Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend

S. James Anaya
University of Colorado Law School

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In this article renowned scholar S. James Anaya analyzes the divergent assessments of international law's treatment of indigenous peoples' demands to lands and natural resources. The author explores several
strains of arguments that have been advanced within this debate, including state-centered arguments and human rights-based arguments. The author also examines the shortcomings of recurring interpretive approaches to international law that consider indigenous peoples’ rights to land and resources. From this analysis the author identifies a more promising approach within the human rights framework—which he describes as a realist approach—that focuses on the confluence of values, power, and change. The author argues that the realist perspective offers a more pragmatic and ethical approach within the discourse of indigenous rights over lands and natural resources.

I. INTRODUCTION

In recent years there has been a good bit of analysis and argument about the rights of indigenous peoples in international law, as indigenous peoples themselves have pressed their demands through channels of international decision making. A central issue has been that of the existence or extent of rights over lands and natural resources, which are widely understood to be critical to the physical and cultural survival of indigenous peoples as distinct groups. This understanding 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. Furthermore, indigenous peoples typically have looked to a secure land and natural resource base to ensure the economic viability and development of their communities.

Among the multiple participants in the discussions that measure indigenous peoples’ demands to lands and resources in terms of international law, divergent propositions have emerged. For some, historical legal doctrine firmly establishes indigenous peoples’ sovereign rights over ancestral lands and resources as a matter of long-standing international law, while within this view these rights are seen as having been observed almost entirely in their breech. For others, international law historically or in its current state provides little or no protection for such rights; under this view indigenous peoples’ rights over lands and resources are mostly aspirational, rights to be recognized—if at all—by future instruments of international law. Still others focus on recent developments to advance the view that a new generation of international law already yields to indigenous peoples’ demands for rights over lands and resources, at least to the extent reconcilable with the basic elements of state sovereignty. Variants of these divergent views abound, with the latter one appearing to be the increasingly dominant one among
international authorities and decision makers.\footnote{In previous works the author has joined in advancing the view that international law has developed in recent years in a manner responsive to indigenous peoples' demands, although with certain limitations. See, e.g., S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed. 2004).}

The dominance of the view that indigenous peoples already possess rights to lands and natural resources under international law is illustrated by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights in the Case of the Mayanga Community of Awas Tingni v. Nicaragua.\footnote{The Case of the Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 79 (Judgment on merits and reparations of Aug. 31, 2001), published in abridged version in 19 ARIZ. J. INT'L & COMP. L. 395 (2002) [hereinafter Awas Tingni case]. Before it submitted the case to the Inter-American Court, the Inter-American Commission on Human Rights, in accordance with the established procedure, adopted its report in the case, which is summarized in the Inter-American Court's judgment. See id. ¶¶ 25, 26. See also Complaint of the Inter-American Commission on Human Rights, Submitted to the Inter-American Court of Human Right in the Case of the Awas Tingni Mayagna (Sumo) Indigenous Community Against the Republic of Nicaragua, June 1998, reprinted in 19 ARIZ. J. INT'L & COMP. LAW 17 (2002); Final Written Arguments of the Inter-American Commission on Human Rights before the Inter-American Court of Human Rights in the Case of the Mayagna (Sumo) Indigenous Community of Awas Tingni Against the Republic of Nicaragua (Unofficial Translation), Aug. 10, 2001, reprinted in 19 ARIZ. J. INT'L & COMP. LAW 325 (2002) [hereinafter Final Written Arguments of the Inter-American Commission in the Awas Tingni case]. The author was lead counsel to the community of Awas Tingni throughout the proceedings leading to the judgment by the Inter-American Court, and he assisted the Inter-American Commission in presenting the case to the Inter-American Court.} In that case both the Inter-American Commission and the Inter-American Court found that Nicaragua violated relevant international law when it failed to recognize and secure the traditional land tenure of the indigenous Mayanga community of Awas Tingni and instead proceeded to grant a concession to a Korean multinational corporation for large-scale logging on the community's traditional lands. The Inter-American Commission has applied and expanded upon the precedent set down in the Awas Tingni case in subsequent cases.\footnote{See Mary and Carrie Dann, United States, Case 11.140, Inter-Am. C.H.R. Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002) [hereinafter Dann case], available at http://cidh.org/annualrep/2002eng/USA.11140.htm; Maya Indigenous Communities of the Toledo District, Belize, Case 12.053, Inter-Am. C.H.R. Report 40/04 (2004) [hereinafter Maya case], available at http://cidh.org/annualrep/2004eng/Belize.12053eng.htm. The author also participated in these cases as lead or co-counsel on behalf of the indigenous parties.}
argument and interpretive approaches within the discourse of indigenous rights. This exercise is not intended to simply cast a fog of indeterminacy. Rather it is an effort to contextualize, explain, and provide some justification for the dominant trend of argument and analysis that is illustrated by the *Awas Tingni* case and its progeny, with the hope of encouraging that trend. The interpretive method that resulted in the outcome in *Awas Tingni* arises within a human rights frame of analysis, rather than one that sees indigenous peoples' rights as based fundamentally on a continuity of historical sovereignty. And that interpretive method contrasts with formalist approaches that tend to read legal texts narrowly and as static instruments, as well as with critical approaches that deconstruct texts and established doctrine to reject them but without providing much in their place. In this regard, the decision in *Awas Tingni* can be described as realist in that it was based on a broad, contextual reading of a human rights treaty and the values implicit in the treaty, in light of evolving thinking and patterns of official behavior. If international law is working in favor of indigenous peoples, it is pursuant to such a realist approach within a human rights frame of analysis.

II. LOCATING THE FOUNDATIONS OF INDIGENOUS RIGHTS IN INTERNATIONAL LAW: THE DIVERGENCE AND INTERPLAY OF HISTORICAL SOVEREIGNTY AND HUMAN RIGHTS DISCOURSES

The appeal to international law is to its presumptive capacity to exert control over or influence the exercise of power, most significantly the power wielded directly by independent states. Indigenous peoples and their advocates have advanced arguments based on what international law is perceived to provide or what it should provide to condition the behavior of states in their relations with indigenous peoples. International law is looked upon as a way of compelling, or at least encouraging, states to act consistently with a catalogue of rights deemed fundamental to the survival of indigenous peoples, including rights over lands and natural resources. Among those who advocate for indigenous rights within the discourse of international law, two, usually complementary, strains of argument emerge.

4. The descriptions of the arguments and interpretive strains in this essay are substantially based on the author's own direct observations of discussions about indigenous peoples' rights among advocates for indigenous peoples, government representatives, scholars, and representatives of international agencies in various forums over a period of some twenty years.
One strain of argument occurs essentially within a state-centered frame. Indigenous groups are referred to as "nations" and identified as having attributes of sovereignty that predate and, at least to some extent, trump the sovereignty of the states that now assert power over them. The rhetoric of nationhood is used to posit indigenous peoples as states, or something like states, within a perceived post-Westphalian world of separate, mutually exclusive political communities. Within this frame of argument, advocates for indigenous peoples point to a history in which the "original" sovereignty of indigenous communities over defined territories has been illegitimately wrested from them or suppressed. The rules of international law relating to the acquisition and transfer of territory by and among states are invoked to demonstrate the illegitimacy of the assault on indigenous sovereignty and derivative rights over lands and natural resources. Under this argument, claims to land, group equality, culture, and development assistance stem from the claim for reparations for the historical injustices against entities that, a priori, should be regarded as independent political communities with full status as such on the international plane.

A second strain of argument employed by advocates for indigenous peoples focuses on the problem within a human rights frame. This strain of argument seizes upon the moral and ethical discourse that characterizes the modern human rights movement, that has the welfare of human beings as its subject, and that is concerned only secondarily, if at all, with the interests of sovereign entities. Indigenous peoples are portrayed as groups of human beings with fundamental human rights concerns that deserve attention. Historical narrative enters into this strain of argument to identify past acts of oppression against indigenous peoples, but the backward-looking narrative is mainly used to identify the origins and historical continuity of present day oppression and inequities that affect today's indigenous human beings and their communities. Affirmation of indigenous group rights, and related remedial measures to secure the enjoyment of these rights, are posited as moral imperatives and justified by reference to human rights principles that are already part, or becoming part, of international law.

The United Nations (UN) and other international intergovernmental organizations, which together provide the institutional framework for the contemporary international system, have been more hospitable to the latter, human rights strain of argument. By contrast, the state-centered historical sovereignty strain of argument finds substantial resistance within intergovernmental organizations. Because of legal, institutional, and political factors, the major international organizations necessarily favor the spheres of sovereignty asserted by their member states over any claim of competing sovereignty by a nonmember entity. Claims that are
grounded in the language of human rights, on the other hand, find greater opportunities for success by virtue of the institutional energies that the United Nations and other international organizations increasingly have devoted to human rights matters and moral considerations over the last several decades.

While the human rights strain of argument advanced by indigenous peoples has been more effective, the state-centered strain has not been without consequence. Accounts of the illegitimate wresting of historical sovereignty have strengthened the human rights arguments by enhancing sensitivity toward the inequities suffered by indigenous peoples that can be understood in human rights terms. Such accounts have helped forge an understanding that indigenous peoples have suffered, not just discrete episodic acts of neglect or even brutality by state actors, but also more systemic oppression as a result of state institutional arrangements that have been imposed on them and have failed to accommodate their cultural patterns.

Thus, with their arguments resonating within the discourse of human rights, indigenous peoples have gained a foothold in the international system's human rights program,\(^5\) while so far finding little or no effective opening within the international system for efforts to explicitly ground their rights on attributes of historical sovereignty or statehood. The draft of a UN Declaration on the Rights of Indigenous Peoples was produced by an expert panel acting under the authority of the UN Commission on Human Rights, and ongoing discussions are taking place within that human rights body.\(^6\) Similar discussions surrounding a proposal for an American Declaration on the Rights of Indigenous Peoples have led to the initial draft of this American Declaration, developed by the Inter-American Commission on Human Rights, and discussions are ongoing within a working group of the Permanent Council of the Organization of American States.\(^7\) Well-established human rights principles provide the foundations for the standards of indigenous rights articulated in both these discussions, while principles of state sovereignty enter the discussions only in attempts to limit the standards in favor of states themselves.

Outside these discussions on future normative texts, the Inter-American Commission as well as the Inter-American Court of Human Rights have examined several cases involving indigenous peoples as matters of human rights, as illustrated in the *Awas Tingni* case.\(^8\) For their

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6. *ANAYA, supra* note 1, at 63.
7. *Id.* at 66.
8. *Id.* at 260–71.
part, the UN human rights treaty-monitoring bodies, including the Human Rights Committee and the Committee on the Elimination of All Forms of Racial Discrimination, now regularly examine the concerns of indigenous peoples as part of their work to monitor compliance with the human rights treaties to which they are attached. What we see is that, whereas the institutional chambers of the international system have all but kept their doors closed to indigenous claims of historical sovereignty, several have been welcoming of indigenous demands based on human rights arguments.

III. DIVERGENT INTERPRETIVE METHODOLOGIES THAT FRAME DIVERGENT DISCOURSES ABOUT THE CONTENT OF INTERNATIONAL LAW

International legal discourse about the rights of indigenous peoples, whether within the historical sovereignty framework or the human rights one, involves efforts to assess the current state of international law as it concerns indigenous peoples. These assessments are used alternatively to support indigenous claims, to deny them, to establish the need to change the law, or to resist proposals for change. Efforts to assess the status of international law typically focus on one or more of the standard sources of international law, which include treaties, custom, general principles of law and, secondarily, judicial decisions and the writings of qualified publicists that interpret the primary sources. Methods of understanding the nature of these sources and interpreting them vary significantly, and that variance can be seen in discussions and decision making about indigenous peoples and their rights. The variance in interpretive methodology is further complicated by the relatively fast pace of international developments that are responsive to indigenous peoples' demands and that can be understood to contribute to the evolution of relevant international law by adding to one or more of the standard sources.

9. Id. at 228–32, 253–58.
10. Cf. Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1031, T.S. No. 993 (entered into force Oct. 24, 1945) (referring to these as the sources of authority to be applied by the International Court of Justice in deciding cases in accordance with international law).
A. The Ghosts of Formalism

A recurrent method of interpreting the sources of international law can be described as falling within the tradition of formalism. As used here formalism refers to an approach that focuses on the wording of legal texts and on established doctrinal threads, while infusing the texts with meaning on the basis of conventional understandings that are attributed to the states that created them or to abstract first principles. For formalists, words in texts, settled doctrine, and first principles tend to have preordained, fixed meaning that is discerned often in isolation from the political and social dynamics and the changing value structures to which they are relevant. The formalist method itself leads to varying results, depending in part upon the extent to which states are deemed to have discretion in shaping or changing the governing rules.

1. Formalism, Positivism, and Apology

Formalism in its dominant variant is closely associated with the positivist school of international law at its height, around the beginning of the last century, which emphasized state sovereignty and articulated the rules created by states to dispossess indigenous peoples of their lands. A hallmark of formalism in international legal discourse is the search for and identification of a definitive assessment of "what international law says," while treating international law as a body of rules with fixed determinate meaning that derives from observable action by states at some time in the past. Formalists do not necessarily agree with rules established in the past, but for them the rules remain the same until changed by new, positive acts by the states that created or endowed them with legal authority. This approach often provides little room for discerning the normative implications of established principles and ongoing processes beyond what states—or sometimes others considered to have sufficient authority—have already put down in written text.

The ghosts of positivistic formalism are clearly present in current discussions over indigenous peoples and their rights. Arguments of indigenous historical sovereignty are countered by the absence of contemporary recognition of that sovereignty among the positive acts of states in their international relations and, at least implicitly, by reference to late nineteenth-century and early twentieth-century international legal doctrine that upheld the expansion and consolidation of the sovereignty

of European states and their offspring over traditional indigenous lands.\textsuperscript{13} Formal categories of statehood and related doctrine, which a priori excluded non-European, "uncivilized" indigenous peoples from among the subjects of international law with rights of sovereignty, provide the foundations for arguments that, whatever rights of historical sovereignty indigenous peoples may have once possessed, those rights have long ceased to be recognized by international law and instead have been made subject to the overriding sovereignty of states by international law itself.

State representatives also frequently resort to formalist approaches within the human rights framework of indigenous rights discourse, focusing on existing human rights texts that do not specifically mention indigenous peoples in association with prior conventional understandings. They consequently interpret those texts as providing little or no protection for indigenous peoples' collective rights. Take, for example, the right to property as affirmed in general terms in the Universal Declaration on Human Rights\textsuperscript{14} and other human rights instruments, including the American Convention on Human Rights.\textsuperscript{15} As discussed below, it is possible to interpret the right to property as supportive of indigenous peoples' land rights if one avoids formalism in favor of another approach. Employing a formalist approach, however, states typically have deemed the right to property in existing instruments to have little or nothing to do with traditional or ancestral indigenous collective land tenure, since that right is articulated in individualistic terms and understood to be associated with accepted Western notions of property.

Somewhat ironically, some indigenous representatives and their advocates have frequently invoked the same formalist approach to come to similar conclusions and, moreover, to characterize international law as devoid of adequate standards for indigenous peoples. At least in part, this can be seen as a strategic move to bolster the case for new international instruments, in particular, a new United Nations Declaration on the Rights of Indigenous Peoples. Without such a new instrument, it is often said with lament, indigenous peoples will continue without rights or with insufficient rights in international law.

\textsuperscript{13} See, e.g., JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 110, 136–45 (1894); WILLIAM E. HALL, A TREATISE ON INTERNATIONAL LAW 47–49, 65 (Alexander P. Higgins ed., 8th ed. 1924); CHARLES C. HYDE, INTERNATIONAL LAW CHIEFLY AS APPLIED AND INTERPRETED BY THE UNITED STATES 19, 125–26, 163–71 (1922).


\textsuperscript{15} American Convention on Human Rights, Nov. 22, 1969, art. 21, 9 I.L.M. 673, 681.
Notably, some indigenous advocates from North America have relied on formalist arguments to criticize the International Labour Organisation (ILO) Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169),¹⁶ the major existing international treaty devoted to indigenous issues. The Convention is acknowledged to represent “what international law says,” but only in relation to states that have ratified it; it is read narrowly without much regard to the core principles it advances, the interplay between the Convention and transformative events in several countries outside of North America, or its impact on international decision making concerning indigenous peoples more broadly.¹⁷ To be sure, the text of Convention No. 169 includes several qualifiers that can be seen as leaving substantial state discretion in tact, and it undoubtedly falls short of indigenous peoples’ full aspirations. But by employing formalism to interpret the Convention, indigenous advocates give up highly useful arguments that otherwise could be derived from the Convention’s central affirmation of indigenous cultural and group integrity and from many of its specific provisions that build upon that affirmation. Instead of relying on formalist arguments, many indigenous peoples have pragmatically invoked Convention No. 169’s land rights provisions. These provisions center on the mandate that “governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories... which they occupy or otherwise use,”¹⁸ and include the requirement that “[t]he rights of the peoples concerned over the lands they traditionally occupy shall be recognized.”¹⁹

2. Formalism with an Anti-Positivist Twist Toward Utopia

As pointed out above, formalism is invoked to oppose the historical sovereignty argument that favors indigenous peoples’ rights. Notably, the indigenous historical sovereignty argument itself rests on a formalist methodology, although within an anti-positivist variant. An exemplary

account of the historical sovereignty argument is made in a groundbreaking article by John Clinebell and Jim Thompson, first published in 1978, when indigenous peoples and their concerns had yet to gain prominence at the United Nations or other international venues.\(^{20}\) This argument represents the kind of legal reasoning that helped motivate the indigenous rights movement, especially in its early stages, to posit indigenous claims as a matter of international law. Clinebell and Thompson focus particularly on Indian tribes in North America, many of which entered into treaties with European powers or their progeny before the latter part of the nineteenth century. Formal international law doctrine frames the argument that the tribes, or at least many of them, have the necessary attributes of statehood and hence are entitled to exercise sovereignty, and that the tribes have not been validly or entirely dispossessed of that sovereignty. This argument is made thoroughly and methodically, and entirely within the logic of long established and still current doctrine of international law relating to the existence, rights, and duties of states.

But while grounding their argument in the classical legal doctrine that presumptively originates in state practice and authority, Clinebell and Thompson do not see indigenous rights of historical sovereignty to be diminished by the demonstrable contrary pattern of historical state practice and exercise of authority that denied sovereign rights to indigenous peoples.\(^{21}\) Instead, in anti-positivist fashion, formal legal doctrine is seen as an autonomous force that constrains, rather than merely follows, the disparate and concerted actions of states. Typical of the historical sovereignty argument, Clinebell and Thompson reinforce their position by a formalistic assessment of contemporary international legal texts that accord “all peoples” a right of “self-determination.”\(^{22}\) The thesis advanced by Clinebell and Thompson has not been adopted by any international tribunal or other body that is part of the international system of intergovernmental institutions. Nonetheless, the arguments in favor of the thesis are compelling, given their logic and the underlying equities,

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and these arguments helped to force open the contemporary international discussion about the rights and status of indigenous peoples.

Formalism is also employed by some indigenous advocates in the discussions around proposals for “new” international standards concerning indigenous peoples within the human rights framework. Formalist arguments take shape to advance the adoption without any changes of the Draft United Nations Declaration on the Rights of Indigenous Peoples,\textsuperscript{23} which was developed by a working group of the UN Sub-Commission on the Promotion and Protection of Human Rights with significant indigenous participation and which is now under consideration by the Sub-Commission’s parent body, the UN Commission on Human Rights. Within the ongoing negotiations of the draft, arguments made to criticize and resist proposals for alternative language for the Declaration similarly employ formalism. Words in the Sub-Commission draft or alternative proposed text are infused with meaning based on fixed, predetermined conceptions, with the implicit assertion that the words, if adopted, will have a force substantially apart from the social and political forces and value structures within which they will be deployed. This formalism can be seen in the arguments made by many indigenous advocates to reject proposed alternative language to the draft concerning rights over lands and natural resources. The relevant language of the Sub-Commission draft, which broadly and in detailed fashion affirms rights over lands and resources, is vigorously defended, while proposals for change in that language are read in isolation and in the worst possible light, with the apparent assumption that the worse-case reading would carry the day in the application of the Declaration.

Such approaches, when based on tightly reasoned arguments, can have strategic utility toward achieving the strongest possible text from the standpoint of indigenous peoples. And very often serious substantive differences are involved in these discussions. But the utopian faith in the force of particular wording and fear of calamity if that wording is not maintained is often misplaced. The implicit assumption that the words in international legal texts, or quasi-legal texts like a UN declaration, will have a force substantially apart from their overall context or normative thrust, or from evolving values and understandings, is highly dubious, especially where human rights are concerned. Such an assumption runs contrary to the very experience of applying existing human rights texts to indigenous peoples, as discussed below. Not only does formalism make

3. The Contradictory Use of “Secondary” Sources

The formalist search for “what international law says” typically goes beyond an independent assessment of written instruments adopted by states or their other relevant practice and relies on “secondary” sources of international law such as the decisions of courts, international institutions, and scholarly publications that interpret texts and state practice. Looking to such secondary sources is, of course, standard fare in international legal discourse of all variants. But in the search for a definitive picture of the law the formalist often treats secondary sources as themselves defining the state of the law. This formalist view of secondary sources arises in arguments trying to show where the law falls short of indigenous peoples’ aspirations or where current international law already upholds indigenous peoples’ rights. This approach can be internally inconsistent, however, in that the institutions and writers that provide the secondary sources do not, by definition, have formal law-making authority, and they are very often engaged in interpretation of a different type.

The decision of the Inter-American Court of Human Rights in the Awas Tingni case, which upheld indigenous peoples’ rights to lands and natural resources, is now often cited within formalist renditions of international law, both to assert that the decision has limited reach as well as to try to put the best face on “what international law says.” The Inter-American Court’s decision in the Awas Tingni case, however, departs significantly from the formalist method in interpreting and applying the relevant law. If the Court had succumbed to the ghosts of formalism it would not have decided as it did. Yet we see the Awas Tingni decision being readily included in formalist renditions of “what international law says” on the rights of indigenous peoples.

Interpretive contradiction of this kind would not defeat ascribing near definitive significance to decisions of institutions like the Inter-American Court if such institutions had the ability to make rather than interpret and apply the law beyond the cases they decide. But such is not the case within the very logic of formalism. In the world of legal formalism, with its positivist foundation, only states make international law. Thus the formal rules of international law provide that a state, absent its consent, is not bound to what international courts or

24. See infra notes 28–34 and accompanying text.
institutions have decided in the abstract or in relation to a case to which
the state is not a party, hence the status of these decisions as "secondary"
sources. As a formal matter, international institutions and courts have no
direct law-making authority, only the authority to interpret and in some
cases apply the law in regard to specific parties; certainly publicists,
however eminent or qualified, have no such authority. For the formalist,
the decisions or opinions of secondary sources can be relevant only
because they interpret the law made by states in ways that are more or
less persuasive, not because they make the law; hence the
authoritativeness of those decisions must be diminished for the formalist
when the interpretive method employed to reach them is at odds with the
formalist method, as in the Awas Tingni case. Moreover, the impulse to
ascribe norm-building significance to the decisions of courts,
international institutions, and qualified publicists is problematic on its
own terms within the formalist logic which denies law-making authority
to all but states. That impulse fits much better within the realist
interpretive discourse, as discussed below.

B. Critical Approaches: Deconstruction, and Then What?

As pointed out above, formalism has been used to criticize existing
aspects of international law regarding indigenous peoples and proposals
for "new" standards of indigenous rights, in particular proposals that
deviate from the Sub-Commission’s Draft United Nations Declaration on
the Rights of Indigenous Peoples. Other approaches arrive at similar
criticisms, but through different routes of analysis. One influential type
of criticism looks beyond conventional understandings associated with
particular doctrine or the wording of legal texts to examine their
conceptual underpinnings and thereby reveal problems. Critical
approaches of this type are associated with the critical legal studies
movement and postmodern thought, and they have made their way into
an important stream of scholarship about international law.25

These postmodern critical approaches are useful in that they
engender broad awareness of the pitfalls and structural baggage that
frequently come with existing or proposed legal texts and doctrine. They
lead to inquiry about political context, power structures, and paradigms
of thinking that determine how law actually works or has worked in the
past to disadvantage particular groups. Using such an approach, one can
uncover the shortcomings of international law in relation to indigenous

25. See Nigel Purvis, Critical Legal Studies in Public International Law, 32 HARV.
people, not just in formal terms but in terms of international law's presuppositions and the forces that have oppressed indigenous peoples. Important scholarly works that critically examine historical international legal doctrine reveal how it functioned to justify the nonconsensual taking of indigenous lands and the deep cultural biases undergirding and structuring that doctrine. These works bring into question the legitimacy of contemporary political configurations and property regimes that rest on historical legal doctrine, and hence sound a compelling call for reform.

But a common shortcoming of postmodern critical approaches is that they often end at the call for reform and fail to offer specific solutions to the problems they uncover. International legal texts and doctrine are deconstructed to show their failings, and the critical analysis stops there. As already pointed out, analysis of this type can be useful as far as it goes. But it can be counterproductive when deployed in discussions about the content of contemporary international law or about proposed changes to the law, when the focus on deconstruction leads, as it often does, to accentuating the negative at the expense of identifying shifts in power, social conditions, or value structures that operate to counter the negative.

In the discussions around the Draft United Nations Declaration on the Rights of Indigenous Peoples, some advocates have employed approaches along the lines of postmodern criticism to paint a bleak picture of contemporary international law as it relates to indigenous peoples and to oppose some of the proposals advanced by states and others. This approach could be seen in the discussions over rights to lands and natural resources, especially before the *Awas Tingni* decision was rendered. Provisions of existing human rights treaties generally affirming rights to property and the indigenous land rights provisions of ILO Convention No. 169 have been deconstructed by reference to the "Western cultural biases" underlying them and the dire forces of state hegemony and international politics. Proposals for land rights provisions that are alternatives to those in the Sub-Commission Draft Declaration have been similarly deconstructed to uncover undesirable paradigmatic


27. Robert Williams, Jr., is among the exceptions to those who have employed a postmodern critical approach to deconstruct historical aspects of international law and then seized upon contemporary trends to attempt to build an understanding of international legal process that favors indigenous peoples' rights. See generally Williams, supra note 21.
presuppositions about control over territory favoring non-indigenous majorities. At the same time, the deconstructionist critiques accord little attention to contemporary trends in thinking that are serving to dilute those presuppositions and that would likely influence the way in which the proposed language would actually be interpreted and applied. Curiously, in the discussions on the Draft Declaration, postmodern deconstruction of rejected text is often followed by a formalistic defense of the language of the Sub-Commission Draft Declaration or of other preferred language. It would be highly illuminating and interesting to see the same techniques of postmodern criticism applied in a scrutiny of the Sub-Commission draft. Indeed, adherence to postmodern critical approaches of the kind that have been seen in the discussions on the Draft Declaration might well lead to simply declaring the whole exercise futile.

C. International Law Understood in Realistic, Dynamic, and Sometimes Even Hopeful Terms

While the ghosts of formalism persist and critical method continues to show the darkness within any silver lining that may exist, international law as it concerns indigenous peoples is increasingly understood in terms that avoid formalism’s inattention to reality and the lack of problem solving in much of postmodern critical analysis. In stark contrast with those approaches, the Inter-American Court on Human Rights in the Awas Tingni case accepted that the right to property, as affirmed in the American Convention on Human Rights in its Article 21, includes the collective right of indigenous peoples to their lands and resources on the basis of traditional tenure and indigenous customary law. Article 21 of the American Convention states: “Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.”

Although the Inter-American Court stressed that Nicaragua’s domestic law itself affirms indigenous communal property, the Court emphasized that the rights articulated in international human rights instruments have “autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law.” The Inter-American Commission on Human Rights had pressed this point in prosecuting the case before the Inter-American Court, invoking in its

29. Awas Tingni case, supra note 2, ¶ 146.
written submissions the jurisprudence of the European Court of Human Rights regarding the analogous property rights provision of the European Convention on Human Rights and referencing developments elsewhere in international law and institutions specifically concerning indigenous peoples' rights over lands and natural resources. The Inter-American Court accepted the Inter-American Commission's view that, in its meaning autonomous from domestic law, the international human right of property embraces the communal property regimes of indigenous peoples as defined by their own customs and traditions, such that "possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property."31

In holding that Nicaragua violated that right when it granted logging concessions on indigenous lands, the Inter-American Court was not deterred by the absence of any specific reference in the American Convention on Human Rights to indigenous peoples or collective rights, by the individualistic terms in which the right to property is expressed in the American Convention, or by the language that allows the state to "subordinate" that right to the "interests of society." Rather than merely looking at the formal wording of the American Convention's property provision or asking what obligations states intend to assume under that particular provision, the Inter-American Court looked to the core values represented by the American Convention's property provision in association with international trends in acceptable action and thinking about indigenous peoples' rights. In so doing, the Inter-American Court employed what it termed an "evolutionary" method of interpretation, taking into account modern developments in conceptions about property as related to indigenous peoples and their lands.32 In his concurring opinion, Judge García Ramírez expounded upon this interpretive methodology, making specific references both to the relevant provisions of ILO Convention No. 169, even though Nicaragua is not a party to that Convention, as well as to parts of the draft UN and Organization of American States declarations on the rights of indigenous peoples.33 Judge Cançado Trindade, the president of the Inter-American Court, joined judges Pacheco Gómez and Abreu Burelli in another concurring opinion, reiterating the cultural and spiritual underpinnings of indigenous peoples'
The Inter-American Commission on Human Rights followed the precedent and interpretive methodology of the *Awas Tingni* case in finding that the United States violated the rights of Western Shoshone sisters Mary and Carrie Dann in connection with Western Shoshone claims over traditional lands. In that case—the *Dann* case—the Inter-American Commission extended the interpretation of the right to property of the American Convention on Human Rights advanced in the *Awas Tingni* case to the similar property rights provision of the American Declaration on the Rights and Duties of Man, emphasizing the due process and equal protections prescriptions that are to attach to indigenous property interests in lands and natural resources. The Commission found that, by virtue of the means by which the United States had disposed of Western Shoshone land claims, it had “failed to ensure the Danns’ right to property under conditions of equality contrary to Articles II [right to equal protection], XVIII [right to fair trial] and XXIII [right to property] of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands.” In applying and interpreting the cited provisions of the American Declaration in the *Dann* case, the Inter-American Commission was explicit in its reliance on developments and trends in the international legal system regarding the rights of indigenous peoples. Significantly, the Inter-American Commission declared that the “basic principles reflected in many of the provisions” of the Proposed American Declaration on the Rights of Indigenous Peoples, which is currently under discussion within the Organization of American States (OAS), “including aspects of [its] article XVIII, reflect general international legal principles developing out of and applicable inside and outside of

34. *Id.* (Trindade, J., Gómez, J., and Burelli, J.).


36. *Id.* ¶¶ 133–34. “Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.” American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Ninth International Conference of American States, art. XXIII (1948), available at http://www.cidh.oas.org/Basicos/basic2.htm.


Toward a Realist Trend

the inter-American system and to this extent are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples.\textsuperscript{40} The cited Article XVIII of the Proposed American Declaration\textsuperscript{41} provides for the protection of traditional forms of land tenure in terms similar to those found in ILO Convention 169, which the Inter-American Commission also highlighted in its analysis.\textsuperscript{42}

The Inter-American Commission employed the same interpretive approach to further build upon the \textit{Awas Tingni} precedent in a decision involving the Maya communities of southern Belize.\textsuperscript{43} In that case the Commission found that Belize violated the human rights of the Maya communities by allowing large-scale logging to take place on their traditional lands and by not taking effective measures to recognize and secure rights in those lands. In contrast to the situations in Nicaragua and the United States, the domestic legal system of Belize provided no formal recognition of property interests of indigenous peoples on the basis of traditional or customary patterns of land use and occupancy. Nonetheless, reiterating and expanding upon the principles articulated by the Inter-American Court in \textit{Awas Tingni}, and again recounting international developments concerning indigenous land rights, the Inter-American Commission affirmed that indigenous peoples’ traditional use and occupancy of lands, such as that of the Maya communities of Belize, are themselves a source of property that is protected independently by inter-American human rights instruments, regardless of what domestic law provides.\textsuperscript{44} In advancing this interpretation of the property rights provision of the inter-American instruments, the Commission repeated the view that the provisions contained in international human rights instruments have meaning “autonomous” from the reach of domestic law.\textsuperscript{45} And for the Inter-American Commission and the Inter-American Court, that meaning goes beyond a narrow reading of the words in those

\begin{itemize}
\item 40. \textit{Dann} case, \textit{supra} note 3, \textsection 129.
\item 41. Article XVIII of the Proposed American Declaration on the Rights of Indigenous Peoples establishes, \textit{inter alia}, that “[i]ndigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property” and are entitled to “recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.” Proposed American Declaration on the Rights of Indigenous People, \textit{supra} note 39, art. XVIII, \textsection 1–2.
\item 42. See \textit{Dann} case, \textit{supra} note 3, \textsection 127–28.
\item 43. See \textit{Maya} case, \textit{supra} note 3.
\item 44. See id. \textsection 127–31.
\item 45. Id. \textsection 131.
\end{itemize}
instruments.

The approach exemplified by the Inter-American Court and the Inter-American Commission in the Awas Tingni case and subsequent cases can be described as realist in its focus on the principles and values behind the formal wording of text, on how relevant actors understand those principles and values to be acted upon, and on possible or actual changes in those understandings. The realist tradition of legal interpretation has a substantial pedigree in the jurisprudence of international law, and it has made substantial inroads into international human rights decision making, as these cases illustrate. With its focus on the confluence of values, power (including the power of both governmental and nongovernmental actors), and change, the realist approach does not necessarily or always yield the preferred or optimal results. But as the Awas Tingni, Dann, and Maya cases demonstrate, it is an approach capable of taking advantage of favorable trends in action that already have taken hold to arrive at an understanding of already existing international law that, in some respects at least, approximates what is being demanded by indigenous peoples.

The realist interpretive approach is now normally seen in international human rights decision making both within and beyond the inter-American institutions, including decision making in regard to indigenous peoples. The interpretive statements of United Nations treaty-monitoring bodies, which are charged with monitoring the human rights treaties to which they are attached, are instructive. For example, the UN Committee on the Elimination of Discrimination (CERD) has interpreted the Convention on the Elimination of All Forms of Racial Discrimination as requiring state parties to recognize and protect indigenous peoples’ cultures, rights of participation in all decisions affecting them, and collective rights to land and resources. CERD arrived at and has applied this interpretation despite wording in that

46. For example, the following works by influential scholars can be seen as linked to or building upon realist approaches: Richard Falk, The Status of Law in International Society (1970); Rosalyn Higgins, Problems and Process: International Law and How We Use It (1994); Myres S. McDougal & W. Michael Reisman, International Law in Contemporary Perspective: The Public Order of the World Community (1981); Luis B. Sohn, Unratified Treaties as a Source of Customary International Law, in Realism in Law-Making: Essays on International Law in Honor of Willem Ripphagan 231 (Adriaan Bos & Hugo Siblesz eds., 1986).


Convention that runs counter to differential treatment and that had previously led many to regard the Convention, from essentially a formalist point of view, as hostile to indigenous collective rights. Additionally, the UN Human Rights Committee's interpretations of the minority rights (art. 27) and self-determination (art. 1) provisions of the International Covenant on Civil and Political Rights can be understood to favor—at least to some extent—indigenous peoples' demands.

The realist approach identified here has generated certain, now well-accepted interpretive maxims that are often explicitly invoked in international human rights decision making. These include the following: terms in international human rights instruments are to be interpreted (1) keeping in mind the overall context and object of the instrument of which they form a part; (2) in light of the larger body of relevant existing or developing human rights standards; and (3) in the manner that is most advantageous to the enjoyment of human rights (the pro homine principle). The human rights bodies mentioned above, and many others in the international arena, can be seen applying these maxims along with consideration of developing trends in thinking and action about human rights, including the rights of indigenous peoples over lands and natural resources.

IV. CONCLUSION

Within its human rights frame, international law is hospitable to indigenous peoples' claims of rights over lands and natural resources, at least to a point. It is within a human rights discourse, as opposed to an historical sovereignty one, that the moral imperatives behind those claims are most brought to the forefront of inquiry and consideration. And it is the expression of those moral imperatives, rather than the formalistic renditions of historical attributes of indigenous nationhood or statehood, that are best able to confront entrenched configurations of power and resonate for change. Furthermore, a realist interpretation of

49. See The Rights of Minorities (Art. 27), General Comment No. 23, U.N. Human Rights Committee, 50th Sess., ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994), available at http://www.ohchr.org/english/bodies/hrc/comments.htm (commenting on the right of minorities to enjoy their culture affirmed in article 27 and noting that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples"). In evaluating periodic compliance reports by states, the Committee has identified indigenous peoples' rights to lands and natural resources as rights falling within the purview of the right of self-determination protected by article 1 of the Covenant. See ANAYA, supra note 1, at 112–13.
the content of international human rights law takes advantage of the evolution in values and shifts in power generated by indigenous peoples' claims, such that, in some measure, the rights demanded by indigenous peoples to lands and natural resources can be seen not simply as aspirational, but as rights that already form part of international law within a value structure that is presumptively shared by all. Formalist and backward-looking postmodern critical approaches largely overlook such an evolution in values and power relationships at the expense of genuine problem solving that could be achieved on the basis of cross-cultural understanding.

A realist, human rights approach to understanding international law is today both the foundation for the most significant international legal developments concerning indigenous peoples, like the decision of the Inter-American Court of Human Rights in the *Awas Tingni* case, and the most promising method for further forging such developments. With its attention to power and authority from all relevant sources, combined with its attention to the leading edge in the evolution of human rights values, this approach is both pragmatic and ethical—a welcome combination in the discourse of indigenous rights over lands and natural resources.