
STATE OBLIGATIONS CONCERNING INDIGENOUS PEOPLES' RIGHTS TO THEIR ANCESTRAL LANDS: LEX IMPERFECTA?

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I. INTRODUCTION

The Nuba peoples are an indigenous ethnic group living in the area of the Nuba mountains in Southern Kordofan in central Sudan. They include a variety of tribes in the Nuba mountains, but what connects them is a common culture and way of life. Salih observes “the Nuba are indeed the indigenous peoples of the Nuba Mountains; they have the strongest ties to their lands and have lived in this region before colonization.”¹ They earn their livelihood through agriculture and raising animals. The Nuba peoples have throughout the centuries been subjected to systematic human rights violations, ethnic cleansing, and superior race policies by different colonial masters ranging from British colonists to Arabs. Such attempts have not ceased. The Sudanese government’s attempts to subdue and demolish them have intensified after Southern Sudan declared its independence on June 9, 2011.² Most recently, *The New York Times* reported on July 3, 2011, that the Sudanese army has “been relentlessly pounding the Nuba Mountains from Russian-made Antonov bombers for weeks Hundreds of civilians have been killed, including many children. Bombs have been dropped on huts, on farmers in the field, on girls fetching water together, slicing them in half with buckets in their hands.”³

1. Guma Kunda Komey, *The Denied Land Rights of the Indigenous Peoples and Their Endangered Livelihood and Survival: The Case of the Nuba of the Sudan*, 31 ETHNIC & RACIAL STUD. 991, 991–1008 (2008).

2. See Jeffery Gettleman, *Sudanese Struggle to Survive Endless Bombings Aimed to Quell Rebels*, N.Y. TIMES, July 3, 2011, <http://www.nytimes.com/2011/07/04/world/africa/04sudan.html?ref=sudan> (reporting that the Sudanese government may be using violence to preemptively discourage further secession movements).

3. *Id.*; see also Matteo Fagotto, *Nuba Mountains Bear Scars of Sudan’s Forgotten War*, Guardian, July 3, 2011, <http://www.guardian.co.uk/world/2011/jul/03/nuba-mountains-scars-sudan-war> (describing the effect of the Sudanese conflict on the region’s residents); *Southern Kordofan - January 13, 2012*, Tomo Križnar Found.: Eyes & Ears of God, <http://www.tomokriznar.com/ang/>

The land is central to the Nuba peoples' cultural existence, language, customs, identity, and socioeconomic survival. Customary laws have traditionally regulated land tenure in the Nuba mountains. However, the Sudanese land tenure system has undermined the ancestral land rights of the indigenous Nuba peoples.⁴ The modern Sudanese state has seriously disregarded the Nuba peoples' ancestral lands. The Nuba peoples have been pushed "systematically to the margin of their customarily owned land."⁵ Further, the Comprehensive Peace Agreement did not resolve issues of land ownership.⁶ All in all, the ancestral lands of the Nuba peoples are critical to their survival and development. Without their lands, an important feature of their cultural identity would be swept away.

The precarious situation of the Nuba peoples is illustrative of the general situation of indigenous peoples, and it poses a number of pertinent questions relating to state obligations concerning indigenous peoples' rights to their ancestral lands. In many parts of the world, indigenous people are left without judicial recourse to enforce their land rights.⁷ Pasqualucci aptly notes that "[i]ndigenous peoples have long suffered violations of their basic land rights, either perpetrated by the state or by third parties who operate free of state interference."⁸ The rights of indigenous peoples to their ancestral lands are group rights. Similarly, Clinton notes that the "[e]xpropriation of the land and resources of indigenous peoples for the benefit of the dominant colonial society recurs in most sagas of colonial contact between indigenous populations and the colonial

[index.php?li=12-01m17_southern_kordofan](#) (last visited Feb. 27, 2013) (showing pictures of civilians who were wounded and displaced in the conflict).

4. See Komey, *supra* note 1, at 992, 996.

5. *Id.* at 1007.

6. *Id.* at 1004–06 (explaining that the Comprehensive Peace Agreement has not resulted in effective safeguards against government land grabbing or protection of customary land rights).

7. See, e.g., Alexandra Xanthaki, *Land Rights of Indigenous Peoples in South-East Asia*, 4 MELBOURNE J. INT'L L. 478–79 (2003) (providing the example of Sarawak, Malaysia, where indigenous peoples who protest the takeover of their lands without their consent are "detained without trial and harassed by the police").

8. Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT'L. L.J., 51, 59 (2010).

power.”⁹ Do states have normative obligations to observe indigenous peoples’ rights to their ancestral lands? If so, what are their sources and the nature and scope of such obligations? What happens when states infringe on and deprive indigenous people of access to their ancestral lands? Or when they systematically wipe out the ancestral indigenous territory of indigenous peoples? Where can indigenous peoples bring claims for violations of their rights?

The moral underpinning of indigenous land rights lies in the cultural, historical, emotional, social, economic, and “spiritual relationship that indigenous peoples have with their ancestral lands.”¹⁰ Ancestral lands often include sacred sites, sacred cemeteries, and places of worship, which are a condition *sine qua non* for the “transmission of their culture and beliefs to future generations.”¹¹ In other words, ancestral lands create and maintain the cultural identity of indigenous peoples. Without access to their ancestral lands, indigenous peoples are stripped of an element of their cultural identity. Article 25 of the UN Declaration on the Rights of Indigenous Peoples (“UN Declaration”) notes that “[i]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal sea and other resources and to uphold their responsibilities to future generations in this regard.”¹²

The moral legitimacy of their rights lies in indigenous peoples’ traditional connection with the lands they inhabit or used to inhabit. Indigenous peoples understand property as a group right, not as individual rights.¹³ The customary law of indigenous peoples, therefore, gives priority to a group land tenure system in which everybody can use the land and cultural institutions, houses, gardens, schools, workshops, and surroundings because they are the property of the indigenous community as a whole.¹⁴ Every member of the

9. Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739, 745–46 (1990).

10. Pasqualucci, *supra* note 8, at 56.

11. *Id.* at 56–57.

12. United Nations Declaration on the Rights of Indigenous Peoples art. 25, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007).

13. Pasqualucci, *supra* note 8, at 64.

14. *Id.*

community can use this property depending on his or her needs.¹⁵

The Preamble to the UN Declaration notes that “indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.”¹⁶ What is more, indigenous peoples should be treated equally while enjoying their rights. Alfredsson aptly notes that “the rights of indigenous peoples . . . are part and parcel of human rights and should be treated in the same manner.”¹⁷ Even more eloquently, Wiessner states, “the collective consciousness of indigenous peoples, often expressed in creation stories or similar sacred tales of their origin, places them unequivocally and since time immemorial at the location of their physical existence.”¹⁸ It is not just a physical place that is important, but “their beliefs make remaining at that place a compelling dictate of faith.”¹⁹ It is not only indigenous peoples’ customs, culture, history, language, and traditions that are important, but also their spiritual connection to their ancestral lands. This is also the reasoning behind the collective indigenous land tenure system.

The remainder of this article is therefore devoted to exploring states’ obligations with regard to the rights of indigenous peoples. It will attempt to explore the nature, value, and scope of these obligations and to answer whether there are uniform international or national legal standards concerning indigenous peoples’ rights to their ancestral lands. The task will be divided into five steps. Section II provides a definition of indigenous peoples. Section III discusses and analyzes sources of state obligations concerning indigenous land rights. The nature and scope of those state obligations are discussed in Section IV. Section V discusses the enforcement of state obligations to observe indigenous land rights. It does so in three steps: first, by discussing and analyzing compliance with the views

15. *Id.* (describing the collective nature of land use surrounding indigenous settlements, including the custom of open hunting and gathering).

16. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12, pmbl.

17. Gudmundur Alfredsson, *The Rights of Indigenous Peoples with a Focus on the National Performance and Foreign Policies of the Nordic Countries*, 59 HEIDELBERG J. INT’L L. 529, 529 (1999), available at http://www.zaoerv.de/59_1999/59_1999_2_a_529_542.pdf.

18. Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievement and Continuing Challenges*, 22 EUR. J. INT’L L. 121, 134 (2011).

19. *Id.*

of the UN Human Rights Committee; second, by examining the enforcement mechanism under the UN Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169; and third, by examining the monitoring system of the Inter-American Convention on Human Rights. Section VI assesses the normative framework *de lege lata* as to indigenous rights to ancestral territories. On the basis of this analysis, the conclusion in Section VII assesses the added value of state obligations regarding indigenous land rights and how they could be better implemented in the future. Overall, the article argues that states have obligations to respect, protect, and fulfil indigenous land rights stemming from both national legal orders and international law.

II. DEFINING INDIGENOUS PEOPLES

Indigenous land rights are the subject of some controversy in international human rights law and are particularly opposed by states and territories in the Americas, Asia, and Oceania, which were “discovered” by European explorers from the fifteenth century onward.²⁰ As it turned out, most of those territories were inhabited by peoples now known as “indigenous peoples.”²¹ Christopher Columbus’s voyage to the shores of the Bahamas started in the autumn of 1492, a dark chapter in the history of the indigenous peoples of Central and South America. Those who were not killed by previously unknown diseases were subjected to inhuman treatment by European conquerors.²² Bartolomé de las Casas witnessed the atrocities and argued that indigenous peoples are free and entitled to human dignity.²³ De las Casas argued that people should be treated

20. See, e.g., Serv Wiemers, *The International Legal Status of North American Indians After 500 Years of Colonization*, 5 LEIDEN J. INT'L L. 69, 70 (1992) (explaining that some North American Indian peoples have sought international recognition of their rights due to their dissatisfaction with the domestic government policies of the United States and Canada).

21. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3 (2d ed. 2004) (asserting that indigenous peoples are distinguished from dominant portions of society due to their ancestral ties to the land); PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* (2002).

22. See EDUARDO GALEANO, *LAS VENAS ABIERTAS DE AMERICA LATINA* (2005).

23. See G.C. Marks, *Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Barolome de Las Casas*, 13 AUSTL. Y.B. INT'L L. 28 (1992) (reporting that Las Casas recognized that denigration of

equally. He described his thesis more specifically in his main work, *Brevísima relación de la destrucción de las Indias*.²⁴ He concludes his book with the following words: “Y con color de que sirven al Rey deshonran a Dios y roban y destruyen al Rey” (roughly translated as, “And with which interest they serve the King, they dishonor God and steal from and destroy the King”).²⁵

There is no consensus on the meaning of the term “indigenous people” in international law. However, as Alfredsson observes, “the practices and instruments of States and international organizations, as well as scholarly writings, contain significant indications as to the contents of the term peoples.”²⁶ He then argues that “territory is the main basis for the definition of a people [together with] common national, ethnic, linguistic and/or religious characteristics of the groups and their desire to maintain and develop their communities.”²⁷ Common culture is therefore another important feature when defining indigenous peoples.²⁸ Other important features are common history, traditions, and language. Jose Martinez Cobo, former UN Special Rapporteur to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Indigenous Communities, Peoples and Nations, defined indigenous peoples as:

those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on 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 system.²⁹

indigenous peoples’ status and capacity to self-govern was used by Europeans to justify colonization).

24. *Brevísima Relación de la Destrucción de las Indias: Fray Bartolomé de las Casas*, CIUDAD SEVA, <http://www.ciudadseva.com/textos/otros/brevisi.htm> (last visited Feb. 27, 2013).

25. *Id.* (author’s translation).

26. Gudmundur Alfredsson, *Peoples*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L LAW, <http://www.mpepil.com/>, para. 2 (last visited Feb. 27, 2013).

27. *Id.* para. 18.

28. See Alexandra Xanthaki, *Indigenous Cultural Rights in International Law*, 2 EUR. J.L. REFORM 343 (2000).

29. Secretariat of the Permanent Forum of Indigenous Issues, *The Concept of*

Similarly, Anaya notes that indigenous peoples can be defined as “the living descendants of preinvasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest.”³⁰ Alternatively, Wiessner notes that “indigenous peoples are vulnerable organic groups with a special relationship to their ancestral lands.”³¹ All four definitions share common patterns, which include territory and common cultural characteristics.

III. THE SOURCES OF INDIGENOUS PEOPLES’ RIGHTS IN NATIONAL AND INTERNATIONAL LEGAL ORDERS

A state’s human rights obligations derive from a particular normative system at the national or international level. Indigenous peoples are entitled to the same rights that apply to individuals and peoples.³² The right to property is generally accepted in most domestic constitutional legal orders and in international law.³³ For instance, Article 1 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms notes that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions.”³⁴ The normative thrust of state obligations concerning indigenous land rights derives from the international and national levels.

A. INDIGENOUS LAND RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW

Indigenous land rights derive from several international human

Indigenous Peoples, ¶ 2, U.N. Doc. PFII/2004/WS.1/3 (Jan. 2004).

30. ANAYA, *supra* note 21, at 3.

31. Wiessner, *supra* note 18, at 138.

32. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12, art. 1.

33. See, e.g., Universal Declaration of Human Rights art. 17, G.A. Res. 217A (III), U.N. Doc A/810 (Dec. 10, 1948) (“1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property.”).

34. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262, 262 (*entered into force* May 18, 1954).

rights documents. International law standards provide the lowest common denominators agreed upon and binding on part or all of the international community.³⁵ Indigenous peoples enjoy the right to property, which derives in particular from the second part of ILO Convention 169 concerning indigenous and tribal peoples in independent countries.³⁶ Article 13(1) provides that “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.”³⁷

Although the above provision does not directly provide for the right of indigenous peoples to their traditional ancestral lands, it nonetheless imposes obligations on states to do no harm to the cultural and spiritual values of indigenous peoples’ lands.³⁸ Indigenous territory can be defined as the “habitat necessary for their collective life, activities, self-government, and cultural and social reproduction”³⁹ Moreover, indigenous peoples’ rights of ownership and possession derive from Article 14 of ILO Convention 169, which provides that rights of peoples “shall be recognized” only

35. See S. James Anaya & Robert A. Williams, *The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 36 (2001) (asserting that the international human rights system imposes international legal obligations on states to uphold the land rights of indigenous peoples).

36. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 72 ILO Official Bull. 59 (entered into force Sept. 5, 1991). So far, only twenty-two states have ratified this convention. See *NORMLEX*, ILO, <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169> (last visited Feb. 27, 2013). See generally Athanasios Yupsanis, *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989–2009: An Overview*, 79 NORDIC J. INT’L L. 433 (2010) (discussing the impact of ILO Convention 169 in the first twenty years after its adoption).

37. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 36, art. 13(1).

38. Anaya & Williams, *supra* note 35, at 33, 80–81 (discussing the United Nations Human Rights Committee’s assertion that governments have a positive obligation to protect indigenous peoples’ lands and cultures).

39. Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, Meeting of the Working Group on the Fifth Section of the Draft Declaration with a Special Emphasis on “Traditional Forms of Ownership and Cultural Survival, Right to Land and Territories,” OEA/Ser.K/XVI,GT/DADIN/doc.113/03 rev. 1 (Nov. 7–8, 2003), at 3.

“over the lands which they traditionally occupy.”⁴⁰ Anaya notes that:

[U]se of the words “traditionally occupy” in article 14(1), as opposed to use of the past tense “occupied”, suggests that the occupancy must be connected with the present in order for it to give rise to possessory rights [H]owever, a sufficient contemporary connection with lost land may be established by a continuing cultural attachment to them, particularly if dispossession occurred recently.⁴¹

In contrast, Article 26(1) of the UN Declaration on the Rights of Indigenous Peoples states that “[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”⁴² Therefore, occupancy of the territory must be connected with the past, and not necessarily also with the present. In other words, peoples who were forced out of their traditional territories and now live in other areas may also be able to exercise their rights.⁴³

In addition, states have obligations to protect the right of peoples to own and possess the land they traditionally use.⁴⁴ In this context, Article 2(2)(b) of ILO Convention 169 obliges states to “promot[e] the full realization of the social, economic and cultural rights of these [indigenous] peoples with respect for their social and cultural identity, their customs and traditions and their institutions.”⁴⁵ The African Overview Report emphasizes the importance of this provision, as “land rights recognised in post-colonial countries often do not give recognition to indigenous peoples’ traditions, customs

40. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 36, art. 14(1).

41. S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13, 40 (2004); *see also* Geir Ulfstein, *Indigenous Peoples' Right to Land*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW, <http://www.mpepil.com/>, at 18–19 (last visited Feb. 27, 2013) (defining the term “traditionally occupy” and its significance to indigenous peoples’ exercise of control over the land).

42. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12, art. 26(1).

43. *See, e.g.*, S. James Anaya, *Maya Aboriginal Land and Resource Rights and the Conflict over Logging in Southern Belize*, 1 YALE HUM. RTS. & DEV. L.J. 17, 19 (1998) (arguing that the Maya continue to possess rights over their historically occupied land despite government concessions to logging companies).

44. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 36, art. 14.

45. *Id.* art. 2(2)(b).

and concepts of ownership.”⁴⁶ In this way, Article 14(1) of ILO Convention 169 notes that measures must be employed:

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.⁴⁷

The strong wording of Article 14 is somewhat undermined by Article 16, which initially notes that “the peoples concerned shall not be removed from the lands which they occupy,” but “[w]here the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent.”⁴⁸ Once the reason for the relocation disappears, ILO Convention 169 recognizes the right of indigenous peoples to return to their traditional lands “[w]henver possible . . . as soon as the grounds for relocation cease to exist.”⁴⁹ However, Article 26 of the UN Declaration provides that “[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”⁵⁰ Furthermore, states are obliged to “give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”⁵¹ In short, states are obliged to observe

46. ILO, OVERVIEW REPORT OF THE RESEARCH PROJECT BY THE INTERNATIONAL LABOUR ORGANIZATION AND THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS ON THE CONSTITUTIONAL AND LEGISLATIVE PROTECTION OF THE RIGHTS OF INDIGENOUS PEOPLES IN 24 AFRICAN COUNTRIES 88 (2009) [hereinafter ILO/ACHPR], available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_115929.pdf.

47. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 36, art. 14(1). In this regard, states “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.” *Id.* art. 14(2).

48. *Id.* art. 16.

49. *Id.* art. 16(3).

50. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12, art. 26(2).

51. *Id.* art. 26(3).

indigenous land rights.

Article 16 of ILO Convention 169 addresses the displacement of indigenous peoples.⁵² Article 16(2) notes that “relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate”⁵³ Article 16(4) covers situations where return is not possible and imposes compulsory obligations upon states that they provide indigenous peoples “in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development.”⁵⁴ It seems that the Convention only allows for displacement of indigenous peoples in exceptional circumstances. Finally, paragraph 5 of Article 16 provides for an individual right that “[p]ersons thus relocated shall be fully compensated for any resulting loss or injury.”⁵⁵

Article 15(1) regulates access to the natural resources on indigenous territories. It states that the “rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management, and conservation of these resources.”⁵⁶ Article 15(2) provides for the right of participation of indigenous people in decision-making relating to the exploration and exploitation of natural resources.⁵⁷ Article 17 regulates the autonomy of procedures of indigenous lands among indigenous peoples themselves.⁵⁸

Indigenous land rights, therefore, arise from several binding and

52. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 36, art. 16.

53. *Id.* art. 16(2).

54. *Id.* art. 16(4).

55. *Id.* art. 16(5).

56. *Id.* art. 15(1).

57. *Id.* art. 15(2). See generally James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT'L & COMP. L. 7 (2005) (arguing that the extent to which indigenous peoples must be consulted is a function of their rights to the land and resources in question).

58. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 36, art. 17.

non-binding international human rights documents. Further, some argue that indigenous land rights follow from customary international law.⁵⁹ For instance, the Belize Supreme Court Justice A. O. Conteh noted that “[t]reaty obligations aside, it is my considered view that both customary international law and general principles of international law would require that Belize respect the rights of its indigenous people to their lands and resources.”⁶⁰

It is clear from this analysis of international documents that a number of sources in international human rights law provide for state obligations with regard to indigenous land rights. However, it must be recognized that the protection of indigenous land rights is much shallower than the protection of the individual in international human rights law, as most state obligations in this field are soft-law obligations. By examining national systems, the next section will show existing state practice and *opinio juris* to observe indigenous land rights.

B. NATIONAL LEGAL ORDERS

National legal orders provide an additional layer of support for the rights of indigenous people to their traditional lands. A number of constitutions and national laws provide for indigenous land rights.⁶¹ The Constitution of Paraguay expressly recognizes the existence of indigenous (Indian) peoples, defined as “ethnic groups whose culture existed before the formation and constitution of the State of Paraguay.”⁶² The right of indigenous people to their lands is recognized in the first paragraph of Article 64, which provides that “Indian peoples have the right, as communities, to a shared ownership of a piece of land, which will be sufficient both in terms of size and quality for them to preserve and to develop their own

59. See Anaya & Williams, *supra* note 35, at 54–55 (asserting that emerging customary international law indicates that states must protect indigenous land rights according to traditional land use and occupancy patterns).

60. *Aurelio Cal v. Attorney General of Belize*, (2007) Judgement, Oct. 18, 2007, para. 127 (Belize).

61. See, e.g., Ley No. 3760, Gaceta Oficial No. 3039 (Nov. 7, 2007) (Bol.) (incorporating the United Nations Declaration on the Rights of Indigenous People into Bolivian national law).

62. CONSTITUTION OF PARAGUAY, art. 62, *translated at* http://www.servat.unibe.ch/icl/pa00000_.html (last visited Feb. 27, 2013).

lifestyles.”⁶³ Moreover, Article 64(1) obliges Paraguay to “provide them with the respective land, free of charge. This land, which will be exempt from attachments, cannot be divided, transferred, or affected by the statute of limitations, nor can it be used as collateral for contractual obligations or to be leased. It will also be exempt from taxes.”⁶⁴ Paragraph 2 of Article 64 deals with relocation and prohibits the “removal or transfer of Indian groups from their habitat, without their express consent”⁶⁵

A number of domestic courts in Latin America have protected the rights of indigenous peoples by referring to ILO Convention 169.⁶⁶ Furthermore, Bolivia has made the UN Declaration on the Rights of Indigenous People binding in domestic law.⁶⁷ The national legal orders of the Philippines and Thailand also protect the rights of indigenous peoples to their land.⁶⁸ More specifically, Chapter III of the Indigenous Peoples’ Rights Act of the Republic of the Philippines protects indigenous rights to ancestral domains.⁶⁹ Chigovera notes that, “[d]espite the absence of specific legal provisions for the protection of the rights of indigenous people, the Namibia government maintains that the Constitution of Namibia provides a legislative and normative framework for the protection of indigenous minorities.”⁷⁰

63. *Id.* art. 64(1).

64. *Id.*

65. *Id.* art. 64(2); *see also* Rainer Grote, *The Status and Rights of Indigenous Peoples in Latin America*, 59 HEIDELBERG J. INT’L L. 497, 509 (1999) (“[T]he constitutions of Paraguay and Ecuador deal with indigenous rights in the context of fundamental rights by recognizing them as collective rights enjoyed by particular sectors of society.”).

66. *See* ILO, APPLICATION OF CONVENTION NO. 169 BY DOMESTIC AND INTERNATIONAL COURTS IN LATIN AMERICA: A CASEBOOK (2009), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_123946.pdf (summarizing relevant judicial decisions from ten Latin American countries and concluding that ILO Convention 169 has had a great impact on the region).

67. Ley No. 3760, Gaceta Oficial No. 3039 (Nov. 7, 2007) (Bol.).

68. *Cf.* Xanthaki, *supra* note 7, at 472, 476 (noting, however, that in Thailand, individual ownership is protected instead of collective ownership, which may weaken indigenous rights).

69. Indigenous Peoples Rights Act, §§ 4–12 (Act No. 8371) (1997) (Phil.), *translated at* <http://www.chanrobles.com/republicactno8371.htm>.

70. ANDRE CHIGOVERA, ILO, EXAMINING CONSTITUTIONAL, LEGISLATIVE AND ADMINISTRATIVE PROVISIONS CONCERNING INDIGENOUS PEOPLES IN NAMIBIA 15, http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_

Several African countries provide for individual and collective rights to the property of indigenous peoples in their national constitutional frameworks. However, these systems lack an explicit normative basis in national legal systems for the rights of indigenous peoples to their ancestral land.⁷¹ Article 29 of the Constitution of Rwanda states that “[p]rivate property, whether individually or collectively owned, is inviolable.”⁷² A similar provision can be found in the land laws of other African countries such as Chad, Egypt, the Republic of Congo, South Africa, and Uganda.⁷³ This lack of a normative basis is common to most African countries.⁷⁴ However, the rights of indigenous people to their ancestral lands in African national legal orders also derive from customary law, which forms an important part of African national legal systems.⁷⁵ Further, the African Overview Report notes that, “in almost all countries in the Central African region, the customary laws of the Bantu population are different to those of the ‘Pygmy’ peoples, as the latter’s traditional territories comprise large areas of land or territories upon

Namibia.pdf (last visited Feb. 27, 2013).

71. See ILO/ACHPR, *supra* note 46, at 87–94 (explaining that, in post-colonial Africa, the shift from collective land ownership to a more individualistic property regime led to large-scale dispossession of lands previously defined under customary law as belonging to the indigenous peoples traditionally occupying them).

72. CONSTITUTION OF THE REPUBLIC OF RWANDA, May 26, 2003, art. 29.

73. See CONSTITUTION OF THE REPUBLIC OF CHAD, Mar. 31, 1996, art. 41 (holding that the right to property is inviolable and “sacred”); CONSTITUTION OF THE REPUBLIC OF CONGO (Congo-Brazzaville) Mar. 15, 1992, art. 30 (guaranteeing the right to property and permitting property transfers and expropriations only “under the condition of a just and proper indemnification”); S. AFR. CONST., 1996, art. 25 (prohibiting the arbitrary deprivation of property, even pursuant to legislation, and allowing expropriation for public purposes and when subject to compensation); CONSTITUTION OF THE REPUBLIC OF UGANDA, Oct. 8, 1995, art. 26 (stipulating that every person has a right to own property “either individually or in association with others”); DRAFT CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 26, 2012, art. 27 (prohibiting public confiscation of property and permitting private confiscation solely pursuant to court order).

74. See, e.g., CONSTITUTION OF THE REPUBLIC OF RWANDA, May 26, 2003, art. 29 (providing citizens generally with an inviolable right to property, yet failing to expressly provide indigenous peoples in the country with a right to ancestral lands).

75. See ILO/ACHPR, *supra* note 46, at 100–14 (identifying various “entry points” offered by national laws for indigenous peoples to assert customary land right claims, and providing the Democratic Republic of Congo as an example).

which they practice hunting, gathering, fishing and other activities.⁷⁶ These lands are considered the common property of the community as a whole.⁷⁷ Customary indigenous land law therefore forms an important part of the national legal orders of African countries.

In addition, the national legal order of New Zealand provides for indigenous land rights.⁷⁸ Furthermore, Australian courts have recognized indigenous land rights in several cases.⁷⁹ Similarly, courts in Japan,⁸⁰ South Africa,⁸¹ Kenya,⁸² Peru,⁸³ the Philippines,⁸⁴ and

76. *Id.* at 101 (noting that, similarly, the Mbororo people of Central and Western Africa treat grazing areas as communally owned lands, in contrast to mainstream society's concepts of individualized property ownership and land use).

77. *Id.* (explaining that, in cultures like those of the Pygmy and Mbororo peoples, it is almost "unthinkable" for one individual or family to claim an area of common property for their exclusive use).

78. *See, e.g.,* S.M. Stevenson, *Indigenous Land Rights and the Declaration on the Rights of Indigenous Peoples: Implications for Maori Land Claims in New Zealand*, 32 *FORDHAM INT'L L. J.* 298, 319 (2008) (stating that the Maori Land Act of 1993 at least officially recognizes the existence of Maori customary title when land is held in accordance with Maori customary traditions and values).

79. *See, e.g., Mabo v. Queensland*, (1992) 175 C.L.R. 1 (Austl.) (holding that the Meriam people are entitled to the possession, occupation, use, and enjoyment of Australia's Murray Islands); *Mabo v. Queensland*, (1988) 166 C.L.R. 186 (Austl.) (affirming the Meriam people's demurrer to prevent the Queensland government from applying the invalidated Queensland Coast Islands Declaratory Act 1985, which was passed to abolish native land title rights).

80. *See, e.g., Kayano et al. v. Hokkaido Expropriation Comm.*, 38 *I.L.M.* 397 (1999) (Japan) (holding that Japan was obligated under international law to recognize the Ainu as an indigenous people); J. Gilbert, *Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title*, 56 *INT'L & COMP. L.Q.* 583 (2007).

81. *See, e.g., Alexkor Ltd. v. Richtersveld Cmty.*, (2003) C.C.T. 19/03 (S. Afr.) (finding that the dispossession of ancestral lands belonging to the Richtersveld community pursuant to the Precious Stones Act of 1927 and other state actions was racially discriminatory).

82. *See, e.g., Lemeiguran v. Att'y Gen.*, (2006) I.L.D.C. 698 (Kenya), available at http://www.oxfordlawreports.com/sample_article?id=/oril/Cases/law-ildc-698ke06&recno=1& (affirming the right of minority groups to "participate effectively in cultural, religious, social, economic and public life").

83. *See, e.g., Jaime Hans Bustamante Johnson*, (2009) EXP. No. 03343-2007-PA/TC (Peru) (halting oil exploration activities in the protected Cordillera Escalera mountains because the oil development threatened the indigenous plaintiffs' right to enjoy their environment).

84. *See, e.g., Isagani Cruz v. Sec. of Env't & Natural Res.*, (2000) G.R. No. 135385 (Phil.) (conceding that indigenous peoples should have "priority in the use, the enjoyment and the preservation of their ancestral lands and domains [but refusing to grant to them] perpetual ownership and control of the nation's

Malaysia⁸⁵ have in unique judicial dialogue reaffirmed indigenous ancestral land rights. What is more, Section 5 of the Norwegian Finnmark Act notes that, “[t]hrough prolonged use of land and water areas, the Sami have collectively and individually acquired rights to land in Finnmark.”⁸⁶

It is clear from this analysis of national legal orders that a number of sources of law in national legal orders recognize the right of indigenous peoples to their ancestral lands. It appears there is growing support for the notion that indigenous land rights can be derived from customary law and constitutional and normative protections.⁸⁷ States are therefore obliged to comply with the national constitutional and legislative protections of indigenous land rights.⁸⁸ Indigenous land rights have been backed by a number of national legal orders in Europe, Africa, the Americas, and Asia.⁸⁹ State obligations concerning indigenous land rights derive from national

substantial wealth . . .” (emphasis in original)).

85. See, e.g., *Sagong Tasi v. Negeri Kerajaan Selangor*, (2002) 2 C.L.J. 543 (Malay.) (recognizing the Temuan-Orang Asli people as customary owners of land from which they had been forcibly evicted by police, and ordering the state to compensate financially the plaintiff community).

86. Act Relating to Legal Relations and Management of Land and Natural Resources in the County of Finnmark (No. 85, June 17, 2005) (Fin.). With respect to Russia, see Malgosia Fitzmaurice Lachs, *Practical Implementation of Indigenous Peoples' Land Rights: A Case Study of the Russian Federation (Comparison with Certain Developments in Africa in Relation to Indigenous Peoples)*, 3 Y.B. POLAR L. 389 (2011) (assessing the contemporary legal framework for indigenous rights protection in Russia and calling on the need for better implementation of existing sources of indigenous law in the country, such as ILO Convention 169).

87. See Lillian Aponte Miranda, *Uploading the Local: Assessing the Contemporary Relationship Between Indigenous Peoples' Land Tenure Systems and International Human Rights Law Regarding the Allocation of Traditional Lands and Resources in Latin America*, 10 OR. REV. INT'L L. 419, 430 (2008) (arguing that several indigenous land rights arise from customary international law, such as the right to the use, enjoyment, control, and development of ancestral lands and resources irrespective of formal title).

88. See generally ILO/ACHPR, *supra* note 46 (studying the constitutional, legislative, and administrative bases for indigenous rights protection in twenty-four African countries).

89. See, e.g., *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 173 (Aug. 31, 2001) (finding Nicaragua had violated the American Convention on Human Rights granting private logging concessions on lands traditionally used and occupied by the indigenous Awas Tingni people).

legal orders and from the international level.⁹⁰ Having gained an understanding of indigenous land rights deriving from national legal orders, the next part turns to the scope and nature of state obligations to observe indigenous land rights.

IV. THE NATURE AND SCOPE OF INDIGENOUS RIGHTS TO TRADITIONAL ANCESTRAL LANDS

This section examines the nature and scope of indigenous land rights. It first examines their collective nature and thereafter moves to tripartite state obligations to respect, protect, and fulfill the human rights of indigenous people to their ancestral lands.

A. THE COLLECTIVE NATURE OF INDIGENOUS LAND RIGHTS

International human rights law traditionally regulates the rights of the individual as a victim of a human rights violation, and human rights are usually construed in the relationship of the individual with the state or, more recently, with non-state actors. However, in some circumstances it is necessary to protect the rights of individuals as a group, particularly relating to characteristics that are better protected on the group level, such as common history, identity, customs, tradition, language, education, land, participation, and self-governance.⁹¹ In such circumstances, the voices of individuals as a group are heard much louder than the voice of a lone individual. Indigenous peoples as a group are also much stronger negotiating partners with states and international organizations.⁹² However, indigenous peoples' rights are not only collective but also individual

90. See also Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, 6 HUM. RTS. L. REV. 281, 304 (2006) (explaining that, in OAS states, the Inter-American system will interpret the American Convention on Human Rights to protect indigenous land rights even in the absence of domestic recognition of such rights).

91. See Cindy L. Holder & Jeff J. Cornassel, *Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights*, 24 HUM. RTS. Q. 126, 126–27 (2002) (noting that those for whom such communal life is “vital” are not adequately protected by human rights instruments guaranteeing rights solely to “persons” and “populations,” as opposed to “peoples”).

92. See, e.g., Rima Wilkes et al., *Packaging Protest: Media Coverage of Indigenous People's Collective Action*, 47 CANADIAN REV. SOC. 327, 328–30 (2010) (attributing the success of indigenous peoples in Canada in affecting significant legal and policy reforms to the tendency of collective action to draw media attention and influence public opinion).

because they belong also to every individual member of an indigenous people.⁹³ Customary rules and traditions have regulated the division of property in indigenous societies. Such societies have not known or recognized individual human rights to property. Property was more a common matter.

In other words, some rights of individuals are far better protected when they are advocated as a group. In this context, Alfredsson aptly notes that “[i]f group rights are rejected and preferential treatment denied, discriminatory patterns will persist and the equal enjoyment of human rights by minorities will never be realized.”⁹⁴ The Inter-American Court noted very clearly in *Awás Tingni Community v. Nicaragua* that:

Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory⁹⁵

Indigenous land rights are therefore group rights and collective in nature. They belong to indigenous peoples as a group.⁹⁶ Anaya and Williams note that “among indigenous communities a group’s particular system of land tenure is recognized as embodying a property rights regime. Within the corresponding system of indigenous peoples’ customary norms, traditional land tenure generally is understood as establishing the collective property of the

93. See Holder & Cornassel, *supra* note 91, at 128–29 (explaining that many indigenous peoples stress the interdependence between collective and individual rights claims, seeking “dual-standing rights,” which may be invoked both by the group and by the individual).

94. G. ALFREDSSON, INSTITUTIONAL TRENDS – MINORITY RIGHTS 20, <http://www.wcl.american.edu/humright/hracademy/documents/Class2-Reading3MinorityRightsNormsandInstitutions.pdf?rd=1> (last visited Feb. 27, 2013) (emphasizing the importance of allowing individuals to “draw on the strength of their groups” to realize a broad array of rights, including cultural, educational, political, and land-related rights).

95. *Id.* (recognizing the importance of ancestral lands to the spiritual, cultural, and economic survival of entire indigenous groups).

96. See Lee Swepston & Roger Plant, *International Standards and the Protection of the Land Rights of Indigenous and Tribal Populations*, 124 INT’L LAB. REV. 91, 95 (1985) (explaining that, while the nineteenth century witnessed the abolition of many communal systems of land management, more recent legal reforms have begun to recognize indigenous peoples’ collective claims to land).

indigenous community and derivative rights among community members.”⁹⁷ Another important characteristic is that indigenous land rights are not static but may change over time as indigenous peoples’ culture and use of land changes. Indigenous peoples’ traditional possession of their land can be proven by objective facts such as their practices and in law by expert opinions by academics or practitioners. All in all, indigenous peoples enjoy collective rights over territory they connect with physically, emotionally, economically, culturally, socially, and spiritually.⁹⁸

B. TRIPARTITE STATE OBLIGATIONS TO OBSERVE INDIGENOUS LAND RIGHTS

This section examines the nature and scope of states’ obligations concerning indigenous land rights. It first examines a tripartite typology of human rights obligations. The tripartite obligations to respect, protect, and fulfill indigenous human rights apply universally to all rights and entail a combination of negative and positive duties.⁹⁹ This tripartite typology of human rights obligations refers, under traditional human rights doctrines, to state obligations.¹⁰⁰ However, the fact that the state is the bearer of human

97. *Id.* (noting that modern tribal courts in the United States tend to emphasize the *sui generis* nature of traditional indigenous land use practices).

98. *See* Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 12.465, ¶ 146 (June 27, 2002) (interpreting Article 21 of the American Convention on Human Rights, which guarantees the right to property to protect indigenous peoples’ material, social, economic, and cultural interests in their lands).

99. *See generally* African Commission on Human and Peoples’ Rights, Decision Regarding Communication 155/96 (Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria), ¶ 44, ACHPR/COMM/AO44/1 (May 17, 2002) (reporting that the Commission interpreted the African Charter for Human and Peoples’ Rights and developed a four-fold typology of human rights obligations in the case of Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria, (Communication 155/96, May 27, 2002)). The Commission held that “internationally accepted ideas of the various obligations engendered by human rights indicate that all rights — both civil and political rights and social and economic — generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights.” *Id.*

100. *See* Int’l Comm’n of Jurists (I.C.J.), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, at 6 (Jan. 26, 1997), available at <http://www.uu.nl/faculty/leg/NL/organisatie/departementen/departementrechtsgele>

rights obligations does not imply that only the state has such obligations.¹⁰¹ Shue notes in this regard that “for every basic right — and many other rights as well — there are three types of duties, all of which must be performed if the basic right is to be fully honoured but not all of which must necessarily be performed by the same individuals or institutions.”¹⁰²

State tripartite obligations to respect, protect, and fulfill also apply to questions of indigenous land rights.¹⁰³ The indigenous rights to

erdheid/organisatie/onderdelen/studieeninformatiecentrummensenrechten/publicaties/simspecials/20/Documents/20-01.pdf (requiring states responsible for violating international legal obligations to establish mechanisms for investigating, prosecuting, and correcting such violations); U.N. Comm. on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food (Art. 11), para. 15 (May 12, 1999) (explaining that the obligation to “respect” imposes on states a duty not to take any measures that in any way deprive protected parties of the right concerned); HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 52 (1980) (observing the tripartite typology of duties to include (1) duties to avoid the deprivation of the right concerned, (2) duties to protect rights holders from deprivation, and (3) duties to aid rights holders who have been deprived).

101. See, e.g., ALLAN ROSAS & MARTIN SCHEININ, *AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK* 57–58 (Raija Hanski & Markku Suksi eds., 2d ed. 2004) (contending that in the Human Rights Committee’s review of a land claim case concerning Finnish Sami, the Committee seemed to imply that activities interfering with an indigenous people’s use and enjoyment of their land may constitute a violation of the people’s cultural rights even when carried out by private, non-state parties). *But see id.* (noting the general reluctance to the express recognition of human rights obligations).

102. SHUE, *supra* note 100, at 76; see also Asbjørn Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach*, 10 *HUM. RTS. L.J.* 35, 37 (1989) (arguing that the tripartite typology of duties bestows on states a negative obligation to abstain from acts contrary to human rights principles and a positive obligation as a “protector and provider” of rights).

103. See *The Right to Adequate Food and to Be Free from Hunger – Updated Study on the Right to Food*, Economic & Social Counsel, ¶¶ 65, 75, U.N. Doc. E/CN.4/Sub.2/1999/12 (June 28, 1999) (by Asbjørn Eide) (reporting the Committee on Economic, Social, and Cultural Rights’ finding that in the case of Guatemala, the issue of land ownership and distribution was essential to assessing indigenous and rural populations’ social, cultural, and economic grievances); OLIVER DE SCHUTTER, *INTERNATIONAL HUMAN RIGHTS: CASES, MATERIALS, COMMENTARY* 232–53 (2010); ROSAS & SCHEININ, *supra* note 101, at 49–62 (observing that unlike most human rights obligations, which create a vertical relationship between the state and the individual rights holder, the collective rights of indigenous peoples and other minorities create a “horizontal effect”); MAGDALENA SEPULVEDA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 157

enjoy ancestral lands create state obligations to respect, protect, and fulfill those rights.¹⁰⁴ Their rights are accompanied with corollary obligations of the state to secure the peaceful enjoyment of their lands.¹⁰⁵ Anaya and Williams note that “passive neglect on the part of states in not demarcating or otherwise securing indigenous peoples’ lands is frequently accompanied by active affronts to the connections that indigenous peoples seek to maintain with lands and natural resources.”¹⁰⁶ As states are often reluctant to recognize and protect indigenous rights to their ancestral lands, it is necessary to map out the nature and scope of states’ obligations.

In this context, Anaya and Williams distinguish two major types of legal obligations relating to indigenous lands: “the obligation of states to adopt adequate measures to specifically identify and secure indigenous peoples’ communal lands” and “state obligations with respect to natural resource or other development initiatives affecting indigenous lands.”¹⁰⁷ Such a division of state obligations is helpful; however, rather than relying on such a framework, it is more useful to rely on indigenous rights within the tripartite framework of state obligations to respect, protect, and fulfill.¹⁰⁸

(2003) (arguing that all human rights, whether civil and political in nature or economic, social, and cultural, impose a broad array of duties).

104. See Eide, *supra* note 102, at 37 (arguing that these obligations comprise the three levels of state responsibility for all human rights).

105. See, e.g., Pasqualucci, *supra* note 8, at 61–63 (describing how Nicaragua finally implemented indigenous land right protections in response to pressure from both the Inter-American Court of Human Rights and the World Bank).

106. Anaya & Williams, *supra* note 35, at 77.

107. *Id.* at 77; see also Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 87 (1999) (stating that the Guatemalan Constitution even obligates the state to provide lands to indigenous communities that need them for their development); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 660 DUKE L.J. 660, 664 (1990) (observing that, at the time the article was written, the international order did not contest domestic legal regimes that limited or completely denied indigenous peoples their collective rights).

108. See Olivier De Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 HUM. RTS. Q. 1084, 1090, principle 3 (2012) (asserting that the obligation of states to respect, protect, and fulfill all human rights applies both domestically and extraterritorially).

States have obligations to ensure indigenous peoples' enjoyment of land rights. The bulk of this section therefore concentrates on states' substantive obligations to regulate and adjudicate indigenous land rights. States have in the past often neglected their obligation to observe indigenous rights, including land rights.¹⁰⁹ The lowest common denominator of state obligations is now clear. The Outcome Statement of the 2005 World Summit established that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity."¹¹⁰ The Outcome Statement thus clarifies that "[t]his responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means."¹¹¹ Such wording was later taken up by Article 7 of the UN Declaration and made stronger in Article 8, which notes that "[i]ndigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."¹¹²

C. THE OBLIGATION OF STATES TO RESPECT

States' obligations to respect indigenous land rights obliges states to refrain from interfering in the enjoyment of indigenous land rights.¹¹³ This rule derives from the ancient Roman principle *sic utere tuo ut alterum non laedes*.¹¹⁴ According to Eide, the obligation to respect:

109. See, e.g., *Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II. 117, doc.1 rev. 1 (2003) (arising as a result of use restrictions imposed by the United States on Western Shoshone traditional lands).

110. 2005 World Summit Outcome Resolution, G.A. Res. 60, UN Doc.A/Res60/L., ¶ 138 (Sept. 15, 2005).

111. *Id.*

112. See United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12, art. 8.

113. See Int'l Hum. Rts. Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 158, ¶ 7, U.N. Doc. HRI/GEN/1/Rev.1 (May 12, 1994) [hereinafter Int'l Hum. Rts. Instruments] (extending the scope of protection beyond property to include culture and traditional activities like hunting and fishing).

114. See Elizabeth E. Ruddick, Note, *The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced*, 77 B.U. L. REV. 429, 471 n.231 (1997) (citing Black's Law Dictionary, which defines the term as requiring one to use his or her own property "in such a manner as not to injure that of another"). The author also points out that this principle has become a widely accepted term in environmental law. See *id.* at 470–71.

[R]equires the State, and thereby all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use the material resources available to that individual in the ways she or he finds best to satisfy the basic needs.¹¹⁵

This obligation to respect also obliges the state to effectively recognize indigenous peoples' right to participation in all matters concerning them.¹¹⁶ The obligation to respect may appear to suggest that states must undertake due diligence ensuring not only that they comply with human rights obligations concerning indigenous land rights, but also that they do everything possible to avoid causing harm to indigenous land rights.¹¹⁷ For instance, the Committee on Economic, Social and Cultural Rights noted in its concluding observations on Finland that the country needs to "find an adequate solution to the question of ownership and use of land in the Sami home-land in close consultations with all parties concerned, including the Sami Parliament, and then to ratify ILO Convention No. 169 . . . as a matter of priority."¹¹⁸ A state's obligation to respect

115. U.N. Office of the High Comm'r for Hum. Rts., *The Right to Adequate Food*, at 67, available at <http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf> (last visited Feb. 27, 2013).

116. See Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 36, art. 6(1) (requiring states parties to consult indigenous peoples before undertaking any legislative or administrative measures that might affect them, and to ensure indigenous peoples' participation in the decision-making processes surrounding such measures); United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12, art. 18 (providing that indigenous peoples have the right to participate in decision-making in matters affecting their rights through their own representatives and decision-making institutions); Anaya & Williams, *supra* note 35, at 78–81 (arguing that, in addition to property rights, indigenous peoples have the right to be consulted on any decision affecting their lands and interests, as well as the right to freely pursue their political, economic, social, and cultural development); Pasqualucci, *supra* note 8, at 86–91 (noting that the Inter-American Court of Human Rights has recognized the obligation of states to consult indigenous peoples with the purpose of receiving their "free, prior, and informed consent" on any proposed activity that may potentially affect the existence, value, use, or enjoyment of their lands and resources).

117. *Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II. 117, doc.1 rev. 1 (2003) (holding that international law obligates states to adopt special measures to guard indigenous peoples against dispossession of their land claims).

118. Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Economic and Social Council, ¶ 20, UN Doc.

therefore includes obligations not only to recognize indigenous land rights, but also to demarcate them.¹¹⁹

Such an obligation to recognize and demarcate also follows from the case law of the Inter-American Court of Human Rights.¹²⁰ For instance, that court recognized in *Awas Tingni v. Nicaragua* the rights of indigenous people to their traditional territories by stating that “[i]ndigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their culture, their spiritual life, integrity, and their economic survival.”¹²¹

The UN Declaration provides in Article 26(1) that “States shall give legal recognition to land, territories and resources.”¹²² The third paragraph of Article 26 thereafter notes that “[s]tates shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”¹²³ The measures that states can adopt to ensure respect

E/C.12/FIN/CO/5 (Jan. 16, 2008) (calling on Finland also to ensure that logging and other activities carried out by private actors on Sami land do not negatively interfere with the Sami’s economic, cultural, and social rights).

119. See Pasqualucci, *supra* note 8, at 61–63 (stating that international courts and organizations like the World Bank alike have recognized the duty of states to demarcate indigenous and tribal lands); see also Anaya & Williams, *supra* note 35, at 75–77 (noting that failure to properly demarcate indigenous lands can leave the lands vulnerable to encroachment by outsiders, including the state itself).

120. Pasqualucci, *supra* note 8, at 61–63 (citing *Awas Tingni Cmty. v. Nicaragua*, a case that arose when the government of Nicaragua granted logging concessions on land traditionally used and occupied by the Awas Tingni, an indigenous group that at the time lacked deed or title to their long-possessed territory).

121. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001); see also Leonardo J. Alvarado, *Prospects and Challenges in the Implementation of Indigenous Peoples’ Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua*, 24 ARIZ. J. INT’L & COMP. L. 609, 623–24 (2007) (explaining that the Nicaraguan government responded to the *Awas Tingni* ruling and subsequent pressure from the World Bank by passing Law 445, which ordered the state to adopt specific legislative and administrative mechanisms for demarcating indigenous lands in the country’s Atlantic Coastal area).

122. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12, art. 26(1).

123. *Id.*

for the indigenous land rights include acknowledging the indigenous land rights in national legislation, constantly and consistently examining human rights situations where indigenous land rights are at stake, effectively monitoring policies that protect the human rights of indigenous peoples, and implementing an effective monitoring system to ensure that human rights policies relating to indigenous land rights are being implemented.¹²⁴ Furthermore, the state should also not interfere with the indigenous land tenure system and should recognize it as equal to the modern system based on the right to property.¹²⁵ States are also obliged to prevent and investigate violations, bring to justice and punish the perpetrators, and provide reparations for harm and injuries caused.¹²⁶ The next section discusses the obligation of states to protect indigenous land rights.

D. THE OBLIGATION OF STATES TO PROTECT

The obligation of states to protect indigenous peoples' right to their ancestral lands includes protecting the individual and collective enjoyment of the indigenous land and employing its resources to protect the right to land of individuals as well as indigenous communities.¹²⁷ For instance, the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights note that "[s]tates must take action, separately, and jointly through international cooperation, to protect economic, social and cultural rights of persons within their territories and extraterritorially"¹²⁸ A state's obligation to protect is of a

124. *Id.* art. 19 (calling on states to consult indigenous peoples in good faith and with the object of securing their free, prior, and informed consent on all administrative or legislative measures potentially affecting them).

125. *See* Pasqualucci, *supra* note 8, at 64–65 (pointing out that while draft provisions of the American Convention on Human Rights initially referred only to "private property," the adjective "private" was subsequently dropped, probably indicating the Inter-American system's recognition and acceptance of collective property regimes).

126. *See id.* at 70–72 (stating that, within the Inter-American system, the state may have a positive obligation to return to indigenous peoples land that was involuntarily taken from them).

127. *See id.* at 83–84 (reporting the Inter-American Court of Human Rights' observation that a state's failure to recognize the land rights of an indigenous people could both jeopardize the collective survival of the people and interfere with the basic rights of individuals within that society).

128. THE MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF

positive nature and requires the state to adopt protective measures to secure the observance of indigenous land rights.¹²⁹ Anaya notes that such an obligation includes “an ambitious programme of legal and policy reform, institutional action and reparations for past wrongs, involving a myriad of State actors within their respective spheres of competence.”¹³⁰ Often, large development projects take place on indigenous territories. In such cases, states are obliged to ensure that development projects do not have adverse impacts on the survival and development of indigenous peoples.¹³¹ Further, indigenous peoples are also entitled to the benefits stemming from development projects on their territory.¹³² This is confirmed by Article 20 of the UN Declaration.¹³³

The obligation to protect is a substantive obligation and a primary obligation relating to the conduct of third parties such as rebel groups or corporations. States are also obliged to ensure that private actors will not violate indigenous land rights.¹³⁴ In *Velásquez Rodríguez v.*

STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, principle 23 (Feb. 29, 2012) [hereinafter THE MAASTRICHT PRINCIPLES], available at <http://www2.lse.ac.uk/humanRights/articlesAndTranscripts/2011/MaastrichtEcoSoc.pdf> (further defining the obligation in Principles 24 to 27).

129. See Anaya & Williams, *supra* note 35, at 81–83 (asserting that the duty to take “positive steps” toward ensuring indigenous peoples their cultural survival requires states to actively adopt policies and systems that incorporate indigenous rights protection).

130. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Human Rights Council, ¶ 46, U.N. Doc. A/HRC/9/9 (Aug. 11, 2008).

131. See Anaya & Williams, *supra* note 35, at 81–83 (arguing that merely identifying the economic or environmental impacts of government-sponsored activities on indigenous lands and livelihoods is not enough to satisfy the duty—proactive protective measures are necessary).

132. See *id.* at 83–84 (arguing that benefits derived from economic activities carried out on indigenous land should be used to build indigenous peoples’ capacity to protect their lands and to pursue their own development agendas).

133. See United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12, art. 20 (“Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.”).

134. See, e.g., *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 164 (Aug. 31, 2001) (ordering Nicaragua to address and prevent any measures that might interfere with the Awas Tingni’s use

Honduras, a case concerning the disappearance of Manfredo Velasquez, the Inter-American Court of Human Rights stated:

An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.¹³⁵

The due diligence standard includes an obligation “to exercise *due diligence* to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”¹³⁶ In *Velasquez*, the IACHR held Honduras responsible for failing “to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”¹³⁷ In *Herrera Rubio v. Colombia*, the HRC emphasized the right to take effective measures to remedy violations.¹³⁸ Similarly, the *European Court of Human Rights* (“ECHR”) held that “the state cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals.”¹³⁹ The state, however, cannot be responsible for every indigenous land rights violation by a private party.¹⁴⁰ To this end, the

and enjoyment of their ancestral lands, including those carried out by private, third parties acting with the state’s authorization or acquiescence).

135. *Velásquez Rodríguez v. Honduras*, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988).

136. Int’l Hum. Rts. Instruments, *supra* note 113, ¶ 8 (emphasis added).

137. *Velásquez Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174.

138. See *Herrera Rubio v. Colombia*, Communication No. 161/1983, ¶ 12, U.N. Doc. CCPR/C/OP/2 (1987), available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/1333fa547f442b3dc1256abc005163ec?Opendocument> (finding the basis for the right in article 2 of the International Covenant on Civil and Political Rights).

139. *Costello-Roberts v. United Kingdom*, App. No. 13134/87, Eur. Ct. H.R. para. 27, available at <http://hudoc.echr.coe.int/webservices/content/pdf/001-57804?TID=pypndabqmb>.

140. See *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Cost, Inter-Am. Ct. H.R. (ser. C) No. 174, ¶ 63 (Nov. 28, 2007) (suggesting that, within the Inter-American human rights system, states may be held accountable for third-party infringements on indigenous land rights only if the

state is only required to have a sufficiently adequate administrative and judicial system of preventing and stopping violations of indigenous land rights, as well as a system for providing remedies for victims of violations instigated by private parties.¹⁴¹ All in all, states are obliged to protect the individual and collective enjoyment of the indigenous lands.

E. THE OBLIGATION OF STATES TO FULFILL

The third category of state obligations concerning indigenous land rights includes the obligation to fulfill, which requires the state to take active measures to ensure the availability, accessibility, and affordability of indigenous land.¹⁴² For instance, the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights note in principle 28 that “[a]ll States must take action, separately, and jointly through international cooperation, to fulfil economic, social and cultural rights of persons within their territories and extraterritorially . . .”¹⁴³ States are and should be primarily responsible to fulfill this obligation. However, a rebel group, such as FARC in Colombia, or a corporation, such as Royal Dutch Shell in Ogoniland, may become the primary holder of an obligation to fulfill indigenous land rights in a failed state where there is no governmental control or no efficient authority to protect indigenous land rights.¹⁴⁴

A similar situation may occur when corporations operate in territories where a state is unable to fulfill the land rights of the people living there.¹⁴⁵ The size and availability of a state’s financial resources will play a large role in meeting these standards to protect

third party was acting with the state’s authorization, acquiescence, or tolerance).

141. See Int’l Hum. Rts. Instruments, *supra* note 113, ¶ 8 (explaining that a state’s failure to ensure rights enshrined in the International Covenant on Civil and Political Rights may amount to a violation by the state of the agreement).

142. See *generally* Economic, Social, and Cultural: Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Economic and Social Council, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, at 4 (2003) (describing the responsibilities and roles that various actors, namely transnational companies, play in promoting human rights to indigenous people).

143. THE MAASTRICHT PRINCIPLES, *supra* note 128, ¶ 28.

144. See *id.* ¶ 12 (providing that non-state actors are responsible for fulfilling the obligations of the state when they are acting in the capacity of the state).

145. *Id.*

indigenous rights. While the resources available for fulfilling human rights obligations may not be as plentiful in small states as in large states, states may adopt such policies to the maximum extent given their available resources.¹⁴⁶

This section has attempted to show that states have obligations to respect, protect, and fulfill indigenous land rights. In sum these inherently interconnected levels of obligations mean that states have tripartite obligations to observe indigenous land rights.

V. ENFORCEMENT OF STATE OBLIGATIONS TO OBSERVE INDIGENOUS LAND RIGHTS

The right to a remedy for victims of human rights violations as an individual or group is a tenet of every functioning judicial system. The effectiveness of all other rights rests on access to an effective legal remedy. This section discusses and analyzes three different avenues allowing indigenous people to enforce state obligations concerning indigenous land rights. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law identify the state's obligation in relation to the due diligence standard.¹⁴⁷ The Basic Principles suggest that states are required to “[t]ake appropriate legislative and administrative and other appropriate measures to prevent violations”;¹⁴⁸ “investigate violations effectively, promptly, thoroughly, impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law”;¹⁴⁹ “provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice . . . irrespective of who may ultimately be the bearer of responsibility for the violation”;¹⁵⁰ and “provide effective

146. *See id.* ¶ 31 (explaining that states must ensure they strategize and pool all available resources to provide economic, cultural, and social rights).

147. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter Basic Principles and Guidelines].

148. *Id.* para. 3(a).

149. *Id.* para. 3(b).

150. *Id.* para. 3(c).

remedies to victims, including reparation.”¹⁵¹ Another important avenue is to enable indigenous peoples’ participation in vital stakeholders forums.¹⁵² Taken together, states have an international legal obligation to comply with the due diligence standard relating to indigenous land rights.¹⁵³

This section discusses the enforcement of state obligations to observe indigenous land rights. It does so in three steps: discussing and analyzing compliance with the views of the UN Human Rights Committee, examining the enforcement mechanism under the UN Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169, and examining the monitoring system of the Inter-American Convention on Human Rights.

A. THE OPTIONAL PROTOCOL UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (‘ICCPR’) is one of the earliest United Nations’ human rights treaties.¹⁵⁴ It provides that every victim of a violation of a right in the Covenant should have access to an effective remedy, and this should include having his or her rights “determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy.”¹⁵⁵ This section examines the domestic and international implementation of indigenous peoples’ rights. The ICCPR does not directly refer to the rights of indigenous

151. *Id.* para. 3(d).

152. See Katie Patterson, *Overcoming Barriers to Indigenous Peoples’ Participation in Forest Carbon Markets*, 22 *COLO. J. INT’L ENVTL. L. & POL’Y* 417 (2011) (using case studies to illustrate that, to ensure successful programs, for example REDD, indigenous peoples should be engaged throughout the design process).

153. See, e.g., Basic Principles and Guidelines, *supra* note 147 (setting forth state roles and responsibilities in tackling international human rights abuses as they relate to indigenous peoples); THE MAASTRICHT PRINCIPLES, *supra* note 128 (same).

154. Kristin Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 *N.W. U. J. INT’L HUM. RTS.* 36 (2005).

155. International Covenant on Civil and Political Rights art. 2.3(b), Mar. 23, 1976, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171.

peoples, although Article 27 provides for the rights of minorities.¹⁵⁶ However, as Scheinin notes, “[g]roups identifying themselves as indigenous peoples generally fall under the protection of Article 27 as ‘minorities.’”¹⁵⁷ The Human Rights Committee recognized indigenous land rights in General Comment No. 23 by stating “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.”¹⁵⁸

The Optional Protocol to the ICCPR establishes the right to individual communications.¹⁵⁹ The Optional Protocol states in the preamble that it aims “further to achieve the purposes” of the ICCPR by enabling the Human Rights Committee, established in Part IV of the ICCPR, “to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.”¹⁶⁰ General Comment no. 33 notes that “the Optional Protocol sets out a procedure, and imposes obligations on States parties to the Optional Protocol arising out of that procedure, in addition to their obligations under the Covenant.”¹⁶¹ An aggrieved individual can appeal to the Human Rights Committee only after having exhausted the process for all available domestic remedies.¹⁶² The Human Rights Committee is thereafter obliged to forward its views to the state party in question

156. *Id.*

157. MARTIN SCHEININ, NORWEGIAN CTR. FOR HUMAN RIGHTS, INDIGENOUS PEOPLES’ LAND RIGHTS UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (Apr. 28, 2004), *available at* http://www.galdu.org/govat/doc/ind_peoples_land_rights.pdf.

158. Int’l Hum. Rts. Instruments, *supra* note 113, ¶ 7.

159. *See generally* Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-5.en.pdf> (entered into force Mar. 23, 1976) [hereinafter Optional Protocol to ICCPR] (detailing how the protocol governs individual communications between victims of violations of the Covenant and the Committee and the procedures undertaken when complaints are registered with the Committee).

160. *Id.*

161. The Obligations of States Parties Under the Optional Protocol to the International Covenant on Civil and Political Rights, General Comment No. 33, para. 3, U.N. Doc. CCPR/C/GC/33 (Nov. 5, 2008), <http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.33.pdf> [hereinafter Optional Protocol to ICCPR General Comment No. 33].

162. Optional Protocol to ICCPR, *supra* note 159, art. 5(2)(b).

and to the complainant.¹⁶³

State Parties are obliged to ensure that individuals and groups can invoke the rights under the ICCPR.¹⁶⁴ A number of indigenous land rights cases have in the past been brought before the Committee through the individual communications mechanism.¹⁶⁵ For instance, the Human Rights Committee noted in *Kitok v Sweden*, in the context of indigenous rights, that “the right to enjoy one’s own culture in community with the other members of the group cannot be determined *in abstracto* but has to be placed in context.”¹⁶⁶

However, it remains debatable how effective a mechanism the Optional Protocol is for enforcing indigenous land rights. The Human Rights Committee is not a judicial body, although its views show some “important characteristics of a judicial decision.”¹⁶⁷ The Human Rights Committee refers to the final outcome of the

163. *Id.* art. 5(4).

164. Optional Protocol to ICCPR General Comment No. 33, *supra* note 161.

165. *See, e.g.,* Aarela v. Finland, Judgments U.N. Admin. Trib., No. 779, U.N. Doc. CCPR/C/73/D/779/1997 (Nov. 7, 2001) (concluding that Finland did not violate any rights owed to the reindeer herders because it conducted logging activities after ample notification and communication to the herders and such activities were not extensive enough to destroy the herders livelihood or cultural rights to the land); Apirana Mahuika v. New Zealand, Judgments U.N. Admin. Trib., No. 547, U.N. Doc. CCPR/C/D/70/547/1993 (Oct. 20, 2000) (holding that the rights of various Maori tribes in New Zealand, with respect to fisheries, were not denied as the result of the enactment of the Treaty of Waitangi Settlement Act); J.G.A. Diergaardt v. Namibia, Judgments U.N. Admin. Trib., No. 760, U.N. Doc. CCPR/C/69/D/760/1996 (Sept. 6, 2000) (finding that Namibia violated the rights of the indigenous tribes when it denied them access to their land over time through various political programs); Jouni Lansman v. Finland, Judgments U.N. Admin. Trib., No. 671, U.N. Doc. CCPR/C/58/D/671/1995 (Nov. 22, 1996) (describing the Committee’s finding of a non-breach by Finland in a case brought by reindeer breeders of Sami ethnic origin against Finland challenging a plan to construct roads within the breeders’ land); Ilmari Lansman v. Finland, Judgments U.N. Admin. Trib., No. 511, U.N. Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1994) (illustrating the Committee’s finding of a non-breach by Finland in a case brought by reindeer breeders against Finland challenging quarrying and transportation of stone through their herding territory).

166. *Kitok v. Sweden*, Judgments U.N. Admin. Trib., No. 197, ¶ 9.3, U.N. Doc. CCPR/C/33/D/197/1985 (Aug. 10, 1988), *available at* <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/d9332db8dfce2f63c1256ab50052d2ff?Opendocument>.

167. *See* Optional Protocol to ICCPR General Comment No. 33, *supra* note 161, para. 11.

procedure concerning individual communication as decisions.¹⁶⁸ The Human Rights Committee implicitly opines that its views are binding, even though it never explicitly refers to the binding nature of its views.¹⁶⁹ The Human Rights Committee has so far adopted views in 882 cases (with violations found in 731 cases); in addition, 569 cases were declared inadmissible, 302 discontinued or withdrawn, and 323 not yet concluded.¹⁷⁰

Of all communications where the Human Rights Committee found violations, it described the follow-up and response of the state party as satisfactory in just seven cases or communications.¹⁷¹ Further, the Human Rights Committee did not receive any response from the state party in 131 cases or communications.¹⁷² Such statistics are more than alarming, as they cast a deep shadow over the monitoring system of the Human Rights Committee, particularly the effectiveness of its work and the compliance of states parties with the Human Rights Committee's views. In other words, no response means not only that a state party has not implemented the Human Rights Committee's view but also that it has refused to reply to the Human Rights Committee's inquiry in the follow up.

When no response is at hand, the Human Rights Committee considers the process as ongoing with a view to implementation.¹⁷³

168. *See id.* para. 12.

169. *See id.* para. 13 (describing the decisions reached by the Committee as "an authoritative determination by the organ established by the Covenant itself charged with interpretation of that instrument").

170. *See* Rep. of the Hum. Rts Comm., Gen. Assembly, on its 6th session, para. 94(4), U.N. Doc. A/66/40 (providing a detailed background of the Committee's work since its implementation).

171. *See, e.g.,* El-Hichou v. Denmark, Judgments U.N. Admin. Trib., No. 1554, U.N. Doc. CCPR/C//99/D/1554/2007 (July 22, 2010); Vojonović v. Croatia, Judgments U.N. Admin. Trib., No. 1510, U.N. Doc. CCPR/C/95/D/1510/2006 (Apr. 29, 2009); Leirvag v. Norway, Judgments U.N. Admin. Trib., No. 1155, U.N. Doc. CCPR/C/82/D/1155/2003 (Nov. 23, 2004); Pauger v. Austria, Judgments U.N. Admin. Trib., No. 415, at 122, U.N. Doc. CCPR/C/44/D/415/1990 (Mar. 26, 1992); Waldman v. Canada, Judgments U.N. Admin. Trib., No. 694, U.N. Doc. CCPR/C/67/D/694/1996 (Nov. 5, 1999).

172. *See generally* Rep. of the Hum. Rts Comm., *supra* note 170, annex IV (providing a table with various communications divided by states parties with details of each decision contained therein).

173. *See generally* Optional Protocol to ICCPR General Comment No. 33, *supra* note 161, para. 16 (describing how the Committee has procedures in place to assist member states with implementing its views, namely designating a Special

However, it does not provide for any sanction if the state party does not participate or comply with the Human Rights Committee's views.¹⁷⁴ In addition, General Comment no. 33 is silent on this.¹⁷⁵ If a state party refuses to implement the Human Rights Committee's views under the Optional Protocol, the Human Rights Committee publically publishes such a failure to implement the view.¹⁷⁶ If the state violates such interim or provisional measures, it directly violates the "obligation to respect in good faith the procedure of individual communication established under the Optional Protocol."¹⁷⁷ It seems this is a major shortcoming in how the Human Rights Committee functions, as it lacks real "teeth" to sanction the violators of the Optional Protocol and the ICCPR and to provide effective redress to the victims of indigenous land rights violations.

B. THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AND ILO CONVENTION NO. 169

The UN Declaration was adopted in 2007 with 143 voting in favor, 4 against, and 11 abstaining.¹⁷⁸ Australia, Canada, New Zealand, and the United States voted against its adoption.¹⁷⁹ Anaya describes the UN Declaration as reflecting "the existing international consensus regarding the individual and collective rights of indigenous peoples."¹⁸⁰ In this way, it provides "the most

Rapporteur for Follow up of Views who meets with states to persuade them to accept the Committee's views as well as to ascertain and work through any issues the state may be facing with such implementation).

174. *See id.* para. 17 (discussing the only reprimand—publication in a public record—available to states that fail to implement the Committee's view).

175. *See id.* (omitting any mention of sanctions or specific punishment to be imposed on member states who fail to implement the Committee's views).

176. *Id.*

177. *Id.* para. 19.

178. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12, art. 1; *see also* R.T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539, 539 (2009); Megan Davis, *Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples*, 9 MELBOURNE J. INT'L. L. 439, 440 (2008) (describing the Declaration at the time of its adoption as "a non-binding aspirational declaration of the General Assembly").

179. *Indigenous Rights Outlined by U.N.*, B.B.C. NEWS (Sept. 13, 2007), http://news.bbc.co.uk/2/hi/in_depth/6993776.stm.

180. *See* Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *supra* note 130, ¶ 43.

authoritative expression of this consensus” and established “a framework of action towards the full protection and implementation of these rights.”¹⁸¹ It seems, however, doubtful to claim that the UN Declaration reflects “the existing international consensus” when four states with some of the largest indigenous populations voted against it.¹⁸² Nonetheless, the UN Declaration is clear about the right to remedy of indigenous peoples to enforce their rights. Article 27 obliges states to:

establish and implement . . . a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, history, culture, language, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used.¹⁸³

Further, Article 28(1) establishes the right to compensation for occupied or confiscated traditional indigenous territories.¹⁸⁴ The state has obligations to compensate indigenous peoples with money, land, or “other appropriate redress.”¹⁸⁵ Some of the monitoring functions are performed by the UN Permanent Forum on Indigenous Issues, although the Forum is not a judicial organ but only an advisory organ to the UN Economic and Social Council.¹⁸⁶ In this way, the UN Declaration may be described as *lex imperfecta*. It is clear, however, that soft-law documents do not have the same normative value as treaties in international human rights law. They nonetheless provide an additional layer from which states’ commitment to observe the land rights of indigenous peoples is derived.

181. *Id.*

182. Coulter, *supra* note 178, at 545 (noting that the United States, Canada, New Zealand, and Australia voted against the Declaration).

183. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 12, art. 27.

184. *See id.* art. 28(1) (providing indigenous people with restitution as the first available remedy, followed by compensation, for land that has been “confiscated, taken, occupied, used or damaged” without their consent).

185. *Id.* art. 28(2) (“Unless otherwise agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.”).

186. *Indigenous Peoples at the United Nations*, UNITED NATIONS, <http://social.un.org/index/IndigenousPeoples.aspx> (last visited Feb. 27, 2013).

ILO Convention 169 provides in Article 14(3) that states are obliged to establish adequate procedures “within the national legal system to resolve land claims by the peoples concerned.”¹⁸⁷ Anaya observes that “Article 14(3) is a response to the historical processes that have afflicted indigenous peoples, processes that have trampled on their cultural attachment to ancestral lands, disregarded or minimized their legitimate property interest, and left them without adequate means of subsistence.”¹⁸⁸ Even though the Convention has only received a handful of ratifications, its impacts have been noted, particularly in Latin America. Despite the lack of a robust international mechanism within the International Labour Organisation (“ILO”),¹⁸⁹ recent ILO studies show that national legislation and national judicial organs refer to it.¹⁹⁰ However, its direct value as a mechanism for enforcing indigenous rights still remains in doubt.

All in all, the UN Declaration and the ILO Convention have not gained a foothold as a useful tool for enforcing indigenous land rights. Even if states are not legally bound by the Declaration, reference to it in national legislation would suggest an emerging trend that states consider themselves as being bound.

C. THE INTER-AMERICAN CONVENTION ON HUMAN RIGHTS

The Inter-American Convention on Human Rights is the authoritative regional human rights treaty in the Americas.¹⁹¹ The

187. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 36, art. 14(3).

188. Anaya, *supra* note 35, at 40.

189. See Anne Trebilcock, ILO, *ILO Conventions-Enforcement Procedures*, http://www.ilo.org/safework_bookshelf/english?content&nd=857170272 (last visited Feb. 2, 2013) (discussing how the ILO has contributed to better working conditions despite it not being a “police force”).

190. See, e.g., ILO, MONITORING INDIGENOUS AND TRIBAL PEOPLES' RIGHTS THROUGH ILO CONVENTIONS: A COMPILATION OF ILO SUPERVISORY BODIES' COMMENTS (2010), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_126028.pdf (providing detailed examples and commentary of how various states interpret and use the ILO Convention within their respective countries); APPLICATION OF CONVENTION NO. 169 BY DOMESTIC AND INTERNATIONAL COURTS IN LATIN AMERICA: A CASEBOOK, *supra* note 66 (describing the application of the Convention by various Latin American states in making decisions concerning indigenous peoples).

191. See American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S.

Inter-American Commission on Human Rights and Inter-American Court of Human Rights are responsible for monitoring state compliance with the Convention. Anaya and Williams note that the Inter-American Court has “the power to require states that have consented to its jurisdiction . . . to take remedial measures for the violation of human rights.”¹⁹² The Inter-American Court has in past decades developed, arguably, the most extensive and evolved case law on indigenous peoples’ rights, including their land rights.¹⁹³

For instance, the Inter-American Court noted in *Awas Tingni v. Nicaragua* that “indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their culture, their spiritual life, integrity, and their economic survival.”¹⁹⁴ Similarly, the Court observed in *Yakye Axa Indigenous Community v. Paraguay* that “disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members.”¹⁹⁵ In contrast, the Court noted in the next paragraph that the “restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society.”¹⁹⁶ In short, right to property is not absolute. In *Sawhoyamaxa Indigenous Community v. Paraguay*, the Court noted “that indigenous communities might have a collective understanding of the concepts of property and possession, in the sense that ownership of the land ‘is not centered on an individual but rather on the group and its community.’”¹⁹⁷ Further, the Court noted that:

123 (detailing the rights that Latin American states are mandated to adopt to “give effect to those rights of freedoms”).

192. Anaya & Williams, *supra* note 35, at 38.

193. *See id.* at 38–40 (illustrating examples of notable cases presented to the Court including *Awas Tingni*, which is projected to “establish an important precedent on indigenous rights under Inter-American and international law”).

194. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001).

195. *Yakye Axa Indigenous Cmty. v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 147 (June 17, 2005).

196. *Id.* ¶ 148.

197. *Sawhoyamaxa Indigenous Cmty.*, Judgment, Inter-Am. Ct. H.R. (ser. L) No. 12/03, ¶ 120 (Mar. 29, 2006), *quoting Mayagna*, Inter-Am. Ct. H.R. (ser. C)

[T]he fact that they claimed lands are privately held by third parties is not in itself an “objective and reasoned” ground for dismissing *prima facie* the claims by the Indigenous people. Otherwise, restitution rights become meaningless and would not entail an actual possibility of recovering traditional lands, as it would be exclusively limited to an expectation on the will of the current holders, forcing indigenous communities to accept alternative lands or economic compensations.¹⁹⁸

This means that states also have to protect indigenous land rights in relation to third parties. In addition, there is no time restriction on the right to restitution.¹⁹⁹

The obligation to respect includes the state’s duty to recognize and demarcate indigenous lands. The Court observed in *Samaraka v Suriname* that “rather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment.”²⁰⁰ It further noted that:

this title must be recognized and respected, not only in practice, but also in law, in order to ensure its legal certainty. In order to obtain such title, the territory traditionally used and occupied by the members of the Saramaka people must first be delimited and demarcated, in consultation with such people and other neighboring peoples.²⁰¹

Ultimately, the work of the Inter-American Court is a step in the right direction. However, it would better if more of such mechanisms are established, ensuring indigenous peoples can enforce rights to their lands.

No. 79, ¶ 149.

198. *Id.*

199. *See generally id.* ¶¶ 131–34 (explaining the factors applied by the Court when determining whether restitution rights have lapsed, namely, whether the indigenous peoples’ beliefs are tied to their relationship with the land and whether a relationship with the land is actually possible).

200. Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 115 (Mar. 29, 2006); *see also* Lisi Brunner, *The Rise of Peoples’ Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights*, 7 CHINESE J. INT’L L. 699 (2008) (supporting the idea that Suriname should get ownership in the land to support the indigenous people in the spirit of the American Convention, which promotes the idea of human rights as determined “by the security of all, and by the just demands of the general welfare, in a democratic society”).

201. *Id.*

D. INTERIM CONCLUSION

It is clear from this analysis of the most important initiatives relating to the enforcement of indigenous land rights that several different avenues are being pursued in an attempt to achieve better protection of indigenous peoples' land rights. The ICCPR remains a seminal point of departure for invoking indigenous land rights. However, effective procedures and mechanisms of international review must be established to screen every alleged state violation of indigenous land rights and to ensure accountability in cases of violations.

VI. ASSESSMENT

Are state obligations concerning indigenous land rights *lex imperfecta*, namely, normative obligations without any sanction for violations? Do indigenous people have court access when their land rights are infringed upon? The above sections have demonstrated that indigenous peoples are largely excluded from international forums when seeking to enforce their rights.²⁰² If monitoring mechanisms exist, they are at best ineffective and at worst only hold symbolic significance for the enforcement of indigenous land rights. Because international enforcement mechanisms under ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples are non-existent, indigenous peoples are left with quasi-judicial mechanisms such as the system of individual communication under the ICCPR.

However, even such a system of individual communication under ICCPR is far from perfect. The views of the Human Rights Committee reveal some problems with the monitoring system, particularly the Human Rights Committee's inability to impose binding decisions on states. Although, over the course of many years, in some cases the Human Rights Committee found states to be in violation of Article 27, neither the Human Rights Committee nor any other UN expert body has the authority to impose sanctions on states for such violations. Most of the underlying weaknesses of the work

202. See Harriet Ketley, *Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples*, 8 INT'L J. MINORITY & GROUP RTS. 331, 357 (2001) (finding that, because indigenous rights are defined as "individual" rights, indigenous peoples lack the power that comes from collective rights).

of the ICCPR can be directly tied to the unenforceable nature of its views. More importantly, it appears that the greatest shortcoming of the work of the Human Rights Committee is the lack of sanctioning mechanisms.

Given the possibility of reforming the Optional Protocol in the future, revisions may be needed to tackle this inadequacy, which could potentially undermine the ICCPR's effectiveness. To be clear, the argument here is not that the Human Rights Committee should be dissolved. It plays a seminal role in monitoring state compliance with the ICCPR. Rather, the argument is that the Human Rights Committee could play a considerable role in setting up an advantageous framework for regulating state activities, including in relation to indigenous rights. The views of the Human Rights Committee suggest that the ICCPR could play a constructive role in efforts to improve state responsibility for human rights, even with its lack of authority to issue binding decisions and impose sanctions. Empowering the Human Rights Committee to engage in binding dispute resolution and to apply sanctions would, however, require a significant revision of the ICCPR and its protocols, a process that states parties may oppose, potentially undermining the entire system that has developed to date. By all accounts, it is therefore not unreasonable to conclude that the implementation procedure under the ICCPR must be strengthened for the Human Rights Committee system to effectively regulate state compliance with civil and political rights.

When states interfere with the individual and collective rights of indigenous peoples, effective complaints mechanisms have to be established to provide remedies for alleged indigenous land rights violations. A lack of access to legal orders is still the major obstacle to the enjoyment of indigenous peoples' rights to their ancestral lands. Given the inadequacy of international mechanisms to hold states directly accountable, at least in international forums, accountability in national legal orders, and possibly also at the international level, must be strengthened and sharpened. Taking into account that there is only one relative effective mechanism within the architecture of accountability, the underlying mechanism would have to be developed.

Given that there is no effective judicial protection of indigenous

land rights, issues such as inaccessibility should be addressed, and national judicial systems should be strengthened. States must be accountable for the failure to meet their indigenous land rights obligations. Where a state fails to meet its obligations, adequate and effective remedies must be available to victims whose human rights have been violated. In the future, the United Nations Human Rights Council may consider establishing an expert working group or complaints mechanisms to receive the complaints of individuals and peoples. Some commentators have already argued for a world court of human rights.²⁰³ Even though such a proposal might seem utopian, such a complaints body might also consider communications from indigenous peoples as victims of land rights violations.

VII. CONCLUSION

The cultural survival and existence of the Nuba peoples and other indigenous peoples is tied to their ancestral land. If the ethnic cleansing perpetrated by the Sudanese government proves successful, a vital part of their identity will have been taken away. This article has argued that state obligations concerning indigenous land rights derive from international and national levels. The overall aim of this article was to examine state obligations with respect to indigenous land rights. Indigenous peoples perceive property rights as collective, not as individual. In this way, states are obliged to observe collective indigenous land tenure systems. This article argued that states have an obligation to respect, protect, and fulfill indigenous land rights. While it can be concluded that indigenous land rights are well incorporated into some national legal orders, it is also evident that they could be generally better protected, implemented, and enforced. Yet it appears that those state obligations are more or less *lex imperfecta*—they do not provide clear sanctions in the event of violations.

The protection and promotion of indigenous land rights generally suffers from a lack of effective enforcement at the international level.

203. See, e.g., Martin Scheinin, *Towards a World Court of Human Rights: Research Report Within the Framework of the Swiss Initiative to Commemorate the 60th Anniversary of the Universal Declaration of Human Rights* (Apr. 30, 2009), <http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/WorldCourtReport30April2009.pdf>; Manfred Nowak, *The Need for a World Court of Human Rights*, 7 HUMAN RIGHTS L. REV., 251 (2007).

Attempts should be made to reform the implementation of indigenous land rights in national systems and at the international level, in the hopes of improving indigenous peoples' access to justice. It is therefore necessary to reform the complaints mechanisms to enforce the protection of indigenous land rights, particularly at the national level. If reforms do not occur, the indigenous land rights of the Nuba peoples and other indigenous peoples will be left unprotected, and all normative documents will be left unenforced.