

SOVEREIGNTY, SELF-DETERMINATION, AND ENVIRONMENT-BASED CULTURES: THE EMERGING VOICE OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW

PETER MANUS

Indigenous peoples' collective right to their land and territories is the most controversial of all human rights issues. . . . Control over indigenous lands, water and resources is also by far the issue that gives rise to most violent conflicts and to human rights violations committed by governments, police, mining companies, logging companies, etc.

— International Working Group for Indigenous Affairs, June 2005¹

I. INTRODUCTION

The term “indigenous peoples” describes racially distinct populations whose long-term histories connect them with identified areas of land situated within the borders of globally recognized nations.² Within this construct, the “indigenous peoples” concept relies on temporal, cultural, racial, and territorial elements as identifiers of particular indigenous communities.³ Of

¹ Int'l Working Group for Indigenous Affairs, Strategy for the 2nd Decade on Indigenous Peoples (June 2005), available at <http://iwgia.inforce.dk/sw8135.asp> (follow “Read IWGIA’s Strategy” hyperlink).

² See, e.g., PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 2 (2002) (identifying various views on the breadth of the term “indigenous peoples”); see also U.N. Econ. & Soc. Council [ECOSOC], Sub.-Comm. on Prevention of Discrimination & Prot. of Minorities, *Study of Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1999/20 (June 22, 1999) (prepared by Miguel Alfonso Martinez) (cited in THORNBERRY, *supra*, at 34 n.6); Catherine J. Iorns, *Indigenous Peoples and Self Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199, 200 n.1 (1993) (“[A]n indigenous people is not merely one that lived in a place before others arrived, which distinguishes indigenous peoples from other types of minorities, but that they are also a self-identified, culturally distinct, non-dominant group within a larger state. This stresses their oppression and their need for protection and excludes, for the purposes of devising measures for the protection of indigenous peoples, those who are presently dominant in their ‘own’ state.”).

³ See THORNBERRY, *supra* note 2, at 37-40 (identifying four elements of indigenouness: association with a particular place, status as a prior inhabitant, status as

central importance among these elements in defining a community of people as indigenous is that community's various associations with a particular environment.⁴ Both a people's historical connection with its environment and the nature of its relationship with the environment—whether static or nomadic, for example, or exclusive or shared—are core features of an indigenous people's identity.⁵

Environment-based elements of an indigenous people's identity are also core to defining its rights in the eyes of the nation under whose domestic authority it resides. A people's particular use of its land has served as the rationale for its conquest, its removal from a land area, and other constraints on its control over territory and natural resources, such as its ability to regulate

an original or first inhabitant, and identity as a distinctive society); *see also id.* at 55 (identifying “elements of the indigenous descriptors” to include: “precedent habitation; historical continuity; attachment to land; the communal sense and the communal right (including those societies which do not have a strong conception of individual rights); [and] a cultural gap between the dominant groups in a State and the indigenous, and the colonial context. To these may be added the specific of *self-identification as indigenous peoples.*”).

⁴ *Id.* at 37 (“In the first, the term suggests *association with a particular place* (usually lengthy) – a locality, a region, a country, a State. Place is important: a particular place, not an amorphous space. . . . The coupling of space and peoples alerts us to the importance of territory, of land rights in the indigenous context, the safeguarding and promotion of which is a key reflex.”).

⁵ *See* John Woodliffe, *Biodiversity and Indigenous Peoples*, in *INTERNATIONAL LAW AND THE CONSERVATION OF BIOLOGICAL DIVERSITY* 255, 256 (Michael Bowen & Catherine Redgwell eds., 1996) (“Present estimates are that among the 250 million indigenous peoples spread over seventy – mainly developing – countries there are some 5,000 peoples distinguishable by culture, language and geographical separation. . . . What all these communities have in common is a profound relationship with the land . . . and respect for nature.” (citations omitted)); *see also* S. James Anaya, *International Human Rights and Indigenous Peoples: the Move Toward the Multicultural State*, 21 *ARIZ. J. INT'L & COMP. L.* 13, 35 (2004) (“While the particular characteristics of indigenous cultures vary among diverse groups, a common feature tends to be a strong connection with lands and natural resources.”); Osvaldo Kreimer, *Indigenous Peoples' Rights to Land, Territories, and Natural Resources: A Technical Meeting of the OAS Working Group*, 10 *HUM. RTS. BRIEF* 13, 13 (2003) (“Central among [the demands of indigenous peoples] are issues related to land, territories, and natural resources. . . . [T]hese rights are not merely real estate issues, and shall not be conceived according to the classical civil law approach to ‘ownership.’ Rather, indigenous land rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control of their habitat as a condition necessary for the reproduction of their culture and for their own development, or as indigenous experts prefer, for carrying ahead their ‘life plans’ (*planes de vida*) and their political and social institutions.”).

natural resource exploitation by non-indigenous persons.⁶ Prominent among the various rationales for disregarding or terminating an indigenous people's territorial rights is the fact that indigenous peoples tend to live lightly on the land, and thus do not produce through their lifestyles the kind of evidence of dominion that European-rooted cultures are willing to recognize as worthy of legal protection.⁷ In other words, the legal and political vulnerability of indigenous peoples rests heavily on the fact that indigenous life patterns are, generally speaking, environmentally benign, and so differ fundamentally from those of the dominant cultures whose laws, moral codes, and life patterns are, generally speaking, environmentally exploitive.⁸ Thus, the environmental values of indigenous peoples are not merely a distinguishing feature of their cultures; they are a key element of their disenfranchised status.

The latter decades of the twentieth century witnessed a steep growth in global awareness of both the importance and vulnerability of indigenous peoples, as documented in international instruments as well as domestic constitutions and legislation.⁹ The term "international instrument" is used in this Article to

⁶ See THORNBERRY, *supra* note 2, at 72 (The North American Indian nations' "unsettled habitation in those immense regions cannot be accounted a true and legal possession; and the people of Europe, too closely pent up at home . . . were lawfully entitled to take possession of it, and settle it with colonies. The earth . . . belongs to mankind in general, and was destined to furnish them with subsistence . . ." (quoting from E. DE Vattel, *THE LAW OF NATIONS* 100 (J. Chitty ed. 1897))).

⁷ *Id.* ("If each nation had . . . resolved to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants.").

⁸ See, e.g., WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 56 (2003) ("English colonists could use Indian hunting and gathering as a justification for expropriating Indian land. To European eyes, Indians appeared to squander the resources that were available to them. . . . Because the Indians were so few, and 'do but run over the grass, as do also the foxes and wild beasts,' [Pilgrim apologist Robert] Cushman declared their land to be 'spacious and void,' free for English taking." (citing Robert Cushman, *Reasons and Considerations Touching on the Lawfulness of Removing Out of England into the Parts of America*, in *CHRONICLES OF THE PILGRIM FATHERS* 243 (Alexander Young ed., 1841))).

⁹ See, e.g., Kreimer, *supra* note 5, at 15 (discussing amplifying efforts of the Organization of American States to address the unique issues involved in protecting indigenous peoples' rights, as well as various constitutional efforts to acknowledge the concept of indigenous peoples habitats).

include declarations, conventions, and other types of documents produced by international organizations. Historically, attempts to apply the broad pledges of protectionism set forth in such instruments to individual assertions of environment-related indigenous rights have tended to reveal such pledges as limited in their ability to provide actual or specific relief.¹⁰ Recently, however, the language of both international instruments and certain court decisions has indicated the emergence of a new era in which the rights of indigenous peoples may enjoy a more meaningful presence in international law. A number of these instruments and decisions protect indigenous interests that are environmental in nature, thereby overriding the historical presumption that environmental resources fall firmly under the control of the nation within whose borders they are located.¹¹ For this reason, events such as the 2002 Inter-American Court decision on the rights of the Awas Tingni Community against Nicaragua¹² and the still-developing American Declaration on the Rights of Indigenous Peoples¹³ stand as particularly noteworthy harbingers of the changing landscape of international law as a vehicle for addressing indigenous peoples' rights.

This momentum in international law makes the present an appropriate time to review some of the means utilized in efforts to protect indigenous peoples' land and natural resources from destructive exploitation by non-indigenous parties. In that interest, this Article presents a survey of both the rhetoric and applications of international law addressing indigenous peoples' environmental rights. As a prefatory matter, Part II briefly assesses three terms that are widely used in international instruments—sovereignty, human rights, and self-determination—for their applicability to the environment-related interests of

¹⁰ See Lawrence Watters, *Indigenous Peoples and the Environment: Convergence from a Nordic Perspective*, 20 UCLA J. ENVTL. L. & POL'Y 237, 243 (2001-02) ("The approval and adoption of an international convention does not necessarily create a domestic standard incorporating the treaty's provision in the law of a state.").

¹¹ See, e.g., *infra* notes 36-38 and accompanying text.

¹² The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

¹³ Org. of Am. States, Inter-Am. Comm'n on Human Rights, *Proposed American Declaration on the Rights of Indigenous Peoples*, OEA/Ser/L/V/II.95 Doc.6 (Feb 26, 1997).

indigenous peoples.¹⁴ Building on Part II, Part III presents a sixty-year litany of international instruments as a means of evaluating the evolution of global awareness of the uniquely vulnerable position that indigenous peoples occupy in the world community in connection with their environmental interests.¹⁵ Some of these instruments directly address indigenous peoples' rights, others make environmental interests their primary focus, and still others focus more broadly on the rights of all persons. Part IV presents two diverse international court disputes that relied on the rhetoric and instruments discussed in Parts II and III in focusing on the environmental rights of indigenous peoples.¹⁶ First, Part IV utilizes the 1985 case of *Kitok v. Sweden* as a prominent example of the international community's analysis of the environmental rights of indigenous peoples in the human rights context.¹⁷ *Kitok* illustrates two closely related issues identified in Parts II and III: the sometimes irreconcilable conflict between individual and collective interests and the essential disconnect between human and environmental rights. Next, and in sharp contrast, Part IV presents the 2002 Inter-American Court decision in *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*.¹⁸ Although the *Awas Tingni* decision did not, in and of itself, immediately and conclusively resolve the environmental issues it addressed, it nevertheless stands as a judicial triumph of an indigenous people over a dominant culture that would have exploited its environmental resources without regard to its heritage, its need for and occupation of its territory, or the state and international instruments in which indigenous control over such resources have been recognized as a matter of self-determination. As such, the case validates the international effort to effectuate further the declarations, conventions, and other multinational agreements that encourage nations to honor the environmental rights of indigenous peoples.

Finally, Part V concludes this Article with a discussion of the 2003 draft American Declaration on the Rights of Indigenous

¹⁴ See *infra* Part II.

¹⁵ See *infra* Part III.

¹⁶ See *infra* Part IV.

¹⁷ See *infra* notes 229-77 and accompanying text.

¹⁸ See *infra* Part IV.B.

Peoples, a document which, if promulgated in its present iteration, will present the world with forceful rhetoric that directly and fully acknowledges the environmental rights of indigenous peoples throughout the western hemisphere.¹⁹ In light of all that has preceded it, the American Declaration would serve as an appropriate continuation of international law's trajectory in the area of indigenous peoples' environmental rights.

II. AN ENVIRONMENTALIST PERSPECTIVE ON THE TERMINOLOGY OF INTERNATIONAL INSTRUMENTS ADDRESSING INDIGENOUS PEOPLES' RIGHTS

Over the past half century, and increasingly as non-indigenous cultures have struggled to embrace environmental values, both domestic and international law have addressed the status of indigenous peoples through means that attempt to define their authority, at least in part, in terms of their relationship with the environment.²⁰ Concepts like sovereignty, human rights, and self-determination have been employed in these efforts.²¹ As a preface to Part III's analysis of various international law instruments, the following sections present a brief overview of the three concepts, focusing on defining each term in the context of indigenous peoples as well as identifying their weaknesses and strengths as means to protect indigenous peoples' environmental interests.

A. SOVEREIGNTY

The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied International law has to treat . . . natives as uncivilized. It regulates, for the mutual benefit of civilized States, the

¹⁹ See *infra* Part V.

²⁰ See, e.g., *infra* Part II.B.1-7.

²¹ Some commentators have observed a fluid relationship among the terms. See, e.g., Robert Araujo, *Sovereignty, Human Rights, and Self-determination: The Meaning of International Law*, 24 *FORDHAM INT'L L.J.* 1477, 1480 (2001) (“[S]overeignty, which is exercised by people in their exercise of self-determination, is also a matter that needs to be protected as an important human right.”); *id.* at 1485 (“A sovereign nation is a community of people who exercise shared values concerning human dignities that shape and direct the particulars of their communitarian self-determination.”).

claims which they make to sovereignty . . . and leaves the treatment of the natives to the conscience of the State to which sovereignty is awarded.²²

Although a “cornerstone of international rhetoric,”²³ sovereignty is a highly elastic concept with application to both international and internal state affairs.²⁴ In either setting, any particular assertion of sovereignty, as well as its acceptance by others, is far less a matter of fundamental justice than a product of political and historical reality.²⁵ It may be safe to observe that in all or

²² THORNBERRY, *supra* note 2, at 73-74 (quoting J. WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 142-43 (1894)).

²³ Iorns, *supra* note 2, at 236-37 (“Despite repeated appeals to the principles of sovereignty, the concept of sovereignty is not clear. This is due largely to its historical origin in the concept of a sovereign rule of a state, who theoretically had absolute power. In international law, however, no state has absolute power: all states must respect each other’s integrity and are considered legally equal, even if not equal in fact.”).

²⁴ *See id.* at 236 (defining external sovereignty as that “concerned with relationships between international personalities,” and internal sovereignty as “concerned with internal self-government: the state’s right to devise its own constitutional and political institutions, enact and enforce its own laws, and to make decisions concerning citizens and residents of the state, without the interference of another state.”); *see also* Dan Sarooshi, *The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government*, 25 MICH. J. INT’L L. 1107, 1108-09 (2004) (“[T]he concept of sovereignty, as the ultimate and supreme power of decision, can be both analyzed and qualified from the perspective of what can be called ‘contested elements’: such elements as legal versus political sovereignty, external versus internal sovereignty, indivisible versus divisible sovereignty, and governmental versus popular sovereignty. . . . [T]he very existence of the concept of sovereignty generates continual arguments as to its core criteria.”).

²⁵ *See, e.g.*, THORNBERRY, *supra* note 2, at 74 (“To many European lawyers of the eighteenth and nineteenth centuries, some indigenous peoples were so low in the scale of civilisation and their forms of social organization and concepts of property so incomprehensible, so incommensurate with ‘advanced’ models, that their lands were regarded as *terra nullius* [or land belonging to no one]. The configuration of *terra nullius* . . . was extensively discussed by the jurist M. F. Lindley. . . . He divided jurists into three classes: (I) those who regarded backward peoples as possessing a title to the sovereignty which they inhabit which is good against more highly civilised peoples; (II) those who admit title but with qualifications; and (III) those who do not consider that the natives possess rights of such a nature as to be a bar to the assumption of sovereignty over them by more highly civilised peoples.”); *id.* at 75 (“Nineteenth-century doctrine presents a mixed picture on the question of indigenous status. There was a tendency, particularly marked among English and American writers, to write off the sovereignty of native tribes. This went beyond a denial of their statehood, which is one thing, to a claim that their lands were assimilable to uninhabited territory.”); W. Michael

most usages the sovereignty concept contains within it a connotation of some form of governmental or government-like power, but the breadth and depth of that power, as well as the realm over which it presides, can be key factors in determining the practical significance of any particular acknowledgment of sovereignty.²⁶

1. *Indigenous Peoples as Sovereigns*

In the United States, the early Supreme Court first recognized American Indian tribes as sovereigns when, in the landmark case of *Worcester v. Georgia*, Chief Justice John Marshall characterized the Cherokee tribe as “a sovereign nation

Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 866-67 (1990) (“[Through history, s]overeignty often came to be an attribute of a powerful individual, whose legitimacy over territory (which was often described as his domain and even identified with him) rested on a purportedly direct or delegated divine or historic authority but certainly not . . . on the consent of the people.”); *id.* at 874 (“There is no international test of the legitimacy of a self-proclaimed government. The only test is internal naked power.”).

²⁶ See Simonovic, *Relative Sovereignty of the Twenty First Century*, 25 HASTINGS INT'L & COMP. L. REV. 371, 376 (2002) (“The core issue of sovereignty – whether we speak about its internal or external aspects – is a question of distribution of power. . . . Sovereign states are mutually equal, respect each other’s monopoly in handling internal affairs, and enter into international obligations only on the basis of consensus.”); see also Sarooshi, *supra* note 24, at 1114 (“The concept of sovereignty has always been associated with an entitlement to exercise governmental powers in the internal and external domain, but his has always been subject to sovereign values that have conditioned its exercise.”); *id.* at 1115-16 (“[T]he exercise of public powers of government can only be considered an exercise of *sovereign* powers when they are in accord with sovereign values, otherwise the exercise of public powers is something entirely distinct from the exercise of sovereign powers and can even be considered as a violation of sovereignty.”). For a discussion of the evolving nature of sovereignty in the international law context, see Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141, 177 (2004) (“[The] abuse of sovereignty delegitimizes the State’s sovereignty. State abuse of sovereignty fueled by authoritarian, totalitarian, or chauvinist ideologies has indeed created a crisis of legitimacy for the view of international relations and law based on the juridical artifact symbolized by the treaty of Westphalia: the sovereign nation-State. Sovereignty is not a license to kill, to make war, to commit crimes against the peace, to disparage basic human rights, to despoil the ecosystem, to subject human aspirations to the whims of caprice or avarice or to arbitrary expedience flowing from the barrel of a gun, or to strip human beings of all vestiges of essential dignity.”).

[with rights] to govern themselves and all persons who have settled within their territory.”²⁷ However, this statement applied only to the relationship between Indian nations and “the several states”; tribal sovereignty’s power in the face of that asserted by the U.S. federal government was another question.²⁸ In short, U.S. courts have used the term sovereignty in the Native American context to indicate a degree of authority that is far less than fully autonomous. One commentator summed up the U.S. position:

[The Cherokee cases] elaborate the notion of the quasi-sovereignty of Indian nations; they are sovereign enough to enter into treaties with the purpose of ceding title to their territory, but they are not sovereign enough to function as independent political entities or . . . to protect the remnants of their sovereignty.²⁹

In contrast, non-U.S. courts have tended to refrain from recognizing indigenous peoples as sovereign entities. Both the Canadian and Australian high courts, for example, appear to consciously reserve the term sovereign to describe their current, northern-European-rooted governments and make few references to tribal cultures as sovereign even when acknowledging tribes as distinct peoples with long-established, externally-recognized societal structures. This is not to say that the courts of Canada and Australia refuse to perceive indigenous peoples as having rights based on their historical presence and culture. To the contrary, landmark decisions like the Canadian Supreme Court decision in *R. v. Sparrow*³⁰ and the Australian High Court

²⁷ *Worcester v. Georgia*, 31 U.S. 515, 540 (1832). In a prior case, Chief Justice Marshall characterized Native American tribes as “domestic dependent nations” over which the U.S. government bore responsibilities akin to those of a guardian. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

²⁸ *Worcester*, 31 U.S. at 540.

²⁹ THORNBERRY, *supra* note 2, at 80 (quoting ECOSOC, Sub-Comm on Prevention of Discrimination & Prot. of Minorities, *Study of Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations, Third Progress Report*, ¶ 54, U.N. Doc. E/CN.4/Sub.2/1996/23 (Aug. 15, 1996) (prepared by Miguel Alfonso Martinez)).

³⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (recognizing in the Canadian government a fiduciary responsibility toward Canadian aboriginal tribes, a responsibility constitutionalized in 1982).

decision in *Mabo v. Queensland*³¹ have recognized indigenous peoples as maintaining comparable, if not superior, interests to those recognized by the U.S. Court under the native sovereignty rubric. Thus, what the non-U.S. courts may indicate through their non-recognition of indigenous peoples as sovereigns is that they simply define sovereignty as the governmental authority wielded by globally-recognized nation states.³² If this is true, then declarations of indigenous sovereignty in international instruments are bound to be perceived by many nations as over-reaching, severely limited insofar as what they are attempting to assert, precatory, or even meaningless.³³

2. *Sovereignty as Authority over the Environment*

Tensions between indigenous peoples and modern nation states take many forms, but none is quite so definitive as the question of resource sovereignty.³⁴

In addition to demonstrating the elasticity of the term sovereignty, Chief Justice Marshall's recognition of American Indian tribes as sovereigns allows U.S. law to illustrate the unreliability of an indigenous peoples' sovereignty as a means of protecting its environmental interests. Justice Marshall's *Cherokee* opinions do

³¹ *Mabo v. Queensland* (1992) 107 A.L.R. 1 (recognizing an Australian aboriginal tribe to hold proprietary interests in its environmental resources).

³² For a similar definition of sovereignty, see JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* 5 (1993) (defining sovereignty as "political units that do not recognize a higher authority").

³³ See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 6 (2nd ed. 2004). Advocates for indigenous peoples point to a history in which "original" sovereignty of indigenous communities over defined territories has been illegitimately taken from them or suppressed. But while appealing to many, this strain of argument must confront international law's strong historical doctrinal tendency, precisely at its height in the nineteenth century, to view as unqualified for statehood non-European indigenous peoples and to instead favor the consolidation of power of them by the European states and their colonial offspring.

³⁴ Richard Howitt et al., *Resources, Nations and Indigenous Peoples*, in *RESOURCES, NATIONS AND INDIGENOUS PEOPLES* 1, 1 (Richard Howitt et al. eds., 1996); see also *id.* at 3 ("[I]ndigenous status is . . . an inherently political issue, notably in the sense that it inherently entails claims to certain rights over the use, management and flow of benefits from resource-based industries.").

link sovereignty to the environment; in fact, the Court's recognition of tribal sovereignty as a lower or weaker form of sovereignty than that of the U.S. federal government is its primary rationale for finding the American Indians' title to their land to be less than absolute.³⁵ The Court's logic makes clear that, at least in Justice Marshall's view, tribal sovereignty was undoubtedly, if not essentially, territorial.³⁶

Several twentieth century U.S. Supreme Court opinions indicate that an environmental element remains central to the concept of sovereignty in U.S. culture. The Court's 1979 opinion in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, for example, found Native American authority over the natural resources within tribal territory, at least to the extent necessary for subsistence and commercial needs, still intact in spite of the treaties under which tribes relinquished most of their interests in their territories.³⁷ While *Washington* focused primarily on interpreting treaty language, the case nevertheless illustrates the centrality of environmental elements in defining sovereignty.³⁸

³⁵ See *Worcester v. Georgia*, 31 U.S. 515, 540 (1832) (identifying the Cherokee nation as "a sovereign nation [with rights] to govern themselves and all persons who have settled within their territory"); see also *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (characterizing American Indian tribes as "domestic dependent nations").

³⁶ See *Worcester*, 31 U.S. at 540; see also *id.* at 544 (explaining that the British assertion of sovereignty as a colonizer of the North American continent did not destroy the rights of aboriginal occupants of their lands); *id.* at 557 (asserting that the post-Revolutionary U.S. federal government viewed "the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries . . ."); *Cherokee Nation*, 30 U.S. at 17 (acknowledging that the American Indian tribes had "unquestioned right[s] to the lands they occupy"); *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823) (recognizing the Piankeshaw as holding occupancy rights in their land, which amounted to a title interest that included the right to physically possess and even control their land, but which fell short of full ownership due to the federal government's ultimate right to alienate).

³⁷ *Washington v. Wash. State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979) (establishing tribal rights to the share of fish necessary to support their subsistence and commercial needs, as opposed to the tribes merely having the right to compete for fish with non-Indians on an equal opportunity basis).

³⁸ *Id.* at 674-79 (interpreting the treaty language by referencing the centrality of fishing to Indian dietary, commercial, social and religious customs, and thereby acknowledging the interdependence of American Indian environment and culture).

Likewise, the 1981 landmark decision of *Montana v. United States* relied heavily on the Court's characterization of land underlying a navigable waterway as a fundamental incident of sovereignty, therefore verifying the environment-sovereignty link in the U.S. Court.³⁹ The *Montana* Court, however, recognized the centrality of navigable waters to sovereignty only where such recognition protected the U.S. federal government's interest in the land underlying such waters. The Court limited its discussion of the sovereignty of indigenous peoples to a tribe's jurisdiction over its own members, thus suggesting that the breadth and significance of sovereignty depended on its context.⁴⁰ Subsequent cases have seized on the *Montana* decision's membership-based view of tribal sovereignty as a means of diminishing Native American territorial authority, though a minority of Justices has maintained the view that tribal sovereignty, like all sovereignty, necessarily includes the power to regulate the use of the sovereign's lands and natural resources.⁴¹ In sum, U.S. law illustrates the fundamentally political and subjective nature of sovereignty and demonstrates its particularly chameleon-like nature in the environmental context.

³⁹ *Montana v. United States*, 450 U.S. 544, 552 (1981) (declaring the ownership of land under navigable waters to be an incident of U.S. federal sovereignty that a court cannot find to have been conveyed "except because of 'some international duty or public exigency.'" (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926))).

⁴⁰ *Montana*, 450 U.S. at 563-67 (asserting that tribal sovereignty is generally limited to tribal power over members of the tribe, and not over tribal territory except where territorial regulation is required to protect against a threat to a tribe's political or economic security).

⁴¹ For example, in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 422 (1989), the plurality acknowledged the possibility that the authority to zone reservation land might emanate from a tribe's "status as an independent sovereign." Ultimately, however, the plurality concluded that any inherent sovereignty a tribe possessed over tribal lands was compromised by its external relations, so that a tribe lost whatever regulatory authority it had over tribal lands when such lands were owned by nonmembers. *Id.* at 425-28. In concurrence, Justice Stevens averred that tribal sovereignty included the power to exclude nonmembers from tribal land, a power he construed as inclusive of the lesser power to regulate land use. *Id.* at 433-35 (Stevens, J., concurring). In dissent, Justice Blackmun asserted that tribal sovereignty was geographical in nature, and thus applied to all reservation land unless its exercise would be "inconsistent with the overriding interests of the National Government." *Id.* at 450 (Blackmun, J., dissenting) (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153 (1980)).

B. HUMAN RIGHTS

Much like the moral discourse engaged in by pre-nineteenth-century theorists who are associated with the early development of international law and who questioned the legality of colonial patterns, the contemporary human rights discourse has the welfare of human beings as its subject and is concerned only secondarily, if at all, with the interests of sovereign entities. Within the human rights framework, indigenous peoples are groups of human beings with fundamental human rights concerns that deserve attention.”⁴²

Declarations of human rights in international instruments characteristically invoke the “basic,” or “first-generation,” rights of individuals, asserting that each person, regardless of culture, race, or citizenship, maintains certain essential physical needs such as life, nourishment, and shelter, along with expectations of some basic level of humane treatment by the authorities under which he or she resides.⁴³ At its narrowest, such humane treatment includes an individual’s freedom from violent coercive treatment such as rape and torture, physical liberty except in connection with prompt and fair legal process, recognition under and access to the law, and religious freedom.⁴⁴ Human rights may also include interests related to a people’s cultural and historical heritage, but, again, such rights are commonly expressed in international instruments as individual, rather than collective, rights.⁴⁵

As such, human rights instruments may certainly be useful to indigenous peoples if upheld.⁴⁶ Without doubt, individuals

⁴² ANAYA, *supra* note 33, at 7.

⁴³ For a discussion of first and second generation rights, *see infra* notes 99-103 and accompanying text.

⁴⁴ *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (addressing fundamental freedoms such as the freedom from slavery (art. 4); freedom from torture (art. 5); the right to equality (arts. 7 & 10); freedom from arbitrary arrest (art. 9); the freedom to marry and have a family (art. 16); freedom of thought and religion (art. 18); freedom of expression (art. 19); freedom of assembly (art. 53)).

⁴⁵ *See* THORNBERRY, *supra* note 2, at 96 (“[I]t can easily be assumed that self-determination as a group right essentially goes against the grain of human rights . . .”).

⁴⁶ *See, e.g.*, Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law*, 34 N.Y.U.

who are members of an indigenous group have as great a need for protection against persecution and other inhuman treatment as any other human beings living under the authority of a particular sovereign.⁴⁷ Once that is granted, the language and focus of human rights in international literature tends not to indicate any contemplation that such rights include the environmental interests of indigenous peoples.⁴⁸ Although indigenous communities relate to land and natural resources in diverse ways, a basic characteristic of many indigenous peoples' territorial and other environmental interests is that they are collective.⁴⁹ Collective interests in land, flora, and fauna are rarely identified as essential rights in documents describing basic human rights. Although a nuanced reading of human rights language may reveal a level of sensitivity to both community and racial concerns, collective territorial and other environmental interests do not translate readily into the so-called essential or first-generation interests of individuals, even where such individuals are members of an indigenous people.⁵⁰

J. INT'L L. & POL. 189, 202 (2001) (“[T]he adaptation of the category of ‘human rights’ is of fundamental importance in addressing indigenous issues, and . . . courts and state institutions often prefer to address such issues within this frame, but practice and experience suggest that additional concepts are needed and often are deployed. Issues connected with distinct histories, cultures, and identities animate the search for alternative concepts of international law and national law related to, but going beyond, individual human rights and non-discrimination.”).

⁴⁷ See THORNBERRY, *supra* note 2, at 20 (“In an argument for collective rights, a representative of the Grand Council of the Crees stated that when indigenous peoples are attacked, ‘individuals suffer the pain But they suffer because they are perceived by their attackers as members of a group.’”).

⁴⁸ See *id.* at 98 (observing that “the Universal Declaration is sometimes portrayed as a hymn to individualism”).

⁴⁹ See, e.g., Org. of Am. States, Inter-Am. Comm’n on Human Rights, *supra* note 13, pmbl. (“Recognizing that in many indigenous cultures, traditional collective systems for control and use of land, territory and resources, including bodies and water and coastal areas, are a necessary condition for their survival, social organization, development and their individual and collective well-being; and that the form of such control and ownership is varied and distinctive and does not necessarily coincide with the systems protected by the domestic laws of the states in which they live.”).

⁵⁰ See Kingsbury, *supra* note 46, at 193 (“Whether issues raised by indigenous peoples can be addressed exclusively within the existing framework of international human rights law or whether, by contrast, a new legal category of indigenous peoples’ rights requires recognition is a fundamental political debate . . .”); see also THORNBERRY, *supra* note 2, at 98 (pointing out that the types of rights that

There is another important consideration in identifying the limitations of human rights instruments to defend environmental interests. The primary thrust of many human rights instruments is that of providing individuals who are members of a non-dominant ethnic or cultural group with a set of rights that are considered essential to members of the dominant ethnic or culture group under whose sovereign authority the non-dominant group resides.⁵¹ In at least some international instruments, it appears that the dominant culture's perspective on land and natural resource ownership presumptively defines the environment-related human rights of indigenous persons, so that international instruments addressing land-related basic interests limit their focus to individual ownership of property.⁵²

C. SELF-DETERMINATION

The claim by indigenous peoples for self-determination is a reference to the idea of freedom from oppressors and the right to determine their future, their own form of government, as well as the extent of self-government. . . . This can range from complete independence and full statehood to autonomy in some areas of competence within a state system.⁵³

tend to be identified as human rights do not appear to include communitarian notions). *But see id.* at 98-99 (offering a "more nuanced" reading of the Universal Declaration of Human Rights, under which the Declaration may be discerned as advocating for the protection of group or community rights).

⁵¹ See THORNBERRY, *supra* note 2, at 108-14 (discussing the dominant position of the State under whose protection minority or indigenous persons live in interpreting and protecting their human rights).

⁵² See, e.g., Eur. Convention for the Prot. of Human Rights and Fundamental Freedoms [ECPHRFF], *opened for signature* Mar. 20, 1952, Eur. T.S. No. 5 (discussed *infra*, notes 76-78 and accompanying text). S. James Anaya has noted that, in spite of differing concepts of property existing in various societies, "[i]nasmuch as property is a human right, the fundamental norm of non-discrimination requires recognition of the forms of property that arise from the traditional or customary land tenure of indigenous peoples, in addition to the property regimes created by the dominant society." Anaya, *supra* note 5, at 37 (also observing that "[several United Nations and Organization of American States] studies and declarations have highlighted that among the most troublesome manifestations of historical discrimination against indigenous peoples has been the lack of recognition of indigenous modalities of property").

⁵³ See Iorns, *supra* note 2, at 225.

Within the language of international instruments, self-determination is often coupled with either sovereignty or human rights. The self-determination concept thus possesses versatility in that it encompasses both group and individual needs and both political and apolitical contexts.⁵⁴ This versatility, while promising in its potential for self-determination to transcend the limitations of other concepts in its application to indigenous peoples' interests, actually has diminished the term's utility, as the level of autonomy implied by the term ranges from an outright right of secession to a mere right to co-exist with non-indigenous citizens.⁵⁵ These extremes have caused both existing states and indigenous peoples to mistrust the term and debate at length over its use in international instruments.⁵⁶ Even worse, the term has

⁵⁴ See *id.* at 203 (positing that “it is the concept of sovereignty, as presently understood and applied by states, that poses the ultimate barrier – that no right of self-determination is recognized in international law where it clashes with the world system of state sovereignty”). Anaya notes that:

[A] common tendency has been to understand self-determination as wedded to attributes of statehood, with “full” self-determination deemed to be in the attainment of independent statehood. . . .

. . . .
An alternative understanding of self-determination . . . [bases it upon] core values of freedom and equality that are relevant to all segments of humanity, including indigenous peoples, in relation to the political, economic, and social configurations with which they live. Under a human rights approach, attributes of statehood or sovereignty are at most instrumental to the realization of these values – they are not themselves the essence of self-determination.

ANAYA, *supra* note 33, at 7-8; see also Brad R. Roth, *The Enduring Significance of State Sovereignty*, 56 FLA. L. REV. 1017, 1023 (2004) (“Sovereignty is a legal attribute of a territorially bounded political community enjoying full membership in the international system. . . . Statehood is conceptualized as consummating the self-determination of a ‘people.’”); *id.* at 1042 (“One could go so far as to say that sovereignty, as the consummation of the self-determination of peoples, is not only itself a human rights, but indeed . . . the first human right (in the sense of providing a foundation for, not morally outweighing, other human rights.)”).

⁵⁵ See Iorns, *supra* note 2, at 209-22 (discussing the debate on the meaning of self-determination, ranging from existing states' fear that it carries with it the implication of a right to secession, to the indigenous peoples' concern that it may be qualified to the point where it only encompasses the relationship between an indigenous people and the State in which they live).

⁵⁶ *Id.*; see also *id.* at 224-34 (presenting the state-endorsed positivist view of international law, under which states bear the power to determine the range and scope of international law, and the natural law approach to international law, generally endorsed by indigenous peoples, under which all indigenous peoples' inherent

been manipulated to the point of near-incoherence; as one commentator noted, “[i]n its present form, . . . self-determination lacks both definition and applicability.”⁵⁷

In spite of their propensity to generate dissension and even incomprehension, the concept and language of self-determination remain prominent in the international vernacular, and thus its conceptual core, that element of self-determination that it does not share with either sovereignty or human rights, is worth identifying.⁵⁸ That conceptual core, plainly stated, is that culturally distinct groups should be free to define and pursue their own destinies, including both whether and how to evolve from an identified set of historically distinguishing lifestyle patterns, as well as whether and how to interact with nonmembers.⁵⁹ Another way of stating this definition of self-determination is that it

right to self-determination compels its recognition by states); Kingsbury, *supra* note 46, at 216 (“Negotiations on international normative instruments relating to indigenous peoples repeatedly have become ensnarled in the question of whether the international law of self-determination applies to indigenous peoples.”); Gerry J. Simpson, *The Diffusion of Sovereignty: Self-determination in the Postcolonial Age*, 32 STAN. J. INT’L L. 255, 256 (1996) (“[I]nternational lawyers manipulate a discourse gone dead in their hands: the language of self-determination. A failure to recuperate the law of self-determination will consign this legal principle to the margins of the new global disorder.”).

⁵⁷ See Simpson, *supra* note 56, at 260 (discussing the “internal conflict between state rights to self-determination, and the rights of minorities within states to dismember or challenge the state in the name of another competing norm of self-determination”); *id.* at 261 (“In both concept and practice, then, self-determination is an inherently unstable principle.”); *id.* at 271-74 (discussing self-determination in the decolonization context and concluding that “[d]uring this period, then, self-determination was transformed from a potentially revolutionary and flexible democratic ideal into a narrowly conceived imperative, applicable only to anti-colonial efforts.”); see also Kingsbury, *supra* note 46, at 217 (“Self-determination has long been a conceptual morass in international law, partly because its application and meaning have not been formulated fully in agreed texts, partly because it reinforces and conflicts with other important principles and specific rules, and partly because the specific international law practice of self-determination does not measure up very well to some of the established textual formulations. The standard international law of self-determination accords to the people of certain territorially-defined units the rights to determine the political future of the territory.”).

⁵⁸ See Simpson, *supra* note 56, at 258 (“The right to self-determination is invoked in international law more often than any other collective human right. It enjoys greater public and institutional recognition than either the right to development or the right to natural resources.”).

⁵⁹ See Araujo, *supra* note 21, at 1492-93 (“[Self-determination] is a notion that brings together the interests of the individual and relates them to the interests of

stands for the rejection of force and other aggressive actions or policies on the part of dominant cultures (usually governments) that have as their goal the assimilation, removal, annihilation, or even the developmental aid of indigenous peoples.

This somewhat narrow definition, which neither includes nor rejects the idea of secession, bases an indigenous people's right to self-determination on the people's right to and need for cultural autonomy, a goal that may be perceived as woefully unambitious by those who advocate for indigenous peoples' full political independence.⁶⁰ Nevertheless, the above-stated definition of self-determination, in contrast to those of sovereignty and human rights, may easily include the protection of indigenous peoples' relationships with the environment. Indeed, the more clearly an indigenous people's lifestyle or heritage may be associated with a land area, a sustenance pattern involving fishing or hunting, or some other nature-focused life pattern, the more likely that element of their culture would fall among the protections offered under the rubric of self-determination. This would seem particularly true where an indigenous population's environment-related heritage or culture differs sharply from that of the dominant culture under whose authority the indigenous population resides.

The definition of self-determination offered above also allows for an indigenous people's evolution to include their naturally assimilating elements of other cultures without losing the protections of instruments devoted to protecting their right to autonomous recognition.⁶¹ Any indigenous community's cultural

the group. The interests of both the individual and the group concentrate on the ability to exercise their selections about how they wish to live their lives and to be free from the interference and imposition of others."); *see also* Anaya, *supra* note 5, at 50 ("Although there is a good deal of debate concerning the precise scope and meaning of self-determination, it is possible to identify a central concept that is widely accepted in international discourse. That is the idea the human beings, individually and collectively, should be in control of their own destinies and that the structures of government should be devised accordingly.").

⁶⁰ *But see* Iorns, *supra* note 2, at 227 (discerning in the rhetoric of autonomy the implication that it will lead to complete independence, "even if it is only achieved in graduated stages").

⁶¹ *See* Anaya, *supra* note 5, at 13 (observing that indigenous peoples "have survived as they have striven to maintain the cultural integrity that makes them different, while adapting, often ingeniously, to the changing conditions around them.").

evolution is bound to include the acquisition of knowledge, technology, and lifestyle patterns of other cultures with which the community's members find themselves in steady contact. This is true particularly where such other cultures, in their efforts to dominate the indigenous community, have introduced political and economic systems that impoverish indigenous groups and have ravaged the environment upon which the indigenous group subsists through pollution, natural resource extraction, or hunting and grazing practices. If the intermingling of dominant and indigenous lifestyles is perceived as the indigenous peoples' relinquishment of their cultural identity, then most, if not all, indigenous peoples are doomed to extinction. If, however, an indigenous people's intermingling with a dominant people is perceived to be a feature of the indigenous people's own cultural evolution, then the indigenous people remains intact and worthy of the international community's protection. Self-determination, when accepted literally, encompasses the idea that an indigenous people might evolve from its ancestral life patterns by choice even as it retains the right to recognition and protection as a distinct entity with the power to determine its own cultural future.

III. INTERNATIONAL INSTRUMENTS ADDRESSING INDIGENOUS PEOPLES' ENVIRONMENTAL RIGHTS: EVOLVING RHETORICAL IDEALS

The majority of existing international instruments have failed to provide a supportive legal environment for local resource dependent populations that would enable these populations to manage in a sustainable manner forests and other components of biodiversity which they utilize or over which they exercise effective control.⁶²

The recent surge of widespread sensitivity to the unique needs of indigenous peoples in a world characterized by conquest and forced assimilation has taken a number of legal and quasi-legal forms. International organizations and individual governments have produced a new generation of documents (conventions, declarations, constitutional provisions, statutes, treaties,

⁶² Gregory F. Maggio, *Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity*, 16 UCLA J. ENVTL. L. & POL'Y 179, 179-80 (1997-1998).

policies, and reports) that share the rhetoric of empowerment, protection, and environmental rights for indigenous cultures historically weakened by the integrationist policies of the non-indigenous governments that invade or colonize, dominate, and come to represent the mainstream.⁶³ The following sections of this Article offer a chronology of international instruments reflecting the global community's slow-growing concern for indigenous populations. It then outlines some of the most significant recent documents, focusing on provisions that address the symbiotic connection between indigenous communities and the land and other attributes of the natural environment. As this survey demonstrates, international instruments have trended toward more direct and open assertions of the cultural significance and vulnerability of indigenous tribes. It also demonstrates that such instruments still tend to fall short of asserting substantive legal rights that indigenous tribes or members may utilize to effectively protect a tribe's cultural integrity against opposing governmental or private interests.

A. EARLY INTERNATIONAL AND REGIONAL STATEMENTS ON HUMAN RIGHTS

International rules are, in most cases, strikingly vague, permitting a scale of possible degrees of implementation.⁶⁴

The 1945 Charter of the United Nations⁶⁵ and the 1948 Universal Declaration of Human Rights⁶⁶ both focus on means of securing and preserving fundamental human rights. Signatories

⁶³ For a detailed discussion of the historical evolution of indigenous peoples' rights in the international arena, see Russell L. Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 649 (1988). For a discussion of this evolution in connection with Native American tribes in the United States, see Allison M. Dussias, *Geographically-based and Membership-based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 PITT. L. REV. 1 (1993) (analyzing historical developments and set-backs in the U.S. Supreme Court's sensitivity to the primacy of territorial authority in connection with tribal sovereignty).

⁶⁴ ANTHANASIA SPILIOPOULOU AKERMARK, JUSTIFICATIONS OF MINORITY PROTECTION IN INTERNATIONAL LAW 17 (1997).

⁶⁵ The Charter entered into force on October 24, 1945, and was ratified by the United States on that date. U.N. Charter, 59 Stat. 1031, T.S. No. 993.

⁶⁶ Universal Declaration of Human Rights, *supra* note 44.

of the U.N. Charter dedicated themselves to “the principle of equal rights and self-determination of peoples,”⁶⁷ as well as to “fundamental freedom for all without distinction as to race, sex, language, or religion.”⁶⁸ The Universal Declaration, without mentioning self-determination at all, expresses the need for member states to secure the fundamental human rights of “the peoples of territories under their jurisdiction.”⁶⁹ Thus, the U.N. Charter and Universal Declaration set the foundation for U.N. member states to recognize the rights not merely of minorities but of indigenous peoples.⁷⁰ Neither document, however, expressly focuses on the significance of the environment in indigenous peoples’ cultural traditions or makes the self-determination of such peoples its primary goal. As one commentator has noted, “[i]t is a measure of how insignificant self-determination was thought to be by the drafters of the Charter that it appears only twice in the whole document.”⁷¹

Similarly, regional human rights instruments of the mid-twentieth century contain only scant, indirect references to environmental interests, and reflect little if any recognition of the unique position of indigenous peoples vis-à-vis land and natural

⁶⁷ U.N. Charter art. 1, para. 2 (“The Purposes of the United Nations are: . . . to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”); *see also id.* art. 55.

⁶⁸ *Id.* art. 1 para. 3, art. 13 para. 1(b), art. 55 para. c, art. 62 para. 2, art. 76, para. c.

⁶⁹ Universal Declaration of Human Rights, *supra* note 44, pmb. Under the preamble, the General Assembly proclaims:

[T]his Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society . . . shall strive . . . to promote respect for [human] rights and freedoms and . . . secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Id. The Declaration goes on to underscore that “no distinction shall be made [as to the entitlement of all to human rights and freedoms] on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” *Id.* art. 2.

⁷⁰ *See AKERMARK, supra* note 64, at 21 (“[T]here exists a grey area between what is a ‘minority’ and what is an ‘indigenous people.’ An element which is strong in the international discourse concerning indigenous peoples is that of restitution for past grievances, an element which is not as central in the discourse concerning minorities.”).

⁷¹ *See Simpson, supra* note 56, at 266.

resources. The American Declaration of the Rights and Duties of Man, promulgated in 1948, makes its primary focus the individual's right to spiritual and cultural development.⁷² Various articles of the American Declaration address the rights of all individuals to practice a faith, move freely within one's homeland, enjoy healthy living conditions, participate in artistic and scientific discovery, and own property.⁷³ Certainly the preamble links the freedom of the individual with that of the collective, observing that "[t]he fulfillment of duty by each individual is a prerequisite to the rights of all."⁷⁴ Still, the declaration contains no language explicitly addressing the communal nature of indigenous communities' interests in territory and natural resources; nor does it directly acknowledge the sensitive relationship between indigenous cultural survival and the environment. In short, a straightforward reading of the American Declaration demonstrates that it aims to treat all persons and all cultures as identical and thus able to thrive when endowed with the rights and freedoms of the dominant American culture.⁷⁵

⁷² Org. of Am. States Inter-Am. Comm'n on Human Rights, *American Declaration of the Rights and Duties of Man*, pmbl., O.A.S. Res. XXX (Apr. 1948) (identifying spiritual development as "the supreme end of human existence" and culture as "the highest social and historical expression of that spiritual development").

⁷³ See *id.* art. III ("Every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private."); *id.* art. VIII ("Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will."); *id.* art. XI ("Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources."); *id.* art. XIII ("Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries."); *id.* art. XXIII ("Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home."). Such rights, presented in a single instrument, serve as a statement of the essential elements of cultural survival.

⁷⁴ *Id.* pmbl.; see also *id.* (identifying "spiritual development" as "the supreme end of human existence" and "culture" as "the highest social and historical expression of that spiritual development").

⁷⁵ That the American Declaration on the Rights and Duties of Man presumes that all persons and cultures will thrive when endowed with rights essential to members of the dominant culture may be best demonstrated in articles that aim to provide individuals with the means to thrive within the dominant culture. See, e.g., *id.* art. XII ("[E]very person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful

The European Convention for the Protection of Human Rights and Fundamental Freedoms, first promulgated in 1950, addresses human rights and fundamental freedoms from a distinctly individualistic perspective, with almost all of its articles asserting the equal rights of every person.⁷⁶ Even as amended through 1985, the European Convention contains only scant and indirect references to community rights or environmental rights, and those references made are in forms common to dominant democratic cultures. Environmental rights, for example, are limited to the property-related privacy interest an individual holds in his home.⁷⁷ Collective cultural rights include only the individual's freedom of religion and the freedom of peaceful assembly and association.⁷⁸ No language asserting these or other rights addresses them in the context of indigenous communities.

member of society. The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide.”); *id.* art. XIII (“Every person has the right to . . . participate in the benefits that result from intellectual progress, especially scientific discoveries.”).

⁷⁶ See ECPHRRFF, *supra* note 52, art. 2 (addressing the individual's right to life); *id.* art. 3 (addressing the individual's right against inhuman treatment); *id.* art. 4 (addressing the individual's right against slavery and compulsory labor); *id.* art. 5 (addressing the individual's right to liberty and security of person); *id.* art. 6 (addressing the individual's right to a fair and public hearing); *id.* art. 7 (addressing the individual's right against ex post facto laws); *id.* art. 8 (addressing the individual's right to privacy); *id.* art. 9 (addressing the individual's right to freedom of thought and religion); *id.* art. 10 (addressing the individual's right to freedom of expression); *id.* art. 11 (addressing the collective right to assemble and the individual's right of association); *id.* art. 12 (addressing the individual's right to marry); *id.* art. 13 (addressing the individual's right to seek effective remedy against breach of his or her rights).

⁷⁷ *Id.* art. 8 (addressing every man's “right to respect for his private and family life, his home and his correspondence,” and also barring governmental interference with these rights except when “necessary in a democratic society in the interests of . . . public safety or . . . for the protection of public health . . .”).

⁷⁸ *Id.* art. 9 (addressing the individual's “freedom of thought, conscience and religion,” including the right to change religions “in community with others . . .”); *id.* art. 11 (addressing the individual's right “of peaceful assembly and to freedom of association with others . . .”). Neither of these passages indicates that they are meant to apply to the unique situation of indigenous peoples; the right to assemble, in fact, offers “the right to form and to join trade unions” as its example of the types of assemblies it protects. *Id.*

1. *The Goal of Assimilation*

In 1957, the International Labor Organization (ILO) adopted Convention 107 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries.⁷⁹ ILO Convention 107 acknowledges, “for the first time in international law,”⁸⁰ the existence and disadvantaged status of indigenous peoples⁸¹ and demands that governments take actions to protect and enable tribal populations located within their borders.⁸² Reflecting the dominant sentiment of the mid-twentieth century, ILO Convention 107 promotes non-coercive assimilation as a means of providing social and economic equality to tribal populations.⁸³ In doing so, however, the document does express sensitivity to the customs and social institutions of such populations, including their relationship to the land.⁸⁴ Article 11, for example, orders governments to

⁷⁹ Int'l Lab. Org., Convention Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, 328 U.N.T.S. 247 [hereinafter ILO Convention 107].

⁸⁰ Paul Havemann, *Twentieth-Century Public International Law and Indigenous Peoples*, in *INDIGENOUS PEOPLES' RIGHTS IN AUSTRALIA, CANADA & NEW ZEALAND* 18, 19 (Paul Havemann ed. 1999) (“ILO Convention No. 107 . . . is expressed primarily in terms of the equal rights of individual members of indigenous populations. But it secondarily includes, for the first time in international law, recognition of indigenous peoples or groups, although still in the framework of integrative or assimilationist national regimes.”).

⁸¹ Convention 107, *supra* note 79, art. 1, para. 1(a) defines indigenous peoples as tribal populations “whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.” *Id.* art. 1, para. 1(b) states that members of tribes are:

regarded as indigenous on account of their descent from the populations which inhabited the country . . . at the time of conquest of colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.

⁸² *Id.* art. 2, paras. 2(a), (b) & (c), listing equal access to rights and opportunities enjoyed by the non-indigenous population; social, cultural, and economic development; and opportunities for integration as three elements that must be included in each member state's action plan for its indigenous populations.

⁸³ *Id.* art. 2, para. 2(c).

⁸⁴ The Convention urges all governments to create “possibilities” for integration and to avoid “the artificial assimilation of these populations.” *Id.* Next, the Convention points out that the “primary objective of all such [assimilative] action

recognize members of indigenous tribes as holding both individual and collective rights of ownership over their traditionally occupied lands.⁸⁵ Article 12 warns assimilating governments against removing tribes from their habitual territories without their consent, although it undermines this protective sentiment with exceptions that allow a state to remove a tribe from its territory “in the interest of national economic development.”⁸⁶

In keeping with this approach, the 1962 Resolution on Permanent Sovereignty over Natural Resources proclaims the sovereignty of states over natural resources within their borders.⁸⁷ Although the Resolution acknowledges “[t]he right of peoples . . . to permanent sovereignty over their natural wealth and resources,” it demands that such sovereignty “be exercised in the interest of . . . national development and of the well-being of the people of the State concerned.”⁸⁸ Thus, like ILO Convention

shall be the fostering of individual dignity, and the advancement of individual usefulness and initiative.” *Id.* art. 2, para. 3. Article 2, para. 4 states even more directly that “[r]ecourse to force or coercion as a means of promoting the integration of these populations into the national community shall be excluded.” *Id.* art. 2, para. 4. Article 4 addresses the need for the integrationist government to respect the cultural and religious values as well as the forms of social control existing within a tribe, and Article 5 addresses the need to allow tribes undergoing integration to participate in the evolution of their culture. *Id.* arts. 5, 6. Articles 7 and 8 advise assimilating states to preserve the customary laws, penal systems, and institutions of assimilated tribes whenever possible.

⁸⁵ *Id.* art. 11.

⁸⁶ *Id.* art. 12, para. 1 (“The populations . . . shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of said populations.”). Article 12, paras. 2 & 3 cover compensation for removed tribes, and article 13 charges states with the duty to oversee the procedure for transferring rights of ownership to tribes and to protect them from persons who would take advantage of their customs or lack of understanding of property laws. *Id.* art. 12, paras. 2, 3, 13(1), (2).

⁸⁷ G.A. Res. 1803, U.N. Doc. A/5217 (Dec. 14, 1962).

⁸⁸ *Id.* para. 1; *see also id.* para. 5 (“[T]he free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.” The provision references the sovereignty of peoples over natural resources, but refrains from including peoples in its statement of sovereign equality.)

107, the 1962 Resolution recognizes tribal sovereignty but immediately undercuts it in favor of allowing states the broad latitude to take such resources on grounds of “national interest.”⁸⁹

In the mid-1960s, the United Nations General Assembly produced three important treaties addressing human rights: the International Convention on the Elimination of all Forms of Racial Discrimination (ICEFRD),⁹⁰ the International Covenant on Civil and Political Rights (ICCPR),⁹¹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁹² These documents echo rights identified in the Universal Declaration, giving legal effect to those rights and setting forth measures for enforcement by nation-states.⁹³

The ICEFRD condemns discrimination against groups of persons, and defines civil rights to include the right to own property both individually and collectively.⁹⁴ Its primary goal, however, is to encourage parity between individuals of all races. Thus, it urges states to “discourage anything that tends to strengthen racial divisions,” a directive which could conceivably justify the programmatic encouragement of assimilation and other efforts to erase the cultural connection between an indigenous community and its territory or natural resources.⁹⁵

The ICCPR differs from the ICEFRD in that it directly addresses the rights of all peoples to self-determination, defined as

⁸⁹ *See id.* para. 4 (“Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign.”).

⁹⁰ Int’l Convention on the Elimination of all Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter ICEFRD].

⁹¹ Int’l Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

⁹² International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

⁹³ *See* Caroline Dommen, *Claiming Environmental Rights: Some Possibilities Offered by the United Nations’ Human Rights Mechanisms*, 11 GEO. INT’L ENVTL. L. REV. 1, 6 (1998).

⁹⁴ ICEFRD, *supra* note 90, art. 2, para. 1(a), art. 5, para. d(v).

⁹⁵ *See id.* art. 2, para. 1(e) (ordering states “to encourage . . . integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.”).

the right to “freely determine their political status and freely pursue their economic, social and cultural development.”⁹⁶ Along similar lines, Article 27 of the ICCPR declares that individuals belonging to ethnic, religious, or linguistic minorities “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”⁹⁷ Significantly, the General Comments on Article 27 recognize that a minority group’s right to enjoy its own culture may involve a lifestyle for which a territory and the use of natural resources are key factors, a scenario particularly likely in the case of indigenous peoples.⁹⁸ Like the ICEFRD, however, the ICCPR makes its primary focus first-generation rights, or the rights of all individuals to humane and equal treatment by the state and under its laws.⁹⁹ Although Article 1 references both group identities and natural resources in its assertion that “[i]n no case may a people be deprived of its own means of subsistence,”¹⁰⁰ only Article 47 expressly references a people’s inherent right “to enjoy and utilize fully and freely their natural wealth and resources.” Even this right comes only in the context of an assurance that the rest of the ICCPR does not impair such inherent rights.¹⁰¹

The ICESCR, unlike the ICEFRD and the ICCPR, addresses second-generation rights, including the rights of a people to freely pursue their economic, social and cultural development.¹⁰² Such rights are almost universally more directly associated with an indigenous people’s relationship with the environment than first-generation rights, as they focus on rights associated with property transactions, agriculture, and religious expression rather than the basic rights to life, physical liberty,

⁹⁶ ICCPR, *supra* note 91, art. 1, para. 1.

⁹⁷ *Id.* art. 27.

⁹⁸ See AKERMARK, *supra* note 64, at 82.

⁹⁹ The majority of the ICCPR covers legal rights associated with arrest, punishment, and process, the right to life, rights against slavery, the rights of persons incarcerated, rights associated with thought, conscience and religion, freedom of association and familial rights. ICCPR, *supra* note 91, arts. 2-27.

¹⁰⁰ *Id.* art. 1, para. 2.

¹⁰¹ *Id.* art. 47.

¹⁰² ICESCR, *supra* note 92.

and freedom from persecution.¹⁰³ The ICESCR addresses rights associated with employment, food production, healthcare, education, and participation in the scientific, artistic, and intellectual community.¹⁰⁴ Like the ICEFRD and the ICCPR, the ICESCR focuses on state creation of opportunities for indigenous populations to evolve in cultural patterns similar to those of the dominant culture. Nowhere does the ICESCR address means through which traditional territories or natural resources may be preserved or protected for an indigenous people's cultural use.

On the regional level, the American Convention on Human Rights, echoing the international instruments being drafted in the late 1960s, set as its goal the wedding of the principles of human rights set forth in the American Declaration of the Rights and Duties of Man, the Universal Declaration of Human Rights, and the protections found in the domestic laws of the various American nations.¹⁰⁵ Addressing its protections to all individuals, the American Convention was a pact among its signatory nations to adopt legislation and institute other means through which each nation's domestic laws could give effect to the Convention's list of individual rights and freedoms.¹⁰⁶

These rights included a litany of civil and political guarantees, including the right to recognition as a person under the law, the right to humane treatment, the right to live free from involuntary servitude, and the right to a fair trial.¹⁰⁷ Rights that could

¹⁰³ The ICCPR and the ICESCR, along with the Universal Declaration of Human Rights, are often referenced collectively as the International Bill of Human Rights. See Watters, *supra* note 10, at 265 (citing DONNELLY, *supra* note 32, at 10 (describing the International Bill of Human Rights as "present[ing] a summary statement of the minimum social and political guarantees internationally recognized as necessary for a life of dignity in the contemporary world.")).

¹⁰⁴ ICESCR, *supra* note 92, arts. 6-15.

¹⁰⁵ American Convention on Human Rights: "Pact of San Jose, Costa Rica", pmbl., *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

¹⁰⁶ *Id.* art. 2.

¹⁰⁷ See *id.* art. 3 (addressing the right to juridical personality); *id.* art. 4 (addressing the right to life and encouraging the abolishment of the death penalty in signatory states); *id.* art. 5 (addressing the right to humane treatment, including the banning of torture and the humane treatment of persons accused of crime); *id.* art. 6 (addressing the right to live free from slavery or involuntary servitude, excepting the punishment of forced labor as a penalty for certain crimes); *id.* art. 7 (addressing the right to personal liberty and security, and banning arbitrary arrest

encompass indigenous communities' environmental interests include those addressing honor and dignity, religion, thought and expression, association, property and residence.¹⁰⁸ None of the provisions addressing rights that might include indigenous peoples' interest in historical territories and natural resources contemplate their potential applicability to such environmental interests. In fact, language in Article 22 barring collective expulsion from a territory addresses only "[t]he collective expulsion of aliens."¹⁰⁹ Thus, although the American Convention did not come into effect until 1978, it reflects the non-environmental focus of its late 1960s drafting date.

Finally, in 1970, the U.N. General Assembly produced the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.¹¹⁰ This powerfully worded instrument, in which the General Assembly declared itself to be reaffirming and explaining the scope and import of the U.N. Charter,¹¹¹ directly charges nations with the duty to promote self-determination of peoples in the areas of economic, social, and cultural development.¹¹² Although primarily aimed at

or imprisonment); *id.* art. 8 (addressing the right to fair trial); *id.* art. 9 (banning ex post facto laws); *id.* art. 10 (addressing the right to compensation in the instance of a miscarriage of justice).

¹⁰⁸ See *id.* art. 11 (addressing the right to privacy, including the right to honor, dignity, and freedom from interference in one's private life, family life and home); art. 12 (addressing religious freedom); *id.* art. 13 (addressing freedom of thought and expression); *id.* art. 16 (addressing the right to associate freely for ideological, religious, political, cultural or other purposes); *id.* art. 20 (addressing the right to a nationality); *id.* art. 21 (addressing the right to property); *id.* art. 22 (addressing the right against expulsion from the territory of one's state); *id.* art. 24 (addressing the right to equal protection under the law).

¹⁰⁹ *Id.* art. 22, para. 9 ("The collective expulsion of aliens is prohibited."). Article 22, paras. 5 & 6, addressing expulsion from a state's territory, are drafted in simple terms that do not appear to contemplate the circumstance in which an indigenous nation exists within the territory of a nation state.

¹¹⁰ G.A. Res. 2625, at 121, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Oct. 24, 1971).

¹¹¹ See *id.* pmb1.

¹¹² *Id.* ("By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every States has the duty to respect this right in accordance with the provisions of the Charter.").

relationships between nations, the declaration contains strong language on the rights of peoples to self-determination:

Every State has the duty to promote . . . the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle in order:

. . . .

(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the [Charter of the United Nations].¹¹³

Direct as this passage is in its condemnation of forced assimilation and in its identification of the duty to protect indigenous cultures as a primary obligations of U.N. Charter signatories, the language of the 1970 declaration never connects self-determination and indigenous cultural survival with sovereignty over traditional territories and their natural resources. Express recognition of the environment-related needs of indigenous peoples is left to later instruments.

2. *Emerging Acknowledgments of the Environment as Central to Indigenous Culture*

The early 1970s saw the emergence of several important international documents addressing environmental rights and responsibilities. In 1972, the United Nations Conference on the Human Environment produced the Stockholm Declaration.¹¹⁴

¹¹³ *Id.* “Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.” *Id.*

¹¹⁴ U.N. Conference on the Human Environment, June 5-16, 1972, *Report of the U.N. Conference on the Human Environment*, Stockholm, Switz., U.N. Doc. A/CONF. 48/14 (June 16, 1972). The 1972 Conference on the Human Environment produced two additional important creations: the Stockholm Action Plan, which set forth recommendations for environmental management on the international

This short, often passionate series of statements on the obligations of a technologically advanced world population to control both pollution and resource exploitation¹¹⁵ calls on both industrialized and developing states to acknowledge and meet the challenges of environmentalism in a world that still requires much development.¹¹⁶ Unlike many of its predecessors, the Stockholm Declaration expressly addresses the link between the environment and human rights, stating in its opening proclamation that “[b]oth aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights.”¹¹⁷ It also reveals an awareness of tribal communities and their need for protection against dominators, speaking to “communities” and “peoples” who, “by their values and the sum of their actions, will shape the world environment of the future.”¹¹⁸ It calls for the abandonment of “projects which are designed for colonialist and racist domination.”¹¹⁹

Still, the essential focus of the Stockholm Declaration is on both industrial and developing governments, with the core message that less-developed communities must be aided so they may

level, and the United Nations Environment Programme, the United Nations organ for environmental issues. See Dena Marshall, Note, *An Organization for the World Environment: Three Models and Analysis*, 15 GEO. INT’L L. REV. 79, 81-2 (2002).

¹¹⁵ *Id.* para. 1 (“Man is both creature and moulder of his environment [T]hrough the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale.”).

¹¹⁶ See, e.g., *id.* para. 3 (“In our time, man’s capability to transform his surroundings, if used wisely, can bring to all peoples the benefits of development and the opportunity to enhance the quality of life.”).

¹¹⁷ *Id.* para. 1. See also *id.* para. 2 (“The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world: it is the urgent desire of the peoples of the whole world and the duty of all Governments.”).

¹¹⁸ *Id.* para. 7 (calling upon “Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity.”).

¹¹⁹ *Id.* princ. 15 (warning that “Planning must be applied to human settlements and urbanization with a view to avoiding adverse effects on the environment and obtaining maximum social, economic, and environmental benefits for all.”).

acquire the economic and social advancements of more developed countries.¹²⁰ However, the Stockholm Declaration has limited utility. As one commentator summarized the instrument:

The most important customary principle of international environmental law, best known as Principle 21 of the Stockholm Declaration, stipulates that states have ‘the sovereign right to exploit their own resources pursuant to their own environmental policies,’ as long as they do not thereby ‘cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.’ The result is that citizens facing locally generated or locally tolerated environmental threats can, with very rare exceptions, only rely on national laws for protection.¹²¹

In short, the cultural sensitivity exhibited in the Stockholm Declaration is undermined by its adherence to the non-interventionist code of sovereignty. In addition, while the Declaration demonstrates a global awareness of the symbiosis between indigenous cultures and the environment, there is no language in the Declaration about preserving or emulating the cultural values or lifestyles of peoples who live lightly on the land.

In 1973, the General Assembly adopted a second Resolution on Permanent Sovereignty over Natural Resources.¹²² Ten years after its first resolution relied on the discretion of individual nation-states to determine the balance between indigenous and national sovereignty over tribal territories and their natural resources,¹²³ the General Assembly directly addressed the treatment of indigenous peoples and their natural resources by

¹²⁰ See, e.g., *id.* para. 4 (“In the developing countries most of the environmental problems are caused by under-development. . . . [T]he industrialized countries should make efforts to reduce the gap between themselves and the developing countries.”); see also *id.* princ. 8 (“Economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.”); *id.* princ. 9 (“Environmental deficiencies generated by the conditions of under-development . . . can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic efforts of the developing countries . . .”).

¹²¹ See Dommen, *supra* note 93, at 2.

¹²² G.A. Res. 3171, U.N. GAOR., 28th Sess., Supp. No. 30, U.N. Doc. A/9400 (Dec. 17, 1973).

¹²³ See *supra* notes 87-89 and accompanying text.

states.¹²⁴ The 1973 resolution not only deplors state use of “force, armed aggression, economic coercion or any other illegal or improper means in resolving disputes concerning the exercise of . . . sovereign rights,”¹²⁵ but also contains a stern reminder on the treatment of indigenous peoples as nations as dictated by a litany of U.N. conventions:¹²⁶

The General Assembly,
Re-emphasizes that actions, measures or legislative regulations by States aimed at coercing, directly or indirectly, . . . peoples engaged in the . . . exercise of their sovereign rights over their natural resources, both on land and in their coastal waters, are in violation of the Charter of the United Nations and of the Declaration contained in General Assembly resolution 2625 (XXV) . . . and that to persist therein could constitute a threat to international peace and security.¹²⁷

In so stating, the 1973 resolution not only reflects a formal recognition of the interconnectedness among a peoples’ culture, its natural environment, its sovereignty, and its self-determination, but also documents the international community’s growing realization that questions of indigenous peoples’ sovereignty over land and natural resources might be handled in a manner inconsistent with international ideals if left to the individual nations in which such environmental resources are found.

B. INSTRUMENTS DIRECTLY LINKING INDIGENOUS RIGHTS AND THE ENVIRONMENT

Indigenous peoples are the base of what I guess could be called the environmental security system. We are the gate-keepers of success or failure to husband our resources. For many of us, however, the last few centuries have meant a major loss of control over our lands and waters. We are still the first to know about changes in the

¹²⁴ See G.A. Res. 3171, *supra* note 122, arts. 4-6.

¹²⁵ *Id.* art. 4.

¹²⁶ *Id.* art. 5.

¹²⁷ *Id.* (referencing the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, discussed *supra* note 110 and accompanying text).

environment, but we are now the last to be asked or consulted.

We are the first to detect when the forests are being threatened, as they are under the slash and grab economics of this country. And we are the last to be asked about the future of our forests. We are the first to feel the pollution of our waters, as the Ojibway peoples of my own homelands in northern Ontario will attest. And, of course, we are the last to be consulted about how, when, and where developments should take place in order to assure continuing harmony for the seventh generation.

The most we have learned to expect is to be compensated, always too late and too little. We are seldom asked to help avoid the need for compensation by lending our expertise and our consent to development.

— Louis Bruyere, President, Native Council of Canada¹²⁸

International instruments produced during the 1980s reflect advancement in the global acknowledgment of the link between human and cultural rights. In 1981, for example, the African Charter on Human and Peoples' Rights addressed the rights of individuals and peoples to both first- and second-generation rights.¹²⁹ This inclusiveness is a conscious goal of the African Charter, made clear in its preamble. The preamble recognizes the role played by "historical traditions" in inspiring "the concept of human and peoples' rights," then observes that "the reality and respect of peoples['] rights should necessarily guarantee human rights."¹³⁰ The African Charter juxtaposes individual and group rights in numerous provisions, recognizing that individual

¹²⁸ World Comm'n on Env't & Dev., Report on Development and International Economic Co-operation: Environment, ¶ 63, U.N. Doc. A/42/427 (Aug. 4, 1987) (World Comm'n on Env't & Dev. Pub. Hearing, Ottawa, May 26-27, 1986) (quoted in WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE 61 (1987)).

¹²⁹ Org. of African Unity, African Charter on Human and Peoples' Rights, CAB/LEG/67/3 Rev. 5 (June 27, 1981), 21 I.L.M. 59 (1982).

¹³⁰ *Id.* pmb1. The preamble states in part that:

The . . . parties to the present convention . . . ,
Tak[e] into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

freedom includes participation in the cultural life of the community and that a peoples' right to existence necessitates a right to self-determination.¹³¹ It also addresses the importance of peoples' dominion over property and natural resources.¹³² However, all language related to the need for territorial dominion and rights over natural resources presents these rights as key aspects of a people's ability to develop.¹³³ Like prior conventions, the African Charter never expressly addresses the idea of environmental rights as a means of preserving and honoring a people's aboriginal identity.

The early 1980s also witnessed the emergence of instruments that focus on environmental protection and environmental risk analysis in conjunction with development. In 1982, for example, the World Charter for Nature emerged. This document does, in fact, assert the connection between humankind's well-being and the state of the natural environment, with opening paragraphs that acknowledge the human-nature symbiosis on both individual and collective levels.¹³⁴ The World Charter also sets forth a

Recogniz[e] on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection and on the other hand that the reality and respect of peoples['] rights should necessarily guarantee human rights

Id.

¹³¹ See *id.* art. 17, paras. 2, 3, linking individual and group rights:

2. Every individual may freely . . . take part in the cultural life of his community.

3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

See also *id.* art. 20, para. 1 (addressing first and second generation rights: "All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.").

¹³² See *id.* art. 21, para. 1, 2, which states that:

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

¹³³ See *id.* art. 24 ("All peoples shall have the right to a general[ly] satisfactory environment favorable to their development.").

¹³⁴ G.A. Res. 37/7, Annex, U.N. Doc. A/RES/37/7 (Oct. 28, 1982). Annex, paras. 2(a), (b) state:

framework for environmentally ethical behavior.¹³⁵ It recognizes the intrinsic value of environmental diversity regardless of its utility to mankind, and it charges mankind with the duty to protect nature in the face of man's ability to destroy it.¹³⁶ It also directs that social and economic development plans take account of environmental impacts and make "the conservation of nature . . . an integral part of [development] activities."¹³⁷ As with previous international documents, however, the Charter still falls short. Although an important document in its linkage of development and environmental degradation, the World Charter does not address the symbiosis between indigenous cultural preservation and environmental preservation.

A third example of human- and economic-rights-related international instruments produced in the early to mid-1980s is the 1986 Declaration on the Right to Development.¹³⁸ Although sensitive to the cultural rights of peoples as well as to the threats against territorial integrity, the 1986 declaration, much like previous instruments, equated self-determination with development. It also charges individual nations with the right and duty to formulate nationwide development plans that encompass "the entire population and . . . all individuals."¹³⁹ Once again, although

(a) Mankind is part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients.

(b) Civilization is rooted in nature, which has shaped human culture and influenced all artistic and scientific achievement, and living in harmony with nature gives man the best opportunities for the development of his creativity, and for rest and recreation.

¹³⁵ *Id.* Annex, paras. 3(a), (b). These paragraphs state that:

(a) Every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action,

(b) Man can alter nature and exhaust natural resources by his action or its consequences and, therefore, must fully recognize the urgency of maintaining the stability and quality of nature and of conserving natural resources.

¹³⁶ *Id.*; see also *id.* para. 1 ("Nature shall be respected and its essential processes shall not be impaired.").

¹³⁷ *Id.* para. 7; see also para. 8, requiring environmental sensitivity in long-range development planning; *id.* para. 11, requiring the use of best available technologies to minimize environmental risks.

¹³⁸ G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986).

¹³⁹ *Id.* art. 2, para. 3 ("States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active,

the language is sensitive to the evils of racism and the plight of territorial populations, the declaration appears to be based on an unspoken philosophy that rights to development bring fundamental equality to all.¹⁴⁰ Its most direct assertion on environmental rights captures this sentiment, stating that “[t]he human right to development also implies the full realization of the right of people to self-determination, which includes . . . the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”¹⁴¹

Finally, in the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador,” parties to the American Convention on Human Rights sought to verify, update, and expand upon the provisions of that instrument.¹⁴² Pertinent to the treatment of indigenous cultures, the Additional Protocol acknowledges the holistic interplay between the dignity of the individual and group or cultural rights.¹⁴³ The Additional Protocol also makes express reference to “peoples,” declaring their rights to “development, self-determination, and the free disposal of their wealth and natural resources.”¹⁴⁴ Article 5 does admit that states may restrict the human rights asserted throughout the Additional Protocol “by means of laws promulgated for the purpose of preserving the general welfare in a democratic

free and meaningful participation in the development and in the fair distribution of the benefits resulting therefrom.”).

¹⁴⁰ *Id.* art. 1, para. 1 (“The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”).

¹⁴¹ *Id.* art. 1, para. 2.

¹⁴² Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”) pmbl., Nov. 17, 1988, O.A.S. T.S. No. 69.

¹⁴³ *See id.* (addressing “the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human persona.”).

¹⁴⁴ *Id.* pmbl.

society.”¹⁴⁵ Article 11 offers no elaboration of this oblique observation, asserting the governmental need to “promote the protection, preservation, and improvement of the environment.”¹⁴⁶ Still, the Additional Protocol serves as evidence of the growing acknowledgment of the presence and environmental needs of indigenous peoples as communities rather than as collectives of individuals.

These instruments all serve as harbingers of a string of international documents that directly address the importance of territory and natural resources in indigenous cultures. These more recent documents also suggest acknowledgement of the idea that an indigenous people’s self-determination, and even its survival as an identifiable people, may depend on its ability to control its environment. The following subsections discuss seven of these instruments that emerged in the late 1980s and early 1990s.

1. *Our Common Future*

It is a terrible irony that as formal development reaches more deeply into rain forests, deserts, and other isolated environments, it tends to destroy the only cultures that have proved able to thrive in these environments.¹⁴⁷

1987 witnessed the first significant international instrument to acknowledge the centrality of environmental rights in addressing the plight of indigenous peoples, as well as the importance of traditional habits and knowledge in addressing the plight of the natural environment. Declaring itself no less than “a global agenda for change,” “Our Common Future,” also known as the Brundtland Commission Report (hereinafter “the Report”), was authored by the U.N. World Commission on Environment and Development.¹⁴⁸ As the first widely recognized statement of a

¹⁴⁵ *Id.* art. 5 (declaring that State laws restricting human rights may do so “only to the extent that they are not incompatible with the purpose and reason underlying those rights”).

¹⁴⁶ *Id.* art. 11 (entitled “Right to a Healthy Environment,” the article begins with a provision asserting the individual’s “right to live in a healthy environment and to have access to basic public services.” Thus, it makes its primary thrust public health.).

¹⁴⁷ WORLD COMM’N ON ENV’T & DEV., *supra* note 128, at 115.

¹⁴⁸ *Id.* at ix.

“unifying theme in environmental protection in the international community,” the Report stands as a manifesto of the sustainable development movement.¹⁴⁹ As such, the Report addresses a wide spectrum of environmental issues with pertinence to indigenous peoples, including the positive and negative environmental impacts of development,¹⁵⁰ the links between poverty and environmental degradation,¹⁵¹ and the fact that many of those who bear the costs of pollution are neither the beneficiaries of the pollution nor the polluters themselves.¹⁵²

Unlike earlier international documents, the Report stresses the needs and vulnerabilities of indigenous peoples in terms other than demands for economic advancement through assimilation involving technology-sharing and recognition of tribal property rights.¹⁵³ To the contrary, the Report states that “indigenous

¹⁴⁹ See Watters, *supra* note 10, at 269 (“With remarkable foresight, the Report remains, fifteen years after its publication, an eloquent testament for advancing environmental protection, rights, including those of indigenous peoples, and sustainable development. Indeed it is not too much to say that the Commission’s formulation of sustainable development remains the most widely recognized, unifying theme in environmental protection in the international community.” (footnotes omitted)).

¹⁵⁰ See, e.g., WORLD COMM’N ON ENV’T & DEV., *supra* note 128, at 28-29 (“Environmental stress has often been seen as the result of the growing demand of scarce resources and the pollution generated by the rising living standards of the relatively affluent. But poverty itself pollutes the environment, creating environmental stress in a different way. . . . On the other hand, where economic growth has led to improvements in living standards, it has sometimes been achieved in ways that are globally damaging in the longer term. . . . Thus today’s environmental challenges arise both from the lack of development and from the unintended consequences of some forms of economic growth.”).

¹⁵¹ See, e.g., *id.* at 30 (“[Natural] disasters claim most of their victims among the impoverished in poor nations, where subsistence farmers must make their land more liable to droughts and floods by clearing marginal areas, and where the poor make themselves more vulnerable to all disasters by living on steep slopes and unprotected shores – the only lands left for their shanties.”).

¹⁵² See, e.g., *id.* at 34 (“Many who bear these risks [posed by radioactive waste, for example] do not benefit in any way from the activities that produce the wastes.”). More generally, Part I of the Report addresses sustainable development and the international economy. Part II addresses population, food supply, species protection, and energy, industrial, and urban challenges. Part III addresses the global commons, the links between environmental stresses and conflict, and the legal challenges.

¹⁵³ See, e.g., *id.* at xi (criticizing the fact that “[t]he word ‘development’ has . . . been narrowed by some into a very limited focus, along the lines of ‘what poor nations should do to become richer’ . . .”); see also *id.* at 3 (“There has been a growing

peoples will need special attention as the forces of economic development disrupt their traditional life-styles; life-styles that can offer modern societies many lessons in the management of resources in complex forest, mountain and dryland ecosystems,” and notes that “[s]ome [indigenous communities] are threatened with virtual extinction by insensitive development over which they have no control.”¹⁵⁴

The Report does far more, however, than treat indigenous populations as a minority population group. Citing social discrimination, cultural barriers, and the exclusion of indigenous peoples from the political arena, the Report expresses concern that the marginalization of such peoples could amount to their “cultural extinction.”¹⁵⁵ This would not only be unjust and inhumane, the Report asserts, but also a loss for the environment:

These communities are the repositories of vast accumulations of traditional knowledge and experience that links humanity with its ancient origins. Their disappearance is a loss for the larger society, which could learn a great deal from their traditional skills in sustainably managing very complex ecological systems.¹⁵⁶

As such, the Report asserts, indigenous communities’ “traditional rights should be recognized and they should be given a decisive voice in formulating policies about resource development in their areas.”¹⁵⁷

2. *International Labor Organization Convention No. 169*

Perhaps the strongest contemporary statement of international responsiveness to indigenous peoples’ demands emerged

realization in national governments and multilateral institutions that it is impossible to separate economic development issues from environment issues: many forms of development erode the environmental resources upon which they must be based, and environmental degradation can undermine economic development.”).

¹⁵⁴ *Id.* at 12.

¹⁵⁵ *Id.* at 114.

¹⁵⁶ *Id.* at 114-15.

¹⁵⁷ *Id.* at 12.

in 1989 in the form of the International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries, generally known as “ILO Convention No. 169.”¹⁵⁸ ILO Convention No. 169, the result of long-term efforts by human rights groups to promote the protection of indigenous rights, replaced ILO Convention No. 107, which, as noted above, endorsed assimilation as the means to achieve equality between indigenous and non-indigenous populations.¹⁵⁹ Representing a reversal of that philosophy, ILO Convention No. 169 expresses the ideal of indigenous peoples maintaining and strengthening their cultural identities as distinct communities existing within larger communities.¹⁶⁰

The preamble to ILO No. 169 recognizes the unique cultural contributions indigenous peoples offer humankind, both in terms of diversity and in their relationship with nature, called “ecological harmony” by the Convention.¹⁶¹ At the same time, the preamble acknowledges the unique threats that assimilationist policies have presented to the cultural survival of indigenous peoples, including their “laws, values, customs and perspectives.”¹⁶² Thus, ILO Convention No. 169 integrates self-determination and environmental values in its statement that the nations of the world need their indigenous populations even as they threaten their cultural existence.

¹⁵⁸ Int’l Lab. Org., Convention Concerning Indigenous and Tribal Peoples in Independent Countries, pmb., June 27, 1989, 28 I.L.M. 1382 [hereinafter ILO Convention No. 169].

¹⁵⁹ ILO Convention No. 169 expressly rejects the integrationist theme of its predecessor Convention. *See id.* (“[D]evelopments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards . . . with a view to removing the assimilationist orientation of the earlier standards.”).

¹⁶⁰ *Id.* (“*Recognising* the aspirations of [indigenous and tribal] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which their live. . .”).

¹⁶¹ *Id.* (“*Calling* attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding. . .”).

¹⁶² *Id.* (“Noting that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded. . .”).

In addition to its preamble language, ILO Convention No. 169 sets forth a number of specific directives concerning the environment that may be expressed as five distinct environmental rights. First, Article 4 introduces the state obligation to protect indigenous peoples' environments from intrusion or exploitation by outsiders, requiring "special measures" to be adopted "as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment" of indigenous populations.¹⁶³ Article 18 also addresses this concern, declaring that "[a]dequate penalties . . . be established by law for unauthorized intrusion upon, or use of, the lands of the people concerned, and [that] governments . . . take measures to prevent such offenses."¹⁶⁴

A second category of environmental rights addressed by ILO Convention No. 169 gives indigenous peoples a voice in managing development programs that impact their environmental interests. Article 7, for example, declares that indigenous peoples have "the right to decide their own priorities for the process of development as it affects their lives, beliefs, [territories], [lands], institutions and spiritual well-being," and demands that "[g]overnments . . . take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit."¹⁶⁵ Article 7 identifies impact studies carried out in cooperation with the indigenous peoples concerned as one method that the peoples may control the environmental impacts of planned development activities.¹⁶⁶ Article 15 further identifies an environmental right of indigenous peoples "to participate in the use, management and conservation of [their natural] resources."¹⁶⁷ Article 15 goes on to require states to

¹⁶³ *Id.* art. 4, para. 1. In keeping with the ideals of self-determination, article 4, para. 2 notes that "[s]uch special measures shall not be contrary to the freely-expressed wishes of the peoples concerned."

¹⁶⁴ *Id.* art. 18.

¹⁶⁵ *Id.* art. 7, paras. 1, 4.

¹⁶⁶ *Id.* art. 7, para. 3.

¹⁶⁷ *Id.* art. 15, para. 1.

“establish or maintain procedures through which they shall consult [with the indigenous] peoples . . . before undertaking or permitting any programmes for the exploration or exploitation of [mineral or sub-surface] resources pertaining to their lands.”¹⁶⁸

A third environmental right that ILO Convention No. 169 recognizes is that of property and natural resource ownership. Article 14 states outright that “[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized,” and is sensitive enough to require that “[p]articular attention . . . be paid to the situation of nomadic peoples and shifting cultivators.”¹⁶⁹ Article 14 sets governments the task of formally identifying and protecting the lands occupied by indigenous peoples, and also of establishing procedures to settle land claim disputes.¹⁷⁰ Adding to the property focus of Article 14, Article 15 recognizes indigenous peoples’ ownership interests in natural resources on their traditional territories, requiring states to specifically safeguard these interests.¹⁷¹ A fourth, related indigenous environmental right is the right to state aid in developing agrarian programs. This right is fortified by the government obligation to value and promote rural and community-based industries.¹⁷²

¹⁶⁸ *Id.* art. 15, para. 2. It is worth noting that this consultation requirement applies “[i]n cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to [indigenous] lands.” *Id.* The section finishes by stating that “[t]he peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they must sustain as a result of such activities.” *Id.*

¹⁶⁹ *Id.* art. 14, para. 1. Article 14, para. 1 goes on to specify that “measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.”

¹⁷⁰ *Id.* art. 14, paras. 2, 3.

¹⁷¹ *Id.* art. 15, para. 1.

¹⁷² *Id.* art. 19 (requiring “[n]ational agrarian programmes [so as to] secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population.”); *see also id.* art. 23, para. 1 (referring to subsistence economy and traditional activities such as hunting, fishing, trapping and gathering: “Governments shall, with the participation of these peoples and whenever appropriate, ensure that these activities are strengthened and promoted.”); *id.* art. 23, para. 2 (“Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.”).

Perhaps the most important environmental right recognized in ILO Convention No. 169 stems from its acknowledgment of the interconnectedness between the environment and indigenous culture. This acknowledgement squarely brings environmental and natural resource issues into the concern over indigenous peoples' identity and survival. Article 13 addresses this straightforwardly, requiring states to "respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the land or territories . . . which they occupy or otherwise use, and in particular the collective aspects of this relationship."¹⁷³ Similarly, Article 23 declares that "subsistence economy and traditional activities of the [indigenous] peoples . . . such as hunting, fishing, trapping and gathering, shall be recognized as important factors in the maintenance of their cultures and in their self-reliance and development."¹⁷⁴

ILO Convention No. 169 consists primarily of broad directives ordering participating governments to view indigenous peoples as deserving of special protections; states are thus required to develop laws and programs to protect various interests of indigenous peoples residing within their national boundaries. Though its lack of specificity might allow speculation as to its legal effectiveness, the Convention nevertheless stands as a leading expression of international recognition of the importance of indigenous cultures and the significance of the environment to their cultural survival.

3. *The World Bank Operational Directive on Indigenous Peoples*

In 1991, the World Bank promulgated Operational Directive 4.20: Indigenous Peoples.¹⁷⁵ This Directive sets forth the World Bank's policies and procedures for Bank-assisted projects that may detrimentally impact indigenous peoples, including agricultural projects, road construction, forestry projects, hydropower

¹⁷³ *Id.* art. 13, para. 1.

¹⁷⁴ *Id.* art. 23, para. 1.

¹⁷⁵ World Bank, Indigenous Peoples, Operational Directive 4.20 (September 17, 1991).

projects and mining projects, among others.¹⁷⁶ Its primary goal is to sensitize those engaging in such activities to the needs and vulnerabilities of indigenous peoples, particularly with regard to “their interests and right in land and other productive resources.”¹⁷⁷ In focusing on sensitivity to the connection between indigenous peoples and their environmental resources, the directive’s provisions reveal a heightened awareness about a number of concerns left unaddressed in earlier international instruments. For example, the directive identifies its foremost objective as

ensur[ing] that the development process fosters full respect for [indigenous peoples’] dignity, human rights, and cultural uniqueness. More specifically, the objective at the center of this directive is to ensure that indigenous peoples do not suffer adverse effects during the development process, particularly from Bank-financed projects, and that they receive culturally compatible social and economic benefits.¹⁷⁸

Unlike the language of many prior instruments that address the need to provide development opportunities for developing nations, this language reflects the World Bank’s recognition that development can threaten indigenous peoples’ cultural identity.¹⁷⁹ Moreover, because the directive focuses primarily on land and resource related projects, the quoted language also reveals the Bank’s recognition of the close connection between indigenous peoples’ culture and environment.

Other provisions in the directive link the concepts of self-determination and environmental decision making more directly than have prior instruments. Among its statements of objectives

¹⁷⁶ *Id.* para. 10 (“Issues concerning indigenous peoples can arise in a variety of sectors that concern the Bank: those involving, for example, agriculture, road construction, forestry, hydropower, mining, tourism, education, and the environment should be carefully screened.”).

¹⁷⁷ *Id.* para. 2. The Directive offers “policy guidance” intended to ensure that Bank projects benefit indigenous peoples and also to minimize adverse impacts on indigenous peoples. *Id.*

¹⁷⁸ *Id.* para. 6.

¹⁷⁹ Similarly, paragraph 15 of the Directive warns that “[i]n many cases, proper protection of the rights of indigenous people will require the implementation of special project components that may lie outside the primary project’s objectives. These components can include activities related to . . . linguistic and cultural preservation [and] entitlement to natural resources.” *Id.* ¶ 15.

and policies, the directive states that strategies for addressing issues relating to indigenous peoples “must be based on the *informed participation* of the indigenous peoples themselves.”¹⁸⁰ Its primary prerequisite for successful development plan states that “[t]he key step in project design is the preparation of a culturally appropriate development plan based on full consideration of the options preferred by the indigenous peoples affected by the project.”¹⁸¹ Elsewhere, the directive advises that development plans include strategies” for participation by indigenous people in decision making through project planning, implementation, and evaluation.”¹⁸²

Perhaps the directive’s strongest assertion of the need for indigenous peoples to maintain control over their own destiny is its provision advising that all development plans include an assessment of the legal status of the indigenous peoples that might be affected by a World Bank project, along with an assessment of whether the legal system will actually protect them.¹⁸³ That provision ends with the warning that: “[p]articular attention should be given to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wildlife, and water) vital to their subsistence and reproduction.”¹⁸⁴ Complementing the requirement that development plans assess the legal status of indigenous peoples, the directive also advises that where the Bank perceives that indigenous peoples’ rights are weak, it should work to strengthen them through legislative or other means.¹⁸⁵ In these provisions, the directive ties indigenous

¹⁸⁰ *Id.* para. 8

¹⁸¹ *Id.* para. 14(a). The development plan prerequisites also include the directive that “[p]lanning should encourage early handover of project management to local people.” *Id.* ¶ 14(f).

¹⁸² *Id.* para. 15(d).

¹⁸³ *Id.* para. 15(a) (“The [development] plan should contain an assessment of (i) the legal status of the groups covered by this [Operational Directive], as reflected in the country’s constitution, legislation, and subsidiary legislation (regulations, administrative orders, etc.); and (ii) the ability of such groups to obtain access to and effectively use the legal system to defend their rights.”).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* para. 15(c):

When local legislation needs strengthening, the Bank should offer to advise and assist the Borrower in establishing legal recognition of the customary

peoples' self-determination to environmental dominion and preservation, and acknowledges that development can threaten those indigenous interests to the point where significant actions may be necessary to offset that threat.¹⁸⁶

4. *The Rio Declaration on Environment and Development*

The Earth Summit of 1992 also stands as a significant moment in the recognition of indigenous peoples' rights, if only due to the breadth of participation in the summit and the global interest in its work product.¹⁸⁷ That work product, the Rio Declaration, is a short series of statements cast as principles, most of

or traditional land tenure systems of indigenous peoples. Where the traditional lands of indigenous peoples have been brought by law into the domain of the state and where it is inappropriate to convert traditional rights into those of legal ownership, alternative arrangements should be implemented to grant long-term, renewable rights of custodianship and use to indigenous peoples. These steps should be taken before the initiation of other planning steps that may be contingent on recognized land titles.

¹⁸⁶ A 2003 World Bank Report reviewed projects developed under the guidelines of the Operational Directive, and recommended that the Bank:

- (i) clarify the intent, scope, and requirements of the [Operational Directive];
- (ii) distinguish clearly between the *safeguard (do no harm)* aspects of the [Operational Directive] and its *do good* aspects. . . .
- (iii) identify indigenous and tribal groups in a manner consistent with the country's legal framework. In countries where the legal framework does not meet the standards of the policy relating to coverage of [indigenous peoples], the Bank should ensure that [indigenous peoples] are protected within the overall framework of its poverty reduction policies and establish a project-level policy to monitor disaggregated impact on [indigenous peoples].
- (iv) ensure that in countries with significant [indigenous peoples] populations the Country director . . . engage the Borrower in discussions on how the Bank can best assist the country in providing culturally appropriate assistance to the [indigenous peoples] within the context of the Country Assistance Strategy . . .
- (v) design regional and sub-regional strategies to implement the [Operational Directive] given the significant differences in circumstances faced by Bank staff in implement the policy.

World Bank, Operations Evaluation Dep't, Country Evaluation & Reg'l Relations (OEDCR), *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review*, at 2-3, Report No. 25332 (Jan. 10, 2003).

¹⁸⁷ Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc A/CONF.151/5/Rev.1 (June 13,

which address the responsibilities of nation states to their populations and to one another.¹⁸⁸

Principle 22 is the sole provision of the Declaration that addresses indigenous peoples. It states:

Indigenous people and their communities . . . have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.¹⁸⁹

Like ILO Convention No. 169, the Declaration casts indigenous cultures as key to the success of dominant cultures insofar as the dominant cultures' efforts to manage the health of the natural environment. Although it does not add to the sentiments expressed in Convention 169, it stands as an eloquent, highly public statement of the symbiosis between environmental protection and indigenous peoples' territorial rights and customs.

5. *The Convention on Biological Diversity*

In addition to the Rio Declaration, several other important documents addressing global environmental issues emerged from the 1992 Earth Summit in Rio de Janeiro.¹⁹⁰ Among these is the Convention on Biological Diversity, which expands upon the Rio

1992), *reprinted in* 33 I.L.M. 874 [hereinafter *Rio Declaration*]. On the significance of the Earth Summit, see Watters, *supra* note 10, at 271 (“[The Earth Summit] was a milestone because it involved participation on a scale far beyond any previous international forum addressing law and the environment.”).

¹⁸⁸ *Rio Declaration*, *supra* note 187. Approximately seven of the Declaration's twenty-seven principles address states' obligations to protect the environment within their borders. *Id.* princs. 3, 4, 8, 9, 11, 15, & 17. Approximately twelve principles address states' obligations to other states with respect to the environment. *E.g.*, *id.* princs. 1, 10, 13, 16, 21, & 23. Other principles address the environmental rights of individuals or non-governmental groups, and some offer observations that are not stated in terms of obligations or rights. *See, e.g.*, *id.* princ. 25, observing that “[p]eace, development and environmental protection are interdependent and indivisible.”

¹⁸⁹ *Id.* princ. 22.

¹⁹⁰ *See* United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 164; *see also* Conference on Env't & Dev., Rio de Janeiro, Braz., June 13, 1992, *Statement of Principles for a Global Consensus of the Mgmt., Conservation and Sustainable Dev. of all Types of Forests*, U.N. Doc. A/CONF.151/6/Rev.1.

Declaration's assertion that indigenous peoples serve an important function in the conservation of biological diversity.¹⁹¹

For example, Article 8 of the convention, which addresses in-situ conservation, orders signing parties to "respect, preserve, and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices."¹⁹² Article 10, on the sustainable use of components of biological diversity, urges parties to the convention to "[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements,"¹⁹³ thus also recognizing the environmental benefits of indigenous practices. Finally, Article 18, which addresses the issue of technical and scientific cooperation, exhorts participating parties to "encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of this convention."¹⁹⁴ Each of these statements reveals not only an appreciation for indigenous customs insofar as their tendency to promote biological diversity, but also a sensitivity to the important role that indigenous peoples should occupy in environmental planning and policy development.

6. *The Draft United Nations Declaration on the Rights of Indigenous Peoples*

In 1993, the United Nations Working Group on Indigenous Populations completed its Draft Declaration on the Rights of Indigenous Peoples.¹⁹⁵ The draft declaration covers a wide spectrum of issues of importance to indigenous peoples, with its

¹⁹¹ United Nations Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.

¹⁹² *Id.* art. 8(j).

¹⁹³ *Id.* art. 10(c).

¹⁹⁴ *Id.* arts. 18(2), 18(4).

¹⁹⁵ U.N. Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Report of the Sub-Commission on Prevention and Protection*

prologue touching on fundamental human rights, self-determination, development, demilitarization of indigenous territories, and economic and social progress.¹⁹⁶ The spectrum of rights detailed in the draft declaration's forty-five articles include rights against genocide; the right to maintain a distinct identity; rights to protection and security in periods of armed conflict; rights associated with spiritual traditions, languages and oral traditions; rights to all levels and forms of state education; and the right of self-representation and the right to participate in the legislative and administrative processes. It also includes rights associated with the development of economic and social programs; rights to health services, including the right to use traditional medicines and health practices; cultural and intellectual property rights; and self-government in matters related to internal affairs.¹⁹⁷

Indigenous peoples' rights associated with land, territories, and natural resources appear prominently in the draft declaration. The prologue places special emphasis on the environmental wrongs suffered by indigenous peoples, recognizing the "urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their land, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies."¹⁹⁸ Thus in its opening

of Minorities on its Forty-Sixth Session, Draft Declaration on the Rights of Indigenous Peoples, 105-115, U.N. Doc. E/CN.4/1995/2: E/CN.4/Sub. 2/1994/56 (Oct. 28, 1994) [hereinafter *Indigenous Draft Declaration*]. The Working Group began its effort to draft a human rights instrument directed at the protection of indigenous peoples in 1987. It produced a refined draft in 1993. Howard R. Berman, *Introductory Note*, 34 I.L.M. 541, 542 (discussing the *Indigenous Draft Declaration*).

¹⁹⁶ *Indigenous Draft Declaration*, *supra* note 195, pmbl. The preamble affirms that indigenous peoples are "equal in dignity and rights to all other peoples," that "all peoples contribute to the diversity and richness of civilization," and that "all doctrines, policies and practices based on . . . racial, religious, ethnic or cultural differences are . . . morally condemnable and socially unjust." *Id.* It expresses concern over indigenous peoples having been "deprived of their human rights and fundamental freedoms" resulting in their "colonization and dispossession of their lands, territories and resources." *Id.*

¹⁹⁷ *See, e.g., id.* arts. 7, 8, 11, 12, 13, 14, 15, 19, 20, 22, 24, 25, 29, 31.

¹⁹⁸ *Id.* pmbl. The preamble goes on to link control over development affecting indigenous peoples' lands and natural resources with the strengthening of their institutions, cultures, and traditions. It also links indigenous knowledge, culture, and traditions with proper management of the environment. *Id.*

language, the draft declaration squarely asserts the interconnectedness of indigenous cultural survival and environmental rights.

Following this introduction, the draft declaration addresses a number of environmental issues of significance to indigenous peoples, including protection from outsiders, recognition of property rights, restitution for past injustices, and the right to revitalize indigenous culture through connections with the environment. Environmental protection is addressed in Article 7, which charges states with the responsibility to prevent or redress actions that aim to dispossess indigenous peoples of their lands or natural resources.¹⁹⁹ Similarly, Article 10 bans the forcible removal of indigenous peoples from their lands, and limits relocations to those which takes place with “the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”²⁰⁰ Article 28 demands protection against a different sort of invasion, charging states with the obligation to “take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.”²⁰¹ Related to these demands, Article 30 requires that indigenous peoples maintain the authority to “determine and develop priorities and strategies for the development or use of their lands,” which includes a consent right for any project impacting their environmental resources.²⁰²

Other articles of the draft declaration address the needs of indigenous peoples to revitalize their culture by reconnecting with their environment. Articles 27 and 28 address the indigenous right to reoccupy land and restore its historical condition. Article 27 declares that “[i]ndigenous peoples have the right to the restitution of the lands, territories and resources which they

¹⁹⁹ *Id.* art. 7(b).

²⁰⁰ *Id.* art. 10.

²⁰¹ *Id.* art. 28.

²⁰² *Id.* art. 30 (specifying a particular interest in tribal consent authority over “the development, utilization or exploitation of mineral, water or other resources.”) It is worth noting that Article 30 does not assert an ownership interest in indigenous peoples over their land, while Article 29 states that “[i]ndigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.” *Id.* art. 29.

have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent.”²⁰³ Article 28, in turn, addresses environmental restoration, declaring that “[i]ndigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation.”²⁰⁴

Articles 25 and 26 may be the draft declaration’s most significant statements of indigenous environmental rights. These articles directly address the symbiosis between indigenous peoples and their natural environment, including the connection between indigenous peoples and their traditional territory for sustenance and cultural practices. Article 25 states that “[i]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.”²⁰⁵ Article 26, in turn, declares:

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by states to prevent any interference with, alienation of or encroachment upon these rights.²⁰⁶

Overall, these articles assert the rights of indigenous peoples in terms that demonstrate the international community’s awareness of the link between ecology and indigenous spiritualism as well as sustenance. The draft declaration’s provisions also stress

²⁰³ *Id.* art. 27. This article goes on to assert the right to just compensation where restitution is not possible, and to specify that compensation shall take the form of “lands, territories, and resources equal in quality, size and legal status” to that lost. *Id.*

²⁰⁴ *Id.* art. 28 (also banning uninvited military activities on indigenous lands).

²⁰⁵ *Id.* art. 25.

²⁰⁶ *Id.* art. 26.

the importance of the state's recognition of indigenous peoples' property rights and its legal protection of those rights.

7. *The Johannesburg Declaration and Plan of Implementation of the World Summit on Sustainable Development*

In 2002, the World Summit on Sustainable Development that took place in Johannesburg, South Africa produced a declaration affirming the commitments to sustainable development set forth in the Rio Declaration.²⁰⁷ As a short, sometimes flowery reminder of the earth's peoples' obligation to sustain the planet's natural resources for future generations, the Johannesburg Declaration focuses on two main objectives in that mission. First, the declaration identifies the goal of achieving essential human dignity for all persons. Essential human dignity under the declaration includes access to basic conditions necessary to a healthy, comfortable lifestyle; access to development opportunities; and the recognition and equal treatment of all members of the global community.²⁰⁸ Second, the declaration stresses its commitment to a multifaceted approach to environmental stewardship, encompassing poverty eradication, informed consumptive and production patterns, and environmentally sensitive economic and social

²⁰⁷ World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26-Sept. 4, 2002, *Johannesburg Declaration on Sustainable Development*, ¶¶ 1, 8, U.N. Doc. A/CONF.199/20 [hereinafter *Johannesburg Declaration*].

²⁰⁸ *Id.* ¶ 2 (addressing the signatories commitment "to building a humane, equitable and caring global society cognizant of the need for human dignity for all"); *id.* ¶ 12 (warning that "[t]he deep fault line that divides human society between the rich and the poor and the ever-increasing gap between the developed and developing worlds pose a major threat to global prosperity, security and stability"); *id.* ¶ 18 (addressing human dignity as requiring "access to such basic requirements such as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of biodiversity," and identifying as related to these "access to financial resources, . . . modern technology to bring about development, and . . . technology transfer, human resource development, education and training to banish underdevelopment forever"); *id.* ¶ 19 (identifying "severe threats to the sustainable development" as "chronic hunger; malnutrition; foreign occupation; armed conflict; illicit drug problems; organized crime; corruption; natural disasters; illicit arms trafficking; trafficking in persons; terrorism; intolerance and incitement to racial, ethnic, religious and other hatreds; xenophobia; and endemic, communicable and chronic diseases, in particular HIV/AIDS, malaria and tuberculosis"); *id.* ¶ 20 (addressing women's empowerment).

development, all elements of sustainable development.²⁰⁹ The declaration makes reference to the “rich diversity” of humankind, which it defines as a strength in attaining the ideal of a global program of sustainable development.²¹⁰ In a separate provision, the declaration asserts without elaboration “the vital role of the indigenous peoples in sustainable development.”²¹¹

The Plan of Implementation of the World Summit on Sustainable Development fleshes out the Johannesburg Declaration.²¹² In an introductory provision, this eleven-chapter document cites “respect for cultural diversity” as one of the essential means toward a global system of sustainable development.²¹³ In keeping with this call for heightened awareness of the differing needs of diverse segments of the earth’s population, a number of the Plan’s provisions demand that particular attention

²⁰⁹ *Id.* ¶ 5 (addressing the “collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development—economic development, social development and environmental protection—at local, national, regional and global levels”); *id.* ¶ 8 (identifying “the protection of the environment and social and economic development [as] fundamental to sustainable development”); *id.* ¶ 11 (identifying “poverty eradication, changing consumption and production patterns and protecting and managing the natural resource base for economic and social development [as] overarching objectives of, and essential requirements for sustainable development”); *id.* ¶ 21 (coupling “poverty eradication and sustainable development”).

²¹⁰ *Id.* ¶ 16 (identifying “our rich diversity, which is our collective strength,” as the basis of “constructive partnership for change and for the achievement of the common goal of sustainable development”). *Id.* ¶ 10 references the Summit’s “rich tapestry of peoples and views [as aiding in the] constructive search for a common path towards a world that respects and implements the vision of sustainable development.” *Id.* ¶ 26 recognizes that “sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels.”

²¹¹ *Id.* ¶ 25.

²¹² Conference on Environment and Development, Rio de Janeiro, Braz., Aug. 26-Sept. 4, 2002, *Plan of Implementation of the World Summit on Sustainable Development*, U.N. Doc. A/Conf.199/20 (2002).

²¹³ *Id.* ¶ 5 (also citing “[p]eace, security, stability and respect for human rights and fundamental freedom, including the right to development” as “essential for achieving sustainable development and ensuring that sustainable development benefits all.”). Paragraph 43(b) calls for programs to enable indigenous communities to develop and benefit from eco-tourism. *Id.* ¶ 43(b).

be paid to the living conditions of discreet groups, including indigenous peoples.²¹⁴ Indeed, indigenous peoples are expressly addressed in seventeen provisions or sub-provisions, some of which read like prior declarations urging the availability of opportunities for economic development.²¹⁵ Other provisions acknowledge the unique symbiosis between tribal culture and environment, and thus the importance of enabling indigenous peoples to profitably share their traditional knowledge.²¹⁶

In Chapter II on poverty eradication, for example, one provision calls for the recognition of the fact that “traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities.”²¹⁷ In Chapter IV, which addresses the protection and management of the natural resource base of economic and social development, one provision recognizes the usefulness of “traditional and indigenous knowledge” in mitigating the impacts of natural disasters,²¹⁸ while other provisions call for the enactment of measures to protect and promote indigenous resource management systems and models of agricultural production.²¹⁹ Indeed, one provision calls for the development and

²¹⁴ See, e.g., *id.* ¶ 53 (addressing “the urgent need to address the causes of ill health, including environmental causes, and their impact on development, with particular emphasis on . . . vulnerable groups of society, such as . . . indigenous peoples.”).

²¹⁵ Paragraph 7(e) urges the development of means through which “to improve access by indigenous people and their communities to economic activities and increase their employment through . . . measure such as training, technical assistance and credit facilities.” *Id.* ¶ 7(e). Paragraph 46(b) calls for the “participation of stakeholders, including . . . indigenous communities . . . in minerals, metals and mining development. . . .” *Id.* ¶ 46(b).

²¹⁶ *Id.* ¶ 44(k) (calling for the recognition of the “specific role of . . . indigenous . . . communities in conserving and using biodiversity in a sustainable way”); *Id.* ¶ 44(j) (promoting the “effective participation of indigenous . . . communities in decision and policy-making concerning the use of their traditional knowledge”). Addressing health and medical needs, Chapter VI calls for the recognition of indigenous communities as “custodians of traditional knowledge and practices.” *Id.* ¶ 54(h). See also *id.* ¶ 64(d) (calling for the promotion of “indigenous medical knowledge, . . . including traditional medicine”).

²¹⁷ *Id.* ¶ 7(e). Paragraph 7(h) also recognizes the distinct needs of indigenous communities in connection with access to agricultural resources. *Id.* ¶ 7(h).

²¹⁸ *Id.* ¶ 37(f).

²¹⁹ *Id.* ¶¶ 40(h), (r). Paragraph 44(h), which calls for financial and technical support for the enhancement of indigenous biodiversity conservation efforts, serves as

implementation of “benefit-sharing mechanisms on mutually agreed terms for the use of [traditional] knowledge, innovations and practices.”²²⁰ It may be perceived as an omission that indigenous communities are not expressly referenced in the plan’s final section addressing the need for individual nations to institute strategies for sustainable development.²²¹ Nevertheless, it is apparent from the plan that environmentalists worldwide have come to accept that indigenous peoples’ traditional knowledge may serve as a source of the practices and benefits of environmentally sensitive development policies.

C. SUMMATION

The international instruments outlined above reveal several trends in the global community’s sensitivity toward and manner of addressing the environment-related rights of indigenous peoples. Positive trends include the shift from a world-view favoring assimilation to one favoring self-determination, the increased awareness of the symbiotic relationship between indigenous cultures and the natural environment, and the realization that indigenous knowledge may provide systems of environmental sustainability.²²² These trends denote an evolution in the international community’s appreciation for the significance and cultural

further evidence of an appreciation of the environmental practices of indigenous peoples. *Id.* ¶ 44(h). Paragraph 45(h) calls for the support of indigenous forest management systems “to ensure their full and effective participation in sustainable forest management.” *Id.* ¶ 45(h).

²²⁰ *Id.* ¶ 44(j), which also calls for the recognition of the “rights of local and indigenous communities who are holders of traditional knowledge, innovations and practices,” but acknowledges that any mutually beneficial agreement for the sharing of traditional knowledge must be “[s]ubject to national legislation.”

²²¹ *Id.* ¶¶ 162-70 (addressing the need for nations to formulate national strategies for sustainable development, and the need for partnerships among governmental and non-governmental groups in programs and activities that aim to achieve sustainable development).

²²² One expert summarized the trend as follows:

1. The right to self-determination with sovereignty over natural resources;
2. The right to health including the right to freedom from health-threatening environmental degradation;
3. The right to information about the environment;
4. The right to participate in environmental decision-making;
5. The right to free association;
6. The right to preservation and the use of the environment for cultural purposes;

value of preserving indigenous peoples. This evolution coincides with the international community's growing appreciation of the need for environmental protection in general, including the need to renew traditional forms of natural resource husbandry. As a result of this enlightenment, the most recent international instruments addressing indigenous peoples and their environment focus on more than simply protecting these cultures; the current focus is on how the non-indigenous population may learn about environmental protection and the value of natural resources from the older, indigenous cultures.

IV. FROM RHETORIC TO APPLICATION: TWO INTERNATIONAL COURT CASES ON INDIGENOUS PEOPLES' ENVIRONMENTAL RIGHTS

As evidenced by the development of international instruments over the past several decades, the international community has experienced an escalating sense of urgency that non-indigenous governments learn to value and effectively protect their indigenous populations.²²³ How such sentiments translate into domestic law and policy is, however, in most cases necessarily left up to individual nations, which have by and large found the task more difficult than the rhetoric of international declarations, conventions, and other instruments may suggest.²²⁴ Incorporating the aspirational declarations of international committees into complex state systems of government and law may be difficult

7. The right to freedom from discrimination and the right of equal protection of the law.

Watters, *supra* note 10, at 275 (footnote omitted).

²²³ This trend was heralded by the President of the United Nations' General Assembly in 1994 when he declared the decade to be devoted to the protection and appreciation of indigenous populations, which, he observed "constitute a vulnerable group which has long been neglected." See Howitt et al., *supra* note 34, at 10 (quoting Amara Essy, President, U.N. Gen. Assembly, Statement at the Commencement of the International Decade of the World's Indigenous People (Dec. 8, 1994)).

²²⁴ See *id.* at 1:

Fundamental changes in the global political order during the 1990s have thrown open complex issues of sovereignty, territoriality and nationhood. Questions of what constitutes nation states, relations between nation states and their constituent peoples and territories, and the nature of national sovereignty are not longer quite so clear-cut as they once seemed.

enough; applying them to individual disputes has proven even trickier.²²⁵ As one commentator noted about the various ambitious conventions emerging from the 1992 Earth Summit, “[t]hese agreements . . . lacked teeth. They were largely devoid of the firm commitments that had in the past occasionally led to progress on significant international environmental issues.”²²⁶

For this reason, international courts serve a necessary role in implementing the pledges set forth in such instruments. The following sections present two diverse cases in which an indigenous individual or community called upon a court to recognize and protect the environmental rights of indigenous peoples. The selected cases highlight a number of the concepts and struggles that have become part of the landscape of international law on indigenous peoples. Part A presents the 1985 United Nations Human Rights Committee case of *Kitok v. Sweden*, in which the reindeer herding interests of a Sami individual were pitted against those of the indigenous group to which he had been born.²²⁷ Part B details *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* 2002 Inter-American Court of Human Rights decision on the land and natural resource rights of indigenous peoples occupying the rainforest region of Nicaragua.²²⁸

A. THE HUMAN RIGHTS COMMITTEE ON SOVEREIGN AUTHORITY IN SAMI TERRITORY

The Nordic Sami people occupy four countries in the Arctic and sub-Arctic regions, with the bulk of the population dwelling

²²⁵ See David M. Driesen, *Thirty Years of International Environmental Law: A Retrospective and Plea for Reinvigoration*, 30 SYRACUSE J. INT'L. L. & COM. 353, 364 (2003) (“Anybody who has worked on implementing environmental law (as I have) appreciates its multilayered nature. In practice, a huge number of things have to go right in order for law to have favorable physical effects upon the environment. At the international level, this problem becomes compounded.”).

²²⁶ See *id.* at 360 (discussing the United Nations Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79; United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 164; U.N. Conference on Environment and Development, June 3-14, 1992, *Agenda 21*, U.N. Doc. A/CONF.151/26/Rev.1, vol. I, at 9 (1992); and the Declaration of Principles, U.N. Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1, vol. I, at 3 (1992)).

²²⁷ See *infra* notes 229-277 and accompanying text.

²²⁸ See *infra* notes 278-322 and accompanying text.

in Norway.²²⁹ They constitute an indigenous population because, as occupants of the Scandinavian peninsula since the late Middle Ages who currently live within the political borders of contemporary countries, they maintain a distinct language, culture, and ethnicity.²³⁰ Like many indigenous peoples, the Sami subsist in close symbiosis with the natural environment, as hunters and gatherers, fishermen, trappers, and reindeer herders.²³¹ As such, the environment sits at the core of Sami religion, ritual practices, and oral heritage.²³²

1. *Background: Efforts to Recognize Sami Occupation Rights*

For centuries, the Swedish government recognized the Sami as a unique arrangement of indigenous communities, possessing governments and territorial borders as well as the right to neutrality in war.²³³ Indeed, until 1751 there was no national border

²²⁹ See Watters, *supra* note 10, at 250 (citing TOM SVENSSON, INSTITUTE FOR COMPARATIVE RESEARCH IN HUMAN CULTURE, THE SAMI AND THEIR LAND 13 (1997)).

²³⁰ See *id.* at 250; see also BJORN AARSETH, THE SAMI PAST AND PRESENT 2 (1993) (“Archaeological sources indicate a probable Sami inhabitation [on the Scandinavian peninsula] as early as 100-200 A.D.”).

²³¹ See Watters, *supra* note 10, at 251:

[Over time, the Sami] split into subcultures that varied according to livelihood and ecological adaptation. From the sixteenth century on, it is possible to identify major groups. They are the coastal and river Sami, where fishing is vital; the mountain Sami, semi-nomadic reindeer herders, also migrate long distances between the tundra and the taiga; the forest Sami; and, the eastern Sami. The last two groups migrating [sic] in the same ecological zone in a semi-nomadic pattern throughout the year (footnotes omitted).

²³² See ODD MATHIS HAETTA, THE ANCIENT RELIGIONS AND FOLK-BELIEFS OF THE SAMI 7 (1994): “[M]ountains and hills, boulders and lakes had a life and were able to help people who prayed to them and made sacrifices to them. The elemental forces were personified through the Wind Man, the Old Man of Thunder, the Alder Man and other nature gods.” See also *id.* at 13 (“Natural phenomena such as thunder, wind, and the sun and the moon featured prominently in worship in the pre-Christian beliefs of the Sami. But it was generally not the natural phenomena themselves that were the object of virtue, but rather the power that manifested itself through them.”).

²³³ See *Kitok v. Sweden*, Communication No. 197/1985, U.N. GAOR, Human Rights Committee, 43rd Sess., Supp. No. 40, at 207, U.N. Doc. A/43/40, Annex 7(G) (1988), CCPR/C/33/C/197/1985, ¶ 5.2 [hereinafter *Kitok v. Sweden*]; see also *id.* (quoting petition of Ivan Kitok: “This was the Swedish position during the Vasa reign and is well expressed in the royal letters by Gustavus Vasa of 1536, 1543,

between Sweden and Norway in Sami territory.²³⁴ When the kingdoms of Denmark-Norway and Sweden-Finland entered a territorial agreement that fixed their frontiers, that treaty included an addendum known as the “Sami Codicil,” which attested to the two nations’ recognition of the Sami as an ethnic minority that was free to ignore the agreement and continue its traditional nomadic practices.²³⁵ This was one expression of the Swedish acknowledgment of “allodial land rights,” or rights in land that existed before the creation of the Swedish state.²³⁶

Increasing conflicts between the Sami and non-indigenous interests seeking to exploit the natural resources of the Sami territory led to an 1866 joint Norwegian-Swedish commission that proposed to overhaul the codicil.²³⁷ Although some prominent legal experts in both Norway and Sweden called for the acknowledgment that the Sami property rights recognized in the codicil are rooted in ancient usage and merely codified in the codicil, the governments of Norway and Sweden urged the joint commission to instead interpret Sami interests in the land they occupied to favor the interests of agriculturalists and, ultimately, promote assimilation.²³⁸ The governments’ views prevailed as an exercise of national sovereignty, severely curtailing the concept of common

and 1551. It was also confirmed by Gustavus Adolphus in 1615 and by a royal judgement that year for Suondavare Lapp village. . . .”).

²³⁴ *Id.*

²³⁵ See Watters, *supra* note 10, at 255-56; see also Helge Salvesen, *Sami Aedan: Four States—One Nation?*, in *ETHNICITY AND NATION BUILDING IN THE NORDIC WORLD* 106, 110, 122 (Sven Tägil ed., 1995) (“[T]he codicil guaranteed a legal right to land and water on the basis of customary practice,” and at 122: “[The Codicil] contains rules concerning neutrality in the case of war; internal Sami administration, including a limited administration of justice, together with the legal confirmation of ancient Sami customs.”).

²³⁶ *Kitok v. Sweden*, *supra* note 233, ¶ 5.2 (“These allodial land rights are acknowledged in the travaux préparatoires of the 1734 law-book for Sweden, including even Finnish territory.”).

²³⁷ See Watters, *supra* note 10, at 256.

²³⁸ *Id.* at 256-59. Norwegian constitutional law scholar Torkel Aschehoug asserted that the Sami’s legal status existed prior to the adoption of the Codicil, so that its cancellation would bring the ancient rights to occupy the Sami territory back to life. Similarly, Swedish parliamentarian Johan Nordstrom concluded that the Sami held an historically-based form of restrictive covenant over their territory. In reaching this conclusion, Nordstrom relied on principles of international law rooted in natural law. He insisted that the Sami rights were held collectively, as was consistent with the tribe’s historical usage.

ownership and essentially deeming the Sami territory unoccupied and thus available for non-Sami occupation.²³⁹ In part as a result of this diminished protection, over the past century the Sami people have been subjected to diverse pressures on their culture, including encroachments into the Sami territories by agriculturalists, miners, timber harvesters, and those seeking sources of hydro-power.²⁴⁰

Laws developed by the non-indigenous society have added to the complexity of the Samis' cultural and environmental rights. The Swedish Constitution, for example, states that "[t]he possibilities for ethnic, linguistic or religious minorities to preserve and develop a cultural and social life of their own should be promoted."²⁴¹ Seemingly in keeping with this prescription, the Swedish government promulgated a statute in 1928 addressing reindeer husbandry, updated in 1971 as the 1971 Reindeer Husbandry Act.²⁴² The act's intent was to improve the living conditions of the Sami by shielding and thus safeguarding for the future the existence and profitability of reindeer husbandry.²⁴³ As the Swedish government would later note, "the area available

²³⁹ *Id.* at 258.

²⁴⁰ *Id.* at 253-54:

In the twentieth century, dramatic change came with the occupation of Norway by Nazi Germany in April 1940.

Development brought new roads, rail lines, airports, towns and large-scale tourism. Over time, external forces created pressures on an ecosystem that had always supported a pastoral culture and the sustainable use of resources.

²⁴¹ *Kitok v. Sweden*, *supra* note 233, ¶ 4.2 (citing to the Constitution of Sweden, Chap. 1, art. 2, para. 4); *see also id.* (quoting the Constitution of Sweden, ch. 2, art. 15 ("No law or other decree may imply discrimination against any citizen on the ground of his belonging to a minority on account of his race, skin colour or ethnic origin.")).

²⁴² *Id.* ¶ 5.3.

²⁴³ *Id.* ¶ 4.2:

The ratio legis for this legislation is to improve the living conditions for the Sami who have reindeer husbandry as their primary income, and to make the existence of reindeer husbandry safe for the future. There have been problems in achieving an income large enough to support a family living on reindeer husbandry. From the legislative history it appears that it was considered a matter of general importance that reindeer husbandry be made more profitable. Reindeer husbandry was considered necessary to protect and preserve the whole culture of the Sami. . . .

for reindeer grazing limits the total number of reindeer to about 300,000. Not more than 2,500 Sami [out of a population of 15,000 to 20,000] can support themselves on the basis of these reindeer and additional incomes.²⁴⁴ The Reindeer Husbandry Act's impact, thus, was to divide the Sami population into reindeer-herding and non-reindeer-herding Sami.²⁴⁵

The second half of the twentieth century saw additional changes for the Sami. The international community began to assert the ideal of self-determination and cultural protection in connection with aboriginal populations. This shift away from a global culture of assimilation coincided with the world's awakening environmental conscience. Like other indigenous peoples, the Sami responded, seeking legal protection for their recognition as distinct communities with, among other rights, rights to land and natural resources.²⁴⁶

Two 1968 decisions of the Supreme Court of Norway illustrate the Sami's attempts to assert their aboriginal dominion over the natural resources of their territory. In *The Brekan Case*, the Norwegian high court upheld the rights of the Sami to engage in traditional activities of hunting, fishing, and berry-picking on the land where the tribe historically pursued these activities.²⁴⁷ In *The Altevann II Case*, the court awarded damages to the Sami for the loss of the tribe's ability to use an area of Sami territory for grazing and fishing due to a government-constructed dam.²⁴⁸ These cases serve to highlight some of the issues to be addressed in a human rights context in *Kitok v. Sweden*, including the competition for land use among indigenous and non-indigenous occupants and the increasing pressure to allow economics to dictate decision making in the context of indigenous environment-related rights.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ See S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L., 1991, no. 2, at 1, 4 ("The subject groups are themselves largely responsible for the mobilization of the international human rights program in their favor. During the 1970's, indigenous peoples organized and extended their efforts internationally to secure legal protection for their continued survival as distinct communities with historically based . . . entitlements to land.").

²⁴⁷ *The Brekan Case*, RT 1968: 394, at 401 jo. 405-406.

²⁴⁸ *The Altevann II Case*, RT 1968: 429, at 437 jo. 440-441.

2. Kitok v. Sweden

The case of Kitok v. Sweden before the Human Rights Committee typifies the problems encountered by tribunals in using Article 27 as a means to redress wrongs involving land and natural resources.²⁴⁹

The 1966 International Covenant on Civil and Political Rights, discussed above, created a Human Rights Committee, which is authorized to hear complaints filed against ratifying states claiming breach of the Covenant. Article 27 of the covenant states that persons belonging to ethnic minority groups “shall not be denied the right . . . to enjoy their own culture. . . .”²⁵⁰ In the 1988 case of *Kitok v. Sweden*, the Human Rights Committee considered the applicability of Article 27 to the Sami in connection with their traditional practice of herding reindeer.²⁵¹

In *Kitok*, a man of Sami origin, Ivan Kitok, claimed that the Reindeer Husbandry Act breached ICCPR Article 27 by causing the Sorkaitum Sami village, or “sameby,” to deny him membership.²⁵² Under the Reindeer Husbandry Act, the Swedish Crown and Lapp bailiff had limited the number of reindeer breeders by requiring *sameby* members who leave the reindeer husbandry profession for a period of three years to apply for special permission to re-acquire their *sameby* status and thus their *sameby*-based access to Sami lands and waters, an important aspect of reindeer husbandry.²⁵³ Kitok belonged to a Sami family that had

²⁴⁹ Kingsbury, *supra* note 46, at 212-13 (analyzing the case and concluding that it represents “a very uneasy compromise . . . [in which] nothing is said about the systemic assimilationist effects of the diminishing resource base or other aspects of historic Swedish state policy.”).

²⁵⁰ ICCPR, *supra* note 91. The full text of Article 27 reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Id. art. 27.

²⁵¹ *Kitok v. Sweden*, *supra* note 233.

²⁵² *Id.* ¶ 2.1 (describing membership in the sameby as similar to “a trade union with a ‘closed shop’ rule,” under the 1971 Act).

²⁵³ *Id.* ¶ 2.2; *see also id.* ¶ 4.2:

engaged in reindeer breeding for a century, and, as the Human Rights Committee acknowledged, he had “always retained some links with the Sami community, always living on Sami lands and seeking to return to full-time reindeer farming as soon as it became financially possible, in his particular circumstances, for him to do so.”²⁵⁴ On these bases, he claimed to have inherited a civil right not only to breed reindeer but to access Sami land and water.²⁵⁵ The Swedish government’s three-year rule, Kitok claimed, “arbitrarily denies the immemorial rights of the Sami minority.”²⁵⁶

Prior to turning to the Human Rights Committee, Kitok exhausted his domestic remedies in the Swedish legal system.²⁵⁷ His appeals were denied, ostensibly due to the reluctance of the Swedish authorities to overturn a decision by the Sami community on *sameby* membership.²⁵⁸ Before the Human Rights Committee, the Swedish government stressed this fact, and also pointed out that the Sorkaitum, in its denial of Kitok’s membership, had allowed him to engage in certain *sameby* practices, including hunting and fishing free of charge in the community’s pasture areas, so as to safeguard his interests as “a reindeer owner in Sami society, albeit not as a member of the Sami community.”²⁵⁹ Thus, the state echoed the Swedish administrative court’s conclusion that “it cannot be said that [Kitok] has been

It should be stressed that a person who is a member of a Sami village also has a right to use land and water belonging to other people for the maintenance of himself and his reindeer. This is valid for State property as well as private land and also encompasses the right to hunt and fish within a large part of the area in question.

²⁵⁴ *Id.* ¶ 9.7; *see also id.* ¶ 2.1.

²⁵⁵ *Id.* ¶ 2.1.

²⁵⁶ *Id.* ¶ 2.2.

²⁵⁷ *Id.* ¶ 2.3 (“[T]he Regeringsrätten (Highest Administrative Court of Sweden) decided against [Kitok] on 6 June 1985, although two dissenting judges found for him and would have made him a member of the *sameby*.”).

²⁵⁸ According to the legislative history of the Act, the County Administrative Board’s right to grant an appeal against a decision made by the Sami community should be exercised very restrictively. It is thus required that the reindeer husbandry which the applicant intends to carry out within the community be in an essential way useful to the community and that it be of no inconvenience to its other members. An important factor in this context is that the pasture areas remain constant, while additional members means more reindeers. *Id.* ¶ 4.2.

²⁵⁹ *Id.*

prevented from ‘enjoying his own culture,’²⁶⁰ making its argument one of self-determination. In other words, the state argued that the Human Rights Committee, like the Swedish government, needed to respect the Sami community’s decision as to the mix of allowances and prohibitions necessary to maintain a balance between Kitok’s individual aboriginally-based rights and the Sami community’s right to protect its collective cultural resources:

The conflict that has occurred in this case is not so much a conflict between Ivan Kitok as a Sami and the state, but rather between Kitok and other Sami. As in every society where conflicts occur, a choice has to be made between what is considered to be in the general interest on the one hand and the interests of the individual on the other. A special circumstance here is that reindeer husbandry is so closely connected to the Sami culture that it must be considered part of the Sami culture itself.²⁶¹

In such passages, the state read into Article 27 an implication that the guarantees it offers to individuals may be eviscerated “in view of public interests of vital importance or for the protection of the rights and freedoms of others.”²⁶²

The idea that Article 27 allows the rights of an individual member of a minority community to be sacrificed in favor of the cultural survival of the minority community arguably reflects the overarching goal of the ICCPR to protect and promote the rights of indigenous peoples to self-determination.²⁶³ In *Kitok*, however, the situation was more complex, because Swedish law played a role in designating Kitok’s status as a half-Sami, prohibited from full enjoyment of Sami cultural rights. Indeed, the state admitted that Swedish law, by designating the majority of Sami as non-reindeer herding Sami, made it difficult for the majority of Sami to maintain their Sami identity:

The reindeer grazing legislation had the effect of dividing the Sami population of Sweden into reindeer-herding and non-reindeer herding Sami, a distinction which is still very important. Reindeer herding is reserved for Sami who are

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* ¶ 4.3.

²⁶³ *See supra*, notes 91, 96-101 and accompanying text, discussing the ICCPR.

members of a Sami village (sameby), which is a legal entity under Swedish law. . . . These Sami . . . also have certain other rights, for example, as regards hunting and fishing. Other Sami, however B the great majority . . . B have no special rights under the present law. These other Sami have found it more difficult to maintain their Sami identity and many of them are today assimilated into Swedish society. Indeed, the majority of the group does not even live within the area where reindeer-herding Sami live.²⁶⁴

Still, the state insisted that the Reindeer Husbandry Act did not violate Kitok's aboriginal right as an individual to enjoy his culture in violation of Article 27 because the Act's purpose was "protecting and preserving the Sami culture and reindeer husbandry as such."²⁶⁵

Kitok argued that the state's admission that its law led a large segment of the Sami population to assimilate was tantamount to an admission that the law violated Article 27.²⁶⁶ Insofar as his own case, he pointed out that the Sorkaitum decision to allow him some Sami rights while denying him Sami membership did not satisfy Article 27 because "as a half-Sami he is forced to pay 4,000 to 5,000 Swedish krona annually as a fee to the Sörkaitum *sameby* association that the full Sami do not pay to that association."²⁶⁷ He labeled the fee a "stigma on half-Sami" that prevented him from enjoying his cultural heritage and his identity.²⁶⁸

The Human Rights Committee agreed with Kitok that the Reindeer Husbandry Act played a role in setting Kitok's status in relation to Sami aboriginal rights, and that therefore the question of whether Sweden had violated Article 27 was a valid one.²⁶⁹ It

²⁶⁴ Kitok v. Sweden, *supra* note 233, ¶ 4.2.

²⁶⁵ *Id.* ¶ 4.3.

²⁶⁶ *Id.* ¶ 5.3 ("When Sweden says that these other Sami are assimilated, it seems that Sweden confirms its own violation of article 27.")

²⁶⁷ *Id.* ¶ 5.4.

²⁶⁸ *Id.*

²⁶⁹ *Id.* ¶ 9.4 ("With regard to the State party's argument that the conflict in the present case is . . . between the author [Kitok] and the Sami community, . . . the Committee observes that the State party's responsibility has been engaged, by virtue of the adoption of the Reindeer Husbandry Act of 1971, and that it is therefore State action that has been challenged.")

also acknowledged that the act's criteria for making determinations of ethnic community status could be applied unfairly to minority individuals, and that this may have happened in Kitok's case.²⁷⁰ In spite of these concerns, however, the Committee agreed with Sweden that the motives and methods of the Act, as well as its application to Kitok, were consistent with Article 27.²⁷¹ Thus, the Human Rights Committee read the ICCPR to prioritize the collective interests it addresses over the individual rights it also claims to preserve.²⁷²

3. *Lansman v. Finland: Extending Kitok*

In 1994, the Human Rights Committee extended its *Kitok* interpretation to allow governmental infringement on aboriginal practices even where the government's actions did not support the aboriginal community's survival or collective will in any way. In *Lansman v. Finland*, the Committee considered another Sami claim alleging violations of ICCPR Article 27.²⁷³ Reindeer breeders of Sami origin from the area of Angeli and Inari in Finland protested a contract between the Finnish Central Forestry Board and a private company that allowed the company to quarry and

²⁷⁰ *Id.* ¶ 9.7 (“The Committee has been concerned that the ignoring of objective ethnic criteria in determining membership of a minority, and the application to Mr. Kitok of the designated rules, may have been disproportionate to the legitimate ends sought by the legislation.”).

²⁷¹ *Id.* ¶ 9.5 (defining the purpose of the Act as “to restrict the number of reindeer breeders for economic and ecological reasons and to secure the preservation and well-being of the Sami minority,” and the method as “the limitation of the right to engage in reindeer breeding to members of the Sami villages.”).

²⁷² In 1990, the Human Rights Committee again addressed the relationship between individual and group rights under the ICCPR in *Ominayak and the Lubicon Lake Band v. Canada*. See *Report of the Human Rights Committee*, 45 U.N. GAOR Supp. (No. 40) at 1, U.N. Doc. A/45/40, vol. II (1990). In that case, the Committee applied Article 27 to a claim by the Lubicon Lake Band of Canada against the Canadian government alleging that the government's having allowed the province of Alberta to enter leases authorizing oil, gas, and timber exploration in Lubicon territory had led to a situation in which the Band's existence was seriously threatened. *Id.* ¶¶ 2.3, 32.2. The Committee confirmed that Article 27 applies to claims brought by individuals, whether acting alone or as “a group of individuals, who claim to be similarly affected. . . .” *Id.* ¶ 32.1.

²⁷³ Communication No. 511/1992, U.N. GAOR, Human Rights Committee, 52nd Sess., Supp. No. 40, at 191, U.N. Doc. A/52/40, vol. II (1999), CCPR/C/52/D/511/1992, ¶ 5.2 (*Lansman v. Finland*).

transport stone in Sami territory.²⁷⁴ Finland cited *Kitok* to argue that the Committee's view of Article 27 allowed states "a certain degree of discretion" in regulating indigenous activities, particularly where the regulations addressed economic issues.²⁷⁵ The Committee agreed, finding that *Kitok* demonstrated that government actions having a "certain limited impact" on an indigenous person's enjoyment of his culture "will not necessarily amount to a denial of the right under Article 27."²⁷⁶

4. *Summation*

Kitok stands as an example of the essential, and sometimes irreconcilable, distinction between individual and collective rights. At the very least, the decision demonstrates that, where an individual's attempts to assert his aboriginal heritage came into conflict with the collective environmental interests of the indigenous people of whom he is a member, the collective interest prevailed in the manner of a sovereign or quasi-sovereign authority. Perhaps more universally, then, the decision may stand as a reminder that the human rights of individuals do not necessarily 'add up' to the collective needs of a people, and that self-determination is better understood as a tool to assert a group's autonomy than an individual's heritage-based rights.

Another impact of *Kitok* may be discerned from the case's aftermath. By taking the decision out of its context in the *Lansman* decision, the Human Rights Committee seemed to render Article 27 little more than a check on wholesale evisceration of aboriginal rights and lands taking place without some level of consultation between the state and the aboriginal community.²⁷⁷ These cases indicate that even where an adjudicatory

²⁷⁴ *Id.* ¶ 2.3.

²⁷⁵ *Id.* ¶ 7.12; *see also id.* ¶ 7.13 ("[A] margin of discretion must be left to national authorities even in the application of article 27.").

²⁷⁶ *Id.* ¶ 9.4.

²⁷⁷ *Id.* ¶ 9.6:

[T]he Committee concludes that quarrying on the slopes of Mt. Riutusvaara . . . does not constitute a denial of the [Samis'] right, under article 27, to enjoy their own culture. It notes in particular that the interests of the Muotkatunturi Herdsmens' Committee and of the [Sami petitioners] were considered during the proceedings leading to the delivery of the quarrying permit, that the [Sami petitioners] were consulted during the proceedings,

body created under international law has as its primary focus the protection of indigenous populations from sovereign oppression, judicial deference to the sovereign's perspective may permeate the decision-making process.

B. THE INTER-AMERICAN COURT OF HUMAN RIGHTS ON TRIBAL RIGHTS IN THE NICARAGUAN RAINFOREST

The impact of the present crisis in Latin America has been compared, in its depth and extension, with the Great Depression of 1929-32. The crisis has made it clear that, although the need to protect the environment against the traditional problems of deterioration and depletion continues to be a valid objective, policymakers responsible for environmental management ought to avoid negative attitudes in the face of the need for economic reactivation and growth.

— Osvaldo Sunkeo, Coordinator, Joint ECLA/UNEP
Development & Environmental Unit, 1985²⁷⁸

1. *Background on the Awas Tingni*

The Awas Tingni and other indigenous communities have occupied the Atlantic Coast region of Nicaragua for centuries, subsisting via a well-developed culture of hunting, fishing, gathering, and communal occupation of the land.²⁷⁹ In spite of long-

and that reindeer herding in the area does not appear to have been adversely affected by such quarrying as has occurred.

²⁷⁸ These remarks were made at World Commission on Environment and Development Public Hearing, Sao Paulo, Oct. 28-29, 1985, as quoted in *OUR COMMON FUTURE*, *supra* note 128, at 74.

²⁷⁹ See *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 79, at 232 (Aug. 31, 2001) [hereinafter *Awas Tingni Judgment*] (testimony of Roque de Jesús Roldán Ortega: "The demands of indigenous groups on the Atlantic Coast are based on historical reasons, due to millenary occupation of that territory by those people, since they were already there at the time of conquest or European occupation of that territory by the British and the Spanish."). According to an anthropologist who testified in the case, the Awas Tingni territory is inhabited by numerous communities of people, including the Tasba Raya, Esperanza, the Yapu Muscana, and the Francia Sirpi. *Id.* at 207 (testimony of Theodore Macdonald Jr.). A second anthropologist identified the Turamin Community, the Tuasca, the Panamascas, the Wuga, the Puerto Cabezas, and the Kukalaya, and totaled the number of indigenous communities making up the Awas Tingni Community as 116. *Id.* at 220-21

term efforts by the dominant Nicaraguan culture to assimilate these peoples,²⁸⁰ the Atlantic Coast tribes have not integrated into the market economy and national culture of the State.²⁸¹ Through the latter decades of the twentieth century, the general policy of Latin American countries shifted from one focused on integration to one focused on valuing and protecting their culturally diverse populations; Nicaragua was one of the first countries to reflect its newfound recognition of its indigenous peoples' rights in its laws.²⁸² In 1987, the Sandinista government of Nicaragua, urged by the Organization of American States Inter-American Commission on Human Rights, responded to demands by the Miskito Indians for political autonomy by enacting the Autonomy Statute.²⁸³ The Autonomy Statute recognizes regional governments of the indigenous communities populating Nicaragua's Atlantic Coast.²⁸⁴ In the early 1990s, however, economic demands focused the Nicaraguan government on the Northern Autonomous Region, an indigenous territory rich in tropical

(testimony of Galio Claudio Enrique Gurdíán Gurdíán). *See also, id.* at 228, (testimony of Charles Rice Hale, anthropologist, describing chronology of Awastingni and neighboring peoples' settlement of the Atlantic Coast).

²⁸⁰ *See id.* at 235 (testimony of Roque de Jesús Roldán Ortega that “[a]ll the policies of Latin American States, for almost 180 years, were geared toward the elimination of forms of collective property and autonomous forms of government of the indigenous peoples.”).

²⁸¹ *Id.* at 209.

²⁸² *Id.* at 232-33.

²⁸³ *Id.* at 232.

²⁸⁴ *Id.*:

[T]he 1987 Constitution and the Autonomy Law . . . established that indigenous peoples have the right to recognition of their ownership of the land [and] of their possession of the land . . . [S]ince then the indigenous peoples can be considered full owners of the land, and if they have no written titles, they can demonstrate their possession through different types of evidence. Adoption of these norms should force the State to abstain from adopting decision regarding the territories occupied by the indigenous.

. . . .
 Indigenous property is private property which belongs collectively to an indigenous people, community, or group. Transactions disposing of it are restricted, taking into account that it is property assigned to a group which is a people and wishes to perpetuate itself as a people, and demands that the population and territory be maintained.

Id. at 233.

hardwood and minerals.²⁸⁵ Thus, in spite of its race-sensitive rhetoric, the state of Nicaragua continued to treat the Atlantic Coast region as state-owned territory, leasing and deeding both the land and its natural resources.²⁸⁶

²⁸⁵ See Theodore Macdonald, *Internationalizing Indigenous Community Land Rights: Nicaraguan Indians and the Inter-American Court of Human Rights*, CENTERPIECE (Weatherhead Ctr. Int'l Affairs at Harv. Univ.), Spring 2001, at 2, 3; see, generally, OUR COMMON FUTURE, *supra* note 128, at 73-5:

In the 1970s, Latin America's economic growth was facilitated by external borrowing. Commercial banks were happy to lend to growing countries rich in natural resources. Then major changes in international conditions made the debt unsustainable. A global recession restricted export markets, and tight monetary policies forces up global interest rates to levels far exceeding any in living memory. Bankers, alarmed by deteriorating creditworthiness, stopped lending. A flight of indigenous capital from developing countries compounded the problem.

. . . .
. . . . Pressures on the environment and resources have increased sharply in the search for new and expanding exports and replacements for imports, together with the deterioration and overexploitation of the environment brought about by the swelling number of the urban and rural poor in desperate struggling for survival. A substantial part of Latin America's rapid growth in exports are raw materials, food, and resource-based manufactures.

So Latin American natural resources are being used not for development or to raise living standards, but to meet the financial requirements of industrialized country creditors.

²⁸⁶ See *Awas Tingni Judgment*, *supra* note 279, at 229 (testimony of Charles Rice Hale, anthropologist):

There have been few concrete actions by the State regarding recognition, titling, and endorsement of communal rights to the land. Only twice has there been land titling more or less in accordance with what the community was claiming; that was in 1987, for two Mayagna communities, out of roughly 300 communities in all. Since 1990 there has been no action directed toward that goal.

In some cases, land titles are agrarian allocations which are less than the community's claims. Agrarian allocations are a step prior to legal titling, and in many cases the process is incomplete, leading to a statement of intent, but without legalization nor the guarantees that the community requires to protect its lands from third parties. There is no evidence of actions tending to ensure use and possession by the communities.

See also *id.* at 26 (testimony of Rodolfo Stavenhagen Gruenbaum, anthropologist and sociologist: "In recent decades, indigenous peoples have begun to organize, as they have realized that they have to do something to juridically protect and safeguard [their] lands."); *id.* at 233-34 (testimony of Roque de Jesús Roldán Ortega):

In 1995, the Awas Tingni Community learned of a government plan to grant logging rights to a Korean timber corporation.²⁸⁷ Forced to seek legal recourse, in September of 1995 the Awas Tingni filed an amparo action; this was rejected by the Appellate Tribunal on the basis of a technicality, a decision that the Constitutional Court of the Supreme Court of Justice of Nicaragua affirmed.²⁸⁸ Only after the Regional Council of the North Atlantic Coast Autonomous Region (RAAN) filed a second amparo action did the Supreme Court declare the logging concession unconstitutional; its decision rested on the fact that the Ministry of the Environment and Natural Resources had failed to obtain RAAN approval for the concession, as required under the Nicaraguan Constitution.²⁸⁹

The Autonomy Statute also states that ownership of indigenous lands by indigenous communities is non-attachable, imprescriptible, and inalienable. In actual practice there are some problems because the Agrarian Reform Law, which authorized giving land to indigenous peoples, was adopted one year before the Constitution and the Autonomy Law. And that Agrarian Reform Law did not recognize a special nature of indigenous property, but rather an ownership according to the terms of Nicaragua's Civil Code, in other words, that it is an attachable, prescriptible, and alienable property.

.....
 The lands occupied by the indigenous peoples of the Atlantic Coast have been seen as national lands, government lands, lands which the State can freely dispose of, and as such they are being given to peasant farmers who have been settling in those regions. The indigenous communities have also been given title deeds to land, but these titles are of the same nature as those to lands given to peasant-farmers.

²⁸⁷ See *Case of the Indigenous Mayagna Community of Awas Tingni (Nicaragua) Before the Inter-American Court of Human Rights*, at 2 http://www.indianlaw.org/body_awas_tingni_summary.htm (last visited Sept., 2005).

²⁸⁸ *Id.* at 2-3. An amparo action is similar to a request for an injunction. The Matalgalpa appellate Tribunal initially rejected the Community's amparo action for the Community's failure to file the action within thirty days of learning about the infringements on its constitutional rights. The Supreme Court affirmed the judgment without comment.

²⁸⁹ See *Awas Tingni Judgment*, *supra* note 279, at 236 (testimony of Lottie Marie Cunningham de Aguirre):

The Awas Tingni Community filed an amparo remedy [an action before the appellate court of Nicaragua claiming a breach of the Constitution of Nicaragua] on September 12, 1995 The remedy . . . was not decided [until] almost two years afterwards, on February 27, 1997, without responding to the applicant's claim.

A second amparo remedy was subsequently filed because the first one was not rejected on the basis of land titling, but rather for other reasons, such as not having consulted [with] the Regional Council of the RAAN. . . .

2. *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua before the Inter-American Court of Human Rights*

After the failure of the initial amparo, Jaime Castillo Felipe lodged a petition with the Inter-American Commission of Human Rights in his own name and on behalf of the Awas Tingni Community.²⁹⁰ Like the amparo that had preceded it, the petition claimed that the Nicaraguan government was about to enter a contract with a private corporation which would allow it to begin logging operations on Awas Tingni communal land.²⁹¹ The petition requested that the Commission order the state of Nicaragua to cease to grant logging concessions in the Awas Tingni territory, and to begin the process of demarcating the land of the Awas Tingni Community, as required under the 1987 Nicaraguan Constitution and the Autonomy Statute.²⁹²

On March 3, 1998, the Inter-American Commission concluded its report on the situation, finding:

. . . that the State of Nicaragua has not complied with its obligations under the American Convention on Human Rights. The State of Nicaragua has not demarcated the communal lands of the Awas Tingni Community or other indigenous communities, nor has it taken effective measures to ensure the property rights of the Community on its

The Court accepted the remedy of unconstitutionality because the Council in full hand not given its approval [of the logging concession]. Thus, the Nicaraguan Court declared that the unconstitutionality remedy was in order, and it annulled the 1997 concession. Once the concession was declared unconstitutional, the Regional council met and ratified the concession.

²⁹⁰ *Id.* at 173. Although the State of Nicaragua eventually received RAAN approval, the petitioners persisted with their claim before the Commission, pointing out in November, 1997 that the core element of the petition was “the lack of protection by Nicaragua of the rights of the [Awas Tingni] Community to its ancestral lands.” *Id.* at 176.

²⁹¹ *Id.* at 173.

²⁹² See *Complaint of the Inter-American Commission of Human Rights Against the Republic of Nicaragua in the Case of the Mayagna (Sumo) Indigenous Community of Awas Tingni*, 19 ARIZ. J. INT’L & COMP. L. 21, 21 (2002) [hereinafter *Awas Tigni Complaint*].

lands. This omission by the State constitutes a violation of Articles 1, 2 and 21 of the Convention. . . .²⁹³

Accompanying these findings, the commission recommended that Nicaragua “[e]stablish a procedure in its legal system, acceptable to the indigenous communities involved, that [would] result in the rapid official recognition and demarcation of the Awas Tingni territory and the territories of other communities of the Atlantic Coast.”²⁹⁴

In its reply, the Nicaraguan government agreed with the commission’s recommendations, and cited various actions it claimed would rectify the problem satisfactorily.²⁹⁵ The state also acknowledged that its constitution guarantees the rights of Nicaragua’s indigenous communities, and went on to assert that it “has faithfully complied with the previous legal provisions and, consequently, it has acted in accordance with the national legal system and the provisions of the rules and procedures of the [American] Convention [on] Human Rights.”²⁹⁶

Perceiving that such rhetoric was meaningless in the face of the Nicaraguan government’s persistent failure to demarcate or otherwise recognize or protect the Awas Tingni territory,²⁹⁷ the commission put the case before the Inter-American Court of Human Rights, requesting that the court determine whether the

²⁹³ See Awas Tingni Judgment, *supra* note 279, at 177 (quoting Inter-Am. C.H.R., Report No. 27/98, OEA/Ser.L./V/II.98, doc. 35 (1998)).

²⁹⁴ *Id.* at 178.

²⁹⁵ *Id.* at 178-79. The State pointed to its National Commission for the Demarcation of the Lands of the Indigenous Communities of the Atlantic Coast and a draft Law on Indigenous Communal Property as means through which it would settle its dispute with the Awas Tingni Community and begin the process of demarcation. It also claimed to have canceled the objectionable logging concession, and committed itself to extensive consultation with the indigenous community.

²⁹⁶ *Id.* at 179.

²⁹⁷ One observer noted that “[t]here has been no titling of indigenous communities since 1990, [and] the formal power of land demarcation and titling has not been exercised. . . . [T]he State seems to have no incentive to solve the historical claims of the communities.” See *id.* at 220 (testimony of Galio Claudio Enrique Gurdíán Gurdíán).

state of Nicaragua had violated provisions of the American Convention on Human Rights,²⁹⁸ and also requesting that the court order the state to adopt

the necessary measures to ensure that its officials do not act in such a way that they tend to apply pressure on the [Awas Tingni] Community to give up its claim, or that tends to interfere in the relationship between the Community and its attorneys, [and . . .] that [the State] cease to attempt to negotiate with members of the Community without a prior agreement or understanding with the Commission and the Court in that regard.²⁹⁹

The court held public hearings in November of 2000, during which it heard testimony by members of the Awas Tingni Community, as well as expert witnesses on anthropology, sociology, relations between states and indigenous populations, rural titling, and law.³⁰⁰ Awas Tingni Community members testified to the community's centuries of occupation of the land, and their usage and husbandry of its natural resources. This history, they asserted, gave the community a communal ownership of the land, one which neither individual community members nor the state of Nicaragua had the right to alienate.³⁰¹

²⁹⁸ *Awas Tigni Complaint*, *supra* note 292, at 22-23 (citing American Convention on Human Rights, arts. 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 21 (Right to Property), and 25 (Right to Judicial Protection)).

²⁹⁹ *Awas Tigni Judgment*, *supra* note 279, at 184 (quoting brief submitted by the Commission, dated April 13, 2000). In a reply, the State of Nicaragua denied the accusations of the Commission. *Id.*

³⁰⁰ *Id.* at 200-49. Witnesses included Jaime Castillo Felipe, a member of the Awas Tingni Community; Charly Webster Mclean Cornelio, Secretary of the Awas Tingni Territorial Committee; Theodore Macdonald Jr., an anthropologist; Rodolfo Stavenhagen Gruenbaum, an anthropologist and sociologist; Guillermo Castilleja, Special Projects Director for the World Wildlife Fund, Galio Claudio Enrique Gurdíán Gurdíán, holder of a licentiate degree in philosophy and a specialist in social anthropology and development studies with a specialty in relations between States and indigenous peoples; Brooklyn Rivera Bryan, an indigenous leader; Humberto Thompson Sang, a member of the Lanlaya indigenous community; Wilfredo Mclean Salvador, a member of the Awas Tingni Community; Charles Rice Hale, an anthropologist specializing in indigenous cultures; Roque de Jesus Jesús Roldán, an attorney; Lottie Marie Cunningham de Aguirre, an attorney; and Marco Antonio Centeno Caffarena, Director of the Office of Rural Titling in Nicaragua.

³⁰¹ *See, e.g., id.* at 201-02 (testimony of Jaime Castillo Felipe):

After hearing arguments by both sides, and analyzing the pertinent Nicaraguan constitutional and statutory provisions, the court concluded that the Nicaraguan government was in violation of numerous articles of the American Convention on Human

They [the Awas Tingni] are the owners of the land which they inhabit because they have lived in the territory for over 300 years, and this can be proven because they have historical places and because their work takes place in that territory.

He and the members of the Community make their living from agriculture, hunting, and fishing, among other activities. . . . The Community selects what is to be consumed, so as not to destroy the natural resources.

The lands are occupied and utilized by the entire Community. Nobody owns the land individually; the land's resources are collective. If a person does not belong to the Community, that person cannot utilize the land. There is no right to expel anyone from the Community. To deny the use of the land to any member of the Community, the matter has to be discussed and decided by the Community Council. When a person dies, his or her next of kin become the owners of those things that the deceased person owned. But since lands are collective property of the community, there is no way that one member can freely transmit to another his or her rights in connection with the use of the land.

See also id. at 204-05 (testimony of Charly Webster Mclean Cornelio):

The territory of the Mayagna [an Awas Tingni tribe] is vital for their cultural, religious, and family development, and for their very subsistence, as they carry out hunting activities (they hunt wild boar) and they fish (moving along the Wawa River), and they also cultivate the land. It is a right of all members of the Community to farm the land, hunt, fish, and gather medicinal plants; however, sale and privatization of those resources is forbidden.

The territory is sacred for them, and throughout the territory there are several hills which have a major religious importance There are also sacred places, where the Community has fruit trees such as pejibaye, lemon, and avocado. When the inhabitants of Awas Tingni go through these places . . . they do so in silence as a sign of respect for their dead ancestors

See also id. at 208 (testimony of Theodore Macdonald Jr., anthropologist):

Forms of land use in the Awas Tingni Community are based on a communal system, in which there is usufruct by individuals, which means that no one can sell or rent this territory to people outside the Community. However, within the Community, certain individuals use a plot, a certain area, year after year. In this way, the Community respects usufruct rights but does not allow this right to be abused. This usufruct right is often acquired through inheritance, passed on from one generation to the next, but mainly it is granted by Community consensus. It can also be transferred from one family to another. Those who benefit from this usufruct have the possibility of excluding other members of the community from the use of that land, the utilization of those resources.

Rights.³⁰² In particular, the court addressed Articles 25 and 21.³⁰³ Article 25 guarantees prompt and effective recourse to a court for protection against fundamental rights.³⁰⁴ The court concluded that the state of Nicaragua had failed to establish adequate procedures for the demarcation and titling of lands held by indigenous communities, and that the government appeared to lack the will to establish such procedures.³⁰⁵ The court found, furthermore, that the Nicaraguan court procedure to hear claims by indigenous peoples regarding their constitutional protections was “illusory and ineffective.”³⁰⁶ Article 21 of the Convention protects private property interests, allowing the state to deprive individuals of property interests only for reasons of public utility or social interest, and only then upon payment of just compensation.³⁰⁷ The court found the state to have violated the rights of

³⁰² The Court cited Articles 1 (Right to State Protection), 25 (Right to Judicial Recourse), 21 (Right to Property), 4 (Right to Life), 11 (Right to Privacy), 12 (Freedom of Conscience and Religion), 16 (Freedom of Association), 17 (Rights of the Family), 22 (Freedom of Movement and Residence), and 23 (Right to Participate in Government.). See *id.* at 267-99.

³⁰³ The Court held by a vote of seven to one that the State of Nicaragua had violated Article 25, in conjunction with the generalized protections of Articles 1(1) and 2, and Article 21, also in conjunction with Articles 1(1) and 2. *Id.* at 308-09.

³⁰⁴ *Awes Tigni Complaint*, *supra* note 292, at 66, quoting Article 25 to state:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws [. . .] or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

³⁰⁵ *Id.* at 281 (“[I]n Nicaragua there is a general lack of knowledge, an uncertainty as to what must be done and to whom should a request of demarcation and titling be submitted.”) Citing a March, 1998 study entitled “General Diagnostic Study on Land Tenure in the Indigenous Communities of the Atlantic Coast,” which had been prepared by the Central American and Caribbean Research Council, the Court also noted that “in Nicaragua the problem is the lack of laws to allow concrete application of the Constitutional principles, or [that] when the laws do exist (case of the Autonomy Law) there has not been sufficient political will for them to be regulated.” *Id.* at 281-82.

³⁰⁶ *Id.* at 286.

³⁰⁷ The Court quotes Article 21 to state:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

the Mayagna Awas Tingni to the use and enjoyment of their property, in part by granting concessions to third parties to exploit land and resources in areas likely to be demarcated as Awas Tingni territory.³⁰⁸

Based on these findings, the court ordered the Nicaraguan government to create the legislative and administrative means to allow delimitation and titling of the Awas Tingni lands in accordance with the Awas Tingni customary laws.³⁰⁹ The court gave the state a fifteen month deadline for completing the task, and required that the state do so “with full participation of the community and taking into account its customary law, values, customs and mores.”³¹⁰ The court also ordered the state to abstain from actions that might further jeopardize the Awas Tingni lands.³¹¹ Finally, the court ordered the state to invest \$50,000 in “works or services of collective interest for the benefit of the Awas Tingni Community.”³¹² In connection with all of its orders requiring actions, the court required the state to submit to it semi-annual reports detailing its progress.³¹³

3. *Aftermath of the Awas Tingni Decision*

The Awas Tingni decision stands as the first case in which an international tribunal has recognized the territorial rights of an

3. Usury and any other form of exploitation of man by man shall b[e] prohibited by law.

Id. at 294

³⁰⁸ *Id.* at 297-98. In its discussion of Article 21, the Court noted that the actions of the Nicaraguan State that violated its terms also violated Article 1(1) of the Convention, which generally obligates States to respect indigenous rights and freedoms and to “organize public power so as to ensure the full enjoyment of human rights by the persons under its jurisdiction.” *Id.* at 298.

³⁰⁹ *Id.* at 305, 309.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* at 306. The Court also assessed \$30,000 of the Awas Tingni Community’s court-related costs against the State. *Id.* at 307.

³¹³ *Id.* at 310. This, along with the orders to develop and implement a system of delimitation, demarcation, and titling of indigenous territories, was a unanimous element of the decision.

indigenous people.³¹⁴ As Claudio Grossman, the Inter-American Commission's agent in the case, observed:

This is a landmark case in the Inter-American System for the Promotion and Protection of Human Rights. . . . It is appropriate that the first such case should examine the property rights of an Indian group because the very culture and existence of the Indian community depends upon the land on which they reside.

This case is also important because it shows the value of the Inter-American System as an avenue to debate (and hopefully settle) very important and complex legal matters. Nicaragua participated fully in the proceedings, showing the vitality of the Inter-American System's framework. Also, Nicaragua's active participation renders illegitimate any later non-compliance with the Inter-American Court's decision by the government. For the *Awas Tingni*, this case also opens up the possibility to achieve justice and to establish principles that will help not only their community, but also establish precedent for future cases involving the rights of indigenous peoples.³¹⁵

Nevertheless, the victory did not readily translate into relief or protection for the *Awas Tingni*. On January 16, 2003, the *Awas Tingni* Community filed another action with the Nicaraguan appellate court, complaining that state officials had failed to meet the Inter-American Court of Human Rights' fifteen month deadline.³¹⁶ Although the government had set up several joint commissions made up of state and indigenous community representatives, and also had made progress toward implementing the \$50,000 investment element of its obligation, it had failed to

³¹⁴ INDIAN LAW RES. CTR. & INT'L HUMAN RIGHTS LAW GROUP, *THE AWAS TINGNI CASE - FIFTEEN MONTHS LATER: THE CHALLENGES TO THE IMPLEMENTATION OF THE DECISION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 3* (2003) (on file with author) [hereinafter *FIFTEEN MONTHS LATER*].

³¹⁵ Claudio Grossman, *Awas Tingni v. Nicaragua: A Landmark Case of the Inter-American System*, 8 HUM. RTS. BRIEF AM. U. WASH. C. L. 2 (2001).

³¹⁶ *FIFTEEN MONTHS LATER*, *supra* note 314, at 1. The suit identified the President of Nicaragua and various ministers and government officials as having failed to meet the constitutional and international legal obligations identified in the August 31, 2001 Inter-American Court of Human Rights ruling.

make significant progress in demarcating and titling the community's territory.³¹⁷ Illegal logging and other resource exploitation continued, and the state had failed to sanction those who were plundering the indigenous lands.³¹⁸

Following the filing of the January 16 suit, Nicaraguan President Enrique Bolanos met with legal representatives of the Awas Tingni Community in March of 2003.³¹⁹ The meeting, which followed from an invitation issued by President Bolanos while he visited the Organization of American States in Washington, D.C., included various Nicaraguan officials, including the Governor of the North Atlantic Coast Autonomous Region.³²⁰ President Bolanos stated a commitment to comply with the Inter-American Court's decision, and Professor Hurtado Garcia Baker, Coordinator of the RAAN government, called for improvements in cooperation between the central and regional governments in their efforts to implement the court's mandates.³²¹ Following this meeting, an advisor to the President was designated the senior person responsible for implementation of the *Awas Tingni* decision and for coordinating the involved institutions.³²²

³¹⁷ *Id.* at 4-5. In connection with the \$50,000 investment, the government agreed to construct a student boarding house for the Community's children, and also to donate furniture for the house and sewing machines for the Community. Although the State did not meet the Court-stipulated deadline for these projects, the construction was underway as of the deadline. In connection with the Court order to demarcate and title the Awas Tingni lands, the joint commission had met a number of times, but the government had failed to even complete a diagnostic study of the territory within the fifteen month period designated for the project.

³¹⁸ *Id.* at 6-7. In fact, the threats to the Community's property rights became so severe that it returned to the Inter-American Court of Human Rights, which issued a provisional measures resolution on September 9, 2002. Under the terms of that resolution, the State of Nicaragua was ordered to adopt immediately all measures necessary to protect the lands and natural resources of the Community.

³¹⁹ Press Release, Indian Law Res. Ctr., Meeting With President Bolanos About the Awas Tingni Case (Mar. 26, 2003), available at http://www.indianlaw.org/PR_2003-03-26__AT_Bolanos_.pdf.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.* The President named Carlos Hurtado, his Atlantic Coast advisor, to this position. *Id.*

V. A COMMON FUTURE DAWNS: THE DRAFT AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Indigenous peoples live off the land; in other words, the possibility of maintaining social unity, of cultural preservation and reproduction, and of surviving physically and culturally, depends on the collective, communitarian existence and maintenance of the land, as has been the case since ancient times.³²³

The *Awes Tingni* decision has been widely acknowledged as a milestone in international law for its acknowledgment and protection of indigenous peoples' environmental rights. It is unsurprising, in this light, that the nations and indigenous peoples of the Americas are currently involved in the process of developing an international instrument to address such rights, or that this instrument reflects a number of the issues that arose in the *Awes Tingni* case. The following sections discuss the environment-focused provisions of that instrument.

A. THE 1997 PROPOSED AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

In 1997, the Organization of American States Inter-American Commission on Human Rights approved a Proposed American Declaration on the Rights of Indigenous Peoples, thereby launching a still-ongoing negotiation among OAS participants on its terms and language.³²⁴ In general, the American Declaration is an ambitious effort to capture the vulnerabilities, strengths, and needs of all indigenous peoples of the Americas in the space of twenty-seven Articles.³²⁵ Provisions of the 1997 draft American

³²³ *Awes Tigni* Judgment, *supra* note 279, at 234 (testimony of Roque de Jesús Roldán Ortega).

³²⁴ Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R., OEA/Ser.L/V/II.95, doc. 7 rev., ch. IV (Mar. 14 1997).

³²⁵ *Id.* These articles address human rights (Art. II); legal status (Art. IV); assimilation (Art. V); discrimination (Art. VI); cultural integrity (Art. VII); language (Art. VIII); education (Art. IX); religion (Art. X); family relations (Art. XI); health (Art. XII); environmental protection (Art. XIII); freedom of association, expression, and thought (Art. XIV); right to self government (Art. XV); indigenous law (Art. XVI); land, territory, and natural resources (Art. XVIII); workers' rights (Art. XIX); intellectual property (Art. XX); development (Art. XXI); and

Declaration may be grouped into three categories of environment-related issues, all of which have a presence in the evolution of international thought on indigenous peoples' environmental interests as traced in this Article.

First, the 1997 version of the American Declaration recognizes that the relationship between people and the environment is often the touchstone of indigenous culture, and thus warrants the respect and particular attention of the non-indigenous population. The preamble not only acknowledges the unique importance of the natural environment and ecological values in indigenous cultures, but also emphasizes this uniqueness by pointing out that the "traditional collective systems" that many such cultures rely on in governing their lands, resources, water bodies, and coastal areas often differ from the systems relied upon by the nation-states within whose borders these indigenous peoples reside.³²⁶ In this way, the 1997 American Declaration rejects antiquated presumptions equating indigenous and non-indigenous values and goals.

A second, related major issue addressed in the 1997 draft American Declaration is the right of indigenous peoples to environmental protection.³²⁷ After echoing the preamble in linking environmental health to the collective well-being of indigenous

treaties, acts, agreements, and constructive arrangements (Art. XXII), among other issues.

³²⁶ *Id.* pmbl. ¶ 3 ("Recognizing the respect for the environment accorded by the cultures of indigenous peoples of the Americas, and considering the special relationship between the indigenous peoples and the environment, lands, resources and territories on which they live and their natural resources."); *Id.* pmbl. ¶ 5:

Recognizing that in many indigenous cultures, traditional collective systems for control and use of land, territory and resources, including bodies of water and coastal areas, are a necessary condition for their survival, social organization, development and their individual and collective well-being; and that the form of such control and ownership is varied and distinctive and does not necessarily coincide with the systems protected by the domestic laws of the states in which they live.

The 1997 Draft also links environmental interests and indigenous culture by declaring the indigenous peoples' entitlement to restitution in return for their dispossession of their property in the article addressing cultural integrity. *See id.* art. VII, ¶ 2.

³²⁷ *See id.* art. XIII.

peoples,³²⁸ Article XIII goes on to declare that indigenous peoples bear the right to protect their environmental resources, to participate in decision making that promises to impact their lands and natural resources, and to have their environmental interests protected by the state within whose borders they reside.³²⁹ In this effort to empower indigenous peoples with both a voice and authority over their environmental interests, the 1997 American Declaration recognizes the need for non-indigenous governments to acknowledge some form of quasi-governmental power in indigenous peoples over their environmental interests, whether or not the term ‘sovereignty’ itself is utilized. Indeed, Article XV declares the indigenous right to self-govern, listing “land and resource management, the environment and entry by nonmembers” as within the purview of such autonomous self-government.³³⁰

Third, the 1997 American Declaration demands that governments provide the legal means for indigenous peoples to protect their environmental interests, including property rights,³³¹ laws providing the means to protect, manage and converse natural resources,³³² and participatory procedures to minimize the environmental impacts of non-indigenous action on indigenous peoples’

³²⁸ *Id.* art. XIII, ¶ 1 (“Indigenous peoples have the right to a safe and healthy environment, which is an essential condition for the enjoyment of the right to life and collective well-being.”).

³²⁹ *Id.* art. XIII, ¶ 3 (addressing indigenous peoples’ rights to “conserve, restore and protect their environment” and its “productive capacity”); *Id.* art. XIII, ¶¶ 2, 4 (addressing indigenous peoples’ right to information about impacts to their environmental interests and the right to participate in government conservation programs); *Id.* art. XIII, ¶¶ 5, 6, 7 (addressing indigenous peoples’ right to state assistance and protection for environmental and public health purposes).

³³⁰ *Id.* art. XV, ¶ 1:

Indigenous peoples have the right to freely determine their political status and freely pursue their economic, social, spiritual and cultural development, and accordingly, they have the right to autonomy or self-government with regard to *inter alia* . . . land and resource management, the environment and entry by nonmembers; and to determine ways and means for financing these autonomous functions.

³³¹ *Id.* art. XVIII, ¶ 2 (“Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources . . .”).

³³² *Id.* art. XVIII, ¶ 4: (“Indigenous peoples have the right to an effective legal framework for the protection of their rights with respect to the natural resources

environments.³³³ Acknowledging that the public interest might necessitate relocation of indigenous peoples in exceptional circumstances, and also that restitution may not be possible in cases of past confiscations of tribal land, the 1997 American Declaration declares the right of indigenous peoples to compensation.³³⁴ The primary thrust of the Article, however, is that “[i]ndigenous peoples have the right to the legal recognition of *their* varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property.”³³⁵ Thus, in addressing the need for non-indigenous legal systems to acknowledge and protect the environmental interests of indigenous peoples, the 1997 American Declaration demands that the indigenous perspective on such interest be accommodated and incorporated to the extent possible.

B. THE 2003 CONSOLIDATED TEXT OF THE DRAFT AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

In June of 2003, the Chair of the Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Peoples distributed a new draft of the Declaration, its text consolidated from the contributions, comments, and proposals submitted on the 1997 draft.³³⁶ In a number of ways, the 2003 American Declaration underscores the primary message of the

on their lands, including the ability to use, manage, and conserve such resources . . .”).

³³³ In the event that ownership of the minerals or resources of the subsoil pertains to the state or that the state has rights over other resources on the lands, the governments must establish or maintain procedures for the participation of the peoples concerned in determining whether the interests of these people would be adversely affected and to what extent, before undertaking or authorizing any program for planning, prospecting or exploiting existing resources on their lands. The peoples concerned shall participate in the benefits of such activities, and shall receive compensation, on a basis not less favorable than the standard of international law for any loss which they may sustain as a result of such activities.

Id. art. XVIII, ¶ 5.

³³⁴ *Id.* art. XVIII, ¶¶ 6, 7.

³³⁵ *Id.* art. XVIII, ¶ 1.

³³⁶ Perm. Council of the Org. of American States, Comm. on Juridical and Political Affairs, Working Group to Prepare the Proposed Am. Declaration on the Rights of Indigenous Peoples, *Consolidated Text of the Draft Declaration Prepared by the*

1997 draft: the appreciation of indigenous peoples as both historically significant and imbued with cultural knowledge of importance to both indigenous and non-indigenous peoples.³³⁷ The 2003 draft makes this theme more explicit, in good part through its prefatory language on the connection between indigenous culture and the environment, which it describes as both crucial to indigenous survival and valuable for all humankind in its quest to live in harmony with nature.³³⁸ In keeping with these opening statements, the 2003 draft also adds a new Article VI, which acknowledges the indispensability of collective rights in indigenous culture, then demands that signatories honor such collectivity.³³⁹

Furthermore, the 2003 American Declaration makes more explicit that indigenous peoples must be free to operate their own forms of organization as well as promote their economic, social and cultural development.³⁴⁰ Unlike the 1997 draft, the 2003 American Declaration defines these freedoms as “the right to self-determination,” thus boldly taking on the complexities of that concept and the level of autonomy it invites.³⁴¹ Indeed, in

Chair of the Working Group, OEA/Ser.K/XVI/GT/DADIN/doc.139/03 (Jun. 17, 2003).

³³⁷ See, e.g., *id.* pmbl. (describing indigenous peoples as “foundational societies that form an integral part of the Americas [whose] values and cultures are inextricably linked to the identity both of the countries they live in and of the region as a whole,” and noting their “cultural wealth and diversity”).

³³⁸ *Id.*

The Member States of the Organization of American States (hereinafter “the States”),
RECOGNIZING that the rights of indigenous peoples constitute a fundamental and historically significant issue for the present and future of the Americas;
RECOGNIZING, moreover, the importance for humankind of preserving the indigenous cultures of the Americas. . . .

Id.

³³⁹ *Id.* art. VI (describing the collective rights of indigenous peoples as “indispensable for their continued existence, well-being, and development as peoples”, then declaring that “the States recognize, *inter alia*, the right of the indigenous peoples to their collective action”).

³⁴⁰ *Id.* art. III (“Within the States, the right to self-determination of the indigenous peoples is recognized, pursuant to which they can define their forms of organization and promote their economic, social, and cultural development.”).

³⁴¹ *Id.*; see also *id.* art. XX (also referencing the “right of self-determination within the States”). By adding the phrase “within the States,” the drafters apparently

the revised version of the 1997 draft's provision on self-government, the 2003 American Declaration states: "Indigenous peoples, in the exercise of the right to self-determination within the States, have the right to autonomy or self-government with respect to, *inter alia*, . . . administration of land and resources, environment and entry of non-members" ³⁴² Thus, the 2003 American Declaration explicitly recognizes the environmental interests of indigenous peoples as among the very basic elements of self-determination. ³⁴³

Articles addressing the right to environmental protection, land, and natural resources, already containing detailed provisions in the 1997 American Declaration, remained relatively intact in the 2003 draft. ³⁴⁴ Alterations worth noting include the additional emphasis on the scope of indigenous peoples' environmental rights being asserted, as well as the centrality of those rights to indigenous culture, with the 2003 draft containing declarations of indigenous peoples' rights to "live in harmony with nature" and to "conserve, restore, make use of, and protect" their environment, along with a declaration of indigenous rights to the "sustainable management of their lands, territories, and resources." ³⁴⁵ In keeping with these environmental rights, the 2003 draft also expanded its description of the property rights of indigenous peoples, including sustenance among the historical uses warranting recognition under property law, and expanding the scope of property rights to include "the waters, coastal seas,

seek to avoid the implication that the American Declaration invites indigenous peoples to assert full autonomy, declaring themselves to be fully separate nations.

³⁴² *Id.* art. XX, ¶ 1.

³⁴³ Additional elements of self-determination include culture, language, spirituality, education, information, means of communication, health, housing, employment, social well-being, maintenance of community security, family relations, and economic activities. *See id.*

³⁴⁴ *See id.* art. XVIII ("Right to environmental protection"); *id.* art. XXIV ("Traditional forms of property and cultural survival. Right to land, territory, and resources.").

³⁴⁵ *See id.* art. XVIII, para. 1 ("Indigenous peoples have the right to live in harmony with nature and to a healthy and safe environment, which are essential conditions for enjoyment of the right to life, to their spirituality, and to collective well-being."). *See also id.* art. XVIII, ¶ 2 ("Indigenous peoples have the right to conserve, restore, make use of, and protect their environment, and to the sustainable management of their lands, territories, and resources.").

flora, fauna, and all other resources of that habitat, as well as their environment. . . .”³⁴⁶

State responsibilities toward indigenous peoples were also amplified in the 2003 draft’s environmental protection section, which claims for indigenous peoples’ consultation rights in connection with potential impacts on their environment as well as participation rights in the “organization” and “implementation of government programs and policies to conserve and exploit their land, territories, and resources.”³⁴⁷ The 2003 draft also adds to the state responsibility to prohibit and punish the introduction of polluting materials to indigenous lands the additional duty to prevent such illegal activity.³⁴⁸ Similarly, the property rights section of the 2003 draft charges states with the responsibility to “establish the special regimes appropriate for [the] recognition [of indigenous forms of property, possession, and ownership of their lands and territories], and for their demarcation or titling.”³⁴⁹ The property rights section also underscores the need for states to acknowledge and accommodate the fact that indigenous and

³⁴⁶ *Id.* art. XXIV, ¶ 1. In connection with the sustenance right, the 2003 draft notes that the indigenous peoples’ property interest must “respect[] the principles of the legal system of each State.” In connection with the statement of indigenous rights over waters, coastal seas, flora, fauna and other resources, the 2003 draft states that indigenous peoples will use such interests to “preserv[e] these for themselves and future generations.” *Id.*

³⁴⁷ *See id.* art. XVIII, ¶ 3 (“Indigenous peoples have the right to be informed and consulted with respect to measures that may affect their environment, as well as to participate in actions and decisions that may affect it.”); *See also id.* art. XVIII, ¶ 4 (“Indigenous peoples have the right to participate fully in the formulation, planning, organization, and implementation of government programs and policies to conserve and exploit their lands, territories, and resources.”).

³⁴⁸ *Id.* art. XVIII, ¶ 6 (“The State shall prohibit, punish, and prevent, in conjunction with the indigenous authorities, the introduction, abandonment, or deposit of radioactive materials or waste, or toxic substances or waste, in violation of legal provisions in force; as well as the production, introduction, transit, possession, or use of chemical, biological, or nuclear weapons on indigenous lands and territories.”).

³⁴⁹ *See id.* art. XXIV, ¶ 2 (discussing indigenous peoples’ rights “to legal recognition of the various and particular modalities and forms of property, possession, and ownership of their lands and territories. . . .”); *see also id.* art. XXIV, ¶ 6 (requiring the States to “take adequate measures to avert, prevent, and punish any intrusion or use of [indigenous peoples’] lands, territories, or resources by persons from outside”); *id.* art. XXIV, ¶ 8 (charging States with the responsibility to “provide, within their legal systems, a legal framework and effective legal remedies to protect the rights of the indigenous peoples referred to in this article”).

non-indigenous systems for allocating interests in land are likely to differ, expressly asserting that “[i]ndigenous peoples have the right to attribute ownership within the community in accordance with the values, usages, and customs of each peoples.”³⁵⁰

As noted above, the American Declaration remains the subject of negotiation among OAS member states. The Delegation of the United States, for example, in 2004, offered an edited general statement of indigenous peoples’ environmental interests, striking the phrase “have the right” and offering “are entitled” in its stead, a change that appears motivated to invite the interpretation of such rights as falling short of serving as a basis for a judicial claim.³⁵¹ In the same edited phrase, the U.S. Delegation sought to diminish the concept of indigenous rights as collective, and also to delete any acknowledgment that environmental rights play a role in tribal identity or culture.³⁵²

The world has yet to witness the outcome of the negotiations among the Organization of American States. The process, however, verifies that a momentum is observable in both international instruments and court decisions, and that this momentum favors the recognition of indigenous peoples’ self-determination as well as the fact that environmental interests lie at the core of any effort to honor that self-determination.

³⁵⁰ *Id.* art. XXIV, ¶ 5.

³⁵¹ PROPOSAL BY THE DELEGATION OF THE UNITED STATES
Article XVIII: Environmental Protection

1. Indigenous peoples *and their members, like all human beings, are entitled* [~~have the right to live~~] to a healthy and productive life in harmony with nature. [~~which is essential for enjoyment of their right to life, to their spirituality, and to collective well being~~].

Perm. Council of the Org. of American States, Comm. on Juridical and Political Affairs, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, *Fourth Meeting of Negotiations in the Quest for Points of Consensus; Proposal to Amend Articles XIX to XXIII and Section Six of the Draft American Declaration on the Rights of Indigenous Peoples*, sec. III, art. XVIII, ¶ 1, OEA/Ser.K/XVI/GT/DADIN/doc.192/04 rev.1, (Nov. 11, 2004).

³⁵² *Id.* The U.S. draft attempts to dilute references to the collective nature of indigenous peoples’ environmental interests by adding the language “and their members” as well as by striking the final phrase of the original draft, which refers to the collective well being of indigenous peoples. The U.S. draft attempts to dilute the idea of environmental rights being of particular cultural value to indigenous peoples by adding the phrase “like all human beings” and, again, by striking the final phrase of the original draft, which characterizes environmental interests as “essential” to a tribe’s “spirituality” and “collective well being.”

VI. CONCLUSION

Empowerment of indigenous peoples is no panacea for planetary environmental and human problems. Empowerment of indigenous peoples in resource decision-making brings no guarantee of more equitable or sustainable local outcomes, as many indigenous peoples have internalised many of the values of industrial society. Yet empowerment of indigenous peoples is a necessary step in creating new political and cultural spaces in which to shape alternatives to the New World Order. In this sense, then, empowerment of indigenous peoples will involve the decolonisation of indigenous spaces, and the development of new ways of seeing the relationships between resource industries, their host communities, and the wider industries and communities that rely on them.³⁵³

From the concepts, international rhetoric, and cases discussed above, it may be observed that, if nothing else, linguistic tools intended for the protection of indigenous peoples' environmental rights do exist. Furthermore, this Article's survey of international instruments illustrates that the world's appreciation for the crucial role that the environment plays in indigenous cultures appears to be both widespread and strengthening. Certainly the pace of the international community's evolution from a paternalistic, assimilationist perspective to one that has only just begun to accept the rhetoric of indigenous peoples' self-determination stands as a testimonial to the overall hesitance of the world's dominant cultures to embrace the positive values offered by indigenous peoples; these values include racial and cultural diversity, important contributions to the historical heritage of so much of the world, and, of course, superior knowledge about nature and particularly about systems of sustainable development.

As one commentator has observed, "international law is no monolith, but is more like a network of interlinked, evolving and eminently challengeable assumptions."³⁵⁴ But the *Awes Tingni* decision, along with the draft American Declaration on the

³⁵³ Howitt et al., *supra* note 34, at 21.

³⁵⁴ THORNBERRY, *supra* note 2, at 87 (discussing changing perspectives on indigenous peoples and indigenous authority over time).

Rights of Indigenous Peoples, are unambiguous signs that international law and international lawmakers are primed to translate the positive rhetoric on indigenous peoples into actions that defend both the cultural heritage of indigenous peoples and, at the same time, some of the earth's environmental resources. Indeed, inspired by these and other events in international law, in December of 2004 the United Nations General Assembly adopted a resolution launching the Second International Decade of the World's Indigenous Peoples, which commenced January 1, 2005.³⁵⁵ The goals for this decade include "the further strengthening of international cooperation for the solution of problems faced by indigenous peoples in such areas as culture, education, health, human rights, the environment and social and economic development, by means of action-oriented programs and specific projects, increased technical assistance and relevant standard-setting activities."³⁵⁶ And, although this announcement may be dismissed as no more than a rhetorical gesture, it is heartening to anticipate the continued positive momentum in the world's appreciation for the environmental values of indigenous cultures.

³⁵⁵ Press Release, General Assembly, General Assembly Adopts 61 Resolutions on Human Rights, Social, Humanitarian Issues, U.N. Doc. GA/10321 (Dec. 20, 2004), available at <http://www.un.org/News/Press/docs/2004/ga10321.doc.htm> (referencing General Assembly, Third Committee, *Programme of Activities of the International Decade of the World's Indigenous People, 1995-2004*, U.N. Doc. A/C.3/59/L.30 (Oct. 22, 2004)).

³⁵⁶ *Id.* ¶ 2.