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## Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples

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# Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples

*Siegfried Wiessner\**

## ABSTRACT

*This Article explores the concept of “indigenous sovereignty” against the backdrop of the resurgence of indigenous peoples as actors in international and domestic law and policy. The Author starts with the traditional Western notion of sovereignty and its dynamization via the principle of self-determination, cabined by the exclusionary concepts of terra nullius and uti possidetis. The next Part delineates the global indigenous renaissance occurring since the 1970s and the resulting state practice that has led to treaties and to the development of customary international law in the field. The Article proceeds to analyze the scope and legal effect of the 2007 UN Declaration on the Rights of Indigenous Peoples. It lays out various understandings of indigenous self-government under the rubric of self-determination; and ultimately, based on an assessment of the authentic aspirations of indigenous peoples, their “inner worlds,” it suggests a functional redefinition of the legal scope and the limits of indigenous sovereignty.*

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September 13, 2007. Indigenous peoples around the world breathe a sigh of relief. They have snatched victory from the jaws of defeat, as the UN General Assembly, in an overwhelming vote of 144 states in favor to 4 against, adopts the UN Declaration on the Rights of Indigenous Peoples.<sup>1</sup> A last-minute change of heart by the African states, occasioned by a few slight accommodations in the text of the document, allowed this milestone of re-empowerment, worked on for over a generation, to become legal reality. Celebrations were in order, and they took place across the globe. Yet questions remain: What, exactly, does this victory mean? Have the indigenous communities accomplished their long way back from what seemed to be assured extinction? Have they, in effect, managed to reverse colonialism? Are they sovereign again, masters of their own fate?

Part I of this Article will briefly review the history of marginalization, exclusion, and often destruction of indigenous peoples. Part II will address the concept of sovereignty in its traditional Western connotation of the modern nation-state, while Part III will describe the way in which the right of self-determination dynamized this concept, also elucidating the anti-indigenous function and effect of the concepts of *terra nullius* and *uti possidetis*. Part IV will delineate the cross-border indigenous resurgence starting in the late 1960s and the resulting state practice that led to treaties as well as customary international law in the field. The Article will then explore the development, content, and legal effect of the 2007 UN

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1. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at <http://www2.ohchr.org/english/issues/indigenous/declaration.htm>.

Declaration on the Rights of Indigenous Peoples in Part V; lay out various understandings of indigenous self-government under the rubric of self-determination in Part VI; and, based on an assessment of the authentic aspirations of indigenous peoples—their “inner worlds”—suggest a functional redefinition of the preferred legal scope of indigenous sovereignty in Part VII.

## I. BACKGROUND

Modern society has tried to extinguish the indigenous voice.<sup>2</sup> Its language, institutions, and rituals have become dominant.<sup>3</sup> Modernity’s law, in particular, has imprinted itself on indigenous peoples, following the sword of conquest in the Western Hemisphere and beyond.<sup>4</sup> Its domination of indigenous ways of life was to be expected. Its aggressive use of the Earth and its resources,<sup>5</sup> combined with sanctions to punish perceived transgressions,<sup>6</sup> its focus on “getting ahead” via technological and social “progress,”<sup>7</sup> its premium on Cartesian reason and logic,<sup>8</sup> and its emphasis on the individual<sup>9</sup> ran head-on into and rolled over the soft, unresisting indigenous concepts of oneness with Mother Earth and Father Sky, their focus on peace and reconciliation, on faith, and on leaving nobody behind—on community.<sup>10</sup>

Still, the onslaught has not been completely successful. All the military, economic, and materialistic might of the modern world has

2. FRANKE WILMER, *THE INDIGENOUS VOICE IN WORLD POLITICS: SINCE TIME IMMEMORIAL* 54–55 (1993) (noting that because “modernization is believed to be a good in itself,” communities have rationalized actions that “[remove] obstacles to modernization,” thereby justifying the oppressive treatment of indigenous communities).

3. *Id.* at 37.

4. *Id.* at 49; see, e.g., Robert Yazzie, *Indigenous People and Postcolonial Colonialism*, in *RECLAIMING INDIGENOUS VOICE AND VISION* 39–41 (Marie Battiste ed., 2000) (discussing the colonization of indigenous people in the United States, Canada, Africa, and Asia through technological advances in warfare).

5. Based often, though controversially, on God’s command to humans found in *Genesis* 1:28 (King James): “Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea and over the fowl of the air, and over every living thing that moveth upon the earth.”

6. THOMAS G. BLOMBERG & KAROL LUCKEN, *AMERICAN PENOLOGY: A HISTORY OF CONTROL* 33 (2000) (noting that “[punishment] was . . . considered to be a moral obligation of the community” in colonial America).

7. See, e.g., REINHART KOSSELLECK, *THE PRACTICE OF CONCEPTUAL HISTORY: TIMING HISTORY, SPACING CONCEPTS* 233 (Todd Presner et al. trans., 2002) (“The concept of progress encompasses precisely that experience of our own modernity: again and again, it has yielded unforeseeable innovations that are incomparable when measured against anything in the past.”).

8. See Yazzie, *supra* note 4, at 66–67.

9. *Id.* at 82–83, 92.

10. *Id.* at 43, 92.

not succeeded in silencing the indigenous voice.<sup>11</sup> Just like tender water ultimately erodes the hardest of rocks, indigenous cultures, peoples, and their values have persisted. Like many oppressed communities, they have had to adapt, go underground, and avoid open confrontation;<sup>12</sup> they withdrew into niches of survival, areas not initially desired by the more dominant and aggressive part of humanity;<sup>13</sup> they engaged in religious syncretism, transforming their own gods into saints of the dominant faith;<sup>14</sup> they participated in the dominant economies, by way of tourism and the sale of handicraft;<sup>15</sup> and they even enlisted in the armed forces of the conqueror.<sup>16</sup>

Paradoxically, modern communication technologies<sup>17</sup> have helped indigenous peoples to come together, sharing their stories across the breadcrumbs of land that the conquerors have left them and asserting their voice.<sup>18</sup> An international movement has united those who have been systematically divided in the past.<sup>19</sup> Domestic and international decisions have resulted in freezing the processes of assimilation and the termination of indigenous voices and values—sometimes even in slightly turning back the clock.<sup>20</sup>

The *Awas Tingni* decision of the Inter-American Court of Human Rights<sup>21</sup> and the internationally successful campaign of the Western Shoshone against the taking of their sacred lands<sup>22</sup> are just two

11. WILMER, *supra* note 2, at 32, 40, 149.

12. *See id.* (describing the assimilation process of the American Indians).

13. *Id.*

14. *E.g.*, ELLA SHOHAT & ROBERT STAM, UNTHINKING EUROCENTRISM: MULTICULTURALISM AND THE MEDIA 43–44 (1994) (“In Mexico, the mythical figure of the ‘Virgin of Guadalupe’ put a *mestizo* face on the Catholic religion, substituting for the Aztec goddess Tonantzin . . . [I]ndigenous syncretism formed a tactic for cultural survival.”).

15. *Id.* (contrasting predominant U.S. narratives with Native American interpretation that “Pocahontas learns English ways in order to become an ambassador for her community and thus rescue it”).

16. For an example of a country’s facilitation of the enlistment of indigenous persons, see Indigenous Australians, <http://www.defence.gov.au/army/51fnqr/indigenous.html> (last visited Sept. 23, 2008).

17. Jeff J. Corntassel & Tomas Hopkins Primeau, *Indigenous “Sovereignty” and International Law: Revised Strategies for Pursuing “Self-Determination,”* 17 HUM. RTS. Q. 343, 360 (1995) (“Due to the unprecedented level of modern communication, indigenous populations around the world are uniting and acting in a concerted fashion.”).

18. *Id.*

19. WILMER, *supra* note 2, at 18–19, 137–38.

20. *Id.* at 32.

21. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. C.H.R. (2001), reprinted in *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 19 ARIZ. J. INT’L & COMP. L. 395, 430–31, 440 (2002) [hereinafter *Awas Tingni*].

22. Julie Ann Fishel, *The Western Shoshone Struggle: Opening Doors for Indigenous Rights*, 2 INTERCULTURAL HUM. RTS. L. REV. 41, 46 (2007) (referring to the December 2002 Final Report of the Inter-American Commission on Human Rights finding violations of the right to property, due process and equality under the law;

examples reaffirming the original assessment, based on recent state practice, that the lands traditionally held by indigenous peoples are theirs as a matter of right under customary international law.<sup>23</sup> Honoring the land rights of indigenous peoples is the first step toward preservation of their culture. The next step is to respect the structures of decisionmaking within traditional communities—a distant variant of the modern processes of decisionmaking in communities we proudly call “democratic.”

Cultural difference provides the context within which indigenous peoples’ claims to self-government arise. Unlike the claims of other groups, indigenous peoples’ claims are often couched in the verbiage of “sovereignty.”<sup>24</sup> Vine Deloria, Jr., one of the modern-day prophets of Indian resurgence, spoke in terms of “indigenous sovereignty.”<sup>25</sup> Even today, U.S. courts use “tribal sovereignty” as a term of art when they analyze cases involving American Indian tribes or, as they prefer to be called, “nations.”<sup>26</sup> Other states also face indigenous peoples’ demands for sovereignty.<sup>27</sup> Thus, the key notion of sovereignty must be critically reviewed.

Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002); and, the March 10, 2006 decision of the United Nations Committee on the Elimination of All Forms of Racial Discrimination, which urged the U.S. to “freeze,” “desist,” and “stop” actions being taken, or threatened to be taken, against the Western Shoshone Peoples of the Western Shoshone Nation, U.N. Comm. on the Elimination of Racial Discrimination [CERD], *Decision 1 (68): Early Warning and Urgent Action Procedure*, U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006)).

23. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 127 (1999).

24. See, e.g., Vine Deloria, Jr., *Self-Determination and the Concept of Sovereignty*, in NATIVE AMERICAN SOVEREIGNTY 118 (John R. Wunder ed., 1996).

25. *Id.* at 121, 123. For biographical background, see Steve Pavlik, *In Honor of Vine Deloria, Jr. (1913–2005)*, <http://www.nwic.edu/deloria/memorial.pdf> (last visited Sept. 24, 2008).

26. For recent case law summary, see DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 377–413 (5th ed. 2005). As to the original Marshall trilogy of cases, see *id.* at 104–27. Felix S. Cohen, in his seminal handbook of federal Indian law, referred to powers of Indian tribes as “inherent powers of a limited sovereignty which has never been extinguished.” HANDBOOK OF FEDERAL INDIAN LAW 122 (1941), *quoted in* United States v. Wheeler, 435 U.S. 313, 322 (1978). North American indigenous peoples often style themselves as a “nation.” See, e.g., The Navajo Nation, <http://www.navajo.org> (last visited Oct. 10, 2008); The Oneida Indian Nation, <http://www.oneidaindiannation.com> (last visited Sept. 24, 2008); The Shasta Indian Nation, <http://www.shastaindiannation.org/index.html> (last visited Sept. 24, 2008); The Catawba Indian Nation, <http://catawbaindiannation.com> (last visited Sept. 24, 2008).

27. See Kirsten Matoy Carlson, *Premature Predictions of Multiculturalism?*, 100 MICH. L. REV. 1470, 1475–76 (2002) (referring to Latin American states’ recognition of indigenous sovereignty claims); see also Dianne Otto, *A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia*, 21 SYRACUSE J. INT’L L. & COM. 65, 79–80 (1995); cf. Benjamin A. Kahn, *The Legal Framework Surrounding Maori Claims to Water Resources in New Zealand: In Contrast to the American Indian Experience*, 35 STAN. J. INT’L L. 49, 81 (1999) (referring to the “importance of a confined resource base to the retention of indigenous sovereignty”). See generally Corntassel,

## II. SOVEREIGNTY

Sovereignty underpins every legal system, be it international or national. The sovereign may be a king or queen or the people, but is, in the original definition, *legibus solutus*—i.e., free from the bonds of law.<sup>28</sup> Bodin's sole exception—divine law or the law of God, from which one cannot be free—has, in the prevailing positivist paradigm, not survived the era of Enlightenment and the emergence of the modern nation-state.<sup>29</sup>

The sovereign reigns supreme, as he or she or it issues binding commands enforced by the threat of severe sanctions within the community under its control.<sup>30</sup> The sovereign holds the power to force compliance with its commands within its community, creating domestic law in a hierarchical or vertical sense.<sup>31</sup> Furthermore, the sovereign has the power to limit its authority beyond the borders of its community via agreements or concurrent practice with the sovereigns of external communities—thus creating international law, which is law in a co-archival or horizontal sense.<sup>32</sup>

The paradigm of the sovereign in the modern world, at least in North America, is the nation-state. The nation-state is an abstract concept empirically understandable only through the notion that authorized persons can effectively control certain territory. The concept of the nation-state replaced the feudal idea of a personal community constituted of the feudal lord and his subjects, who are related by the very tangible concept of perpetual allegiance, i.e., the inescapable duty of obedience of the subject toward the lord, and the

*supra* note 17; STEVEN CURRY, *INDIGENOUS SOVEREIGNTY AND THE DEMOCRATIC PROJECT* (2004).

28. JEAN BODIN, *THE SIX BOOKES OF A COMMONWEALE* 86 (Kenneth Douglas McRae ed., Harvard Univ. Press 1962) (1606) (“[W]hereas the prince or people themfelues, in whome the Soueraigntie refteh, are to giue account vnto none, but to the immortall God alone.”).

29. Joanne Barker, *For Whom Sovereignty Matters*, in *SOVEREIGNTY MATTERS: LOCATIONS OF CONTESTATION AND POSSIBILITY IN INDIGENOUS STRUGGLES FOR SELF-DETERMINATION* 1, 2 (Joanne Barker ed., 2005).

30. At least that is the definition of law as a “command of the sovereign” under the ruling positivist paradigm. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 27 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832). Others would see law in an empirical perspective, as a “process of authoritative and controlling decision.” Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT’L L. 316, 319 (1999).

31. As to the interrelationship of power and law, particularly in the international context, see generally Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS, 133 (1953), and Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT’L L. 64 (2006).

32. See W. Michael Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, 78 AM. SOC’Y INT’L L. PROC. 74, 76 (1984) (referring to “the traditional coarchical system of international relations”).

lord's duty to protect the subject, even in the lands of another lord.<sup>33</sup> When Louis XIV, the Sun King of France, famously proclaimed "L'Etat c'est moi!," he not only reveled in his absolute power over everybody in his realm—he also created a rival entity, the state, which would ultimately overtake, subdue, and bring to an end the very concept of personal, dynastic rule.<sup>34</sup> Enlightenment's insights led to the next step: the more or less voluntary subordination of the ruler to the state, which was best expressed by Prussian King Frederick the Great's characterization of himself as the "first servant of the state."<sup>35</sup> In German political philosophy, in particular, the state is described as a mystical phenomenon; Georg Wilhelm Friedrich Hegel called it the highest manifestation of reason.<sup>36</sup> Anglo-American political philosophy historically never went as far as Hegel's characterization—the state and its agent, the government, ever to be distrusted, were just a pragmatic way of delivering certain services to the people—at a minimum, protecting their liberties by providing security.<sup>37</sup>

Whatever theoretical basis underpins state and government in the modern era, it can still safely be assumed that the U.S. Supreme Court will enforce self-executing treaties<sup>38</sup> and customary international law,<sup>39</sup> so long as it has jurisdiction and the plaintiff has

33. 1 SIR EDWARD COKE, *Part Seven of the Reports: Calvin's Case, or the Case of the Postnati*, in THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 175–76 (Steve Sheppard ed., 2003) (defining allegiance as a "duplex et reciprocum ligamen; quia sicut subditus regi tenetur ad oboedientiam, ita rex subdito tenetur ad protectionem"). Compare the reference to this concept in the British treason case of *Joyce v. Director of Public Prosecutions*, [1946] A.C. 347, 364 (H.L.).

34. EDWARD LATHAM, *FAMOUS SAYINGS AND THEIR AUTHORS: A COLLECTION OF HISTORICAL SAYINGS IN ENGLISH, FRENCH, GERMAN, GREEK, ITALIAN, AND LATIN* 144 (2d ed. 1906).

35. SIEGFRIED WIESSNER, *DIE FUNKTION DER STAATSANGEHÖRIGKEIT* 102 (1989).

36. Georg Wilhelm Friedrich Hegel, *The Philosophy of Right*, in GREAT BOOKS OF THE WESTERN WORLD 84 (Mortimer J. Adler ed., T. M. Knox trans., 2d ed. 1990). Interestingly, Harold J. Laski accused Hegel of having "universalize[d] the Prussian monarchy into the ultimate expression of the time-spirit." HAROLD J. LASKI, *A GRAMMAR OF POLITICS* 15 (1925).

37. This was based on the view of the state and, particularly, government as a revocable creature of a fictional social contract. According to John Locke, citizens moved from the state of nature to the state of culture, instituting a government, by agreeing to cede some of their natural rights to liberty and property to the government in exchange for the government's provision of security. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 267–428 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

38. See the most recent reaffirmation of this rule in the Supreme Court's March 25, 2008 opinion in *Medellin v. Texas*, 128 S. Ct. 1346 (2008), which offers this definition in Chief Justice Roberts' majority opinion: "What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification." *Id.* at 1356 n.2.

39. The key decision is *The Paquete Habana*, 175 U.S. 677 (1900): "[W]here there is no treaty and no controlling executive or legislative act or judicial decision,



standing. International legal restrictions limit any sovereign.<sup>40</sup> Like the United States, other countries have integrated international law into their domestic law, thus allowing domestic power structures such as courts, police, and marshals to become the main engines of enforcement of international law.<sup>41</sup> Most such states have chosen a dualist approach, where they keep “sources” of international law conceptually distinct from domestic law and invite them into their domestic law at a level below that of their highest ranked norm, usually a constitution.<sup>42</sup> Monist systems—integrated unitary legal systems with international law either at the top or at the bottom of the “pyramid” of norms—are the exception, the Austrian Constitution of 1919 being one of them.<sup>43</sup>

The limitations that international law places on sovereigns largely emanate from self-restraint.<sup>44</sup> The most restrictive interpretations of international law call these limits “external public law” (“äusseres Staatsrecht”),<sup>45</sup> and any such restrictions, at least before World War II, had to be interpreted narrowly out of respect for a state’s sovereignty, which could not lightly be infringed.<sup>46</sup> Hitler’s blatant abuse of the shield of sovereignty to commit the horror of the Holocaust and his unprovoked attacks on other countries yielded a

resort must be had to the customs and usages of civilized nations.” *Id.* at 700; *cf.* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816–817 (1997) (questioning the idea that customary international law has the status of federal common law).

40. WILMER, *supra* note 2, at 44, 164.

41. W. MICHAEL REISMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 122–25 (2004).

42. See *id.* for further references on the dualist approach. The United States’ stance is predominantly dualist with respect to international agreements. U.S. CONST. art. VI, § 2; REISMAN, *supra* note 41, at 123–24.

43. Hans Kelsen was the legal architect of the Austrian Constitution, which followed his idea of a “pyramid of norms,” with international law and its founding principle [*Grundnorm*] of *pacta sunt servanda* at the top. HANS KELSEN, PURE THEORY OF LAW 323–43 (Max Knight trans., Univ. of Calif. Press 1967) (1960).

44. See generally 12 GEORG WILHELM FRIEDRICH HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS, §§ 330–340 (Hamburg, Meiner 1955) (1821).

45. *Id.*

46. The Case of the S.S. “*Lotus*” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

qualitative change in international law.<sup>47</sup> Its focus shifted to creating individual rights on the international plane via a commitment to human rights, establishing group rights through the right to self-determination of peoples, prohibiting aggression, and delegating powers to the UN and its Security Council to make binding decisions regarding the maintenance of international peace and security.<sup>48</sup> The United Nations and its Charter provided the key mechanism for this transformation.<sup>49</sup> Thus, international law moved slowly from an exclusively consent-based system to a values-based international legal order. Sovereignty itself, already historically divided along territorial lines in the federalist models of the United States and its followers,<sup>50</sup> now arguably devolved to persons or groups.<sup>51</sup>

### III. THE PRINCIPLES OF SELF-DETERMINATION AND *UTI POSSIDETIS*: THEIR EFFECT ON INDIGENOUS PEOPLES

One key concept of the order established in the wake of World War II was the principle of self-determination.<sup>52</sup> The legacy of colonial conquest was supposed to be dealt with by offering colonized peoples a UN-supervised process of decolonization through which they could arrive at their preferred solutions to their political status, whether they desired independence, integration into the colonizing

47. See The Declaration of St. James Palace, June 12, 1941, available at <http://www.yale.edu/lawweb/avalon/imt/imtjames.htm> (declaring the allied governments to be resolved in the fight against German oppression and coercion until the achievement of enduring peace).

48. U.N. Charter arts. 1–2, 23–32.

49. *Id.* arts. 1–2.

50. Siegfried Wiessner, *Federalism: An Architecture for Freedom*, 1 NEW EUR. L. REV. 129, 133 (1993) (noting that federalism was born in the United States and now has spread to each of the six inhabited continents).

51. Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age*, 32 STAN. J. INT'L L. 255, 282 (1996). See generally STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999); ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996); and Allison D. Garrett, *The Corporation as Sovereign*, 60 ME. L. REV. 129 (2008).

52. U.N. Charter art. 1, ¶ 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.”); Universal Declaration of Human Rights, G.A. Res. 217A, art. 15, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) (“(1) Everyone has a right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 1, U.N. Doc. A/6316 (opened for signature Dec. 16, 1966, entered into force Mar. 23, 1976) (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

state, association, or any other status in between.<sup>53</sup> The decolonization process has been virtually completed.<sup>54</sup>

The problem with the UN's decolonization process was this: the choice as to the political future of colonized peoples was not given to the individual peoples conquered, but to the inhabitants of territories colonized by European conquerors, within the boundaries of the lines of demarcation drawn by the colonizers.<sup>55</sup> Thus the colonizers, by constituting the new country's "people" under the new sovereign's control, continued to rule the colonized from their graves. The name of the game is *uti possidetis*, a Roman legal term that essentially means one should leave the place as one received it.<sup>56</sup>

The decolonization of Spanish lands in Latin America set the precedent that was followed in other areas of European conquest, particularly Africa.<sup>57</sup> There, the boundaries were drawn by rulers who often literally used rulers at the Berlin Congo Conference of 1884.<sup>58</sup> The straight lines drawn there cut right through the heartlands, and the hearts, of very distinct linguistic and ethnic groups, creating problems that persist to the present day.<sup>59</sup> Pursuant

53. See REISMAN ET AL., *supra* note 41, at 151–54 (quoting relevant portions of G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (Dec. 14, 1960); G.A. Res. 1541, U.N. GAOR, 15th Sess., Annex, U.N. Doc. A/4651 (Dec. 15, 1960)).

54. *Id.* at 187.

55. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (Dec. 14, 1960); Malcolm N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 BRIT. Y.B. INT'L L. 75, 119–25 (1997).

56. See generally Shaw, *supra* note 55, at 97–151 (explaining the principle of *uti possidetis juris* and providing practical examples of its application). For critical evaluations, see HELEN GHEBREWEBET, *IDENTIFYING UNITS OF STATEHOOD AND DETERMINING INTERNATIONAL BOUNDARIES: A REVISED LOOK AT THE DOCTRINE OF UTI POSSIDETIS AND THE PRINCIPLE OF SELF-DETERMINATION* (2006), and Steven R. Ratner, *Drawing A Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590 (1996).

57. Case Concerning the Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 565 (Dec. 22).

58. H.J. DE BLIJ & PETER O. MULLER, *GEOGRAPHY: REALMS, REGIONS, AND CONCEPTS* 340 (1997) (“[T]he colonial powers’ representatives drew their boundary lines across the entire map. These lines were drawn through known as well as unknown regions, pieces of territory were haggled over, boundaries were erased and redrawn, and sections of African real estate were exchanged in response to urgings from European governments.”).

59. *Id.*

In the process [of drawing such lines on the map], African peoples were divided, unified regions were ripped apart, hostile societies were thrown together, hinterlands were disrupted, and migration routes were closed off. All of this was not felt immediately, of course, but these were some of the effects when the colonial powers began to consolidate their holdings and the boundaries on paper became barriers on the African landscape. The Berlin Conference was Africa's undoing in more ways than one. The colonial powers superimposed their domains on the African continent. By the time independence returned to Africa after 1950, the realm had acquired a legacy of political fragmentation that could . . . not . . . operate satisfactorily. The African politico-geographical

to the principle of *uti possidetis*, the UN-effectuated return of lands retraced the borders drawn by the conquerors.<sup>60</sup> Even the dissolutions of European countries today did not dare violate *uti possidetis*, as confirmed by the Badinter Commission, which formulated the conditions for EU recognition of breakaway entities of the former Yugoslavia.<sup>61</sup> Kosovo had to deal with the application of this principle—originally directed at the infamous Republika Srpska, the Serbian part of Bosnia-Herzegovina—as a major obstacle in its quest for recognition as an independent state.<sup>62</sup>

This process of decolonization was assumed to be concluded, by and large, in the mid-1970s after the demise of Franco and Salazar, the dictators of the last European colonial powers.<sup>63</sup> The Western Sahara and East Timor controversies were just part of the cleanup of this relatively orderly process.<sup>64</sup>

Orderly as the decolonization process was, it did not account for the peoples who were not yet back on the agenda of the state-centered international decision makers.<sup>65</sup> Quiet but determined, they subsisted not just as collections of individuals but as organic cultures with fervently held beliefs—indigenous peoples from around the world, numbering about 370 million, scattered in about seventy different nation-states.<sup>66</sup> They live a predominantly subsistence-based, non-urbanized, sometimes nomadic lifestyle; often they farm

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map is thus a permanent liability that resulted from three months of ignorant, greed acquisitiveness during the period of Europe's insatiable search for minerals and markets.

*Id.*; see also Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995).

60. See Shaw, *supra* note 55, at 128–41 (explaining that, given the concept of *uti possidetis juris*, the borders traced at the time the U.N. returned lands to the indigenous African peoples were those that were in evidence at the time of independence, which happened to be those arbitrarily drawn by European rulers at the Berlin Conference).

61. Conference of Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Jan. 11, 1992, and July 4, 1992, 31 I.L.M. 1488, 1503. For a thorough analysis, see Matthew C. R. Craven, *The European Community Arbitration Commission on Yugoslavia*, 66 BRIT. Y.B. INT'L L. 333 (1995).

62. REISMAN ET AL., *supra* note 41, at 218–30; Jonathan I. Charney, *Self-Determination: Chechnya, Kosovo, and East Timor*, 34 VAND. J. TRANSNAT'L L. 455 (2001). On February 17, 2008, Kosovo declared its independence, with major Western powers and other countries in support; Serbia and Russia, principally, remain opposed. *Kosovo MPs Proclaim Independence*, BBC NEWS, Feb. 17, 2008, <http://news.bbc.co.uk/2/hi/europe/7249034.stm>.

63. REISMAN ET AL., *supra* note 41, at 187.

64. *Id.* at 154–87.

65. Shaw, *supra* note 55, at 119–25; see also G.A. Res. 1514, *supra* note 55.

66. Official Website of the United Nations Permanent Forum on Indigenous Issues, <http://www.un.org/esa/socdev/unpfi/en/history.html> (last visited Sept. 24, 2008).

or hunt for food for immediate use.<sup>67</sup> They are called the Fourth World, and they have become a factor not only in the world's social process but also in its constitutive process.<sup>68</sup> They have risen like the mythical phoenix from the ashes.

#### IV. THE RISE OF INDIGENOUS PEOPLES AND THE FORMATION OF CUSTOMARY INTERNATIONAL LAW

Prior to the 1970s in the United States, and even today in Europe, indigenous peoples were not known to textbooks in international law as actors of any significance in the field; if anything, they were viewed as legal units of domestic law, as one arbitral tribunal characterized the Cayuga Nation in 1926.<sup>69</sup> Their numbers had decreased: in the census of 1960, only 523,591 people in the United States identified themselves as American Indian.<sup>70</sup> The conquerors' policies of assimilation and termination had had significant effect.

The 1960s and 1970s, however, were characterized by a revolutionary fervor that fueled a remarkable resurgence of the First Nations that continues today.<sup>71</sup> The American Indian Movement militantly protested the treatment of indigenous peoples in the United States.<sup>72</sup> In 1973, they ended up in a memorable seventy-one-day standoff with federal authorities near Wounded Knee in South Dakota, the site of the last major battle between white soldiers and Native Americans—as one view of history would have it—or the site of a massacre of over three hundred Sioux men, women, and children—as another opinion would hold.<sup>73</sup> The American Indian Movement's international offshoot, the International Indian Treaty

67. Wiessner, *supra* note 23, at 58–60, 93, 101–04.

68. See, e.g., Center for World Indigenous Studies, Fourth World Documentation Program, <http://www.cwis.org/fwdp/index.php> (last visited Sept. 24, 2008).

69. Cayuga Indians (Gr. Brit.) v. United States, 6 R. Int'l Arb. Awards 173, 176 (1926) (stating that an Indian tribe "is not a legal unit of international law"); see also *Island of Palmas Case (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards 829 (Perm. Ct. Arb. 1928). For an argument for international Cayuga land rights today, see Carrie E. Garrow, *Following Deskaheh's Legacy: Reclaiming the Cayuga Indian Nation's Land Rights at the Inter-American Commission on Human Rights*, 35 SYRACUSE J. INT'L L. & COM. 341 (2008).

70. Joane Nagel, *American Indian Ethnic Renewal: Politics and the Resurgence of Identity*, 60 AM. SOC. REV. 947, 947 (1995).

71. The number of self-identified American Indians increased in the census of 1990 to 1,878,285, a rise attributed to the combined effect of "federal Indian policy, American ethnic politics, and American Indian political activism." *Id.*

72. See generally Rachel A. Bonney, *The Role of AIM Leaders in Indian Nationalism*, 3 AM. INDIAN Q. 209 (1977).

73. *Id.* at 216. For information on the initial 1890 battle at Wounded Knee, see DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* 444–46 (1970).

Council,<sup>74</sup> was founded in 1974, followed by the World Council of Indigenous Peoples,<sup>75</sup> allowing leaders to unite indigenous pursuits in the Western Hemisphere from Canada to Venezuela and beyond. The Fourth World had found its voice,<sup>76</sup> and it soon found entrance into the institutions of the First World—in particular, the United Nations. Internationally united, the newly founded organizations created media attention for the plight of their members and ultimately gained a seat at the formal table of international decision making, the United Nations. Driven by Dr. Erica-Irene Daes, the Chairperson of the UN Working Group on Indigenous Populations, established in 1982, they found a forum in Geneva, where every indigenous group received five minutes, and not one second more, to bring its complaints to the attention of the world. The Working Group fielded these claims and responded in 1993 with a Draft Declaration on the Rights of Indigenous Peoples.<sup>77</sup>

The Draft Declaration, and the changes the global indigenous movement effectuated by consciously engaging the organized international community, were nothing short of monumental. One important change was the delegitimization of the conceptual grounding of the Conquest in the notion of *terra nullius*, which European powers had used to justify the acquisition of overseas lands by simple conquest—not only disregarding the will of the conquered original inhabitants of the land, but treating them, in essence, as legally irrelevant—as Aristotelian “natural slaves,” in the Spanish

74. The International Indian Treaty Council defines itself as “an organization of Indigenous Peoples from North, Central, South America and the Pacific working for the Sovereignty and Self Determination of Indigenous Peoples and the recognition and protection of Indigenous Rights, Treaties, Traditional Cultures and Sacred Lands.” Official Website of the International Indian Treaty Council, <http://www.treatycouncil.org/home.htm> (last visited Sept. 24, 2008).

75. The World Council of Indigenous Peoples (WCIP) was founded in 1975 as a powerful force of uniting dispossessed indigenous peoples across the globe. Douglas E. Sanders, *The Formation of the World Council of Indigenous Peoples* (IWGIA, Doc. 29, 1977). It formulated the basis for international indigenous claims with its 1977 Declaration on Human Rights and its 1984 Declaration of Principles. World Council of Indigenous Peoples, *Declaration on Human Rights*, Sept. 24-27, 1977, available at [http://www.cwis.org/fwdp/International/wcip\\_dec.txt](http://www.cwis.org/fwdp/International/wcip_dec.txt); World Council of Indigenous Peoples, *Declaration of Principles*, Sept. 23-30, 1984, available at <http://www.cwis.org/fwdp/Resolutions/WCIP/wcip.txt>. The WCIP dissolved in 1996 due to internal conflict. Christian J. B. Hicks, *Stallo's Knife?: An Historical Analysis of the Saami/United Nations Relationship*, in *NORTHERN VECHÉ* 116, 118 (2004), available at [http://www.nrf.is/images/stories/pdf/reports/northern\\_veche/theme2.pdf](http://www.nrf.is/images/stories/pdf/reports/northern_veche/theme2.pdf).

76. Cf. WILMER, *supra* note 2. See generally RECLAIMING INDIGENOUS VOICE AND VISION (Marie Battiste ed., 2000).

77. U.N. Economic and Social Council [ECOSOC], U.N. Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, Working Group on Indigenous Populations, *Report of the Working Group on Indigenous Populations on its Eleventh Session*, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993) [hereinafter Draft Declaration], reprinted in 9 ST. THOMAS L. REV. 212 (1996).

version of the Conquest.<sup>78</sup> The conquerors thoroughly believed in the superiority of European culture, as shown by France's promotion of its *mission civilisatrice*<sup>79</sup> and Spanish attempts to convert the "savages" by joint action of military and church.<sup>80</sup> Today, the international community generally accepts that the *terra nullius* concept in the acquisition of inhabited land is racist, as reflected in paragraph 4 of the Preamble of the 2007 UN Declaration on the Rights of Indigenous Peoples.<sup>81</sup> General international law discarded *terra nullius* as a consequence of the 1975 *Western Sahara* Opinion of the ICJ, which considered land agreements between indigenous peoples and states as "derivative roots of title" rather than recognizing original title obtained by occupation of *terrae nullius*.<sup>82</sup>

In addition to recognizing the right to self-determination, the Draft Declaration formulated an array of tailor-made collective rights, such as indigenous peoples' right to maintain and develop distinct legal systems and unique political, economic, social, and cultural identities and characteristics.<sup>83</sup> The Draft Declaration also set forth the right of indigenous groups to participate fully, "if they so choose," in the political, economic, social, and cultural life of the state.<sup>84</sup> It guaranteed indigenous people the right not to be subjected to genocide or ethnocide, which the Draft Declaration defined as action aimed at or affecting their integrity as distinct peoples or their cultural values and identities, including the dispossession of land, forced relocation, assimilation or integration, and the imposition of foreign lifestyles and propaganda.<sup>85</sup> The Draft Declaration guaranteed to groups of indigenous peoples, but not individuals, the right to observe, teach, and practice tribal spiritual and religious traditions; the right to maintain and protect manifestations of their

78. *Id.* pt. I, arts. 2–3 (delegitimizing the *terra nullius* notion by proclaiming that indigenous people are equal to all others and retain the right to self-determination).

79. See generally Matthew Burrows, 'Mission Civilisatrice': French Cultural Policy in the Middle East, 1860–1914, 29 HIST. J. 109 (1986).

80. See *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16) (referencing generally Spain's colonial involvement in Saharan Africa).

81. U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, pmb1. ¶ 4 ("Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.").

82. The Court found that agreements between colonizing States and local rulers could be "regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*." *Western Sahara*, *supra* note 80, at 39. It also entertained the concept of "legal ties" based on non-European ideas of governance as being relevant under international law. W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT'L L. 350, 354–55 (1995).

83. Draft Declaration, *supra* note 77, pts. II–VII.

84. *Id.* pt. I, ¶ 4.

85. *Id.* at 215.

cultures such as archaeological and historical sites and artifacts; the right to restitution of spiritual property taken without free and informed consent, including the right to repatriate Indian human remains; and the right to protection of sacred places and burial sites.<sup>86</sup> The Draft Declaration listed indigenous peoples' rights to maintain and use tribal languages, to transmit oral histories and traditions, to be educated in tribal languages, and to control their own educational systems.<sup>87</sup> It also afforded indigenous peoples the right to maintain and develop their political, economic, and social systems, and to determine and develop priorities and strategies for exercising their right to development. Their treaties with states should be recognized, observed, and enforced.

Last, but not least, the Declaration supports the right of indigenous people to own, develop, control, and use the lands and territories that they have traditionally owned or otherwise occupied and used, including the right to restitution of lands confiscated, occupied, or otherwise taken without free and informed consent, with the option of just and fair compensation whenever such return is not possible.<sup>88</sup>

In addition to the Declaration, another key concept of international law affected by the resurgence of indigenous communities is the notion of individual human rights rooted in the dignity of each person. The concept of individual human rights led to the recognition of individual rights against the state, prescribed and enforced internationally through universal and regional treaty arrangements and the UN Charter.<sup>89</sup> This assortment of rights, spearheaded by the 1948 Universal Declaration of Human Rights, did not, like the original French *Déclaration des droits de l'homme et du citoyen*, contain group rights.<sup>90</sup> Even Article 27 of the International Covenant on Civil and Political Rights (ICCPR)<sup>91</sup>—often deemed to confer a universal group right—in fact only granted individual members of a minority the right to celebrate their culture.<sup>92</sup>

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86. *Id.* at 217.

87. *Id.*

88. *Id.* at 216.

89. *E.g.*, U.N. Charter; International Covenant on Civil and Political Rights, *supra* note 52.

90. Universal Declaration of Human Rights, *supra* note 52; *Déclaration des droits de l'homme et du citoyen* [Declaration of the Rights of Man and Citizen], Aug. 26, 1789, available at <http://www.conseil-constitutionnel.fr/textes/d1789.htm>.

91. "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 practise their own religion, or to use their own language." International Covenant on Civil and Political Rights, *supra* note 52, art. 27.

92. See *Lovelace v. Canada*, Communication No. R. 6/24, Report of the Hum. Rts. Comm., U.N. Doc. Supp. No. 40 (A/36/40) (July 30, 1981), available at <http://www.javier-leon-diaz.com/minorities/Lovelace%20v.%20Canada.pdf>; Office of the



The struggle of indigenous peoples led to a treaty that recognized the rights of groups, particularly with respect to resources, as formulated in the 1989 International Labour Organization (ILO) Convention No. 169,<sup>93</sup> which has now been ratified by virtually all of the Latin American countries with significant indigenous populations. The Convention has as its basic theme the right of indigenous people to live and develop as distinct communities by their own designs.<sup>94</sup> It ensures indigenous peoples' control over their legal status, lands, internal structures, and environmental security, and it guarantees indigenous peoples' rights to ownership and possession of the total environment they occupy or use.<sup>95</sup>

In addition, global comparative research on state practice and *opinio juris* over a period of five years in the late 1990s reached certain conclusions about the content of newly formed customary international law regarding the rights and status of indigenous peoples.<sup>96</sup> The worldwide indigenous renaissance had led to significant changes in constitutions, statutes, regulations, case law, and other authoritative and controlling statements and practices of states that had substantial indigenous populations.<sup>97</sup> These changes included the recognition of indigenous peoples' rights to preserve their distinct identity and dignity and to govern their own affairs—be they “tribal sovereigns” in the United States, the Sami in Lapland, the *resguardos* in Colombia, or Canada's Nunavut.<sup>98</sup> This move toward recognition of indigenous self-government was accompanied by an affirmation of native communities' title to the territories they traditionally used or occupied.<sup>99</sup>

In many countries, domestic law now mandates a practice that would have been unthinkable only a few years ago: the demarcation and registration of First Nations' title to the lands of their ancestors. Indigenous people achieved this dramatic victory through several

High Commissioner for Human Rights, *General Comment No. 23: The Rights of Minorities (Article 27)*, ¶ 3.1, CCPR/C/21/Rev.1/Add.5 (1994).

93. Int'l Labour Organisation [ILO], Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382.

94. *Id.*

95. *Id.* arts. 1–19. For details of the contents of this convention as well as its more assimilationist predecessor, ILO Convention No. 107 of 1957, see ALEXANDRA XANTHAKI, *INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS* 49–101 (2007).

96. Wiessner, *supra* note 23, at 60–93, 98–110.

97. *Id.*

98. *Id.* at 126; see also Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 341 (2004).

99. See, e.g., *Mabo v. Queensland II* (1992), 175 C.L.R. 1, ¶ 2 (Austl.) (Mason, C.J., concurring) (“[T]he common law of this country [Australia] recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands.”).

means: a peace treaty in Guatemala,<sup>100</sup> constitutional and statutory changes in countries such as Brazil,<sup>101</sup> and modifications of the common law in Australia and other states.<sup>102</sup> Indigenous culture, language, and tradition, to the extent they have survived, are increasingly inculcated and celebrated.<sup>103</sup> Treaties of the distant past are being honored, and agreements are fast becoming the preferred mode of interaction between indigenous communities and the descendants of the former conquering elites.<sup>104</sup> This now very widespread state practice and *opinio juris* regarding the legal treatment of indigenous peoples allowed the following conclusion in 1999:

First, indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life. Second, they hold the right to political, economic and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own system of justice. Third, indigenous peoples have a right to demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used. Fourth, governments are to honor and faithfully observe their treaty commitments to indigenous nations.<sup>105</sup>

The Inter-American Commission made the key step from the global research effort to a practical application of those conclusions to the international legal status of indigenous peoples. Relying on this study and the opinions of other international legal scholars to argue for a new principle of customary international law,<sup>106</sup> the Inter-American Commission submitted the case of an indigenous group in the rainforest of Nicaragua to the Inter-American Court of Human

100. Wiessner, *supra* note 23, at 86.

101. *Id.* at 74–79 (referring, *inter alia*, to Article 231 of the Brazilian Constitution of 1988). For other countries of Latin America, *see id.* at 79–89.

102. *See Mabo*, *supra* note 99, and Wiessner, *supra* note 23, at 60–74, regarding state practice in the U.S., Canada, New Zealand, and Australia.

103. Wiessner, *supra* note 23, at 58.

104. *Id.* at 93.

105. *Id.* at 127; *see also* S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001); S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 49–72 (2d ed. 2004); Chidi Oguamanam, *Indigenous Peoples and International Law: The Making of a Regime*, 30 QUEEN'S L.J. 348 (2004). A recent in-depth study of the protection of groups in international law also concluded that “there is sufficient proof of State practice and *opinio juris* among States to suggest the existence of a right to autonomy for indigenous peoples in international law.” NICOLA WENZEL, *DAS SPANNUNGSVERHÄLTNIS ZWISCHEN GRUPPENSCHUTZ UND INDIVIDUALSCHUTZ IM VÖLKERRECHT* 508 (2008).

106. *Final Written Arguments of the Inter-American Commission on Human Rights Before the Inter-American Court of Human Rights in the Case of Mayagna Indigenous Community of Awas Tingni v. Republic of Nicaragua*, 19 ARIZ. J. INT'L & COMP. L. 327, 349 n.80 (2002).

Rights. The tribunal, in its celebrated *Awas Tingni* judgment of August 31, 2001,<sup>107</sup> affirmed the existence of an indigenous people's collective right to its land.<sup>108</sup> It stated:

Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention—which precludes a restrictive interpretation of rights—, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.

Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.<sup>109</sup>

Other decisions in the same vein followed, including a recent decision involving Suriname.<sup>110</sup> The Inter-American Court of Human Rights continued its pertinent jurisprudence in a broad variety of contexts.<sup>111</sup> Most recently, the Belize Supreme Court also recognized

107. *Awas Tingni*, *supra* note 21. For details of this case, see S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1 (2002).

108. Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability under International Law*, 11 LEWIS & CLARK L. REV. 135 (2007); cf. Jonathan P. Vuotto, *Awas Tingni v. Nicaragua: International Precedent for Indigenous Land Rights*, 22 B.U. INT'L L.J. 219 (2004).

109. *Awas Tingni*, *supra* note 21, ¶¶ 148–149.

110. *Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005); *Yakye Axa Indigenous Community v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); *Sawhoymaxa Indigenous Community v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146 (March 29, 2006).

111. Cf. *Yanomami v. Brazil*, Case 7615, Inter-Am. C.H.R., Report No. 12/85, OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1985); *Enxet-Lamenxay & Kayleyphapopyet (Riachito) Indigenous Cmty. v. Paraguay*, Case 11.713, Inter-Am. C.H.R., Report No. 90/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 12 (1999); *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002), available at <http://www.cidh.org/annualrep/2002eng/USA.11140.htm>; *Maya Indigenous Cmty. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, ¶¶ 120, 144 (2004); *Kichwa Peoples of Sarayaku Cmty. & Members v. Ecuador*, Petition 167/03, Inter-Am. C.H.R., Report No. 64/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶ 74 (2004), available at <http://www.cidh.org/annualrep/2004eng/Ecuador.167.03eng.htm>.

the customary international legal character of an indigenous people's right to its land.<sup>112</sup>

## V. THE 2007 UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Parallel to the development of customary law through state practice in the field, the UN Declaration on the Rights of Indigenous Peoples (the Declaration) went through more than ten years of review by another working group established by the UN Human Rights Commission.<sup>113</sup> Catching many observers by surprise, the Declaration was adopted by the newly formed UN Human Rights Council on June 29, 2006, in one of its very first acts, by a vote of 30 in favor, 12 abstentions, and 2 against (with 3 absent).<sup>114</sup> The Declaration appeared to be on the fast track to formal adoption by the UN General Assembly in September 2006.

In somewhat of a shock to the indigenous community, on November 28, 2006, this process was brought to a halt by the 3rd Committee of the UN General Assembly when the African bloc of fifty-three countries, led by Namibia and joined by sundry others, decided to defer consideration pending further consultations, with a view toward taking action on the Declaration before the sixty-first Session of the General Assembly in early September 2007.<sup>115</sup> This decision dismayed virtually all of the Latin American and Western European countries that had led the fight for such rights and had negotiated what they thought were sensible compromises in 1993 and 2006.<sup>116</sup> The vote was 82 in favor and 67 against, with 25

112. Supreme Court of Belize, *Cal v. Attorney General of Belize*, Claim No. 171 of 2007, Judgment, Oct. 18, 2007, ¶ 127, available at [http://www.law.arizona.edu/depts/iplp/advocacy/maya\\_belize/documents/ClaimsNos171and172of2007.pdf](http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf) (“[I]t is my considered view that both customary international law and general international law would require that Belize respect the rights of its indigenous people to their lands and resources.”).

113. UN Permanent Forum on Indigenous Issues, *supra* note 66.

114. Human Rights Council, *Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214 of 23 December 1994*, U.N. Doc. A/HRC/RES/1/2 (Nov. 13, 2006), available at [http://ap.ohchr.org/documents/sdpage\\_e.aspx?b=10&se=2&t=11](http://ap.ohchr.org/documents/sdpage_e.aspx?b=10&se=2&t=11) [hereinafter Human Rights Council]; Geneva for Human Rights – Global Training, List of HRC Resolutions/Decisions (2006–2008), [http://www.upr-info.org/IMG/pdf/List\\_of\\_Resolutions\\_Decisions\\_2006-2008\\_.pdf](http://www.upr-info.org/IMG/pdf/List_of_Resolutions_Decisions_2006-2008_.pdf) (last visited Sept. 24, 2009) (listing the voting records).

115. Report of the Human Rights Council, ¶¶ 10–24, U.N. Doc. A/61/448 (Dec. 6, 2006); Press Release, United Nations Permanent Forum on Indigenous Issues, Declaration on the Rights of Indigenous Peoples – Update (Nov. 22, 2006), available at <http://www.un.org/esa/socdev/unpfii/en/news.html>.

116. Report of the Human Rights Council, ¶¶ 10–24, U.N. Doc. A/61/448 (Dec. 6, 2006).

abstentions.<sup>117</sup> This result was affirmed by the General Assembly in December 2006.<sup>118</sup> Cultural Survival and other indigenous NGOs blamed some large powers, including the United States, Canada, Australia, New Zealand, and Russia, for lobbying the African nations and thereby causing the delay.<sup>119</sup>

The root of the problem appeared to be Article 3 of the Declaration, which established indigenous peoples' right to self-determination.<sup>120</sup> Article 3 defined self-determination broadly as the right to "freely determine their political status and freely pursue their economic, social and cultural development."<sup>121</sup> It did not allay their fears that the original Article 31 was moved up to Article 3 *bis*, which arguably reduced the exercise of the right of self-determination in Article 3 to a right to "autonomy or self-government in matters relating to their internal and local affairs."<sup>122</sup> The protesting African nations were unconvinced by Article 45, which stated that the Declaration did not give indigenous peoples any right to perform acts contrary to the UN Charter, presumably including the principle of the inviolability of territorial integrity.<sup>123</sup> That the Declaration's arrangement of articles did not fully exclude the option of secession or external self-determination, as the Proposed American Declaration of the Rights of Indigenous Peoples had done, was a major concern.<sup>124</sup> The protesting countries feared the implications of the Declaration, even though no indigenous nation seriously raises a claim for secession other than the conditional claim by the James Bay Cree Indians, who have threatened to secede from Québec if Québec manages to secede from Canada.<sup>125</sup>

117. *Id.* ¶ 17.

118. G.A. Res. 61/178, ¶ 2, U.N. Doc. A/61/178 (Dec. 20, 2006).

119. See *Our Land, Our Identity, Our Freedom: A Roundtable Discussion*, 31.1 CULTURAL SURVIVAL Q. (2007), available at <http://www.culturalsurvival.org/publications/csq/csq-article.cfm?id=1952>.

120. *Id.*

121. Human Rights Council, *supra* note 114, art. 3.

122. Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994 Draft Declaration, U.N. Doc. A/HRC/1/L.3 (June 23, 2006).

123. U.N. Charter art. 2, ¶ 4; United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 45.

124. Haider Rizvi, *U.N. Faces Test on Native Rights*, INTER PRESS SERVICE, Oct. 13, 2006, available at <http://www.ipsnews.net/news.asp?idnews=35103>; Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R., 1333d sess., OEA/Ser/L/V/II.95, doc. 6 (Feb. 26, 1997), reprinted in 6 INT'L J. CULTURAL PROP. 364 (1997). "The use of the term 'peoples' in this instrument shall not be construed as having any implication with respect to any other rights that might be attached to that term in international law." *Id.* art. 1, ¶ 3. So as to remove any doubt, Article XXV affirmed: "Nothing in this instrument shall be construed as granting any right to ignore boundaries between states." *Id.* art. 25.

125. Reference Re: Secession of Québec, [1998] 2 S.C.R. 217 (Can.), reprinted in 37 I.L.M. 1340, 1373 (1998). The Court did not find it necessary to rule directly on self-determination claims of Canada's indigenous peoples, since they were contingent on

The specter of secession threatens the African Union (AU) consensus on the inviolability of colonial borders,<sup>126</sup> reaffirmed in a decision to remain united as a bloc vis-à-vis the Declaration on the Rights of Indigenous Peoples formulated by the AU Assembly in January 2007.<sup>127</sup> As elsewhere, however, none of the indigenous peoples of Africa ever claimed a right to secession or external self-determination.<sup>128</sup> The African states also rarely, if ever, sent a delegation to participate in the annual meetings of the Working Group on Indigenous Populations, the organization that drafted the Draft Declaration from 1982 to 1993 and worked on related issues afterward.<sup>129</sup>

Supporters of the Declaration were obviously frustrated with the last-minute delay in its passage. Early fears that the delay, along with the sunset date for further consultations, would be the permanent demise of the Declaration were, however, overstated.<sup>130</sup> Over the summer of 2007, Sheikha Haya Rashed Al Khalifa, President of the General Assembly, acquired the helpful services of an experienced diplomat, H.E. Hilario G. Davide, Jr., Permanent Representative of the Philippines to the United Nations.<sup>131</sup>

On the basis of Davide's July 13, 2007 report<sup>132</sup> and further negotiations that resulted in amendments emphasizing existing

the secession of Québec. It emphasized that "a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account." *Id.* at 1374, ¶ 139.

126. See Rizvi, *supra* note 124.

127. See Decision on the United Nations Declaration on the Rights of Indigenous Peoples, ¶ 2, AU. Assemb. Doc. Dec. 141(VIII) (2007) ("[R]eaffirm[ing] Resolution AHG Res-17/1 of 1964 in which all Member States of the Organization of African Unity pledged to respect borders existing on their achievement of national independence."). The most important questions that the AU has regarding the DRIP are about "a) the definition of indigenous peoples; b) self-determination; c) ownership of land and resources; d) establishment of distinct political and economic institutions; and e) national and territorial integrity." *Id.* ¶ 6.

128. See The Int'l Forum on Globalization, Draft Report Toward a Campaign in Support of The UN Declaration on the Rights of Indigenous Peoples, at 17 (Aug. 2, 2007), available at <http://www.ifg.org/pdf/draft%20report%20UN%20Dec.pdf> ("Indigenous peoples insist that they are not looking for the right of secession, but for other forms of self-determination.").

129. Cf. ACHPR Working Group on Indigenous Populations, <http://www.iwgia.org/sw12955.asp> (last visited Sept. 24, 2008) (discussing a conference that recommended that "the ACHPR should be encouraged to address the human rights situation of indigenous peoples in Africa, as it had never done so before").

130. See Anup Shah, *Rights of Indigenous People*, GLOBAL ISSUES, Sept. 30, 2007, available at <http://www.globalissues.org/article/693/rights-of-indigenous-people> (discussing the delay of the UN Declaration).

131. See, e.g., Letter from H.E. Sheikha Haya Rashed Al Khalifa, President of the General Assembly, to All Permanent Missions and Permanent Observers to the United Nations (Sept. 17, 2007), available at <http://www.un.org/ga/president/61/letters/letters.shtml> (thanking Davide for his consultations).

132. The Permanent Representative of the Republic of the Philippines, *Report on the Consultations on the Draft Declaration on the Rights of Indigenous Peoples*,

constraints on the right to self-determination and recognizing the diversity of views on secession, the Declaration was adopted on September 13, 2007, by a landslide affirmative vote of 144 states in the UN General Assembly.<sup>133</sup> Only four countries—the United States, Canada, Australia, and New Zealand—voted against it, while Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa, and Ukraine abstained.<sup>134</sup>

The four negative votes on the Declaration cannot reverse previously established customary international law benefiting indigenous peoples;<sup>135</sup> in fact, the overwhelming support for the Declaration in the UN General Assembly works to strengthen it. This is true, in particular, for the indigenous peoples' rights to their traditional lands as upheld by the Inter-American Court and Commission of Human Rights.<sup>136</sup> Although the Declaration itself is not binding in the same way that a treaty is, it represents, in the words of UN Special Rapporteur S. James Anaya:

[A]n authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law.... The principles and rights affirmed in the Declaration constitute or add to the normative frameworks for the activities of United Nations human rights institutions, mechanisms and specialized agencies as they relate to indigenous peoples.<sup>137</sup>

The Declaration, even in its draft form, has formed the basis for legislation in individual countries, such as the Indigenous People's Rights Act in the Philippines,<sup>138</sup> and it has inspired constitutional and statutory reforms in various states of Latin America.<sup>139</sup>

delivered to the President of the General Assembly, (July 13, 2007), available at <http://www.un.org/ga/president/61/follow-up/indigenous.shtml>.

133. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1.

134. *Id.*

135. See S. James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, JURIST, Oct. 3, 2007, available at <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>.

136. See Anaya & Williams, *supra* note 105, at 36.

137. Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Doc. A/HRC/9/9, ¶¶ 85, 88 (Aug. 11, 2008) [hereinafter *Report on Fundamental Freedoms*]; see also UN News Center, *United Nations Adopts Declaration on Rights of Indigenous Peoples*, Sept. 13, 2007, <http://www.un.org/apps/news/story.asp?NewsID=23794&Cr=indigenous&Cr1> ("A non-binding text, the Declaration sets out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues.").

138. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds

The African states' original criticism appears to be on point insofar as they correctly stated that "indigenous peoples" is not defined in this Declaration. Many scholars have justified this absence of delimitation with the need to avoid "essentialism"—i.e., to avoid packaging the diversity of indigenous peoples into a straitjacket of objective criteria incongruent with the variety of the peoples' traditions and aspirations in real life.<sup>140</sup> Despite the dangers of such approach, the identity of the legitimate holder of a right must be discernible for a court or other decision maker to adjudicate a claim based on that right. After all, the essentialism critique cannot reasonably be used to prevent the identification of members of racial or ethnic groups protected by the equal protection clause or pertinent international conventions. Defining the legitimate holder of a right is necessary to effectively protect that person from violations of such right.

Mindful of the pitfalls of oversimplification, the following definition of indigenous peoples would address the major issues:

Indigenous communities are best conceived of as peoples traditionally regarded, and self-defined, as descendants of the original inhabitants of lands with which they share a strong, often spiritual bond. These peoples are, and desire to be, culturally, socially and/or economically distinct from the dominant groups in society, at the hands of which they have suffered, in past or present, a pervasive pattern of subjugation, marginalization, dispossession, exclusion and discrimination.<sup>141</sup>

In any event, some African states claim that all Africans are indigenous, having survived European colonization.<sup>142</sup> This is not necessarily an African Union position, nor is it the Author's understanding, nor is it true under the definition offered above. Certain indigenous peoples in Africa would fall within this mixed objective and subjective definition, such as the !Kung San in Botswana, Angola, and Namibia,<sup>143</sup> the Twa in Rwanda,<sup>144</sup> the Pygmy

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Thereof, and for Other Purposes, Rep. Act No. 8371, § 2(a)-(f), (1997) (Phil.), available at [http://www.grain.org/brl\\_files/philippines-ipra-1999-en.pdf](http://www.grain.org/brl_files/philippines-ipra-1999-en.pdf).

139. See Wiessner, *supra* note 23, at 74–89 (discussing the increase in government protection of the rights of indigenous peoples in Latin America).

140. See PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 33–60 (2002) (discussing the lack of definitions in the Declaration due to opposing approaches to definition and description).

141. Wiessner, *supra* note 23, at 115.

142. Vincent O. Nmeihelle, *Cultures Within Cultures: When Laws Ignore Reality*, 30.1 *CULTURAL SURVIVAL QUARTERLY* (2006), available at <http://209.200.101.189/publications/csqr/article.cfm?id=1895&highlight=Africa>.

143. See, e.g., MARJORIE SHOSTAK, *NISA: THE LIFE AND WORDS OF A KUNG WOMAN* 4–5 (1981); Polly Wiessner, *Risk, Reciprocity and Social Influences on Kung San Economics*, in *POLITICS AND HISTORY IN BAND SOCIETIES* 61 (Eleanor Leacock & Richard Lee eds., 1982) (characterizing the behaviors and lifestyles of the Kung San).



in the Republic of Congo,<sup>145</sup> and the Maasai in Kenya and northern Tanzania.<sup>146</sup> These peoples remain at the margins of society, maintaining subsistence economies and sharing a strong, spiritual bond with their land.<sup>147</sup>

The African states were finally convinced to drop their insistence on a definition of indigenous peoples.<sup>148</sup> They did so in exchange for a clarification in the preamble of the Declaration, which now states:

*Recognizing* that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.<sup>149</sup>

This formulation allows for flexibility in the interpretation of the text but takes away some of the clarity of legal obligation. The United States has stated that the declaration's "failure to define the phrase 'indigenous peoples'" is "debilitating to the effective application and implementation of the declaration."<sup>150</sup> The U.S. representative explained: "This obvious shortcoming will subject application of the declaration to endless debate, especially if entities not properly entitled to such status seek to enjoy the special benefits and rights contained in the declaration."<sup>151</sup>

The most interesting aspect of the U.S. argument is, however, the implicit recognition that indigenous peoples do have a "status," that they enjoy "special benefits and rights contained in the

For a summary of Shostak's work, see Cathy Suroviak, *The Kung of the Kalahari Desert*, <http://www.ucc.uconn.edu/~epsadm03/kung.html> (last visited Sept. 24, 2008).

144. Joshua Project.net, *Pygmy - Twa of Rwanda Ethnic People Profile*, <http://www.joshuaproject.net/peopctry.php?rop3=110338&rog3=RW> (last visited Sept. 24, 2008) (profiling the Pygmy people).

145. See S. James Anaya, Moira Gracey & Leonardo Alvarado, *The Rights of the Pygmy People in the Republic of Congo: International Legal Context* 1-6, available at <http://www.law.arizona.edu/Depts/iplp/advocacy/baka/documents/Congo-Pygmy-Int'l-Legal-Context-IPLP-AZ.pdf> (discussing the rights and treatment of the indigenous Pygmy people of the Congo).

146. See, e.g., LISA MCQUAIL, *THE MASAI OF AFRICA* 4-5 (2002) (discussing the Masailand region and what it means to be Masai); THOMAS SPEAR, *BEING MAASAI: ETHNICITY & IDENTITY IN EAST AFRICA* 9-16 (Thomas Spear & Richard Waller eds., 1993) (discussing the history and characterization of the Maasai); *Maasai Information*, <http://www.uiowa.edu/~africart/toc/people/Maasai.html> (last visited Sept. 24, 2008) (charting condensed facts about the Maasai).

147. See Wiessner, *supra* note 23, at 115-16; SPEAR, *supra* note 146, at 9-16.

148. See Office of the United Nations High Commissioner for Human Rights, <http://www2.ohchr.org/english/issues/indigenous/declaration.htm> (last visited Sept. 24, 2008) (discussing the events prior to the Declaration's passage, including the AU's continued efforts to adopt a definition before agreeing to the Declaration).

149. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, pmb1. ¶ 25.

150. Press Release, Robert Hagen, U.S. Advisor, *Explanation of Vote on the Declaration on the Rights of Indigenous Peoples* (Sept. 13, 2007), available at [http://www.treatycouncil.org/PDFs/US\\_DRIP.pdf](http://www.treatycouncil.org/PDFs/US_DRIP.pdf).

151. *Id.*

declaration.” This is in some tension with the U.S. position that the Declaration should be seen solely as an “aspirational declaration with political and moral, rather than legal, force.”<sup>152</sup> The language of “rights” and “status” is the language of legal obligation. By participating in this process and related processes of standard setting for several years while expressing concern for special international rights of indigenous peoples, the four states in opposition to the Declaration have demonstrated an *opinio juris*—a willingness to be bound if all of the provisions were formulated to agree with their detailed policy preferences.<sup>153</sup> Thus, to the extent that the Declaration reflects preexisting customary international law or engenders future such law, it is binding on states that do not qualify as persistent objectors.<sup>154</sup>

The issue most important to the Africans has been the fear of secession and its challenge to the status quo of existing boundaries, a pillar of the structure of the African Union. The final text of the Declaration addresses this issue by adding a new provision, Article 46(1), which states:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

While this provision does not expressly banish the specter of secession by indigenous peoples—an argument could be made that such remedy could be justified, in the words of the Canadian Supreme Court, if an indigenous people, like any other definable group, is “denied meaningful access to government”<sup>155</sup>—it severely restricts the argument that a right to secession or external self-determination is

152. *Id.*

153. Anaya & Wiessner, *supra* note 135.

While the explanatory statements of the four States that voted against adoption of the Declaration (Australia, Canada, New Zealand, and United States of America) showed disagreement with the wording of specific articles or concerns with the process of adoption, they also expressed a general acceptance of the core principles and values advanced by the Declaration.

*Report on Fundamental Freedoms, supra* note 137, ¶ 35.

154. *Id.*

155. The Canadian Supreme Court, in its Québec Opinion, concluded that:

[T]he international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.

Reference Re: Secession of Québec, *supra* note 125, ¶ 138.

guaranteed by Article 3's broadly formulated right to self-determination:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The key content of Article 3, however, is the guarantee of internal self-determination—the right to autonomy or self-government defined in Article 4:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

## VI. INDIGENOUS SELF-GOVERNMENT AND “TRIBAL SOVEREIGNTY”

The range of self-government guaranteed by the Declaration remains somewhat unclear. This indeterminacy is probably a good thing, given the diversity of indigenous peoples' lives, traditions, and aspirations. Natalia Loukacheva's recent study, *On Autonomy and Law*, concludes that the concept of the right to autonomy is “evolving and to date it has a stronger ground for its legal justification and implementation as regards the right of indigenous peoples to autonomy compared to other groups.”<sup>156</sup> She argues that “the form, type, and scope of autonomy vary in each case,” and that there is “no need for a rigid legal definition of autonomy,” as the “lack of clarity makes the concept of autonomy more attractive to many groups and flexible in response to their aspirations for self-governance.”<sup>157</sup>

Going farther, Federico Lenzerini would argue for the “parallel sovereignty” of indigenous peoples:

[T]he spread of contemporary practice favorable to the recognition of indigenous autonomy seems to demonstrate that, to a certain extent, the idea of indigenous sovereignty, as parallel to State sovereignty (that is to say that the territorial State, pursuant to international law, can, to a certain extent regulate, but not preclude, its exercise), has emerged in the context of the international legal order, giving rise to a provision of customary law binding States to grant a reasonable degree of sovereignty to indigenous peoples. Although such sovereignty is to be exercised within the realm of the supreme sovereignty of the territorial State, it actually produces the result of shifting some aspects of State sovereignty, providing indigenous peoples with some significant sovereign prerogatives that previously belonged to the State and that, at least in principle, may be opposed to the State itself under general

156. Natalia Loukacheva, *On Autonomy and Law* 20 (MCRP Working Paper), available at [http://www.globalautonomy.ca/global1/servlet/Xml2pdf?fn=RA\\_Loukacheva\\_AutonomyLaw](http://www.globalautonomy.ca/global1/servlet/Xml2pdf?fn=RA_Loukacheva_AutonomyLaw). For an excellent analysis of various forms of territorial, personal and sectoral autonomy, see WENZEL, *supra* note 105, at 95–112.

157. Loukacheva, *supra* note 156, at 20.

international law. This outcome certainly represents an excellent step forward in the context of the evolution of international law towards a just, fair, and “pluralistic” legal system.<sup>158</sup>

The use of the term “parallel sovereignty” in this context suggests an architecture of coordinate original bodies of principally unrestricted power—entities with *Kompetenzkompetenz*, or “the power to create power”—that might be far from the minds of the erstwhile conquerors and the erstwhile conquered.<sup>159</sup> The use of the term “sovereignty” in various countries to denote ranges of autonomy of indigenous peoples does not, however, place them on the same level as, say, the two original holders of power in a federation, i.e., the federal government and the states.<sup>160</sup> Nor is the indigenous concept of sovereignty necessarily related to its Western connotation of original power over people and territory.

The situation in the United States illustrates the different concepts of sovereignty. The government and the Indian nations have both used the notion of tribal sovereignty<sup>161</sup> to delimit the range of indigenous self-government. Although Chief Justice John Marshall’s trilogy of Indian cases<sup>162</sup> defined the Indians as victims of conquest—“domestic dependent nations”<sup>163</sup> due to the history of the takeover of the North American continent—American courts nonetheless view the American Indian nations as entities that possess tribal sovereignty.<sup>164</sup>

In the *Santa Clara Pueblo* case of 1978, the U.S. Supreme Court defined tribal sovereignty in the following way:

Indian tribes are “distinct, independent political communities, retaining their original natural rights” in matters of local self-government. Although no longer “possessed of the full attributes of sovereignty,” they remain a “separate people, with the power of regulating their internal and social relations.” . . . As the Court in *Talton* recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.<sup>165</sup>

158. Federico Lenzerini, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples*, 42 TEX. INT’L L.J. 155, 189 (2006).

159. Lexexakt.de, Defining Kompetenz-Kompetenz, <http://www.lexexakt.de/glossar/kompetenzkompetenz.php> (last visited Sept. 24, 2008).

160. See *infra* text accompanying notes 162–167.

161. Cf. Ada Deer, *Tribal Sovereignty in the Twenty-First Century*, 10 ST. THOMAS L. REV. 17, 17–19 (1997) (arguing that tribal sovereignty must be protected against Congressional disregard).

162. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823). See Barker, *supra* note 29, at 6–17, for a discussion of Marshall’s trilogy.

163. *Cherokee Nation*, 30 U.S. at 17, 27.

164. *United States v. Lara*, 541 U.S. 193, 196 (2004) (discussing the inherent tribal sovereignty of Indian tribes).

165. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978).

On February 9, 2007, the U.S. Circuit Court of Appeals for the District of Columbia applied the National Labor Relations Act to employment at a casino located on an Indian reservation.<sup>166</sup> The court generally explicated its theory of tribal sovereignty:

The principle of tribal sovereignty in American law exists as a matter of respect for Indian communities. It recognizes the independence of these communities as regards internal affairs, thereby giving them latitude to maintain traditional customs and practices. But tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint.<sup>167</sup>

The court also observed that tribal sovereignty is strongest when based on a treaty or when the tribal government acts within the borders of the reservation in matters concerning only tribal members, e.g., the determination of tribal membership.<sup>168</sup> Tribal sovereignty is weakest in off-reservation business transactions with non-members.<sup>169</sup> The federal courts recognize tribes as unincorporated legal persons subject to generally applicable law; nonetheless, they may be immune from suit under the principle of tribal sovereign immunity, particularly when they perform governmental functions.<sup>170</sup> Apart from these principles, certain issues may be resolved not on the basis of a “mechanical or absolute conceptions of state or tribal sovereignty, but . . . [a] particularized inquiry into the nature of the state, federal and tribal interests at stake . . . .”<sup>171</sup> Often, the question is whether general law constrains the tribe when it acts with respect to its governmental functions.

Congress has the plenary power to withdraw any power from Indian nations.<sup>172</sup> Under the plenary power doctrine, treaties can be abrogated and Congress can apply any general law it chooses to Indian tribes.<sup>173</sup> If a statute explicitly applies to Indian tribes, courts will enforce it; even in the absence of express provisions, courts are

166. *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1307 (D.C. Cir. 2007).

167. *Id.* at 1314.

168. *Id.* at 1312; see also *Santa Clara Pueblo*, 436 U.S. at 72 n.32 (“A tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.”).

169. *San Manuel Indian Bingo & Casino*, 475 F.3d at 1312–13.

170. *Id.* at 1313.

171. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

172. The “plenary power” doctrine was expressed perhaps most strongly in *Lone Wolf v. Hitchcock*, 187 U.S. 533 (1903). “Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.” *Id.* at 565. For a critical perspective, see Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. U. L. REV. 1115, 1120–22 (2001–2002).

173. *Lone Wolf*, 187 U.S. at 565–66.

increasingly inclined to read in an implicit application of the law.<sup>174</sup> Thus, it seems unlikely that American Indian nations are true “third sovereigns” in a positive law sense.<sup>175</sup> However, the law in action probably does not match the law on the books regarding the plenary power doctrine.<sup>176</sup> Congress and the Executive have been more protective of Indian tribes than the courts recently,<sup>177</sup> as exemplified by the Religious Freedom Restoration Act, a legislative response to the *Peyote* U.S. Supreme Court decision,<sup>178</sup> and the Executive’s policy in favor of Indian self-determination, which was touched off by President Nixon’s decree in 1970.<sup>179</sup>

Many other countries recognize various aspects of self-government of their indigenous peoples, such as the making of rules and their enforcement through tribal courts or similar bodies of dispute resolution.<sup>180</sup> The patterns of positive domestic law regarding indigenous self-government are quite diverse, ranging from the quasi-

174. *See id.* at 565–66.

175. *But see* Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. J. 1, 1 (1997) (“Today, in the United States, we have three types of sovereign entities—the Federal government, the States, and the Indian tribes.”); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 799 (2007).

176. Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 588–89 (1994).

[T]he United States Government has seen fit to exercise this plenary power gingerly, always stressing the remaining original sovereignty of the Indian communities, complying with treaties after the 19th century rush of violations, and intent, most recently from the Nixon to the Clinton Administrations, on increasing autonomy and self-reliance of the first inhabitants of this continent.

*Id.*

177. “In sum, the Executive Branch and Congress have led the way to preserve Native American self-determination and cultural heritage. The Supreme Court has provided the theme of tribal sovereignty in a series of early decisions; after that, it has been a retarding, if not retrogressive force.” Wiessner, *supra* note 23, at 66.

178. *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 890 (1990). For a perceptive critique, see Robert N. Clinton, *Peyote and Judicial Political Activism: Neo-Colonialism and the Supreme Court’s New Indian Law Agenda*, 38 FED. B. NEWS & J. 92 (1991).

179. President Nixon repudiated the termination policy toward American Indian nations in a Message to Congress. President’s Message to Congress Transmitting Recommendations for Indian Policy, 1 PUB. PAPERS 564, 564–65 (July 8, 1970). Congress’ response is reflected in the Indian Self-Determination and Education Act of 1975. 25 U.S.C. § 450 (1975). *Cf.* Michael C. Walsh, Note, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1196 (1982) (noting that Congress’ failure to repeal eight prior termination acts weakens the beneficial impact of the Indian Self-Determination and Education Act of 1975). The success of this movement is due to Native Americans’ determined resistance to assimilation. Nell Jessup Newton, *Let a Thousand Policy-Flowers Bloom: Making Indian Policy in the Twenty-First Century*, 46 ARK. L. REV. 25, 27–28 (1993).

180. *Cf.* Paul Okalik, *Nunavut: The Road to Indigenous Sovereignty*, 2 INTERCULTURAL HUM. RTS. L. REV. 11, 16 (2007).

provincial authority of the Canadian territory of Nunavut<sup>181</sup> to local powers of the *resguardos* in Colombia,<sup>182</sup> and many forms in between.<sup>183</sup> Because the structure and content of power relations regarding self-government of indigenous peoples vary, it would behoove scholars and decision makers to look for responses to the claims raised by the affected peoples themselves.

In other words, to achieve a global order of human dignity responding to human needs and aspirations, the quest should be redirected from the cataloguing of states' grants of power or tolerance of indigenous peoples' authorities toward looking instead for the proper starting point: the authentic claims and aspirations of indigenous peoples.<sup>184</sup> This approach would lead to a framework of laws more narrowly tailored to the inner worlds of indigenous peoples. Indigenous peoples may have a concept of sovereignty quite different from predominantly Western ideas of self-government.

## VII. TOWARD AUTHENTIC INDIGENOUS SOVEREIGNTY

As law, in essence, ought to serve human beings, any effort to design a better law should be conceived as a response to human needs and aspirations. These vary from culture to culture, and they change over time. As Michael Reisman has explained, humans have a distinct

need to create and ascribe meaning and value to immutable experiences of human existence: the trauma of birth, the discovery of the self as separate from others, the formation of gender or sexual identity, procreation, the death of loved ones, one's own death, indeed, the mystery of it all. Each culture . . . records these experiences in ways that provide meaning, guidance and codes of rectitude that serve as

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181. *Id.* at 11; Jason R. Wiener, *Neighbors Up North: Nunavut's Incorporation in Canada as a Model for Multicultural Democracy*, 28 SUFFOLK TRANSNAT'L L. REV. 267, 281–82 (2004); Jeffrey Wutzke, *Dependent Independence: Application of the Nunavut Model to Native Hawaiian Sovereignty and Self-Determination Claims*, 22 AM. INDIAN L. REV. 509, 537–40 (1998).

182. The Colombian Constitution provides a high degree of political and administrative autonomy to indigenous communities. See CONSTITUCION POLITICA DE LA REPUBLICA DE COLOMBIA DE 1991 arts. 246, 286, 321, 329, reprinted in IV CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., Peter B. Heller & Marcia W. Coward trans., 1995). The Constitution guarantees respect for the indigenous communities' institutions of self-government, including courts applying traditional customary standards. *Id.* arts. 246, 330. Additionally, the Constitution recognizes collective property rights; in particular, collectively owned and inalienable *resguardos*. *Id.* art. 329.

183. For a detailed analysis in a global *tour d'horizon* of state practice, see Wiessner, *supra* note 23, at 60–93.

184. Robert B. Porter, *Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples*, 5 YALE HUM. RTS. & DEV. L.J. 123, 133–35 (2002).

compasses for the individual as he or she navigates the vicissitudes of life.<sup>185</sup>

Thus, from the need to make sense of one's individual and cultural experiences arise inner worlds, or each person's inner reality. The international human rights system, as Reisman sees it, is

concerned with protecting, for those who wish to maintain them, the integrity of the unique visions of these inner worlds, from appraisal and policing in terms of the cultural values of others. This must be, for these inner world cosmologies, or intocosms, are the central, vital part of the individuality of each of us. This is, to borrow Holmes' wonderful phrase, "where we live." Respect for the other requires, above all, respect for the other's inner world.<sup>186</sup>

The cultures of indigenous peoples have been under attack and are seriously endangered. One final step is the death of their language. As George Steiner wrote in 1975:

Today entire families of language survive only in the halting remembrances of aged, individual informants . . . or in the limbo of tape recordings. Almost at every moment in time, notably in the sphere of American Indian speech, some ancient and rich expression of articulate being is lapsing into irretrievable silence.<sup>187</sup>

Reisman concluded that political and economic self-determination in this context are important, "but it is the integrity of the inner worlds of peoples—their rectitude systems or their sense of spirituality—that is their distinctive humanity. Without an opportunity to determine, sustain, and develop that integrity, their humanity—and ours—is denied."<sup>188</sup>

Similarly, the late Vine Deloria, Jr., revered leader of the U.S. indigenous revival, stated that indigenous sovereignty "consist[s] more of a continued cultural integrity than of political powers and to the degree that a nation loses its sense of cultural identity, to that degree it suffers a loss of sovereignty."<sup>189</sup> "Sovereignty," explains another great Native American leader, Kirke Kickingbird, "cannot be separated from people or their culture."<sup>190</sup> In this vein, Taiaiake Alfred appeals for a process of "de-thinking" sovereignty. He states:

185. W. Michael Reisman, *International Law and the Inner Worlds of Others*, 9 ST. THOMAS L. REV. 25, 25 (1996).

186. *Id.* at 26.

187. GEORGE STEINER, AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION 53 (1992). For a most recent discussion of these serious issues, see Allison M. Dussias, *Indigenous Languages Under Siege: The Native American Experience*, 3 INTERCULTURAL HUM. RTS. L. REV. 5 (2008); Douglas A. Kibbee, *Minority Language Rights: Historical and Comparative Perspectives*, 3 INTERCULTURAL HUM. RTS. L. REV. 79 (2008).

188. Reisman, *supra* note 185, at 33.

189. Deloria, *supra* note 24, at 123.

190. KIRKE KICKINGBIRD ET AL., INDIAN SOVEREIGNTY 2 (1977).



Sovereignty . . . is a social creation. It is not an objective or natural phenomenon, but the result of choices made by men and women, indicative of a mindset located in, rather than a natural force creative of, a social and political order. The reification of sovereignty in politics today is the result of a triumph of a particular set of ideas over others—no more natural to the world than any other man-made object.

Indigenous perspectives offer alternatives, beginning with the restoration of a regime of respect. This ideal contrasts with the statist solution, still rooted in a classical notion of sovereignty that mandates a distributive rearrangement but with a basic maintenance of the superior posture of the state. True indigenous formulations are non-intrusive and build frameworks of respectful coexistence by acknowledging the integrity and autonomy of the various constituent elements of the relationship. They go far beyond even the most liberal Western conceptions of justice in promoting the achievement of peace, because they explicitly allow for difference while mandating the construction of sound relationships among autonomously powered elements.<sup>191</sup>

June McCue, Director of First Nations Studies at the University of British Columbia and member of the Neduten tribe, says:

I can connect sovereignty and self-determination within the distinct context of my people by making an analogy to the trees on my Clan or house territory. The roots, trunk, and bark of the trees represent sovereignty to me. The special sap, food, medicines and seedlings that come from our trees are symbiotic with the life force or energy of my people and the land, united in a consciousness and connected through the web of life. . . .

Indigenous conceptions of sovereignty are found in the respective traditions of Indigenous peoples and their relationships with their territories. The power to exercise sovereignty flows from their laws, customs, and governing systems and their interconnectedness with the Earth. . . .

My people's power is sourced or rooted in our creation stories, our spirituality and our organic and peaceful institutions. Sovereignty requires the energy of the land and the people and is distinct about locality.<sup>192</sup>

Creation stories, in particular, are much more than accounts of the genesis of the Earth. They are essentially normative, as they portray appropriate, model behavior<sup>193</sup>—like the *hadith*, the

191. Taiaiake Alfred, *Sovereignty*, in SOVEREIGNTY MATTERS: LOCATIONS OF CONTESTATION AND POSSIBILITY IN INDIGENOUS STRUGGLES FOR SELF-DETERMINATION 33, 46 (Joanne Barker ed., 2005); see also Taiaiake Alfred, "Sovereignty": An Inappropriate Concept, in SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS: A READER 67, 67–71 (Robert Odawi Porter ed., 2005).

192. June McCue, *New Modalities of Sovereignty: An Indigenous Perspective*, 2 INTERCULTURAL HUM. RTS. L. REV. 19, 24–25 (2007).

193. PEGGY V. BECK ET AL., THE SACRED: WAYS OF KNOWLEDGE, SOURCES OF LIFE 102 (1996). Medicine men or shamans interpret the creation stories and determine how people "must live in order to keep the balance of relationships that order the world." *Id.*; see also Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003, 1012–14 (1997).

traditions of the Prophet in Islam. As the Western Shoshone say, decisions are made by consensus; the whole community thus has ownership of the decision made.<sup>194</sup> Those decisions are ultimately based on natural laws that are not written by humans but imposed by the Creator, variously referred to as Mother Earth and Father Sky.<sup>195</sup> There is no separation between church and state. McCue explains:

From an Indigenous perspective, sovereignty is not just human-centered and hierarchical; it is not solely born or sustained through brute force. Indigenous sovereignty must be birthed through a genuine effort to establish peace, respect, and balance in this world. Indigenous sovereignty is interconnected with self-determination. Non-Indigenous formulations of sovereignty treat states as artificial entities that hold sovereign rights such as territorial integrity or sovereign equality. Self-determination is severed as a right possessed by peoples which can limit state powers. Finally, Indigenous sovereignty is sacred and renewed with ceremonies that are rooted in the land. . . .

In this sense, sovereignty can be seen as the frame that houses the life force or energy that can flow at high or low levels depending on how the people are living at any given particular moment in their territories. Such sovereign attributes are renewed each and every time we use our potlatch system and when clan members choose to fulfill their roles and responsibilities to each other and to their neighbors. These attributes are renewed when we act as stewards for our ecological spaces. These sovereign attributes do not negate the fact that my people also exercise attributes of sovereignty similar to those upon which Western societies found their state systems—such as protecting and defending territorial boundaries, and engaging in external foreign relations with trade and commerce. I would add peacemaking, possessing governing institutions for the people, a citizenry or permanent population with a language, and powers of wealth and resource redistribution amongst our clans. The comparative inquiry is rather one of the priorities and whether or not conduct or behaviors of the people are coordinate with our principles of living a good life and maintaining and securing peaceful good relations.<sup>196</sup>

Taiaiake Alfred, even more focused on culture, has called for a physical and spiritual self-renewal of indigenous communities, a radical “indigenous resurgence.”<sup>197</sup>

Self-help and re-empowerment are, thus, key to the survival and the flourishing of indigenous communities. These gains cannot be achieved, however, if indigenous peoples and their cultures are crushed by the constant onslaught of modern society’s influences.

194. Goldberg, *supra* note 193, at 1010.

195. *Id.* at 1009.

196. McCue, *supra* note 192, at 25–26.

197. TAIAlAKE ALFRED, WASÁSE – INDIGENOUS PATHWAY OF ACTION AND FREEDOM 198 (2005). To the extent this book rejects alliances with non-indigenous groups as a condition for the recapturing of the indigenous self, others have cautioned against a resulting possible threat to the success of the indigenous movement. See Austen Parrish, *Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights*, 31 AM. INDIAN L. REV. 291, 312–13 (2006).

While it is impossible and undesirable to imprison indigenous peoples in a living museum of their culture, the world community at large ought to support their choice to live according to the codes of their inner worlds.

What would an appropriate legal framework for the flourishing of indigenous identity be?

1. First, *safe spaces* ought to be created. The Western concept of exclusive property should be used to build, figuratively, fences around the land indigenous peoples have traditionally held. No one has ever explained this need for connection with the land as eloquently as the Coordinator of the Indian Nations Union in the Amazon:

When the government took our land . . . they wanted to give us another place . . . . But the State, the government, will never understand that we do not have another place to go. The only possible place for [indigenous] people to live and to re-establish our existence, to speak to our Gods, to speak to our nature, to weave our lives, is where God created us. . . . We are not idiots to believe that there is possibility of life for us outside of where the origin of our life is. Respect our place of living, do not degrade our living conditions, respect this life. . . . [T]he only thing we have is the right to cry for our dignity and the need to live in our land.<sup>198</sup>

Land rights are thus critical to indigenous peoples' survival,<sup>199</sup> and significant progress has been reached in the field of customary law regarding this claim.<sup>200</sup>

2. Within these lands, indigenous peoples should have the right to order their lives the way their traditions teach them. *Local and internal self-government*, or autonomy, as recognized in Article 4 of the UN Declaration,<sup>201</sup> is essential. To assuage the fears of existing states, secession or other threats to the territorial integrity of a state should generally be disallowed. An exception, as stated by the Canadian Supreme Court in its advisory opinion on the secession of Québec, would apply, as with any other ethnic group, if an indigenous people were excluded from the political processes and suffered from wholesale discrimination.<sup>202</sup>

3. The third important claim, which ought to be heeded, is the indigenous peoples' cry for *free, prior, and informed consent* before the

198. Ailton Krenak, Co-ordinator of Indian Nations' Union, Remarks to the World Commission on Environment and Development (WCED) Public Hearing, Sao Paulo (Oct. 28–29, 1985), *quoted in* WORLD COMM'N ON ENV'T AND DEV., OUR COMMON FUTURE 115 (1987).

199. Cf. Andrew Huff, *Indigenous Land Rights and the New Self-Determination*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 295, 295 (2005).

200. See the description of pertinent customary international law, *supra*, Part IV; see also Lindsey L. Wiersma, *Indigenous Lands as Cultural Property: A New Approach to Indigenous Land Claims*, 54 DUKE L.J. 1061, 1077–78 (2004).

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

202. Reference Re: Secession of Québec, *supra* note 125, at 1372–73.

government takes any measure affecting them.<sup>203</sup> That includes relocation<sup>204</sup> and other displacement as well as significant impairment of their distinct heritage. The term "indigenous heritage" should be broadly construed and subject to the same standards and means of protection as traditional intellectual property rights.<sup>205</sup>

4. The right to self-government ought to be granted with the express dedication to the survival of *their culture, their cosmivision, and their respect for the Earth*, including all living and nonliving things. The fact that, for some groups, religion is the law should be respected. While certain indigenous codes of criminal law may be restorative rather than retributive, those should be upheld as well. As long as the indigenous group meets the definition's objective criteria, it should be entitled to make determinations regarding its membership. Indigenous sovereigns, as any government, should, however, be bound by the minimum threshold of universal standards of human rights.

5. Indigenous peoples have already attained international legal agency through their equal representation on the United Nations' Permanent Forum on Indigenous Issues. The *treaties* concluded with them in the past should be honored, and disputes regarding their validity, breach, or interpretation should be resolved by appropriate *international bodies*.

6. Finally, affirmative steps should be taken to more effectively protect, promote, and revitalize indigenous languages and manifestations of culture.

This array of measures would serve to maintain indigenous sovereignty in the sense indigenous peoples themselves define it. These measures may be less threatening than traditional autonomy models suggest, and may prove to contribute collectively to the survival of the planet as a site of cultural diversity and mutual respect. Still, indigenous and non-indigenous forces need to combine in order to realize all of these aspirations. Many interests may stand in the way of these goals, and some of them may have to be

203. Article 19 of the Declaration enshrines this idea: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. IX.

204. XANTHAKI, *supra* note 95, at 255 (referring to, *inter alia*, Article 16 of the International Labor Organization (ILO) Convention No. 169).

205. *Cf.* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Prot. of Human Rights, *Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People*, ¶ 13, U.N. Doc. E/CN.4/Sub.2/2000/26 (June 19, 2000).

accommodated. In any event, struggle is essential to life, especially the life of the law,<sup>206</sup> and this is a battle worth fighting.

### VIII. CONCLUSION

Indigenous sovereignty, just like any claim to sovereignty, is not granted. It inheres in its bearer; it grows, or it dies, from within. The 2007 United Nations Declaration on the Rights of Indigenous Peoples is based on the universal recognition of their claim to self-determination on their lands, an aspiration that lies at the heart of the rising indigenous peoples' claims to re-empowerment. In important respects, particularly regarding their rights to their territories, their culture, and internal self-government, the Declaration reaffirms pre-existing rules of customary international law and treaty law. The right to recapture their identity, to reinvigorate their ways of life, to reconnect with the Earth, to regain their traditional lands, to protect their heritage, to revitalize their languages and manifest their culture—all of these rights are as important to indigenous people as the right to make final decisions in their internal political, judicial, and economic settings. The flame of self-determination, however, needs to burn from inside the indigenous community itself. International and domestic law can, and should, stand ready to kindle, protect, and grow this flame until it burns fiercely, illuminating the path for the ultimate goal of self-realization of indigenous peoples around the world.

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206. Compare Rudolf von Jhering's introduction to his lecture *Der Kampf um's Recht*:

The life of the law is struggle, – a struggle of nations, of the state power, of classes of individuals. All the law in the world has been obtained by strife. Every principle of law which obtains had first to be wrung by force from those who denied it; and every legal right – the legal rights of a whole nation as well as those of individuals suppose a continual readiness to assert it and defend it. The law is not mere theory, but living force.