toward prompt ratification are the following: Guatamala, Brazil, Venezuela, Chile and Russia. Telephone Interview with Lee Swepston, Legal Officer, ILO (Feb. 1992).

30. This theme is apparent in the Preamble to the Convention which recognizes "the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the states in which they live." ILO Convention No. 169, supra note 21, preamble para. 5.

31. See infra notes 82-92 and accompanying text.

32. See infra notes 101-14 and accompanying text.

33. See ILO Convention No. 169, supra note 21, part III (Recruitment and Conditions of Employment), part IV (Vocational Training, Handicrafts and Rural Industries), part V (Social Security and Health), part VI (Education and Means of Communication).

34. See infra notes 150-56 and accompanying text.
relation to indigenous peoples' concerns. Indeed, the Convention "contains few absolute rules but fixes goals, priorities and minimum rights." But whatever its shortcomings, the Convention succeeds in affirming the value of indigenous communities and cultures and in setting forth a series of basic precepts in that regard.

In 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. Customary norms arise—or to use the now much favored term "crystallize"—when a preponderance of states and other authoritative actors converge upon a common understanding of the norms' content and generally expect future behavior in conformity with the norms. The traditional points of reference for determining the existence of a customary norm are patterns of communicative behavior involving physical episodic conduct. Under traditional analysis, the content of the emergent rule and

35. Representatives of indigenous peoples' organizations expressed such dissatisfaction to the International Labour Conference ("ILC") upon completion of the drafting of ILO Convention No. 169. See International Labour Conference, Provisional Record 31, 76th Sess., at 31/6 (1989) [hereinafter 1989 ILO Provisional Record 31] (statement of Sharon Venne, representative of the International Work Group for Indigenous Affairs speaking on behalf of indigenous peoples from North and South America, the Nordic countries, Japan, Australia and Greenland); see also id. at 31/7 (statement of Ontiveros Yulquila, representative of the Indian Council of South America). Since the Convention was adopted at the 1989 Labour Conference, however, indigenous peoples' organizations and their representatives increasingly have expressed support for ratification. Among the organizations now favoring ratification are the Nordic Sami Conference, the Inuit Circumpolar Conference, the World Council of Indigenous Peoples, and the National Indian Youth Council.

36. Swepston, supra note 28, at 689. Several of the provisions of the ILO Convention No. 169 contain caveats or appear in the form of recommendations. See, e.g., art. 8.1 ("In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws . . . ."); art. 9.1 ("To the extent compatible with the national legal system and internationally recognized human rights, the methods customarily practiced by the peoples concerned for dealing with offenses committed by their members shall be respected."); art. 10.1 ("In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.") (emphasis supplied). ILO Convention No. 169, supra note 21.

37. Professors McDougal, Lasswell and Chen describe customary law as "generally observed to include two key elements: a 'material' element in certain past uniformities in behavior and a 'psychological' element, or opinio juris, in certain subjectivities of 'oughtness' attending such uniformities in behavior." Myers S. McDougal et al., Human Rights and World Public Order 269 (1980) (footnote omitted). Compare the Statute of the International Court of Justice, article 38(1)(b), describing "international custom, as evidence of a general practice accepted as law."

38. Such episodic conduct is illustrated by Professor D'Amato thusly: [A] courier of State X delivers an unwelcome message to the king of State Y. The king imprisons the messenger. State X responds by sending another courier (obviously a reluctant one) who delivers the message that unless Y returns the first courier safe and sound X will sack and destroy the towns of Y. If Y releases the first courier with an apology and perhaps a payment of gold, a resolution of the issue in this matter will lead to a rule that official couriers are entitled to immunity against imprisonment.

Anthony D'Amato, The Concept of Human Rights in International Law, 82 Colum. L. Rev. 1110, 1130 (1982).
the required subjectivities of normative expectation (the so-called *opinio juris*) are inferred from the episodic conduct.

Today, however, interactive patterns around concrete events are no longer considered the only—or even necessarily required—material elements constitutive of customary norms. With the advent of modern international intergovernmental institutions and enhanced communications media, states and other relevant actors increasingly engage in dialogue to come to terms on international standards. It is now understood that express communication, whether or not in association with concrete events, is a form of practice that builds customary rules, and that communication may itself bring about a convergence of understanding and expectation about rules even in advance of a widespread corresponding pattern of physical conduct. Of course, conforming conduct will strengthen emergent customary rules by enhancing attendant subjectivities of expectation.

ILO Convention No. 169 embodies a convergence of normative understanding and expectation, which under the theory just sketched, is constitu-

39. See McDougal et al., *supra* note 37, at 272 ("[I]t is easily observable that such organizations, especially the United Nations and affiliated agencies, play an increasingly important role as forums for the flow of explicit communications and acts of collaboration which create peoples' expectations about authoritative community policy.").

40. See *id.* at 272-73; Bin Cheng, *United Nations Resolutions on Outer Space: Instant International Customary Law?*, 5 Indian J. Int'l L. 43 (1965) (stating that the common belief of states that they are bound to a rule is the "only one single constitutive element" and that conforming actual conduct merely provides evidence of the rule's existence.); H.W.A. Thirlway, *International Customary Law and Codification* 56 (1972) ("The *opinio necessitatis* in the early stages is sufficient to create a rule of law, but its continued existence is dependent on subsequent practice accompanied by *opinio juris*, failing which the new-born rule will prove a sickly infant, and fail to survive for long."). Accordingly, Professor Brownlie defines the "material sources of custom" to include: "diplomatic correspondence, policy statements, press releases, . . . comments by governments on drafts produced by the International Law Commission, . . . recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly." Ian Brownlie, *Principles of Public International Law* 5 (4th ed. 1990). See also Michael Akehurst, *Custom as a Source of International Law*, 1974-75 Brit. Y.B. Int'l L. 1, 15-16; Tunkin, *Theory of International Law* 114-15 (1970) (Butler trans. 1974); Theodor Meron, Human Rights and Humanitarian Norms as Customary Law 41 (1989).

Professor D'Amato holds that when two or more states conclude a treaty setting forth generally applicable norms, the treaty-making act itself generates customary international law. D'Amato *supra* note 38, at 1130-35. Professor Sohn further observes that government practice in negotiating the text of a normative treaty may generate customary law even in advance of signature or ratification: "[T]he Court is thus willing to pay attention not only to a text that codifies preexisting principles of international law but also to one that crystallizes an 'emergent rule of customary law."


41. See generally Joseph Gabriel Starke, *Introduction to International Law* 38-39 (10th ed. 1989) (describing how the recurrence of a usage develops *opinio juris*, that is "an expectation that, in similar future situations, the same conduct or the abstention therefrom will be repeated.").
five of customary law. The process leading to the adoption of the Convention was part of a larger effort to identify and promote indigenous rights that had been going on for some time within international human rights bodies, particularly within the United Nations Working Group on Indigenous Populations ("Working Group"). Established in 1982, the Working Group is an organ of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities ("Sub-Commission") with a mandate to review developments concerning indigenous peoples' rights and to work toward the evolution of corresponding international standards. In 1985 its standard-setting mandate was refined when the Sub-Commission approved the Group's decision to draft a declaration on the rights of indigenous peoples for adoption by the U.N. General Assembly.

The Working Group itself is composed of five rotating members of the Sub-Commission who act in the capacity of experts rather than government representatives. Through its activities, however, the Working Group has engaged states, indigenous peoples and others in an extended multilateral dialogue on indigenous rights. The Working Group has provided a forum for indigenous representatives to articulate concerns and assert rights, which they have done in part by promoting their own written declarations of rights.


44. The Working Group is unique in all the U.N. System in its practice of allowing anybody to speak at public Working Group meetings. In other U.N. meetings open to individuals other than government representatives, participation is limited to designated experts, special invitees or representatives of non-governmental organizations with recognized consultative status with the Economic and Social Council. See generally Chiang Pei-Heng, Nongovernmental Organizations at the United Nations: Identity, Role, and Function (1981).

Government representatives have joined in the discourse with their own pronouncements on the content of indigenous rights.\textsuperscript{46} Virtually every State of the American continents has participated in the discussion. Canada, with its large indigenous population, has taken a leading role. States of other regions with significant indigenous populations also have been active, especially Australia and New Zealand. The Philippines, Bangladesh and India are just a few of the other numerous states that have made regular oral or written submissions to the Working Group.\textsuperscript{47}

Most all of the states that have been active in the U.N. Working Group meetings also took on visible roles in the committee of the International Labour Conference that drafted Convention No. 169. The United States, although having minimally participated in the Working Group’s activity, notably contributed to the ILO process.\textsuperscript{48} Representatives of a total of thirty-nine governments participated in the Conference committee, in addition to the worker and employee delegates that are part of the “tripartite” system of governance in the ILO.\textsuperscript{49} The ILO treaty revision process accelerated the international discussion of indigenous rights by focusing it on the adoption of a normative instrument within a fairly short time frame.

The text of the Convention was approved by the committee by consensus\textsuperscript{50} and adopted by the full Conference by an overwhelming majority of the voting delegates.\textsuperscript{51} None of the government delegates voted against adoption of the text, although a number abstained.\textsuperscript{52} Government delegates who abstained, however, expressed concern primarily about the wording of certain provisions or about perceived ambiguities in the text, while in many


\textsuperscript{47} A listing of the participants at the Working Group meetings and a summary of the discussion is included in the reports that correspond to each of the annual Working Group sessions. See, e.g., 1989 Working Group Report, \textit{supra} note 43; 1990 Working Group Report, \textit{supra} note 43; 1991 Working Group Report, \textit{supra} note 43.


\textsuperscript{50} 1989 ILO Provisional Record 25, \textit{supra} note 48, at 25/24 to 25/25.

\textsuperscript{51} The vote was 328 in favor, 1 against, with 49 abstentions. The opposing vote was cast by the employer delegate from the Netherlands. International Labour Conference, Provisional Record 32, 76th Sess., at 32/17 to 32/19 (1989) [hereinafter 1989 ILO Provisional Record 32].

\textsuperscript{52} Among the delegates recording votes in favor of the Convention were representatives of the governments of 92 states; the government delegations of 20 states recorded abstentions. \textit{Id}.
instances indicating support for the core precepts of the new Convention.\footnote{53} No government recorded outright rejection of the essential principles represented in the text.\footnote{54} Since the Convention was adopted in 1989, government

\footnote{53. Peru's statement is typical of the views expressed by the abstaining governments:

Given the importance of this subject for Peru, our delegation participated actively in the revision of Convention No. 107 with a view to updating the text and improving it on a multilateral basis to promote the rights of indigenous and native populations and to guarantee these rights in the various countries. We also wished to ensure that within the international community these populations would be able to develop fully and transmit their cultural heritage.

In my country, there is very progressive legislation along these lines and I must highlight the fact that most of the criteria laid down in the new Convention are already contained in our legal instruments. However, the work which has taken place within this tripartite forum—at an international level—has been of considerable significance and receives our full support.

In this context, after the prolonged negotiations which led to a consensus text, our delegation nevertheless felt bound to express reservations with respect to the use in the Convention of some terms which could lead to ambiguous interpretations and create difficulties with our laws in force, on some points of the highest importance. These reservations are laid down in paragraph 156 of the report of the Committee. \ldots

\textit{Id.} at 32/12. The part of the Committee report cited reflects Peru's concern over the use of the term "territories" and other language that "might imply the right to deny or accord approval and thereby lead to concepts of sovereignty outside the Constitution." 1989 ILO Provisional Record 25, \textit{supra} note 48, at 25/22. \textit{See also}, e.g., 1989 ILO Provisional Record 32, \textit{supra} note 51, at 32/12 (statement of the government delegate of Argentina concurring in the "pluralistic view of the new Convention" and endorsing "national legislation which recognizes the cultural and social identity of indigenous peoples and the granting of land" to them, while at the same time expressing difficulty with the use of the term "peoples" to refer to the subject groups and with the inclusion of the words "consent" and "agreement" in article 6). On use of the terms "territories", "peoples" and the wording of article 6, see, respectively, \textit{infra} notes 120 and accompanying text, note 146, and note 153. Government expressions of dissatisfaction with the text were directed especially at its land rights provisions. \textit{See, e.g.}, 1989 ILO Provisional Record No. 25, \textit{supra} note 48, at 25/16 to 25/23 (summarizing statements of the governments of Argentina, Brazil, Japan, Peru, and Venezuela). Government attitudes toward the land rights norms expressed in Convention No. 169 are discussed \textit{infra} notes 115-21, and accompanying text. Several of the abstaining governments indicated support for the Convention's basic thrust by reporting on domestic initiatives generally consistent with the Convention. \textit{See infra} note 59 and accompanying text.

\footnote{54. But see the Venezuelan adviser's statement in 1989 ILO Provisional Record 31, \textit{supra} note 35, at 31/16, that Venezuela "has serious difficulties with the text submitted \ldots [which] includes concepts by their nature and scope [that are in conflict with standards contained in the Venezuelan national Constitution and with some specific provisions of our legislation on the subject. Our government will examine the text carefully and constructively." Similarly, in statements to the U.N. Working Group, Venezuela has appeared reluctant to embrace norms concerning indigenous peoples beyond prescriptions of nondiscrimination. \textit{See, e.g.}, U.N. Doc. E/CN.4/Sub.2/AC.4/1990/1, at 13 (1990) (information received from Government of Venezuela). Venezuela's public statements to international bodies, however, do not fully reflect that country's position or compulsion regarding indigenous peoples' rights. For example, in the summer of 1991 the Venezuelan president signed a decree "that reserves a stretch of Amazon forest the size of Maine as a permanent homeland for the country's 14,000 Yanomami Indians." James Brooke, \textit{Venezuela Befriends Tribe, But What's Venezuela?}, N.Y. Times, Sept. 11, 1991, at A4.}
comments directed at developing a universal indigenous rights declaration in the U.N. Working Group context generally have affirmed the basic precepts set forth in the Convention, and indeed the comments indicate an emerging consensus that even more closely accords with indigenous peoples' demands.\textsuperscript{55}

The convergence of international opinion about the content of indigenous rights implies a convergence of subjectivities of obligation and expectation attendant upon the rights, regardless of any treaty ratification or other formal act of assent to the articulated norms. The standard-setting discussion in both the Working Group and the ILO has proceeded in response to demands made by indigenous groups over several years and upon an extensive record of justification based upon general human rights precepts.\textsuperscript{56}

The pervasive assumption has been that the articulation of indigenous rights norms is an exercise in identifying standards of conduct that are \textit{required} to uphold widely shared community values of human dignity. The multilateral processes that build a common understanding of the content of


indigenous rights, therefore, also build expectations that the rights will be upheld.57

Especially probative of the existence of customary indigenous rights norms are government statements in the ILO and Working Group processes about relevant domestic policies and initiatives. Because the reports of domestic developments have been made to international audiences concerned with promoting indigenous peoples’ rights, they provide a strong indication of what governments consider their corresponding obligations to be, notwithstanding difficulties in agreeing on normative language for inclusion in written texts. Several governments made statements on domestic developments during the negotiation of Convention No. 169 and upon its submission for a record vote.58 The statements reflect a clear trend of programmatic reforms generally in line with the Convention, even among states whose governments abstained from voting in favor its adoption.59

57. Moreover, such subjectivities of expectation are of a legal and not just moral character. Traditionally, there has been a distinction between subjectivities of moral as opposed to legal obligation or expectation, with only the latter qualifying as opinio juris, the essential psychological component of customary law. The distinction between moral and legal obligation is a product of positivist thinking that prevailed in international legal discourse at the turn of the century. See supra note 12 and accompanying text. Under such thinking, it was possible for a state to violate widely shared norms of human dignity while not committing an affront to international law. However, as noted at the outset of this article, contemporary international law includes among its constitutional elements the moral precepts of peace and human rights. The U.N. Charter and the constituent texts of the major regional intergovernmental organizations, along with decades of transnational normative activity, have firmly established an obligation to uphold human rights as a matter of general international law. See supra note 56. The consequent demise of the traditional distinction between moral and legal obligation is evident in contemporary jurisprudential studies. For Miguel D’Estefano, state practice builds customary law where it is a response to “an idea of justice and humanity.” Miguel A. D’Estefano, I Esquemas del Derecho Internacional Publico (Primera Parte) 13 (1986) (translation from Spanish is the writer’s). Professor Meron finds opinio juris in a subjective belief that a practice follows from “compelling principles of humanity.” Meron, supra note 40, at 53. Professors McDougal, Lasswell and Chen hold that “subjectivities of oughtness [opinio juris] required to attend . . . uniformities of behavior may relate to many different systems of norms, such as prior authority, natural law, reason, morality, or religion.” McDougal et al., supra note 37, at 269. See also Brownlie, supra note 40, at 28 (discussing considerations of humanity that may function as a source of law).

58. For example, see government statements made to the Conference committee that drafted ILO Convention No. 169, summarized in 1989 ILO Provisional Record 25, supra note 48, at 25/2 to 25/3; see also 1989 ILO Provisional Record 31, supra note 35, at 31/12 to 31/17 (containing government statements to the plenary of the Labour Conference upon the Convention’s submission for a vote); 1989 ILO Provisional Record 32, supra note 51, at 32/11 to 32/12.

59. See 1989 ILO Provisional Record 25, supra note 48, at 25/2: “Several Government members referred to recent enactments of legislation . . . and noted that their legislation went beyond the provisions contained in the proposed Convention.” See also 1989 ILO Provisional Record 32, supra note 51. Among the abstaining governments that reported on such domestic developments were the governments of Bangladesh, Brazil, Argentina and Peru. Id. at 32/11 to 32/12. The government delegate from Bangladesh, for example, even while expressing reservations about the need to revise the ILO Convention, reported on “recent legislation passed by the parliament with a view to further strengthening the rights of tribal peoples and the machinery to enable them to manage their own affairs and preserve their own socio-cultural heritage and separate identity.” Id.
The government practice of reporting on domestic policies and initiatives has been a regular feature of the Working Group's activity under its mandate "to review developments pertaining to the promotion and protection of indigenous populations." Over the life of the Working Group, more and more states have entered its discussion of developments, affirming the pattern of responsiveness to indigenous peoples' demands. In their written and oral statements to the Working Group, governments have continued to characterize their conduct in ways that comport with, and in many cases surpass, the norms expressed in the ILO Convention. Such statements add to the evidence of customary indigenous rights law which includes the essential aspects of Convention No. 169. The remainder of this article elaborates upon the emergent customary and conventional norms of indigenous rights, while establishing their grounding in previously accepted human rights precepts.

III. CULTURAL INTEGRITY

The new body of international law concerning indigenous peoples intersects with and in significant part extends from a generally applicable human

60. 1985 Sub-Comm'n Res., supra note 43.


62. The report of the 1991 session of the Working Group states:

Several Governments reported that their countries had experienced political changes and indigenous peoples have benefitted from the new constitutional reforms and enactment of legislation. Indigenous representatives participated in the drafting process or were consulted. As some indigenous representatives stated, even at this stage, new laws are being proposed or have been adopted which recognize the right to self-determination of indigenous peoples and their right to land, acknowledge the jurisdiction of indigenous peoples in their own territories, suggest mechanisms for dealing with the settlement of land claims, and recognize the right to education and health care.

rights norm of cultural integrity. The notion of respect for cultural particularism has been a feature of treaties among European powers since the Peace of Westphalia in 1648. The Anti-Genocide Convention, the first U.N. sponsored human rights treaty, upholds that all cultural groupings have, at a minimum, a right to exist. Respect for cultures beyond those of European derivation is promoted further by article 27 of the International Covenant on Civil and Political Rights. Article 27 affirms in universalist terms the right of persons belonging to "ethnic, linguistic or religious minorities . . . to enjoy their own culture, to profess and practice their own religion [and] to use their own language."


Although without endorsing such formalistic distinctions, U.N. practice has been to treat indigenous groups as within a category apart from the more general category of minorities. While there is a U.N. Working Group on Indigenous Populations, there is also a U.N. Working Group on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities. And the Minority Rights Working Group is engaged in a parallel effort to develop a U.N. declaration. See Draft Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, U.N. Doc. E/CN.4/1989/38, Annex I at 11 (1989). It is apparent that indigenous peoples are considered to have distinguishing concerns and characteristics that warrant separate treatment. Nonetheless, as Professor Brownlie observes, the normative bases for addressing indigenous peoples' concerns and the concerns of the more general category of minorities have much in common. Ian Brownlie, The Rights of Peoples in Modern International Law, in The Rights of Peoples 1, 5-6 (Crawford ed. 1988).


65. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951) (defining, at article II, genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. . . .")

66. International Covenant on Civil and Political Rights, supra note 63, art. 27.

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

1. Each culture has a dignity and value which must be respected and preserved.
2. Every people has the right and duty to develop its culture.
3. In their rich variety and diversity, and in the reciprocal influence they exert on one another, all cultures form part of the common heritage belonging to all mankind. 68

Both article 27 of the Covenant and the UNESCO Declaration are framed by preambular language as extending from the human rights principles of the United Nations Charter. 69 A number of other human rights instruments also have provisions upholding rights of cultural integrity. 70

The cultural integrity norm, particularly as embodied in article 27, has been the basis of decisions favorable to indigenous peoples by the U.N. Human Rights Committee and the Inter-American Commission on Human Rights of the Organization of American States. Both bodies have held the norm to cover all aspects of an indigenous group’s survival as a distinct culture, understanding culture to include economic or political institutions, land use patterns, as well as language and religious practices. The norm is also held to require states to act affirmatively to protect the cultural matrix of indigenous groups and not simply to refrain from coercing assimilation or abandonment of cultural practices. The Inter-American Commission, furthermore, has treated the norm as generally binding upon states regardless of any specific treaty obligation.


69. See, e.g., International Covenant on Civil and Political Rights, supra note 63, preambular para. 4 (“[i]n consideration the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms”); 1966 UNESCO Declaration of the Principles of International Cultural Cooperation, supra note 68, para. 9 (proclaiming the declaration “to the end that governments, authorities, [etc.] . . . may constantly be guided by these principles; and for the purpose . . . of advancing . . . the objectives of peace and welfare that are defined of the charter of the United Nations.”).

70. See, e.g., 1960 UNESCO Convention on Combatting Discrimination in Education, Dec. 14, 1960, art. 5 (entered into force May 22, 1962) (recognizing “the right of all members of national minorities to carry out educational activities of their own, among them that of establishing and maintaining schools, and according to the policy of each state on education, to use their own language.”). Recently, the cultural rights of ethnic minorities have been the subject of renewed focus by the Conference on Security and Co-Operation in Europe. See Hurst Hannum, Contemporary Developments in the International Protection of the Rights of Ethnic Minorities, 66 Notre Dame L. Rev. 1431, 1439–43 (1991).
In its 1985 decision concerning the Yanomami of Brazil,\(^7\) the Commission invoked article 27 in favor of the Indians even though Brazil is not a party to the International Covenant on Civil and Political rights. Citing the article, the Commission held that “international law in its present state . . . recognizes the right of ethnic groups to special protection on the use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity.”\(^7\) In this vein, the Commission stressed that “the Organization of American States has established, as an action of priority for the member states, the preservation and strengthening of the cultural heritage of [indigenous] groups. . . .”\(^7\) The Commission viewed a series of incursions into Yanomami ancestral lands as a threat not only to Yanomami’s physical well-being but also to their culture and traditions.\(^7\) Among the recommendations made by the Commission to protect the cultural heritage of the Yanomami was that the government proceed to secure the boundaries of a reserve for the group.\(^7\)

The Commission further demonstrated the scope of the cultural integrity norm in its consideration of a complaint against the government of Nicaragua concerning the Miskito Indians.\(^7\) The Commission found that the “special legal protection” accorded the Indians for the preservation of their cultural identity should extend to “the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands.”\(^7\) In response to the Indians’ demands for political autonomy, the


\(^{72}\) Id. at 31 para. 7.

\(^{73}\) Id. para. 9.

\(^{74}\) Id. at 29-30, para. 2.

\(^{75}\) Id. at 33, para. 3b.


\(^{77}\) Id. at 81, para. 15. The Commission noted that the requirement of special measures to protect indigenous culture is

“based on the principle of equality: for example, if a child is educated in a language which is not his native language, this can mean that the child is treated on an equal basis with other children who are educated in their native language. The protection of minorities, therefore, requires affirmative action to safeguard the rights of minorities whenever the people in question . . . wish to maintain their distinction of language and culture.”

Id. at 77, para. 4 (quoting U.N. Secretary General: The Main Types and Causes of Discrimination, U.N. Publ. 49.XIV.3 paras. 6-7).
Commission also found that "the observance of these principles entails the need to establish an adequate institutional order as part of the structure of the Nicaraguan state."\textsuperscript{78}

A similarly extensive view of the cultural integrity norm as applied to indigenous peoples has been taken by the U.N. Human Rights Committee. In \textit{Ominayak and the Lubicon Lake Band v. Canada}\textsuperscript{79} the Committee construed the cultural rights guarantees of article 27 to extend to "economic and social activities" upon which the Lubicon Lake Band relied as a group.\textsuperscript{80} Thus the Committee found that Canada had violated article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and for timber development within the aboriginal territory of the Band. The Committee acknowledged that the Band's survival as a distinct cultural community was bound up with the sustenance that it derived from the land.\textsuperscript{81}

Government practice in the U.N. Working Group and in the negotiation and adoption of the text of ILO Convention No. 169 is in accord with these interpretations of the norm of cultural integrity, and the practice is probative of the norm's status as customary law. Ambassador España-Smith of Bolivia, the chair of the ILO Conference Committee that drafted Convention No. 169, summarized the normative consensus reflected in the text:

The proposed Convention takes as its basic premise respect for the specific characteristics of the differences among indigenous and tribal peoples and the cultural, social and economic spheres. It consecrates respect for the integrity of the values, practices and institutions of these peoples in the general framework of guarantees enabling them to maintain their own different identities and ensuring self-identification,

\textsuperscript{78} \textit{Id.} at 81-82, para. 15.


\textsuperscript{80} Report of the Human Rights Committee, \textit{supra} note 79, para. 32.2.

\textsuperscript{81} \textit{See also} Kitok v. Sweden, \textit{in} Report of the Human Rights Committee, \textit{supra} note 79, para. 9.6. In considering whether reindeer husbandry constituted a cultural activity protected by article 27 of the Covenant, the Human Rights Committee observed:

The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under Article 27 of the Covenant . . . [t]he committee observes, in this context, that the right to enjoy one's own culture in community with the other members of the group cannot be determined \textit{in abstracto} but has to be placed in context.

The Committee, however, ultimately found that the Swedish Reindeer Husbandry Act did not violate article 27 as to the complainant. The Committee noted that Kitok was allowed under the Act to graze his reindeer and carry on other subsistence activities, under the act, even if not as a matter of right. \textit{Id.} paras. 9.6 to 9.8.
totally exempt from pressures which might lead to forced assimilation, but without ruling out the possibility of their integration with other societies and lifestyles as long as this is freely and voluntarily chosen.\textsuperscript{82}

The same cultural integrity theme is at the core of the draft indigenous rights declarations produced by the chair of the U.N. Working Group pursuant to that body's standard-setting mandate.\textsuperscript{83} States have joined indigenous rights advocates in expressing widespread agreement with that essential thrust even while diverging in their views on particular aspects of the drafts.\textsuperscript{84} The preamble to the Working Group chair's first revised draft declaration is an express elaboration on the norm of cultural integrity as applied to indigenous peoples. In 1990, the Working Group chair concluded, on the basis of comments by governments and nongovernmental organizations, that a consensus supported all but three of the preambular paragraphs.\textsuperscript{85} Among the preambular paragraphs for which the Working Group Chair reported widespread support is the following:

\emph{Endorsing} calls for the consolidation and strengthening of indigenous societies and their cultures and traditions through development based on their own needs and value systems and comprehensive participation in and consultation about all other relevant development efforts.\ldots \textsuperscript{86}

The Working Group Chair also reported general agreement among governments and NGO's with regard to the following operative provision of the revised draft:

3. the [collective] right to exist as distinct peoples and to be protected against genocide.\ldots

\textsuperscript{82}1989 ILO Provisional Record 31, \textit{supra} note 35, at 31/4; see also government statements in 1988 ILO Provisional Record 32, \textit{supra} note 48, at 32/11 to 32/13.

\textsuperscript{83}See infra notes 86-87 and accompanying text.

\textsuperscript{84}See 1989 Working Group Analytical Compilation of Observations, \textit{supra} note 55. Australia, for example, "supports the thrust of the draft declaration towards recognition of the right of indigenous people to be free and equal to all other human beings, to preserve their cultural identity and traditions, and to pursue their own cultural development." \textit{Id.} at 2.

Panama holds that the "draft universal declaration on indigenous rights reflects all contemporary assumptions regarding indigenous populations and represents genuine recognition of the rights of those populations to be observed by Governments and societies." \textit{Id.} at 8.

Commenting on the first revised draft, Mexico affirmed that it "endorses, on the whole, the spirit of the draft" and emphasized the importance of clear language affirming the cultural characteristics and the distinct identity of indigenous peoples. U.N. Doc. E/CN.4/Sub.2/AC.4/1991/1 (1991), \textit{supra} note 55, at 6.

\textsuperscript{85}See 1990 Working Group Analytical Commentary, \textit{supra} note 55, at 3.

4. the [collective] right to maintain and develop their ethnic and cultural characteristics and distinct identity, including the right of peoples and individuals to call themselves by their proper names...\(^{87}\)

The ILO and Working Group processes, furthermore, confirm that States are to act affirmatively to protect the enjoyment of indigenous culture.\(^{88}\) Within these processes states have manifested their assent to a requirement of affirmative action with particular regard to language, although with some divergence of views. Indigenous peoples’ representatives have advocated that indigenous peoples be permitted to use their mother tongue in legal proceedings, and that position has found support among some states.\(^{89}\) Other states, while demonstrating support for the use of indigenous languages in legal proceedings and other official contexts, have appeared reluctant to accede to a strict requirement to that effect.\(^{90}\) The trend, nonetheless, is in

\(^{87}\) Id. operative paras. 3, 4.

\(^{88}\) Thus, article 2(1) of ILO Convention No. 169, supra note 21, provides: “Governments shall have responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.” Similarly, operative paragraph 7 of the First Revised Text of the Draft Universal Declaration on the Rights of Indigenous Peoples, supra note 43, specifies: “The right to require that states grant—within the resources available—the necessary assistance for the maintenance of their identity and their development.” This provision was among those for which the Working Group Chair reported there is widespread support among governments and NGOs. 1990 Working Group Analytical Commentary, supra note 55, at 3. See also U.N. Indigenous Study, supra note 16, at U.N.Doc. E/CN.4/Sub.2/1983/21/Add.3 para. 12 (1983) (“The fact that the State has clear positive responsibilities in matters of cultural rights is generally recognized today.”).

\(^{89}\) During the drafting of Convention No. 169, for example, the government delegate from Ecuador proposed an amendment to allow indigenous peoples to use their languages in legal proceedings. The delegate from Argentina responded that, although the amendment was laudable, it was impractical. The amendment was withdrawn. 1989 ILO Provisional Record 25, supra note 48, at 25/16.

\(^{90}\) Canada, for example, has reported to the U.N. Working Group that it “encourages and financially supports its aboriginal citizens in maintaining, using and promoting their own languages and cultures in their own communities, in educating their children, in legal proceedings, etc. However... it would be administratively and financially difficult, if not impossible to provide for the use of over 50 aboriginal languages for administrative or other official purposes.” U.N. Doc. E/CN.4/Sub.2/AC.4/1990/1/Add.1 (1990), supra note 55, at 3 (information from the Government of Canada). Similarly, the government of New Zealand stated to the Working Group that it can “fully support” the concept of the right of indigenous peoples to use their language in judicial administrative proceedings. The government also suggested, however, that “the principle be couched in terms of being an objective for states to work toward in a determined and thorough-going manner.” 1991 Statement of the Government of New Zealand to the Working Group (presented by Alastair Bisley, Permanent Representative) (on file with author) [hereinafter 1991 Statement of the Government of New Zealand to the Working Group]. Previously, the New Zealand government had reported to the Working Group on the Maori Language Act of 1987 which “declares Maori to be an official language and establishes a Commission to promote the Maori language as an ordinary means of communication.” 1989 Statement of the Government of New Zealand to the Working Group (presented by Graham Fortune, Permanent Representative) (on file with author) [hereinafter 1989 Statement of the Government of New Zealand to the Working Group]. See also, Statements of Colombia, Egypt,
favor of greater efforts to promote and accommodate indigenous languages.  

Normative expectations converge at least to the extent of an obligation upon states to provide some affirmative support for the use of indigenous languages as appropriate to particular circumstances. At a minimum, states must provide interpretation services or other effective means to ensure that indigenous persons can communicate in legal proceedings and other official contexts.

As for religion, states have conceded that the preservation of sacred sites and guarantees of access to them are among the affirmative measures which may be required in particular circumstances. Thus, the government of Australia reported to the U.N. Working Group that it successfully halted the construction of a dam that would have submerged a number of sacred sites near Alice Springs. The Australian government also reported that it had stopped a mining project that would have damaged an area of significant cultural and religious import to the aboriginal Jawoyn people. Similarly, the government of New Zealand reported to the U.N. Working Group on newly established protection for sites of special religious significance to the

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92. ILO Convention No. 169 provides that “[m]easures shall be taken to insure that members of [indigenous peoples] can understand and be understood in legal proceedings, where necessary for the purpose of interpretation or by other effective means.” ILO Convention No. 169, supra note 21, art. 12. Argentina goes further suggesting that the proposed Universal Declaration on Indigenous Rights include: “The right to develop and promote their own languages, including an [sic] own literary language, and to use them for cultural and other purposes. In legal and administrative proceedings, when the indigenous person does not know the national language, the State shall obligatorily provide and/or make available the services of interpreters. . . .” 1991 Revised Working Paper, supra note 55, at 57.


94. Id.
indigenous Maori of that country.\textsuperscript{95}

Rights of access to sacred sites, however, are generally not held to be absolute. Canada, for example, agrees with rights of access to sacred sites and burial grounds, but stresses the need to balance such rights with competing claims and interests of non-indigenous groups and the state itself.\textsuperscript{96} In any case, states clearly are held, and hold themselves, to an increasingly higher standard of care to ensure indigenous peoples the free exercise of their religious traditions.\textsuperscript{97}

Government practice indicates assent to affirmative duties protective of culture beyond categories of language and religion, commensurate with the broad interpretation of the cultural integrity norm advanced by the Inter-American Human Rights Commission and the U.N. Human Rights Committee. In statements to the ILO and U.N. Working Group, governments have reported on domestic initiatives concerning indigenous peoples, including constitutional and legislative reforms, and have characterized the initiatives as generally intended to safeguard the integrity and life of indigenous cultures.\textsuperscript{98} The reported reforms vary in scope and content, based in part on the diversity of circumstances and characteristics of the indigenous groups

\textsuperscript{95} See 1989 Statement of the Government of New Zealand to the Working Group, \textit{supra} note 90, at 5. ("All Crown agencies responsible for the management and disposal of Crown land must follow a procedure prior to disposal of any land in order that \textit{wahi tapu} [sacred sites] be protected.").


\textsuperscript{97} The formal policy of the United States, as expressed in the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996, is generally in line with international developments. The U.S. federal courts, however, have held the Act not to be judicially enforceable thus facilitating transgressions of the Act’s policy of promoting government accommodations for the exercise of indigenous religion. See, e.g., \textit{Lyng v. Northwest Indian Cemetery Protective Association}, 485 U.S. 439 (1988). But the federal courts have not ruled on the application of the modern \textit{international} norm requiring protection for the enjoyment of indigenous culture, including religious practices. For authority on the use of international rules in United States courts, see \textit{infra} notes 167-69.

\textsuperscript{98} Representatives of the following governments reported on such domestic initiatives: New Zealand, Brazil, U.S.S.R., United States, Mexico and Honduras. These reports are summarized in 1989 ILO Provisional Record 25, \textit{supra} note 48, at 25/2 to 25/4 paras. 9-14. The governments of Bangladesh, India, Argentina and Peru reported on similar initiatives to the plenary session of the 1989 ILC upon submission of the revised convention for a record vote. 1989 ILO Provisional Record No. 32, \textit{supra} note 51, at 32/11 to 32/12.

Additional domestic initiatives reflective of the norm of cultural survival and flourishment have recently been reported to the U.N. Working Group. Among these are constitutional reforms in Colombia, 1991 Statement of the Government of Colombia to the Working Group, \textit{supra} note 91; executive level initiatives, as well as legislative and constitutional reforms in Canada, characterized as efforts to preserve “the special place of our first citizens”, 1991 Statement of the Government of Canada to the Working Group (presented by Gerald E. Shannon, Ambassador and Permanent Representative) (on file with author) [hereinafter 1991 Statement of the Government of Canada to the Working Group]; proposed framework legislation in Australia that would set in motion a series of efforts to further the aspirations of the aboriginal peoples, July 31, 1991 Statement of the Government of Australia to the Working Group, \textit{supra} note 93; and the implementation of government policy characterized as responsive to the demands of the Maori people of New Zealand, 1991 Statement of the Government of New Zealand to the Working Group, \textit{supra} note 90.
concerned. The Maori people of New Zealand, for example, who live throughout that country and have developed pervasive linkages with the majority population in many spheres of life, are properly regarded as having requirements different from those of the isolated forest dwelling tribes of Brazil.\textsuperscript{99} Government representatives have been quick to point out the diversity among indigenous groups throughout efforts to articulate prescriptions protective of indigenous rights.\textsuperscript{100} That diversity, however, does not undermine the strength of the cultural integrity norm as much as it leads to an understanding that the norm requires diverse applications in diverse settings. In all cases, the operative premise is that of securing the survival and flourishing of indigenous cultures.

**IV. LAND AND NATURAL RESOURCES RIGHTS**

The Inter-American Human Rights Commission and the U.N. Human Rights Committee in the cases previously mentioned specifically acknowledge the importance of lands and resources to the survival of indigenous cultures.\textsuperscript{101} That understanding is a widely accepted tenet of contemporary international concern over indigenous peoples.\textsuperscript{102} It follows from indigenous peoples’ articulated ideas of communal stewardship over land and a deeply felt spiritual and emotional nexus with the earth and its fruits.\textsuperscript{103}

\textsuperscript{99} For information on the situation of the Maori people of New Zealand as compared to the conditions of the forest dwelling tribes of Brazil, see, respectively, Andrew Sharp, Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s (1990); Alex Shoutmatoff, The Rivers Amazon 39-54 (1978).


\textsuperscript{101} See supra notes 71-81 and accompanying text; see also Laurie Reynolds, Indian Hunting and Fishing Rights: the Role of Tribal Sovereignty and Preemption, 62 N.C. L. Rev. 743, 743 (1984) (“Historically, the land and its resources have played a central role in tribal life. Hunting and fishing, aside from satisfying basic need of subsistence, often have provided the tribe with a source of income and have played an important part in religious and ceremonial aspects of the tribal life.”).


It must be understood that, for indigenous populations, land does not represent simply a possession or means of production.... It is also essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture.

\textit{Id.} at 39.

Property concepts add to the normative underpinnings of indigenous land and resource rights. The idea of property is a long established feature common to societies throughout the world. The concept of property includes the notion that human beings have rights to lands and chattels that they by some measure of legitimacy have reduced to their control. Legal systems vary in prescribing the rules by which the rights are acquired and in defining the rights. The most commonly noted dichotomy is between the system of private property rights in Western societies and classical Marxist systems in which the state retains formal ownership of all real estate and natural resources while granting rights of use. The common feature, however, is that people do acquire and retain rights of a proprietary nature in relation to other people, and respect for those rights is valued.

Property has been affirmed as an international human right. Article 17 of the Universal Declaration of Human Rights states that "[e]veryone has the right to own property alone as well as in association with others" and that "[n]o one shall be arbitrarily deprived of his property." These norms are repeated in article 21 of the American Convention on Human Rights.

Early international jurisprudence invoked property precepts to affirm that indigenous peoples in the Americas and elsewhere had original rights to the lands they used and occupied prior to contact with the encroaching white societies. That jurisprudence made its way into the legal and political doctrine of some of the countries that were born of colonial patterns, most notably the United States. That doctrine, however, developed without


108. A common theme of the classical theorists of international law (1500s through early 1700s) was that non-European aboriginal peoples had territorial and autonomy rights which the Europeans were bound to respect. See Vitoria, supra note 3 (arguing that the Indians of the Americas were the true owners of their lands, with dominion in both public and private matters); Hugo Grotius, The Law of War and Peace 550 (Francis W. Kelsey et al. trans., Classics of International Law ed. 1925) (1646) (rejecting title by discovery "even though the occupant may be wicked, may hold wrong views about God, or may dully of wit. For discovery applies to those things which belong to no one."); Vattell, supra note 10.

109. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832) (drawing upon the "law of nations" to affirm the "original natural rights" of Indians to their lands); United States As
valuing indigenous cultures or the significance of their ongoing relationship with land. Thus the United States, while upholding original rights to lands, has traditionally treated Indian lands as fungible with cash.\(^{10}\)

In contemporary international law, by contrast, modern notions of cultural integrity join property precepts in the affirmation of indigenous land and resource rights, as evident in ILO Convention No. 169. The principal land rights provisions of the Convention are arts. 13 and 14:

**Article 13**

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

2. The 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**

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. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

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.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

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Article 15, furthermore, specifies the right "to participate in the use, management and conservation" of the natural resources pertaining to their lands. The Convention also states that indigenous peoples "shall not be removed from the lands which they occupy" unless under prescribed conditions and where necessary as an "exceptional measure".¹¹¹ When the grounds for relocation no longer exist, they "shall have the right to return to their traditional lands" and when return is not possible "these peoples shall be provided in all cases with lands of quality and legal status at least equal to that of the lands previously occupied by them."¹¹² The Convention additionally provides for recognition of indigenous land tenure systems.¹¹³

Thus Convention No. 169 affirms the norm recognized by the Inter-American Human Rights Commission and the U.N. Human Rights Committee that indigenous peoples are entitled to a continuing relationship with lands and natural resources according to traditional patterns of use or occupancy. Use of the words "traditionally occupy" in article 14(1), as opposed to use of the past tense of the verb, suggests that the occupancy must be connected with the present in order for it to give rise to possessory rights. In light of the article 13 requirement of respect for cultural values related to land, a sufficient present connection with lost lands may be established by a continuing cultural attachment to them, particularly if dispossession occurred recently. Also relevant in this regard is paragraph 3 of article 14 which mandates the establishment of land claims procedures. This provision is without any temporal limitation and thus empowers claims originating well in the past, including those that might today rest primarily on concepts of property.¹¹⁴

The essential aspects of Convention No. 169's land rights provisions are strongly rooted in a broad nexus of international opinion and practice. In responding to a questionnaire circulated by the International Labour Office in preparation for the drafting of the new Convention, governments overwhelmingly favored strengthening the land rights provisions of ILO Convention No. 107 of 1957, including governments not parties to that Convention.¹¹⁵ Although Convention No. 107 is generally regarded as flawed, it contains a recognition of indigenous land rights that has operated in favor of indigenous peoples' demands through the ILO's supervisory

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¹¹¹ ILO Convention No. 169, supra note 21, art. 16.
¹¹² Id. art. 16(3)-(4).
¹¹³ Id. art. 17.
¹¹⁴ A concurring analysis of the land rights provisions of Convention No. 169 from the perspective of the primary International Labour Office official involved in developing the Convention is in Swepston, supra note 28, at 696-710 (1990).
¹¹⁵ Responses to the land rights part of the questionnaire are summarized and analyzed in ILO Convention (No. 107), Report VI(2), supra note 90, at 45-64.
machinery. The discussion on the new Convention proceeded on the premise that indigenous peoples were to be accorded recognition of land rights in excess of those specified in Convention No. 107.

The land rights provisions of Convention No. 169 were finalized by a special working party of the Labour Conference Committee that developed the text of the Convention, and the Committee approved the provisions by consensus. Several governments, however, commented on the provisions and expressed concerns over their wording, although not with their basic content. Particularly problematic was use of the term "territories" in article 13(2) because some governments believed the term might have open-ended implications of sovereignty for indigenous peoples in derogation of the sovereignty of the state. But no exception was taken to the specific meaning attached to the term in the text. Several governments, moreover, reported on domestic measures that generally were in conformity with the adopted land rights provisions.

Government statements to the U.N. Working Group confirm general acceptance of at least the core aspects of the land rights norms expressed in Convention No. 169. Government statements tell of worldwide initiatives to secure indigenous possessory and use rights over land and to redress


117. Although the drafting of the land rights provisions of Convention No. 169 was controversial, the controversy was mostly a result of efforts by indigenous peoples' representatives, worker delegates and some governments to attain specification of greater land and resource rights than those ultimately included in the Convention. See Swepston, supra note 28, at 696-98.


119. Id. at 25/21 to 25/23.

120. See, e.g., id. at 25/22 (summary of the statement of Peru); see also, id. at 25/18 to 25/20 (summary of discussion prior to adoption of the consensus text). Several states also expressed difficulty with the use of the term "ownership" in article 14 to describe the character of the land rights recognized. See id. at 25/1 to 25/23. There was no objection, however, to the idea of secure rights of possession and occupancy in lands. Id. Thus, for example, Brazil, while expressing concern about article 14, stressed that its new Constitution "recognizes the permanent possession of traditionally occupied lands by indigenous and tribal peoples." Id. at 25/21.

121. See, e.g., 1989 ILO Provisional Record 25, supra note 48, at 25/19 (Brazil) and 25/22 (Colombia); 1989 ILO Provisional Record 31, supra note 35, at 31/13 (Norway, on behalf of itself, Finland, Sweden and Denmark); 1989 ILO Provisional Record 32, supra note 51, at 32/11 (India).
historical claims. And discussions over language for the indigenous rights declaration include efforts to build on the already recognized rights. It appears most probable that indigenous land rights norms, rooted in otherwise accepted precepts of property and cultural integrity, have made their way not just into international conventional law but also into customary law.

V. SELF-DETERMINATION

An additional and overriding normative category of international human rights law that extends in favor of indigenous peoples' demands is the principle or right of self-determination. The term “self-determination” gained prominence in international political discourse around World War I and served as a prescriptive vehicle for the re-division of Europe in the wake of the downfall of the German, Austro-Hungarian and Ottoman empires. World War II gave rise to the United Nations, and “self-determination of peoples” was included in the U.N. Charter as among the foundational principles to which the organization's members commit themselves. The International Human Rights Covenants hold out self-determination as a “right” of “[a]ll peoples” as does the African Charter on Human and Peoples Rights. Beyond its textual affirmation, self-determination is widely held to be a norm of general or customary international law, and


124. See Umozurike Oji Umozurike, Self-Determination in International Law 11-12 (1971). “The word 'self-determination' is derived from the German word selbstbestimmungs-recht and was frequently used by German radical philosophers in the middle of the 19th century.” Id. at 3.

125. U.N. Charter art. 1, para. 2.


arguably *jus cogens* (a peremptory norm). Theoretical conceptions about the precise contours of the norm vary. It is possible, however, to identify a core of widely held conviction in international legal discourse about the self-determination concept. That core consists of the idea that human beings, individually and as groups, should be in control of their own destiny and that structures of government should be devised accordingly. The self-determination idea promoted the downfall of colonial structures by which people were considered to be under "alien subjugation, domination and exploitation." Today, the idea promotes the abolition of apartheid in South

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The fact that the specific contours of the principle of self-determination remain elusive has not discouraged scholars from affirming its legal character. Ofuatey-Kodjoe responds to the skeptics by quoting Hirsch Lauterpacht:

> Although it may be admitted that the effective implementation of a rule is somewhat reduced by the lack of precision, there is no logical reason to say that the rule, therefore, does not exist, for, the existence of a rule of law, strictly speaking, is independent of the exactness of its definition.


Africa,\textsuperscript{132} "democratic reforms" throughout the world,\textsuperscript{133} as well as the reform of political institutions that impede the capacities of indigenous peoples to develop freely.

In the decolonization context, the international community conceived of self-determination as the right of the inhabitants of colonized territories to achieve a condition of self-government and equality through "(a) [e]mergence as a sovereign independent State; (b) [f]ree association with an independent State; or (c) [i]ntegration with an independent State."\textsuperscript{134} In most cases, relevant actors deemed circumstances to warrant the transformation of colonial territories into independent states. Prominent among the determining circumstances, although not the only factor, was the apparent or expressed desire of the majority of the people within the colonial territorial unit.\textsuperscript{135} Historical and geographic factors also came into play.\textsuperscript{136} In all cases, however, the goal was to remove the colonial structures of government in which the colonized were, by definition, not full and equal participants.\textsuperscript{137}

Contemporaneous with the early periods of the decolonization movement, previously existing and newly emergent states held out assimilation and rights of full citizenship as means of bringing enclave indigenous peoples


\textsuperscript{133} See generally Reisman, supra note 14, (discussing “self-determination” in association with the spread of the idea of government by the “will of the people” as evidenced by recent world events). The core idea of self-determination as described here is prominent in the political rhetoric of western leaders in reflecting upon the downfall of communist regimes. See, e.g., \textit{U.S., Europe Cut Aid to Haiti: Bush Seeks Ousted Leader's Return}, Chi. Trib., Oct. 2, 1991, at 4C (President Bush condemns military coup in Haiti and pledges to try to restore ousted democratically elected President Jean-Bertrand Aristide); \textit{Between Thatcher and Bush, Remarkable Common Ground}, Wash. Times, Sept. 29, 1991, at B2 (in reflecting upon the fall of communism and the responsibility of the West to aid the emerging democracies, Mrs. Thatcher stated that communism was opposed “not simply by an alliance of free peoples—though certainly by that—but by the ideas of liberty, free enterprise, private property and democracy.”).

\textsuperscript{134} Principles Which Should Guide Members In Determining Whether Or Not An Obligation Exists To Transmit The Information Called For In Article 73(e) of the Charter of the United Nations, Dec. 15, 1960, G.A. Res. 1541 (XV), principle VI. See Ofuatey-Kodjoe, supra note 129, at 115-28 (concluding that G.A. Res. 1541 is generally reflective of international practice in the application of the principle of self-determination to the colonial territories).

\textsuperscript{135} Where the process of decolonization came under the auspices of the U.N. General Assembly, the apparent or expressed goals of a “National Liberation Movement” frequently substituted for a referendum. Michla Pomerance, Self-Determination in Law and Practice 35-36 (1982) (criticizing the U.N. practice of giving preference to national liberation movements).

\textsuperscript{136} Historical and geographical factors, for example, led to the incorporation of the small territory of Ifni into Morocco, without a referendum for the people of Ifni. See Rigo-Sureda, supra note 130, at 176, 198. In most all cases, historical and geographic factors alone establish the self-determining unit.

\textsuperscript{137} Ofuatey-Kodjoe, supra note 129, at 125-26.
within the fold of self-government and equality. ILO Convention No. 107 of 1957 reflected the prevailing policy. The ideal paradigm was that of the culturally homogenous independent nation-state.

As the international community has come to value the integrity of indigenous cultures, there has emerged a new norm of self-determination which breaks from the dominant decolonization era paradigm. New thinking on the requirements of modern governmental institutions as they relate to indigenous peoples was advanced by the OAS Inter-American Commission on Human Rights in the case referred to above involving the Miskito Indians of Nicaragua. In responding to the Indians’ demands for political autonomy, the Commission found that they were not beneficiaries of the right of self-determination as the right was understood under the law of decolonization. However, the Commission defied its own formalism and found that notions of cultural integrity required a reconstituted political order for the Indians. The Commission further held that “[s]uch an institutional organization can only effectively carry out its assigned purposes to the extent it is designed in the context of broad consultation, and carried out with the direct participation of the ethnic minorities of Nicaragua, through their freely chosen representatives.”

Although perhaps unwittingly, the Commission in the Miskito case indicated how, for indigenous peoples, the notion of cultural integrity, like freedom and equality, is bound up with the principle of self-determination. If indigenous cultures are not valued, neither are their customs, and historical institutions of self-government are either mere relics of the past, or at best, mechanisms through which to assimilate indigenous cultures into the dominant one. Under such a perceptual gloss, the idea of self-determination may be considered satisfied by the simple inclusion of indigenous individuals as full participants within social and political systems that are based on Western liberal notions of democracy or popular sovereignty (or, until recently, Marxist proletarianism). But once indigenous cultural groupings are acknowledged and valued, as in the Miskito case, their defining characteristics and community aspirations become factors that must be reflected in the governing institutional order if self-determination notions are to prevail.

Following the Commission’s decision, the Nicaraguan government entered into negotiations with Indian leaders and eventually developed a

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138. During the early decolonization period the policy of the United States was to “terminate” federal recognition of Indian tribes and to assimilate them into the dominant society. Other states with diverse indigenous populations, particularly newly independent states, were similarly preoccupied with “nation-building”, a euphemism for policies of breaking down tribal bonds and customs in favor of assimilation.
139. See supra notes 22-27 and accompanying text.
140. OAS Miskito Indians Report, supra note 76, at 78-81.
141. Id. at 81-82.
142. Id. at 82.
constitutional and legislative regime of political and administrative autonomy for the Indian populated Atlantic Coast region of the country. The Nicaraguan government promoted the regime internationally as affirming the Atlantic Coast indigenous groups' self-determination.

The developments concerning the Nicaraguan Indians mark a worldwide trend. During the ILO and U.N. Working Group procedures numerous states have reported use of constitutional, legislative and other official measures to reorder governing institutional matrixes in response to indigenous peoples' demands. The indicated trend is toward securing for indigenous groups spheres of autonomy over a range of policy and administrative matters, while at the same time ensuring their effective participation in all decisions affecting them in matters left to the larger institutions of government.


144. For example, the Nicaraguan Sandinista government reported on its new autonomy regime to the United Nations Working Group at its 1988 session. The autonomy regime has been much criticized by a Nicaraguan Indian Organization, YATAMA, as well as by international advocacy groups, for not sufficiently meeting Indian aspirations. Nonetheless, the Nicaraguan autonomy statute remains indicative of an important trend in governmental policy and treatment of indigenous peoples.

145. See, e.g., 1991 Statement of the Government of Colombia to the Working Group, supra note 91 (reporting on the newly adopted Colombian Constitution which establishes indigenous territories as among the territorial entities that form part of the political-administrative subdivision of the country and thus enables Indians to exercise jurisdictional functions in accordance with their own procedures and norms as long as they are not contrary to the constitution and laws of the country); 1991 Information submitted by Colombia, supra note 61, at 4-5 (outlining Colombian government steps taken to afford indigenous groups "the necessary conditions to organize themselves in accordance with their own usages and customs and to strengthen indigenous participation in decision-making on policies and programs affecting them"); 1991 Statement of the Government of Canada to the Working Group, supra note 98, at 4-5 (government program by which the country's "first nations... can negotiate self-government through new legislative arrangements that reflect more closely their particular circumstances" and open discussions involving indigenous representatives "leading toward the constitutional entrenchment of aboriginal self-government"); July 31, 1991 Statement of the Government of Australia to the Working Group, supra note 93, at 1-2 ("consolidation of the Aboriginal and Torres Strait Islander Commission", described as "a significant step toward aboriginal self-determination and self-management"); July 29, 1991 Statement by Lois O'Donoghue, Chairperson of the Aboriginal and Torres Strait Islander Commission in Australia (on file with author) (describing the government-sponsored Commission scheme under which national elections were held for aboriginal regional councils whose major responsibilities are to develop regional plans and budgets, to set regional priorities, and to represent aboriginal and islander residents of the region and advocate their interests); 1989 Statement of the Government of the Philippines to the Working Group, supra note 122, at 2-3 (constitutional and legislative measures for the creation of autonomous regions in the Muslim Mindanao and the Cordilleras, characterized as "the granting of autonomy to indigenous populations"); 1989 Statement by the Government of Norway to the Working Group, supra note 91, at 2 (1987 legislation concerning the establishment of a "Sami assembly" which will "comprise all matters affecting the Sami people in Norway, and will be elected by direct elections").

After a campaign of criticism against the government of Bangladesh concerning its treatment of the tribal peoples in the Chittagong Hill Tracts, the government of Bangladesh
measures to enhance capacities of self-government vary from case to case. However, states invariably have characterized these measures as resulting from negotiations or meaningful consultations with the indigenous peoples concerned and appropriate to their particular needs and characteristics. Notwithstanding the prevailing attitudes, states have resisted an express association of the term “self-determination” with indigenous peoples in standard-setting exercises in the U.N. and I.L.O. That resistance often has taken the form of objection to use of the term “peoples” to refer to indigenous communities, given that in a number of international instruments “all peoples have the right to self-determination.”

The rhetorical sensitivity, however, does not entail an aversion to extending self-determination’s conceptual core in favor of indigenous peoples. Rather it is based on a concern that an acknowledged “right to self-determination” for indigenous groups may imply an effective right of secession. Thus, for example, in commenting on the Working Group chair’s first revised draft declaration on indigenous rights, Canada remarked:

reported to the U.N. Working Group on legislation in that regard. U.N.Doc. E/CN.4/Sub.2/AC.4/1989/2/Add.1 (1989), at 2-5 (information submitted by Bangladesh). The government reported that the legislation sets up three “local elected and autonomous government councils . . . with adequate power for the tribal power to run their own affairs and preserve their socio-cultural heritage and separate identity.” Id.

See also 1989 ILO Provisional Record 25, supra note 48, at 25/2. The Government of the Soviet Union informed the Committee that drafted ILO Convention No. 169 that “associations of indigenous peoples would be set up to improve the legal status of autonomous groups.” Id. “The government member of Honduras drew the Committee’s attention to a new law precluding state interference in matters within the competence of indigenous peoples, which was drafted [sic] following extensive consultations with their representatives.” Id.

146. See supra note 126 and 127 and accompanying text. Controversy over the term “peoples” came to a head at the 1989 International Labour Conference which adopted Convention No. 169. Worker delegates pressed the position of indigenous observers in favor of the term “peoples” against staunch opposition by government delegates. See 1989 ILO Provisional Record 25, supra note 48, at 25/6 to 25/8. In the end, a compromise was reached which allowed use of the term “peoples” in the revised Convention, but with the following provision added to the text:

The use of the term “peoples” in this convention shall not be construed as having any implications as regards to the rights which may attach to the term under international law.

ILO Convention No. 169, supra note 21, art. 1(3). Furthermore, it was agreed that the following appear in the record of the proceedings:

It is understood by the Committee that the use of the term “peoples” in this Convention has no implications as regards the right to self-determination as understood in international law.

1989 ILO Provisional Record 25, supra note 48, at 27/7 para. 31. The International Labour Office has taken the position that the qualifying language regarding use of the term “peoples” “did not limit the meaning of the term, in any way whatsoever” but rather was a means of deferring a decision on the legal implications of the term to procedures within the United Nations. 1989 Statement of International Labour Office to the Working Group (presented by Lee Swepston) (on file with author).
The use of the term "indigenous peoples" in lieu of "indigenous populations", may have implications regarding rights to self-determination in international law that would be unacceptable to many states if it meant that their indigenous populations were to have rights of self-determination similar to those of sovereign nation-states. Clarification of these terms need not, of course, preclude indigenous populations' rights or aspirations to greater autonomy or self-government, in line with current and potential domestic legal provisions.\textsuperscript{147}

The concerns raised by Canada are exacerbated by an unfortunate strain of political rhetoric that tends to equate self-determination with the idea that "peoples" of some limited denomination have an absolute right to choose whatever degree of "sovereignty" they wish, up to and including independent statehood. Even in the decolonization context, the "peoples" concerned—which were defined primarily by the colonial boundaries drawn without regard to historical patterns of group identity—were not always accorded a choice of independent statehood.\textsuperscript{148} The absolutist view of self-determination moreover, misses the principle's essential thrust, which is not fundamentally about exercising a one-shot choice for some degree of "sovereignty" but, rather, is about securing for individuals and groups a political order that promotes a perpetual condition of freedom.\textsuperscript{149} In the decolonization context, independent statehood was not as much an end as it was a means for achieving conditions of human dignity. To be sure, a self-determining condition can hardly exist if government structures are imposed upon a politically conscious group without genuine regard for the group's aspirations. But in today's world of complex interdependencies, little room exists for absolute choices, even for recognized states.

Despite aversion to the term self-determination, states have been able to agree on normative language commensurate with self-determination's jurisprudential core. As already stressed, Convention No. 169 generally affirms

\textsuperscript{147} U.N. Doc. E/CN.4/Sub.2/AC.4/1990/1/Add.3, at 2; see also 1990 Statement of the Government of India to the Working Group (presented by Prabhu Dayal) (on file with author). While affirming that the "Government of India has been conscious of the fact that the scheduled tribes should be allowed to develop according to their own ideas and goals", the delegate from India objected to the use of the term self-determination on the ground that the "rights to self-determination includes the right to cessation [sic: secession] and to form a separate political entity." \textit{Id.} at 6, 8.

\textsuperscript{148} Thus for example, the population of British Togoland was asked to decide between integration with the Gold Coast and continuing the status quo; and in referenda held in the Northern and Southern British Cameroons the choice was between joining with Nigeria or the Republic of Cameroon. Rigo-Sureda, \textit{supra} note 130, at 163-68 (1973).

\textsuperscript{149} In his insightful study on the international law and practice of self-determination, Ofuatey-Kodjoe concludes that "self-determination is not an act or process. During the inter-war period, it was a principle that could be applied in order that a group may achieve a condition of equality, and in the decolonization, it has become a right by which a group may attain equality and full self-government" through various options. Ofuatey-Kodjoe, \textit{supra} note 129, at 161.
that states are to allow indigenous peoples, as groups, meaningful choices in all matters affecting them. Specifically, Convention No. 169 requires "special measures" to safeguard indigenous "persons, institutions, property, labor, cultures and environment" and requires that the measures be consistent with "the freely-expressed wishes of the peoples concerned."\(^{150}\) Also, the Convention mandates effective means by which indigenous peoples "can freely participate . . . at all levels of decision-making" affecting them;\(^{151}\) requires governments to promote indigenous peoples "own institutions and initiatives";\(^{152}\) requires that consultations with indigenous peoples "be undertaken, in good faith . . . with the objective of achieving agreement or consent"\(^{153}\) and affirms the right of indigenous peoples "to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use."\(^{154}\) The Convention also upholds the right of indigenous peoples to "retain their own customs and institutions"\(^{155}\) and requires that "the methods customarily practiced by the people concerned for dealing with offenses committed by their members shall be respected."\(^{156}\)

Government practice in discussing the proposed indigenous rights declaration within the U.N. Working Group has affirmed the foregoing prescriptions. But governments have generally withheld approval of proposed language affirming a "right of autonomy" over "internal and local affairs."\(^{157}\) Governments have raised fears that such a right expressed in abstract terms without greater clarification might be interpreted as allowing indigenous communities to displace state laws unilaterally, or as promoting a kind of isolation of indigenous peoples that might be inappropriate to many situations.\(^{158}\) However, a consensus among states at least to the extent of the prescriptions set forth in Convention No. 169 is apparent, particularly by the

\(^{150}\) ILO Convention No. 169, supra note 21, art. 4.

\(^{151}\) Id. art. 6.1(b).

\(^{152}\) Id. art. 6.1(c).

\(^{153}\) Id. art. 6.2. Inclusion of the terms "agreement" and "consent" was controversial because some governments believed that the words might be construed to imply an effective veto power on the part of indigenous groups. During the negotiation of the text, Argentina and Bolivia proposed language that would "ensure effective participation of [indigenous] peoples in decisions which affected them" while avoiding use of the disputed words. 1989 ILO Provisional Record 25, supra note 48, at 25/11 para. 73. Other states that expressed support for the proposed alternative language were Ecuador, Brazil, India and Venezuela. Id. States that expressed support for the language as ultimately adopted included Australia, Denmark, Portugal, United States and U.S.S.R. Id. at 25/12, para. 73. The proposed alternative language was put to a vote in the committee and narrowly rejected. Id. at 25/12, para. 74.

\(^{154}\) ILO Convention No. 169, supra note 21, art. 7(1).

\(^{155}\) Id. art. 8(2).

\(^{156}\) Id. art. 9(1).

\(^{157}\) First Revised Text of the Draft Universal Declaration on the Rights of Indigenous Peoples, supra note 43, art. 23.

government reports on domestic reforms that are in line with and even surpass those prescriptions.\textsuperscript{159}

Since the time Convention No. 169 was developed, the U.N. Working Group has promoted a dialogue on express recognition of the right of indigenous peoples to self-determination, in a spirit of moving beyond absolutist notions of the concept and matching it with contemporary realities. Within the Group's deliberations, an increasing number of states have encouraged express reference to self-determination in the proposed U.N. indigenous rights declaration. In 1989 Australia had joined other states in expressing concern over the usage of the term "peoples" because of its association with the term self-determination.\textsuperscript{160} In a statement to the Working Group at its 1991 session, however, the Australian delegation expressed "hope" that

it would be possible to find ways to refer to self-determination in the draft declaration which will meet the concerns of all.

Events in all parts of the World show us that the concept of self-determination must be considered broadly, that is, not only as the attainment of national independence. Peoples are seeking to assert their identities, to preserve their languages, cultures, and traditions and to achieve greater autonomy and self-management, free from undue interference from central governments.\textsuperscript{161}

Other states that have indicated some support for invoking the term self-determination in standard setting exercises concerning indigenous peo-

\textsuperscript{159} See supra notes 59, 62; see also 1991 Statement of the Government of New Zealand to the Working Group, supra note 90, at 4 (while expressing difficulty with the proposed language concerning a "right to autonomy", New Zealand supports the concept of enhanced respect for indigenous laws, customs and practices). Argentina has proposed language affirming the right of indigenous peoples "to have their specific character duly reflected in the political system and in the socio-economic institutions, including and in particular proper regard to and recognition of indigenous customs." 1991 Revised Working Paper, supra note 55, at 89. Further, while expressing difficulty with the term "self-determination", Argentina stated that it does not oppose the basic concept that indigenous communities should have the freedom to administer their own affairs to the greatest extent possible. U.N. Doc. E/CN.4/Sub.2/AC.4/1990/1, supra note 55, at 4 para. 9; Mexico similarly has expressed concern over the art. 23 "right to autonomy" while affirming the right of indigenous peoples to have control over their own affairs. U.N. Doc. E/CN.4/Sub.2/AC.4/1991/1, at 6-7.

\textsuperscript{160} 1989 Working Group Analytical Compilation of Observations, supra note 55, Add.1 at 3.

ples include Papua New Guinea, Mexico, New Zealand, Iran and Ukraine.

Whether or not by express reference to the term, an international consensus supports a norm concerning indigenous peoples which extends from self-determination's jurisprudential core. A preponderance of states and other relevant actors now accepts that indigenous peoples have the right to exist as distinct cultural communities and develop freely as such in all spheres of life, to live within a governing institutional order that reflects their specific characteristics, and to be genuinely associated with all decisions affecting them.

VI. CONCLUSION

The emergence of a new body of international law specifically concerned with indigenous peoples is a milestone in their centuries-long quest for survival. Although in somewhat modest form, ILO Convention No. 169 stands as an express affirmation of the burgeoning commitment by the world community to secure a future in which indigenous communities may retain their unique characteristics and develop freely in co-existence with all of humankind. The Convention corresponds with a still developing body of customary norms upholding rights to indigenous cultural integrity, lands and resources, and self-determination.

The new indigenous rights norms are grounds upon which indigenous peoples may appeal to decisionmakers within the international human rights program. The norms may even be invoked in purely domestic adjudicative settings. In many countries, as in the United States, domestic tribunals may invoke international treaty and customary norms as rules of

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163. In commenting on proposals for the new ILO Convention No. 169, Mexico stated that the Convention should reflect respect for political and economic self-determination for indigenous communities. ILO Convention (No. 107), Report VI(2), supra note 90, at 7-8.

164. During the 1990 Session of the U.N. Working Group, the government of New Zealand sought to "put the record straight" to rebut any inference that it was not willing to recognize the "right to self-determination" of the indigenous Maori. 1990 Supplemental Statement by the Government of New Zealand to the Working Group (on file with author).

165. During the negotiation of Convention No. 169, Iran stated that the new Convention "should not neglect the rights of the indigenous peoples of the world to land and self-determination." 1989 ILO Provisional Record 25, supra note 48, at 25/4 para. 14.

166. 1989 Working Group Analytical Compilation of Observations, supra note 55 Add.3, at 10 (comments by the Ukrainian Soviet Socialist Republic) ("A serious shortcoming of the draft declaration is the absence of any reference among the other indigenous rights to such a basic right as the right of peoples to self-determination.").

decision.\textsuperscript{168} Alternatively, international norms may be used to guide judicial interpretation of domestic rules.\textsuperscript{169} Indeed, the genesis of United States legal doctrine concerning Native peoples is in the international law of the colonial period.\textsuperscript{170} It would be appropriate for the United States doctrine to again cross paths with the relevant international law.

Contemporary indigenous rights law, furthermore, has implications beyond the direct concerns of indigenous peoples. In affirming the value of indigenous cultures within a global framework of increasing interdependence, contemporary indigenous rights norms point toward a blueprint of world order in which diverse peoples with diverse cultures may co-exist. In a world in which ethnic and nationalist poles of identity are surging, and in many instances resulting in violent confrontation, such a blueprint is much needed.


\textsuperscript{170} See Anaya, \textit{supra} note 2, at 201-03 & nn.50-56 (discussing the famous trilogy of early Indian law cases: Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)).