

THE RIGHTS OF THE PYGMY PEOPLE IN THE REPUBLIC OF CONGO

International Legal Context

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I

INTRODUCTION

This report sets forth the broad contours of the international human rights regime as it concerns indigenous peoples¹ and thus the Republic of Congo-Brazzaville's responsibilities under international law, in the context of the current initiative to develop legislative protection for the Congolese Baka "Pygmy" peoples. The report first provides an overview and synthesis of the relevant provisions of applicable treaties, other international instruments, interpretive decisions by international human rights bodies, and the practice of state and other actors engaged in multilateral discussions about the rights of indigenous peoples. It then describes the domestic legal developments of several countries, including select francophone countries in Africa. Finally, the report summarizes the content of international norms concerning indigenous peoples, including norms of customary international law that establish obligations for states in addition to their treaty-based obligations.

Concern within the international system for peoples or populations identified as indigenous has arisen as part of a larger concern for those segments of humanity that have experienced histories of colonization and marginalization and that continue to suffer the legacies of those histories. At the close of World War II, the international system instituted the United Nations Charter and incorporated human rights precepts among its foundational elements. The reformed system joined the revolutionary movements that fought colonialism where it continued to exist in its classical form and urged self-government in its place.² The initial regime of decolonization prescriptions led to the

¹ There is no single precise definition of 'indigenous' within international law and institutions. Indigenous peoples are identified, and identify themselves as such, by reference to identities that pre-date historical encroachments by other groups and the ensuing histories that have challenged their cultural survival and self-determination as distinct peoples. For an excellent discussion of the meaning of 'indigenous' in the African context, which specifically identifies the Yaka or Pygmy peoples of Congo-Brazzaville as fitting under this rubric, see *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (May 14, 2003), adopted by the African Commission on Human and Peoples' Rights at its 34th ordinary session, November 2003 [hereinafter "ACHPR Working Group report"]. Cf. Benedict Kingsbury, "Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy," *American Journal of International Law*, Vol. 92 (1998), p. 414-457, at p. 457 (arguing for a flexible approach to understanding the concept of "indigenous peoples" that emphasises the commonality of "experiences, concerns and contributions made by groups in many different regions"). See generally *Note by the Chairperson-Rapporteur of the Working Group on Indigenous Populations, Ms. Erica-Irene Daes, on Criteria Which Might Be Applied When Considering the Concept of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/ AC.4/1995/3 (1995).

² Chapters XII and XIII of the U.N. Charter created a trusteeship system similar to but with results more effective than the system of mandates under the League of Nations, the failed attempt at world organization that preceded the U.N. at the close of World War I. U.N. trusteeship was established for the territories detached from the powers defeated in World War II with the objective of moving the territories to self-governing or independent status. Of far greater scope and impact has been the program pursuant to Chapter XI of the Charter, entitled "Declaration on Non-Self-Governing Territories," establishing special duties for U.N. members "which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government." U.N. Charter (June 26, 1945) 59 Stat. 1031 (entered into force October 24, 1945), art. 73. After a period of resistance by colonial powers, the General Assembly became increasingly engaged in promoting decolonization on the basis of Chapter XI

independence of African territories with their colonial boundaries in tact. However, indigenous patterns of association and political ordering that originated prior to colonization or conquest were largely bypassed. Instead, the population of a colonial territory as an integral whole, irrespective of pre-colonial political and cultural patterns, was deemed the beneficiary unit of decolonization prescriptions.³ In this context, international norms directed at sub-state indigenous groups defined by common ethnic or tribal characteristics focused on protection as part of a project of assimilation of these groups into the dominant population's culture and economic modalities. Such norms were articulated in ILO Convention No. 107 of 1957 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.⁴

Despite this and previous paradigms of assimilation, sub-state groups throughout the world that identify themselves as indigenous have long sought to flourish as distinct communities on their ancestral lands, and they have endeavoured to roll back the historical patterns of oppression – patterns which occurred in Africa both before and after European colonization.⁵ In conjunction with efforts at the domestic level, indigenous

and related Charter principles. See Robert E. Riggs & Jack C. Plano, *The United Nations: International Organization and World Politics* 193-98 (2d ed. 1994) (discussing U.N. procedures under Chapter XI).

³ A corollary to the focus on the colonial territorial unit was what became known as the “blue water thesis,” which developed effectively to preclude from decolonization procedures consideration of enclaves of indigenous or tribal peoples living within the boundaries of independent states. The blue water, or salt water, thesis was developed in opposition to efforts by certain colonial powers (particularly Belgium and France) to expand the scope of the obligations and procedures of Chapter XI of the U.N. Charter, which concerns non-self-governing territories, to include enclave indigenous populations. Ofuatye-Kodjoe, *The Principle of Self-Determination in International Law* 119 (1977). These states argued that the “primitive” communities living within the frontiers of many states were in relevant respects indistinguishable from the peoples living in colonial territories, an argument apparently advanced for self-serving ends to diffuse the political momentum coalescing against colonialism. Gordon Bennett, *Aboriginal Rights in International Law* 12-13 (1978). Latin American states especially opposed the expansive interpretation of Chapter XI and eventually prevailed in securing the more restrictive interpretation, which effectively limited Chapter XI procedures to overseas colonial territories. *Id.* The blue water thesis was incorporated into G.A. Res. 1541(XV), Dec. 15, 1960, principle 6, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1961), which states in relevant part:

Principle IV

Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.

Principle V

Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature.

⁴ This philosophy of enhancing the economic welfare of indigenous groups and promoting their integration into the larger social and political order also manifested itself at the international level in mid-twentieth century programs promoted by the Inter-American Indian Institute, which became a specialized agency of the Organization of American States.

⁵ See ACHPR Working Group report, *supra*, pp. 5, 63. While virtually all Africans are in one sense ‘indigenous’, in the African context the term refers to a specific subset of groups, usually with a land-based culture and way of life that have been subjected to discrimination, dispossession, and marginalization because of their cultures by other ethnic groups who are generally more recent arrivals to the specific area indigenous peoples inhabit.

peoples have appealed to the international community and to international law, mostly through its human rights regime, to advance their cause. In the same way that the participation of colonized peoples, particularly in Africa, helped shift international legal norms toward a human rights and decolonization framework, indigenous peoples through their efforts over the last three decades have been able to generate a significant shift in understanding of the content of those norms to address the injustices they experience. This can be seen in several concrete developments that build upon previously articulated human rights principles of general applicability and upon the matrix of existing international human rights institutions. The development of a particularized human rights regime concerning indigenous peoples' context of oppression demonstrates the ability of international law, like all law, to evolve over time.

A watershed in relevant international activity was the 1971 resolution of the United Nations Economic and Social Council authorizing the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights) to conduct a study on the "Problem of Discrimination against Indigenous Populations." The resulting multi-volume work by special rapporteur José Martínez Cobo compiled extensive data on indigenous peoples worldwide and made a series of findings and recommendations generally supportive of indigenous peoples' demands.⁶ The Martínez Cobo study initiated a pattern of multiple activities concerning indigenous peoples among United Nations, regional, and affiliated institutions.

In addition to drawing attention from throughout the international human rights system, indigenous peoples now are the subjects of specially created institutions and programs, including the United Nations Working Group on Indigenous Populations,⁷ the UN Special Rapporteur on the "situation of human rights and fundamental freedoms of indigenous people,"⁸ the African Commission's Working Group on Indigenous

⁶ See Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7 & Add. 1-4 (1986) (José Martínez Cobo, special rapporteur). The study contains the following definition:

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

Ibid., Add.4, para. 379.

⁷ See Human Rights Commission Res. 1982/19 (March 10, 1982); E.S.C. Res. 1982/3 (May 7, 1982). These resolutions established the Working Group as an organ of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities—now the Sub-Commission on the Promotion and Protection of Human Rights—with a mandate to review developments concerning indigenous peoples and develop relevant international standards. The Working Group, allows broad participation by indigenous peoples at its annual week-long sessions, has become an important venue for indigenous peoples to voice their concerns and the important focal point for UN activity on the subject.

⁸ Established by the UN Commission on Human Rights by its Resolution 2001/57 (24 April 2001).

Populations/Communities, and the UN Permanent Forum on Indigenous Issues.⁹ The institutional energies devoted to the concerns of indigenous peoples over the course of several years have shaped—and are continuing to shape—a contemporary regime of international norms on the subject.¹⁰ These norms can be discerned by an examination of various sources of international law binding on or relevant to the Congo: human rights treaties to which the Congo is a party, particularly as interpreted by the judicial decisions and commentary of these treaties’ monitoring bodies in examining the specific context of indigenous peoples; other international instruments that relate specifically to the rights of indigenous peoples and that further reveal the international consensus on the subject; and the practice and explicit statements of states and other international actors that in some measure confirm this consensus.

II

OVERVIEW OF INTERNATIONAL HUMAN RIGHTS TREATIES TO WHICH THE CONGO IS A PARTY

The most immediate and concrete source of the international obligations of the Republic of Congo with respect to its treatment of the indigenous peoples within its borders and polity are the international human rights treaties to which it is a party. These include the African Charter on Human and Peoples’ Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. In addition, the Congo is a party to the Convention on the Rights of the Child and the Convention on Biological Diversity, both of which include provisions specifically relating to indigenous peoples.

A review of these instruments reveals common themes in their application to indigenous peoples: affirmation of norms of non-discrimination; cultural integrity; land and resource

⁹ The Permanent Forum was created with a mandate to advise and make recommendations to the Economic and Social Council specifically on “indigenous issues”, and to promote awareness and coordination of the activities concerning these issues within the U.N. system. ECOSOC Res. E/RES/2000/22 (July 28, 2000). In addition, eight of the sixteen members who constitute the Permanent forum as independent experts are named by the president of the Council in consultation with indigenous organizations, *ibid.* para 1, and the eight individuals originally named are themselves leaders of indigenous organizations or peoples. The definition of the Permanent Forum’s particular functions within the framework of its general mandate is still in its early stages of development. Nevertheless, it will undoubtedly lead to the creation of specialized procedures that will enhance indigenous peoples’ access to the international system, requiring greater expertise and institutional resources to guarantee indigenous peoples’ effective enjoyment of their rights. More than 900 people representing indigenous peoples from around the world attended the first session of the Permanent Forum in 2002, and were provided the opportunity to publicly voice their concerns and proposals at the United Nations headquarters before a broad range of international agencies and government representatives. UN Press Release: Permanent Forum On Indigenous Issues Concludes Historic First Session; Secretary-General Says World’s Indigenous Peoples ‘Have A Home’ At UN, HR/4602 (24 May, 2002).

¹⁰ See generally S. James Anaya, *Indigenous Peoples in International Law* (Oxford Univ. Press, 2d ed. 2004); Patrick Thornberry, *Indigenous Peoples and Human Rights* (Juris Publishing 2002); Siegfried Wiessner, “The Rights and Status of Indigenous Peoples: A Global Perspective and International Legal Analysis” *Harvard Human Rights Journal*, vol. 12 (1999), p. 57.

rights; self-determination through consultation, self-governance and collective participation in national political structures; and culturally appropriate development.

A. African Charter on Human and Peoples' Rights¹¹

Many provisions in the African Charter are relevant to the situation of the Pygmy people of the Congo, including the individual rights to equality,¹² property,¹³ and culture;¹⁴ and the rights of peoples to equality and non-domination,¹⁵ to their existence and self-determination,¹⁶ to their natural resources¹⁷ and to development.¹⁸ The explicit protection of collective rights in the African Charter in the form of peoples' rights is unique. The term "peoples" as used in the African Charter and the collective rights associated with it have been applied to the indigenous groups in Africa by the African Commission on Human and Peoples' Rights.¹⁹ The Commission's interest in the particular context of indigenous peoples is demonstrated by the creation of a Working Group of Experts on Indigenous Populations/Communities.²⁰

The African Commission Working Group has described the situation of Pygmy people in the Congo in relation to the non-discrimination norm rather starkly:

In Congo-Brazzaville the Babendjelle and Baka social systems are not known to outsiders. Whenever there are logging activities, government activities or medical programmes that need to reach a wide audience, the promoters target first the Bilo of the villages to which the Babendjelle are linked and not the Babendjelle directly, which means that all action in favour of the Pygmies is easily intercepted by the Bilo. The Babendjelle are considered to be the property of the Bilo and, for this reason, they do not wish them to be represented at local or regional level. The Bilo treat the Babendjelle as their slaves, considering them sub-human, dirty, lazy, greedy, stupid, infantile and uninterested in development. Among the

¹¹ African Charter on Human and Peoples' Rights, June 27, 1981, Organization of African Unity, 21 *I.L.M.* 58 (entered into force Oct. 21, 1986). Congo became a party to the African Charter on January 17, 1983. It has signed but not yet ratified the protocol accepting jurisdiction of the African Court of Human and Peoples' Rights.

¹² *Id.* arts. 2 & 3.

¹³ *Id.* art. 14.

¹⁴ *Id.* art. 17.

¹⁵ *Id.* art. 19.

¹⁶ *Id.* art. 20.

¹⁷ *Id.* art. 21.

¹⁸ *Id.* art. 22.

¹⁹ See Decision of the ACHPR concerning Communication 155/96 – Social and Economic Rights Action Center, Center for Economic and Social Rights / Nigeria, ACHPR Doc. No. ACHPR/COMM/A044/1, 30th ordinary session, October, 2001, para. 62 ("La protection des droits garantis par les articles 14 ... mène à la même conclusion. En ce qui concerne le droit précédent, et dans le cas du peuple Ogoni, le gouvernement du Nigeria n'a pas rempli ces deux obligations minimums."). [hereinafter "Ogoni decision"]

²⁰ See Resolution on the Rights of Indigenous Populations/Communities in Africa, adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session (Oct.-Nov. 2000)

Babongo, who have long been settled in Sibiti District, 63% declare that their relations with the Bantu are bad, characterised by social inequality or exploitation. This discrimination is reinforced by official attitudes, which tend to perceive the hunter/gatherer way of life as being primitive and shameful for national heritage. And yet their knowledge of plants for healing and magic and their dancing and singing skills are all a part of national heritage.²¹

Furthermore,

Throughout Central Africa the Batwa/Pygmies are victims of discrimination. They can neither eat nor drink with their neighbours, they are forbidden to enter their houses and are not permitted to have sexual partners other than from their own ethnic group. The Batwa/Pygmy communities live on the outskirts of other people's settlements. This exclusion is less within towns, although serious prejudice does still persist against the Batwa/Pygmies, particularly in terms of derisory comments. ... [D]iscrimination against the Pygmies is prevalent in ... Congo-Brazzaville... To the extent that any action is taken, the purpose is rather to assimilate the Pygmies into the dominant culture and not to promote multiculturalism, which respects the diversity and rights of all different groups.²²

This situation contravenes the African Charter on Human and Peoples' Rights, which affirms the right of the individual to take part in the "cultural life of his community"²³ and requires the state to "promote and protect [the] morals and traditional values recognized by the community."²⁴ This individual right is complemented and reinforced by the group right of peoples to "their cultural development with due regard to their freedom and identity".²⁵

Like UN bodies have done, the African Commission Working Group has linked indigenous land and resource rights to the African Charter, and indeed the largest section in its report is devoted to land and resource issues:

Dispossession of land and natural resources is a major human rights problem for indigenous peoples. ... The dispossession of land and natural resources threatens both the economic, social and cultural survival of indigenous pastoralist and hunter-gatherer communities and this violates

²¹ Jackson, Dorothy, *Indigenous Peoples in Central Africa. A desk review for the International Labour Office*, March 2001.

²² ACHPR Working Group report, *supra*, pp. 24, 25, citing Jackson, Dorothy *Indigenous Peoples in Central Africa. A desk review for the International Labour Office*. March 2001. *See also* L'Observatoire congolais des droits de l'Homme, *The Situation of the Pygmies in the Republic of Congo*, (February, 2004) [hereinafter "OCDH Report"].

²³ *Id.* art. 17(2).

²⁴ *Id.* art. 17(3).

²⁵ *Id.* art. 22.

Article 22(1) of the African Charter which says that all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.²⁶

More specifically, the working group has expressed concern over the land and resource rights of the Batwa/Pygmy people of Congo-Brazzaville:

In Congo-Brazzaville the alienation of Babendjelle land has been seriously aggravated by the allocation of state land as Unités forestières d'Aménagement (Forest Management Units - UFA) to logging companies and conservation organisations. The North of Congo-Brazzaville is covered with 17.3 million ha of forest, of which 8.9 million are judged to be exploitable. In 1996, 5.3 million ha were allocated to logging companies and donors interested in developing the forest sector. ... [T]he overall impact of these companies on the local populations is clearly negative. Traditional tenure and use rights, and the resource management system of the local populations, have been wiped out. As elsewhere in Central Africa, deforestation and the creation of roads have encouraged trade in wild meat and large-scale hunting. This has had a devastating effect on subsistence hunters such as the Baka and Babendjelle.²⁷

As the African Commission's Working Group on Indigenous Populations/Communities has noted, "the principle of self-determination of 'peoples' in the African Charter ... was closely associated with colonization and the need for national liberation from foreign domination ... It is, however, important to note that no international law regime is static but should continuously be interpreted in the line with changing realities."²⁸ The Working Group affirmed that the lack of representation of indigenous peoples in the political structures is an indirect violation of the right to participation in government.²⁹ While not expressly addressing the duty to consult, throughout its report the Commission

²⁶ See ACHPR working Group Report, *supra*, pp. 12, 13.

²⁷ *Id.* p.18. The report provides the following further details in a footnote: The *Industrielle du Bois* company (CIB) operating near Quesso, covers all or part of 8 or 9 traditional Land belonging to the Pygmies/Bantu. The influx of professional hunters has destroyed the Pygmies' traditional hunting areas. The companies use tractors to transport wild meat out of the forests. Forest guards carrying automatic guns are put in place by the companies in order to stop commercial hunting on their concessions. The companies never have any dealings with Pygmy communities, only with village communities. The result is that the Pygmies never receive compensation for what has been taken. They are also less capable of benefiting from schools and dispensaries built by the companies in Bantu villages, through lack of money and discrimination against Pygmies living near these establishments. *Indigenous Peoples in Central Africa" A desk review for the International Labour Office*. March 2001.

²⁸ *Id.* p.50. For a discussion of changing understandings of self-determination represented by its inclusion in the African Charter, see S. Kwaw Nyameke Blay, "Changing African Perspectives on the Right of Self-determination in the Wake of the Banjul Charter on Human and Peoples' Rights" [1985] J.A.L. Vol. 29, No. 2, p. 147

²⁹ *Id.* pp. 34-35.

assumes that effective consultation is required to adequately respect indigenous peoples' rights.³⁰

The African Commission has had only one case before it from a sub-state group that could be considered an indigenous people, a case brought by the Ogoni of Nigeria.³¹ However, the Ogoni did not bring their complaint to the African Commission *qua* indigenous people, but as simply a people, and as such the Commission has not engaged the particular application of the African Charter to an explicitly indigenous context. However, the Ogoni communication alleged among other things, violations of property and the collective right to natural resources resulting from resource development in Ogoniland and a failure to consult the Ogoni people in that regard. The Commission did not address the issue of consultation, but found violations of the other rights. Because the case as framed did not seek a decision concerning land and resource rights arising from indigenous customary law,³² that broader issue has not been specifically addressed by the Commission, but given its mandate to and history of citing the jurisprudence of international human rights bodies including the inter-American system, it is unlikely it will depart from the international norm when presented with the issue.

The Commission has begun to address the situation of indigenous peoples through this state reporting and monitoring function.³³ The Congo has an obligation to provide periodic reports to the African Commission every two years. Its first report was delivered in 2001, and the report due December 12, 2003 is now overdue.

B. International Covenant on Civil and Political Rights (ICCPR)³⁴

The ICCPR has great relevance to indigenous peoples, particularly through Article 1 (the right to self-determination) and Article 27 (the right to culture). Article 1 proclaims that “[a]ll peoples have the right of self-determination, by virtue of that right the freely pursue

³⁰ See *id.* p. 6 (urging African states to “develop policies and practices in consultation with the people concerned”), and pp. 18, 19, 20, 35, 45, all including consultation in descriptions of problematic treatment of indigenous groups.

³¹ See Ogoni decision, *supra*, para. 4. The Congo has encouraged indigenous peoples to avail themselves of the mechanisms available under the African human right system. See *Report of the 2004 session of the Working Group on Indigenous Populations* U.N. Doc. E/CN.4/Sub.2/2004/28 (Aug. 3, 2004), para. 46.

³² The violations of property, for example, were reached concerning the torching of Ogoni homes (*See id.* paras. 60, 61), and the violation of the collective right to resources was found to have occurred because petroleum concessions issued in Ogoniland did not ensure benefits to the local African population but exclusively to foreign oil companies. “L’origine de cette disposition peut remonter au colonialisme, période durant laquelle les ressources matérielles et humaines de l’Afrique ont été largement exploitées au profit de puissances étrangères ... Les rédacteurs de la Charte africaine voulaient manifestement ... ramener le développement économique coopératif à sa place traditionnelle, c’est-à-dire au coeur de la Société africaine ... le gouvernement nigérian a facilité la destruction d’Ogoniland. ... Si l’on utilise n’importe quelle mesure de normes, sa pratique n’atteint pas la conduite minimum que l’on attend des gouvernements.” *Id.* para 56, 58.

³³ See ACHPR Working Group Report, *supra*, p. 59.

³⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200(XXI), art. 27, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). The Republic of Congo became a party to ICCPR on January 5, 1984.

the economic, social and cultural development,” and that “by no means may a people be deprived of its means of subsistence.” Respect for the cultures of non-dominant populations in particular is required by Article 27, which affirms in universal terms the right of persons belonging to “ethnic, linguistic or religious minorities...in community with other members of their group, to enjoy their own culture, to profess and practise their own religion [and] to use their own language.”³⁵

The Human Rights Committee, responsible for monitoring compliance with the ICCPR and adjudicating complaints brought under it, has a rich body of jurisprudence concerning indigenous peoples. The Committee has used the principle of cultural respect underlying article 27 to interpret application of other articles in the ICCPR to indigenous peoples in a manner that takes into account their own cultural understandings of those rights. Thus, in a case involving the disturbance of a burial ground by a tourist development, the meaning of the rights to family and privacy were interpreted according to the cultural understandings of the indigenous victims, with the result that a violation was found.³⁶

Similarly, while the Human Rights Committee has ruled that state action resulting in the exclusion by the state of individual indigenous persons from their community will violate article 27, similar exclusions that accord with the indigenous peoples’ own values may not. Thus, a law in Canada taking away a native Maliseet woman’s community membership status, and hence the right to live in her reserve community upon her marriage to a non-indigenous man, was a violation of article 27.³⁷ However, a Swedish law upholding a Saami community’s denial of a Saami man’s membership status and the consequent right to engage in traditional reindeer herding upon his return to the community after more than three years, was not found to violate article 27.³⁸ Conformity of the state action with indigenous peoples’ own values and norms appears to have made the difference in the latter case.³⁹

Accordingly, the Committee has affirmed that land and resource rights can be a necessary corollary of indigenous peoples’ right to cultural integrity, and that permitting resource extraction activities on indigenous lands such as mining, forestry, or oil drilling can amount to a violation of that right if it undermines an indigenous people’s ability to

³⁵ *Id.* art. 27.

³⁶ See *Hopu & Bessert v. France*, Communication No. 549/1993, Human Rights Committee, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1 (views adopted July 29, 1997).

³⁷ See *Lovelace v. Canada*, Communication No. 24/1977, *Report of the Human Rights Committee*, U.N. GOAR, 36th Sess., Supp. No. 40, at 166, U.N. Doc. A/36/40, Annex 18 (1977) (views adopted July 30, 1981).

³⁸ *Ivan Kitok v. Sweden*, Communication No. 197/1985, *Report of the Human Rights Committee*, U.N. GOAR, 43rd Sess., Supp. No. 40, at 207, U.N. Doc. A/43/40, Annex 7(G) (1988) (views adopted July 27, 1988).

³⁹ See *id.* In the *Kitok* decision the Committee stated “that a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole”, and thus the interests of the collective may trump those of the individual where there is conflict. The Committee does not overtly rely on the participation of the indigenous group in making this judgment, but it seems apparent that fact carried weight in the case.

sustain itself according to its traditional cultural and economic patterns and norms. The Committee has also affirmed the duty of states to consult with indigenous peoples when making decisions that will affect their interests.

In *Ominayak v. Canada*⁴⁰ the Committee included in the cultural rights guarantees of article 27 "economic and social activities" upon which the Lubicon Lake Band of Cree Indians relied as a group.⁴¹ Thus the Committee found that Canada had violated its obligation under article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and for timber development within the aboriginal territory of the Lubicon Lake Band.⁴²

After its decision in the *Ominayak* case, the Committee incorporated its broad and contextual interpretation of article 27 into its General Comment No. 23(50) to affirm that "one ... aspect of the rights of individuals protected under that article ... to enjoy a particular culture[,] may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority."⁴³ The General Comment further states:

[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.⁴⁴

In relation to this requirement of effective participation, the Human Rights Committee has confirmed that the norm of cultural integrity imposes a duty on states to consult with indigenous peoples concerning decisions directly involving their rights and interests—including cultural, land and resource rights—and to make appropriate accommodations to

⁴⁰ *Ominayak, Chief of the Lubicon Lake Band v. Canada*, Communication No. 167/ 1984, U.N. Doc. CCPR/C/38/D/167/1984 *Report of the Human Rights Committee*, U.N. GOAR, 45th Session, Supp. No. 40, Vol. 2, at 1, , Annex 9 (A) (1990) (views adopted March 26, 1990) [hereinafter "Ominayak case"] The case is discussed and analyzed in Dominic McGoldrick, "Canadian Indians, Cultural Rights and the Human Rights Committee," *International & Comparative Law Quarterly*, Vol. 40 (1991), pp. 658-669.

⁴¹ *Id.* at para. 32.2.

⁴² Compare the *Ominayak* case with *Diegaardt et al. v Namibia*, Communication No. 760/1997, U.N. Doc. CCPR/C/69/D/60/1997 (views adopted July 25, 2000), in which the committee considered a claim by the Rehoboth Baster Community, a community descended from indigenous Khoi and Afrikaans settlers, that their rights under article 27 were violated due to impediments to their use and enjoyment of certain lands. The committee declined to find a violation of article 27, having determined that there were insufficient cultural connections between the claimed land, on which community members grazed cattle and engaged in other activities, and a distinctive way of life. *Id.* at para. 10.6.

⁴³ Human Rights Committee, *General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights: General Comment No. 23(50) (art.27)*, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994), para. 3.2 [hereinafter "HRC General Comment 23"].

⁴⁴ *Id.* para. 7 (footnote omitted).

protect those rights and interests.⁴⁵ Indeed, proper prior consultation and accommodation, in cases where state decisions authorizing natural resource use have a limited impact on indigenous peoples and do not threaten their way of life or economic survival, may save actions that might otherwise violate the Covenant.⁴⁶ Accordingly, the Committee has provided that rights of cultural integrity are not absolute when confronted with the interests of society as a whole, but must be duly taken into account.

The U.N. Human Rights Committee has also addressed indigenous issues in association with article 1 of the International Covenant on Civil and Political Rights, advancing the view that the right of self-determination articulated in that article applies to indigenous peoples. In commenting upon Canada's fourth periodic report under the Covenant, the Committee stated that the right of self-determination affirmed in article 1 protects indigenous peoples, *inter alia*, in their use and control of traditional lands and resources.⁴⁷ The Committee has also invoked the right of self-determination in examining reports from Australia, Norway, and Mexico as they relate to indigenous peoples.⁴⁸

⁴⁵ See Ilmari Länsman et al. v. Finland, Comm. No. 511/1992, Hum. Rts. Committee, 52d Sess., U.N. Doc. CCPR/C/33/D/511/1992 (1994) [hereinafter "Länsman I"]; Jouni E. Länsman et al. v. Finland, Comm. No. 671/1995, Hum. Rts. Committee, 58th Sess., U.N. Doc. CCPR/C/58/D/671/1995 (November 22, 1996) [hereinafter "Länsman II"].

⁴⁶ See Länsman I, *Id.* at para 9.4-9.6. It should also be noted that the committee arrived at its conclusion of no existing violation without any consideration of the dispute over ownership of the area, assuming state ownership of the land for the purposes of the proceeding. A different conclusion about the legality of the impugned acts could result from the application of international norms upholding property rights of indigenous peoples over their traditional lands. The Committee also applied this analytical framework in the subsequent Länsman II case, in which the same Saami group from Finland challenged State logging plans in their reindeer herding area. Similar to the Länsman I case, the committee in Länsman II ruled that the planned lumber exploitation did not amount to a violation of article 27, but warned about future plans and the aggregate effect of these with plans for quarrying within the same area, *id.* at paras. 10.6, 10.7. See also Sara et. al. v. Finland, Communication No. 431/1990, Human Rights Committee, U.N. Doc. CCPR/C/50/D/431/1990 (Revised Decision on Admissibility, March 23, 1994) (reiterating that Saami reindeer herding is a protected cultural activity under article 27 of the covenant, but declaring the case inadmissible for failure to exhaust internal remedies). In another case the Committee recognized the cultural significance for the Maori of access to their traditional fishing grounds, and that Maori commercial and non-commercial fishery enjoyed protection under article 27. *Mahuika et. al. v. New Zealand*, Communication No. 547/1993, Human Rights Committee, U.N. Doc. CCPR/C/70/D/547/1993 (November 15, 2000), para. 9.3. However, the committee ruled that the circumstances presented, in which the State of New Zealand limited Maori fishing according to an agreement negotiated with Maori leaders, did not constitute a violation of the Covenant. *Id.* at paras. 9.4-9.8.

⁴⁷ *Concluding Observations and Recommendations of the Human Rights Committee: Canada*, (April 7, 1999), U.N. Doc. CCPR/C/79/Add.105., at para. 8.

⁴⁸ See *Concluding Observations of the Human Rights Committee: Australia*, U.N. Doc. A/55/40, paras. 506-508 (24 July 2002) (admonishing Australia that, in connection with article 1, para. 2 of the covenant, it should "take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources"); *Concluding Observations of the Human Rights Committee: Norway*, U.N. Doc. CCPR/C/79/Add.112 17 (1 Nov. 1999), para. 17 (expressing its expectation that Norway "report on the Saami people's right to self-determination under article 1 of the Covenant, including paragraph 2 of that article"). See also *Concluding Observations of the Human Rights Committee: Mexico*, U.N. Doc. CCPR/C/79/Add.109, para. 19 (27 July 1999) (urging "appropriate measures ... to increase [indigenous] participation in the country's institutions and the exercise of the right to self-determination"). See generally: Human Rights Committee, General Comment No. 12 – The Right of Self-Determination (Art. 1), Twenty-first session, 1984, in *Compilation of General Comments and*

Under the ICCPR, the Republic of Congo committed itself to submit periodic reports to the Human Rights Committee. Partly as a result of political instability and military conflict in the country, it has not submitted a report since 1996. In its concluding observations concerning that report, the Committee expressed concern regarding “the lack of specific information on the different ethnic groups in the Congo, particularly the Pygmies, and on measures taken to guarantee, simultaneously, the full and equal enjoyment of their civil and political rights and respect for their rights under article 27, to enjoy their own cultural traditions,” and requested further information on the measures taken to protect these groups in the Congo’s third periodic report, which became overdue on March 31, 2002.⁴⁹

C. International Convention on the Elimination of All Forms of Racial Discrimination (Convention Against Discrimination)⁵⁰

The Convention Against Discrimination is the principal international instrument enshrining the fundamental norm of non-discrimination underlying contemporary human rights discourse. The Convention was written to address the paradigm of apartheid and forced racial exclusion uppermost in the international community’s concern during a time when desegregation and individual integration was viewed as necessary to guarantee equality. Over the last few decades, however, the “problem of discrimination against indigenous populations”⁵¹ and minority groups collectively has been the point of departure for a surge of United Nations activity, and consequently the Convention Against Discrimination has come to be interpreted in a more nuanced fashion according to the evolving understanding of and respect for the value of cultural diversity and collective identity. The Committee on the Elimination of Racial Discrimination (CERD), the body charged with monitoring compliance with this Convention, has emphasized

that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises.

Recommendation Adopted by the Human Rights Treaty-Bodies, HRI/GEN/1/Rev.5 (Apr. 26, 2001), at 121-122.

⁴⁹ Human Rights Committee, *Concluding observations on the second periodic report of the Congo*, March 27, 2000, U.N. Doc. CCPR/C/79/Add.118, para. 21.

⁵⁰ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, G.A. Res. 2106 A(XX), 660 U.N. The Republic of Congo acceded to the International Convention for the Elimination of All Forms of Racial Discrimination in 1988.

⁵¹ E.S.C. Res. 1589(L), May 21, 1971, U.N. ESCOR, 50th Session, Supp. No.1, at 16, U.N. Doc. E/5044 (1971) (Economic and Social Council resolution authorising the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities to conduct a “[c]omplete and comprehensive study of the problem of discrimination against indigenous populations,” a study that resulted in the now well-known *Martinez Cobo Report*).

Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.⁵²

For this reason, CERD has paid special attention to indigenous peoples in its efforts to achieve compliance with the Convention, making clear that the non-discrimination norm goes beyond ensuring for indigenous *individuals* the same civil and political freedoms or the same access to the state's social welfare programs accorded others within a state. It also upholds the right of indigenous *groups* to maintain and freely develop their cultural identities in coexistence with other sectors of humanity. Hence, CERD has called upon states to

- (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
- (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
- (e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.⁵³

In calling for protection of indigenous peoples' cultural forms of economic and social development, CERD has connected indigenous land and resource rights to the non-discrimination norm. It has confirmed this connection in its decision adopting urgent measures under its "early warning" procedure involving Australia, in which it found legislative measures by the Australian government extinguishing aboriginal land rights to be racially discriminatory.⁵⁴ The Committee has also made the connection between non-

⁵² Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII: Indigenous Peoples*, U.N. Doc. CERD/C/51/misc 13/Rev 4 (1997), para. 3 [hereinafter CERD General Recommendation on Indigenous Peoples]. For an example of how discrimination against indigenous peoples in Africa has led to dispossession of land, see Clement Ng'ong'ola, "Land Rights for Marginalized Ethnic Groups in Botswana, with special reference to the Basarwa" 41 J.A.L. 1.

⁵³ CERD General Recommendation on Indigenous Peoples, *supra*, para. 4.

⁵⁴ See Decision (2)54 on Australia, U.N. Doc. CERD/C/54/Misc.40/Rev.2, paras. 6-10 (March 18, 1999).

discrimination and protection of indigenous land rights its review of country reports under its monitoring procedure.⁵⁵

Like the Human Rights Committee, in calling on states to ensure indigenous peoples' effective participation in public life and to obtain their consent prior to making decisions affecting their rights and interests, CERD too has affirmed a duty to consult indigenous peoples.⁵⁶ CERD has recommended that states look to ILO Convention No. 169, with its land rights and detailed provisions on consultation, for guidance in their treatment of indigenous peoples, even when they are not a party to that instrument.⁵⁷

Under the Convention Against Discrimination, the Republic of Congo committed itself to submit periodic reports to the Committee for the Elimination of Racial Discrimination. However, it has never done so. CERD has once examined the country in the absence of a report, noting with concern “that members of Pygmy groups continued to suffer from ethnic discrimination.”⁵⁸ CERD's guidelines for state periodic reports require Congo to address the situation of indigenous peoples in its next report, which would include the situation of Pygmy peoples and the Congo's efforts to comply with the General Recommendation on Indigenous Peoples.⁵⁹

D. International Covenant on Economic, Social and Cultural Rights⁶⁰

The International Covenant on Economic and Social Rights affirms an array of social welfare rights and corresponding state obligations that are to benefits “everyone”. Like

⁵⁵ See, e.g., *Report of the Committee on the Elimination of Racial Discrimination*, U.N. Doc. A/49/18, at 30 (1994) (considering the legal regime applicable to Saami land and hunting rights in Sweden); *id* at 88, 92 (evaluating developments in Australia concerning indigenous land rights); *Report of the Committee on the Elimination of Racial Discrimination*, U.N. Doc. A/48/18, at 40-43 (1993) (evaluating government programs in Ecuador concerning indigenous languages, lands, benefits from natural resource exploitation, and participation in government decision making); *Report of the Committee on the Elimination of Racial Discrimination*, U.N. Doc. A/47/18, at 38-44, 47-52, 59-62 (1992) discussing a broad range of issues concerning indigenous peoples in connection with reports by Costa Rica, Banladesh, Colombia and Chile); *Report of the Committee on the Elimination of Racial Discrimination*, U.N. Doc. A/46/18, at 28-32, 62-69, 90-94 (1991) (similar discussion in connection with reports by Argentina, Canada, Sweden, Australia, and Mexico); *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*. U.N. Doc. A/56/18, paras.380-407 (Aug. 14, 2001).

⁵⁶ See CERD General Recommendation on Indigenous Peoples, *supra*, para 4(d).

⁵⁷ See *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*. U.N. Doc. A/56/18, paras.380-407 (Aug. 14, 2001) at para. 400. (“The State party is also encouraged to use as guidance the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.”); *Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname*.. U.N. Doc. CERD/C/64/CO/9 (March 12, 2004) at para. 23 (“The Committee ... reminds [the State party] of the relevance of International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples to Suriname's particular circumstances.”).

⁵⁸ *Review of the implementation of CERD: Congo*, U.N. Doc. A/54/18, paras.108-115 (March 18, 1999), para. 111.

⁵⁹ See *General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties*, Dec. 5, 2000, U.N. Doc. CERD/C/70/Rev.5, para. 9.

⁶⁰ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200(XXI), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976). The Republic of Congo became a party to the ICESCR on January 5, 1984.

the ICCPR, this treaty contains as its first article the right of peoples to self-determination. Emphasized in the Economic and Social Rights Covenant are broad rights to health, education, and an adequate standard of living.⁶¹

Historically across the world, education particularly has often both been and perceived as part of a project of assimilation of indigenous peoples.⁶² The rejection of state education by the Pygmies of the Republic of Congo may indicate that many share this perception.⁶³ At the same time, education potentially offers indigenous people valuable knowledge and skills for development and improved individual and collective standards of living, and for culturally respectful integration in broader national and international society. For these reasons, state education has been both rejected and sought after by indigenous peoples at different times and in different contexts. In light of changing state practice and new international norms, including I.L.O. Convention No. 169 (discussed below), the Committee on Economic, Social and Cultural Rights has addressed the right to education in the context of indigenous peoples,⁶⁴ affirming “State ... obligations to respect, protect and fulfil each of the "essential features" (availability, accessibility, acceptability, adaptability) of the right to education. By way of illustration, a State must ... (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all.”⁶⁵

Like the Human Rights Committee and CERD, the Committee on Economic, Cultural and Social Rights has addressed the particular obligations of states under the Covenant in the context of indigenous peoples. It has affirmed the application of the right of self-determination to indigenous peoples,⁶⁶ and has elaborated specific recommendations with

⁶¹ The Covenant protects the right to work (art. 6); fair wages and decent working conditions (art. 8); labour unions and social security (arts. 8, 9); protection of the family, pregnancy and children (art. 10); an adequate standard of living (art.11); the highest attainable standard of health (art. 11); education, free at the primary level (arts. 13, 14); culture and intellectual property (art. 15).

⁶² For example, Canada and Australia are both facing complex issues of redressing indigenous peoples for the systematic use of residential schools for aboriginal children, with the explicit purpose of erasing indigenous culture from their knowledge. Apart from physical and sexual abuse that arose in residential schools, these countries are having to respond to the cultural discontinuity and associated social problems (i.e. as high suicide and alcoholism rates, drug use, mental illness, and family disintegration) resulting from this concerted attack on indigenous identity. See e.g. Ministry of Supply & Social Services (Canada), *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: 1996), Vol.1, Part II, Ch.10 (4). See also, Australian Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, (Sydney: 1997), Ch. 11.

⁶³ See OCDH report, *supra*, p.21.

⁶⁴ Committee on Economic, Social and Cultural Rights, *General Comment 13: the right to education*, December 8, 1999, U.N. Doc. E/C.12/1999/10, para. 31 [hereinafter, “CESCR General Comment 13”]. See also Committee on Economic, Social and Cultural Rights, *General Comment 14: the right to the highest attainable standard of health*, August 11, 2000, U.N. Doc. E/C.12/2000/4, footnote 19 (citing same developments as relevant to interpretation of right to health) [hereinafter “CESCR General Comment 14”].

⁶⁵ CESCR General Comment 13, *supra*, para. 50.

⁶⁶ See, e.g. *General Comment 15: the right to water*, January 20, 2003, E/C.12/2002/11 para. 7. (“Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not “be deprived of its means of subsistence”, States parties should ensure that there is adequate access to water ... for securing the livelihoods of indigenous peoples.”) [hereinafter “CESCR General Comment 15”]

respect to indigenous peoples in its general comments on water, health, education, and food.

The Committee has also linked many of the covenant's social welfare rights to indigenous access to and control over their traditional territories and called on states to facilitate that control and provide all public services in a culturally respectful manner.⁶⁷ Thus it has affirmed, for example, "[w]hereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right ... [i]ndigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution."⁶⁸ With respect to the general right to food, the committee noted that "[a] particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened."⁶⁹ Similarly, the Committee has affirmed that the right to health requires that "[t]he vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health."⁷⁰ This central importance of indigenous lands and resources to the protection of their social rights necessitates protecting indigenous control and management of those assets. In its monitoring procedures, the Committee has urged states to recognize indigenous land title "as a matter of high priority."⁷¹

⁶⁷ See CESCR General Comments 13, *supra*, para. 50; CESCR General Comment 14, *supra*, para. 12(c).

⁶⁸ CESCR General Comment 15, *supra*, para. 16(d).

⁶⁹ Committee on Economic, Social and Cultural Rights, *General Comment 12: the right to adequate food*, May 12, 1999, U.N. Doc. E/C.12/1999/5, para. 13.

⁷⁰ CESCR General Comment 14, *supra*, para. 27. The African Commission Working Group's Report describes the dismal health situation of the pygmy people in the Congo, "where, in comparison with other village inhabitants, the Babendjelle from the North Congo forest suffer more from yaws, jiggers, leprosy and conjunctivitis. The mortality rate from measles is five times higher amongst the Babendjelle than the Bantu. Under-5 mortality is 27% among the Babendjelle compared with 18% among Bantu children. The Babendjelle are nicknamed out of prejudice (*la viande qui parle* - the animal that can speak) and so do not receive the same treatment as others. This leads the health staff to discriminate against sick Babendjelle. For example, their consultation takes place after all Bantu have been dealt with, and they are refused appropriate treatment. The public health system employs Bantu individuals to distribute medicines for leprosy to the Babendjelle. Often, the Babendjelle do not receive the medicines or they receive them only if they work for the person who is supposed to give them the medicines. The provisions put in place by the health services and company clinics are thus not able to improve the Pygmies' health situation." ACHPR Working Group report, *supra*, citing Dorothy Jackson, *Indigenous Peoples in Central Africa. A desk review for the International Labour Office*. March 2001. The OCDH report, *supra*, describes the situation in similar terms.

⁷¹ See *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Finland*. U.N. Doc. E/C.12/1/Add.52 (December 1, 2000), at para. 25.

As under the other UN instruments, the Congo committed to submitting periodic reports to the Committee on Economic, Social, and Cultural Rights when it became a party to the Covenant in 1984; however, it has never done so. The Committee examined the status of compliance with the Covenant in the absence of a State report in 2000.⁷² In that report, the Committee expressed concern that “[t]he Pygmies do not enjoy equal treatment in the predominantly Bantu society. Pygmies are severely marginalized in the areas of employment, health and education, and are usually considered socially inferior.”⁷³ The Committee recommended that Congo “adopt measures in order to fully integrate Pygmies into Congolese society, so that they may fully enjoy their economic, social and cultural rights.”

E. Other International Treaties to which Congo is a Party

The Congo is a party to the Convention on the Rights of the Child,⁷⁴ which explicitly affirms the right to cultural integrity: “a child ... who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.”⁷⁵ The Convention also provides that the education provided to children must respect “his or her own cultural identity, language and values”, and impart a “spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.”⁷⁶ These provisions confirm the general international norm concerning respect for indigenous cultures. The Committee on the Rights of the Child views implementation of ILO Convention No. 169 as relevant to state obligations under the CRC.⁷⁷

The Convention on Biological Diversity, to which the Congo is also a party,⁷⁸ provides that states ought to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge,

⁷² See *Concluding observations of the Committee on Economic, Social and Cultural Rights: Republic Of The Congo*, May 23, 2000, U.N. Doc. E/C.12/1/Add.45.

⁷³ *Id.* p.18.

⁷⁴ Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) U.N. Doc A/44/49 (1989), entered into force Sept. 2, 1990. The Congo has been a party to this convention since November 13, 1993. The Congo has the obligation to submit reports to the Committee on the Rights of the Child every five years, which it has not yet done. The last report was due in 2000. These reports are expected to include information on the situation of indigenous children. For a discussion of the convention and relevant U.N. procedures, see Patrick Thornberry, *Indigenous Peoples and Human Rights*, 225-41 (2002).

⁷⁵ *Id.* art. 30.

⁷⁶ *Id.* art. 29(c)&(d).

⁷⁷ See *Concluding observations of the Committee on the Rights of the Child: Honduras*. U.N. Doc. CRC/C/15/Add.24 (October 24, 1994) at para. 35. (“the Committee suggests that the State party consider the possibility of adopting adequate measures to implement ILO Convention No. 169”)

⁷⁸ Convention on Biological Diversity, UNCED, Rio de Janeiro, June 5, 1992, U.N. Doc. UNEP/Bio.Div/ N7INC.5/4 (1992) (entered into force Dec. 29.1993). Congo ratified this convention on August 1, 1996.

innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”⁷⁹ This provision protects the intellectual property of indigenous peoples and reiterates the requirement of consultation with and consent from these peoples concerning the use of their traditional knowledge.

Both of these treaties confirm and amplify, in their particular sphere of authority, the same norms expressed by the bodies monitoring the general human rights instruments described throughout this paper. The inclusion of express reference in these specialized instruments to indigenous peoples demonstrates the widespread concern for the particular situation of indigenous peoples and consensus regarding the appropriate normative framework.

III OTHER INTERNATIONAL INSTRUMENTS RELEVANT TO THE RIGHTS OF INDIGENOUS PEOPLES

International instruments other than treaties to which the Congo is a party, and related jurisprudence, constitute additional sources of authority relevant to discerning the Congo’s international legal obligations concerning the Pygmy people. These instruments are relevant in two respects: they bear on the interpretation of the treaties to which the Congo is a party, and they are parts of a pattern of international practice that constitutes and provides evidence of customary international law, which binds states independently of ratified treaties.⁸⁰ The following instruments are important in both functions.

⁷⁹ *Id.* art. 8(j). Implementation of the convention includes periodic meetings of state parties (Conferences of the Parties), as well as a number of technical committees and working groups on specific issues covered by the convention. The issue of indigenous traditional knowledge has been object of a specific focus by the Conference of the Parties. See Decision III/14 (Implementation of article 8.j), *Report of the Third Meeting of Conference of the parties to the Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/COP/3/38 (1997), Annex 2, at 90-93; Decision IV/9 (Implementation of article 8.j and related provisions), *Report of the Fourth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/COP/4/27 (1998), Annex, at 111-114; Decision V/16 (Article 8.j and related provisions), *Report of the Fifth Meeting on the Conference of the Parties to the Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/COP/5/23 (2000), Annex III, at 141-143; Decision VI/10 (Article 8.j and related provisions), *Report of the Sixth Meeting on the Conference of the Parties to the Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/COP/6/20 (2002), Annex I, at 151-169. Following a workshop on traditional knowledge and biological diversity (Spain, 1992), the Conference of the Parties decided to create an *ad hoc* working group on article 8(j). The working group has met a number of times. In addition, the Conference of the Parties decided to establish a technical expert group in order to develop a thematic focal point within the convention’s general clearing-house mechanism on issues related to article 8(j) and related provisions. This expert group met in Bolivia in 2003. The reports and conclusions of these meetings are found in *Report of the Workshop on Traditional Knowledge and Biological Diversity*, U.N. Doc. UNEP/CBD/TKIP/1/3 (1997); *Report of the First meeting of the Ad Hoc Open-ended Inter Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity on the work of its second meeting*, U.N. Doc. UNEP/CBD/COP/6/7 (2002); *Report of the Ad Hoc Technical Expert Group on Traditional Knowledge and the Clearing House Mechanism*, U.N. Doc. UNEP/CBD/AHTEG/TK-CHM/1/3 (2003).

⁸⁰ For a brief description of the nature of customary international law, see Part V below.

A. ILO Convention No. 169⁸¹

ILO Convention on Indigenous and Tribal Peoples, Convention No. 169 of 1989, is today perhaps the most prominent and specific international affirmation of indigenous cultural integrity and group identity. Convention No. 169 is a revision of the ILO's earlier Convention No. 107 of 1957, and it articulates a marked departure in world community policy from the philosophy of integration or assimilation underlying the earlier convention. ILO Convention No. 169 has been explicitly referred to by U.N. human rights bodies and the inter-American human rights system in interpreting the provisions of their respective governing instruments.⁸² Similarly, the African Commission's Working Group has cited this convention as part of international law relevant to indigenous peoples in Africa, despite the fact that as yet it has not been ratified by any African states.⁸³ UN treaty monitoring bodies have recommended that states use this Convention to guide their behaviour, even when they are not parties to it, and have urged states to ratify this Convention.⁸⁴ Thus it can be said that ILO Convention No. 169 has come to be viewed as an articulation of the minimum human rights standards concerning indigenous people.

The basic theme of Convention No. 169 is indicated by the Convention's preamble, which recognizes "the aspirations of [indigenous] peoples to exercise control over their

⁸¹ Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, International Labour Conference, (entered into force Sept. 5, 1991) [hereinafter "ILO Convention No. 169"]

⁸² See note 64. *supra*; Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Court H.R. (Ser. C) No. 79 (Judgment on merits and reparations of August 31, 2001), *published in abridged version in Arizona Journal of International & Comparative Law*, Vol. 19 (2002), concurring opinion of Judge Sergio García Ramírez, p.450, para. 7 (p. [hereinafter "Awas Tingni case"]; Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Inter-Am. Comm. H.R., Report No. 40/04 (merits decision of Oct. 12, 2004), para. [hereinafter "Maya Communities case"]; Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. Comm. H.R., Report No. 75/02 (merits decision of Dec. 27, 2002) [hereinafter "Dann case"] paras. 127-28.

⁸³ See ACHPR Working Group report, p. 58 and annex 1 (draft resolution).

⁸⁴ See note 39, (CERD urging non-party states to use ILO Convention No. 169). CERD has repeatedly recommended that states ratify ILO Convention No. 169 in order to fulfill their obligations of non-discrimination under the ICERD. See e.g. *Concluding observations of the Committee on the Elimination of Racial Discrimination: Finland*. U.N. Doc. CERD/C/63/CO/510/12/2003, at para. 12; *Concluding Observations of the Committee on Economic, Social and Cultural Right: Panama*. U.N. Doc. E/C.12/1/Add.64 (September 24, 2001) at para 28, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Sweden*. U.N. Doc. CERD/C/304/Add.103 (May 1, 2001) at para. 13; *Concluding observations of the Committee on the Elimination of Racial Discrimination: Russian Federation*. U.N. Doc. CERD/C/304/Add.5. (March 28, 1996). The CESCR has also repeatedly recommend states ratify ILO Convention No. 169 in fulfillment of their obligations under the ICESCR. See e.g. *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Japan*. U.N. Doc. E/C.12/1/Add.67 (September 24, 2001) at para. 18; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Morocco*. U.N. Doc. E/C.12/1/Add.550 (December 1, 2000) at para. 41; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Finland*. U.N. Doc. E/C.12/1/Add.52 (December 1, 2000), at para. 25.

own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they lie.”⁸⁵ Upon this premise, the convention includes provisions advancing indigenous cultural integrity,⁸⁶ land and resource rights,⁸⁷ and non-discrimination in social welfare spheres;⁸⁸ and it generally enjoins states to respect indigenous peoples’ aspirations in all decisions affecting them.⁸⁹

The land rights provisions of Convention No. 169 are framed by article 13(1), which states:

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

The concept of indigenous territories embraced by the Convention is deemed to cover "the total environment of the areas which the peoples concerned occupy or otherwise use."⁹⁰

Indigenous land and resource or territorial rights are of a collective character,⁹¹ and they include a combination of possession, use, and management rights. In its article 14(1), Convention No. 169 affirms:

The rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognised. In addition, measures

⁸⁵ ILO Convention No. 169, fifth preambular para.

⁸⁶ *E.g., id.* art. 5 (“[T]he social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected”).

⁸⁷ *Id.* pt. 2 (land).

⁸⁸ *Id.* pt. 3 (“Recruitment and Conditions of Employment”), pt. 4 (“Vocational Training, Handicrafts and Rural Industries”), pt. 5 (“Social Security and Health”), pt. 6 (“Education and Means of Communication”).

⁸⁹ *E.g., id.*, art. 7(1):

“The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.”

⁹⁰ *Id.* art. 13(2).

⁹¹ *See Report of the Committee set up to examine the representation alleging non-observation by Peru of the Convention on Indigenous and Tribal Peoples, 1989 (No.169), made under Article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP), GB.273/14/4 (Nov. 1998), at para. 32(b) (emphasising the “collective aspects” of the relationship of indigenous peoples with land, and that “when communally owned indigenous lands are divided and assigned to individuals or third parties [as permitted by Peruvian law] this often weakens the exercise of their rights by the community or the indigenous peoples and in general they may end up losing all or most of the land, resulting in a general reduction of the resources that are available to indigenous peoples when they own their lands communally.”)*

shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.

Article 15, furthermore, requires states to safeguard indigenous peoples' rights to the natural resources throughout their territories, including their right "to participate in the use, management and conservation" of the resources. Pursuant to the norm of non-discrimination, indigenous peoples must not be denied subsurface and mineral rights where such rights are accorded to non-indigenous landowners.

The Convention adds that indigenous peoples "shall not be removed from the lands which they occupy" unless under prescribed conditions and where necessary as an "exceptional measure."⁹² When the grounds for relocation no longer exist, they "shall have the right to return to their traditional lands" and when return is not possible "these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them."⁹³

The Convention also provides for recognition of indigenous land tenure systems,⁹⁴ which typically are based on long-standing custom. These systems regulate community members' individual interests in collective landholdings, and they also have bearing on the character of collective landholdings *vis-a-vis* the state and others. Thus Convention No. 169 affirms the notion, promoted by various international institutions, that indigenous peoples as groups are entitled to a *continuing* relationship with lands and natural resources according to traditional patterns of use or occupancy. Use of the words "traditionally occupy" in article 14(1), as opposed to use of the past tense "occupied," suggests that the occupancy must be connected with the present in order for it to give rise to possessory rights. In light of the article 13 requirement of respect for cultural values related to land, however, a sufficient contemporary connection with lost lands may be established by a continuing cultural attachment to them, particularly if dispossession occurred recently.

Also relevant in this regard is article 14(3), which requires "[a]dequate procedures...within the national legal system to resolve land claims by" indigenous peoples. This provision is without any temporal limitation and thus empowers claims originating well in the past. Article 14(3) is a response to the historical processes that have afflicted indigenous peoples, processes that have trampled on their cultural attachment to ancestral lands, disregarded or minimised their legitimate property interests, and left them without adequate means of subsistence. In light of the acknowledged centrality of lands and resources to indigenous cultures and economies, the requirement to provide meaningful redress for indigenous land claims implies an

⁹² ILO Convention No. 169, *supra*, art. 16.

⁹³ *Id.* art. 16(3).

⁹⁴ *Id.* art. 17(1).

obligation on the part of states to provide remedies that include for indigenous peoples the option of regaining traditional lands and access to natural resources.⁹⁵

In the context of indigenous-state relations, there are requirements for consultation that are expected to be applied whenever the state makes decisions that may affect indigenous peoples. ILO Convention No. 169 in its article 6 affirms the duty of governments to “[c]onsult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.”⁹⁶ In applying the Convention, ILO committees have held that consultations must be in a variety of contexts involving measures affecting indigenous interests, including legislative measures regulating the consultation process itself;⁹⁷ constitutional provisions concerning indigenous peoples;⁹⁸ development activities on lands adjacent to,⁹⁹ or within indigenous territories;¹⁰⁰ and the complete destruction of those lands.¹⁰¹ Article 15 of the convention makes clear that among the many situations in which this consultation requirement applies are those in which natural resource or other development projects are proposed for areas that are within traditional indigenous territories, even when the resources at stake are not owned by the indigenous peoples concerned.¹⁰²

⁹⁵ For a concurring analysis of the land rights provisions of Convention No. 169 by the ILO officer primarily involved in drafting of the Convention, see Lee Swepston, "A New Step in the International Law on Indigenous and Tribal Peoples," *Oklahoma City University Law Review*, Vol. 15 (1990), pp. 677-714, at pp. 696-710.

⁹⁶ ILO Convention No. 169, *supra*, art. 6(1)(a). Also relevant in this regard is article 7(1) of the convention, which recognises “the right [of indigenous peoples] to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.”

⁹⁷ *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT)*, ILO Doc. GB.282/14/2 (Nov. 21, 2001) [hereinafter “U’wa Report”] (impugning lack of consultation in three situations: the passage of a law governing consultation with indigenous peoples; the construction of a highway through indigenous lands; and granting permission for oil exploration in indigenous lands).

⁹⁸ *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Union of Workers of the Autonomous University of Mexico (STUNAM) and the Independent Union of Workers of La Jornada (SITRAJOR)*. ILO Doc. GB.289/17/3 (Mar. 19, 2004) [hereinafter “Mexico Report”].

⁹⁹ See U’wa Report, *supra* note 11.

¹⁰⁰ See *id.*

¹⁰¹ See *id.*; see also *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association*, ILO Doc. GB.282/14/3 (Nov. 14, 2001) [hereinafter “Embera Report”].

¹⁰² See *id.* art. 15. The Governing Body of the ILO, through tripartite *ad hoc* committees created to analyze complaints of violations of the convention, has warned against a lack of adequate consultative processes in various cases in which states have endeavoured to develop natural resources on traditional indigenous territories. See *Report of the Committee set up to examine the representation alleging non-observance by Bolivia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Bolivian Central of Workers (COB)* I.L.O. Doc. GB.274/16/7 (March, 1999) [hereinafter “Bolivia Report”] (signalling need to correct lack of consultation prior to

In order for consultations to meet the developing international standard, the indigenous people concerned must be fully informed of the government's planned decision and the consequences of that decision for them.¹⁰³ The consultations must take place in a culturally appropriate manner, which includes consulting with those decision makers or institutions that legitimately represent the indigenous peoples.¹⁰⁴ Often this means understanding the traditional locus of authority in the culture of the people, which may not correspond to decision-making structures of the dominant society. It also requires procedural safeguards to account for indigenous peoples' own decision-making mechanisms, including relevant customs and organisational structures, and ensuring that indigenous peoples have access to all the information and relevant expertise needed.¹⁰⁵

ILO authorities have interpreted the Convention to mean that the consultations do not provide indigenous peoples with an unqualified veto power over government decisions in all instances,¹⁰⁶ although their free and informed consent is explicitly required in extreme circumstances such as where relocation of a people is proposed.¹⁰⁷ Nonetheless the Convention stipulates that consultations in all cases "shall be undertaken, in good faith

granting of concessions for logging on traditional indigenous lands in Bolivian Amazon region); *Third Supplementary Report of the Committee established to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Single Confederation of Workers of Colombia (CUT)*, GB. 276/17/1, GB 282/14/3 (November 2001), at para. 86 (specifying that Colombia was required to adequately apply the convention's consultation provisions prior to authorising oil development in an area outside the U'wa reserve, and rejecting the government's position that the provisions applied only in regard to areas regularly and permanently occupied by indigenous communities); *Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL) (Ecuadorian Confederation of Free Union Organizations)*, I.L.O. Doc. GB.282/14/2 (November 2001) [hereinafter "Shuar Report"] (lack of consultation prior to oil exploitation within Shuar territory in Amazon region).

¹⁰³ See Shuar Report *id.* paras. 38, 44; Bolivia Report, *supra*, para. 40; Embera Report, para. 61.

¹⁰⁴ See Shuar Report, *id.*

¹⁰⁵ Such is the interpretation of the consultation provisions of ILO Convention No.169 provided by the relevant ILO officials, as manifested in *Manuela Tomei & Lee Sweston*, *supra*, at sec. 1., an ILO publication whose authors are among the organisation's principal officials in charge of applying the convention. This interpretation is also advanced by the *ad hoc* ILO committees charged with examining complaints. For example, in finding Ecuador in violation of article 6 for its failure adequately consult the Shuar people with regard to oil development that would affect 70% of the Shuar territory, the relevant ILO committee stated,

the concept of consulting the indigenous communities that could be affected by the exploration or exploitation of natural resources includes establishing a genuine dialogue between both parties characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord. A simple information meeting cannot be considered as complying with the provisions of the Convention. In addition, Article 6 requires that the consultation should occur beforehand, which implies that the communities affected should participate as early as possible in the process, including in the preparation of environmental impact studies...[I]f an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention

¹⁰⁶ See Shuar Report, *supra*, at para. 39; Statement of the International Labour Office, summarised in *Report of the Committee on Convention No. 107*, International Labour Conference, Provisional Record 25, 76th Session at 25/12, para. 74 (1989).

¹⁰⁷ See ILO Convention 169, *supra*, art. 16(2).

and in a form appropriate to the circumstances, *with the objective of achieving agreement or consent* to the proposed measures.”¹⁰⁸ This requirement that agreement should be the objective of the consultations means that the consultations cannot simply be a matter of informing indigenous communities about the measures that will affect them. Consultation processes must be crafted to allow indigenous peoples the genuine opportunity to influence the decisions that affect their interests. This requires governments to engage indigenous peoples in the discussions about what the outcomes of those decisions should be before they are taken. In addition to the procedural safeguards that apply, and whether or not agreement is to be achieved, the consultations should lead to decisions that are consistent with indigenous peoples’ substantive rights. This puts a burden on a government to justify, in terms consistent with the full range of applicable international norms concerning indigenous peoples, any decision that is contrary to the expressed preferences of the affected indigenous group.

ILO Convention No. 169 establishes as a “matter of priority” the “improvement of the conditions of life and work and levels of health and education of [indigenous] peoples,” and it mandates “[s]pecial projects ... to promote such improvement.”¹⁰⁹ The Convention, furthermore, specifies duties on the part of states to ensure the absence of discriminatory practices and effects in areas of employment, vocational training, social security and health, education, and means of communication.¹¹⁰ And it emphasizes that the special programs devised to ensure the social welfare and development of indigenous peoples are to be established in cooperation with the indigenous peoples concerned¹¹¹ and in accordance with their own collectively formulated priorities.¹¹²

B. Inter-American Human Rights Instruments

The instruments and jurisprudence of regional human rights systems such as those in Europe and the Americas also form part of the corpus of international law relevant to interpreting the Congo’s international obligations. The inter-American system particularly, given the significant presence of indigenous peoples in that region, has considered the application of the general human rights principles affirmed in the American Declaration on the Rights and Duties of Man, the American Convention on Human Rights and other international instruments to the situation of indigenous peoples.

¹⁰⁸ *Id.* art. 6(2) (emphasis added). International Labour Organization officials have affirmed that “consultations with indigenous and tribal peoples are compulsory: prior to any exploration or exploitation of mineral and/or other natural resources within their lands; when it might be necessary to remove indigenous or tribal communities from their traditional lands and resettle them somewhere else, and prior to the design and launching of vocational training programmes for them.” Manuela Tomei & Lee Swepston, *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169* (Geneva: International Labour Organization, 1996), at p. 8.

¹⁰⁹ ILO Convention No. 169, *id.* art. 7(2).

¹¹⁰ *Id.* arts.20-31.

¹¹¹ *E.g. id.* art. 20(1) (“special measures” regarding conditions of employment are to be adopted “in cooperation with the peoples concerned.”)

¹¹² *See id.* art. 7(1) (“the peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions.”).

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are the major human rights organs of the inter-American system. Both bodies have weighed in on the subject of indigenous peoples and confirmed the relevant normative understandings reflected elsewhere in the international system. Like the UN treaty monitoring bodies, the Inter-American Commission has confirmed that the norm of cultural integrity covers all aspects of an indigenous group's survival as a distinct people, understanding culture to include economic or political institutions and land use patterns, as well as language and religious practices. In a case concerning the Miskito Indians of Nicaragua, the Inter-American Commission cited Nicaragua's obligations under article 27 of the International Covenant on Civil and Political Rights and found that the "special legal protections" accorded the Indians for the preservation of their cultural identity should extend to "the aspects linked to productive organisation, which includes, among other things, the issue of ancestral and communal lands."¹¹³

In its 1985 decision concerning the Yanomami of Brazil, the Commission again invoked article 27 and held that "international law in its present state...recognises the right of ethnic groups to special protection on their use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity."¹¹⁴ The Commission viewed a series of incursions into Yanomami ancestral lands as a threat not only to the Yanomamis' physical well being but also to their culture and traditions.¹¹⁵ Significantly, the Commission cited article 27 to support its characterisation of international law even though Brazil was not a party to the International Covenant on Civil and Political Rights, thus indicating the norm's character as general or customary international law.¹¹⁶

¹¹³ Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure Regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin*, O.A.S. Doc. OEA/Ser.UV/II.62, doc. 10 rev. 3 (1983), O.A.S. Doc. OEA/Ser.UV/II.62, doc. 26 (1984) (Case No. 7964 (Nicaragua)), at 81 [hereinafter "Miskito Report and Resolution"]. The commission noted that the requirement of special measures to protect indigenous culture is

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

Id. at 77 (quoting U.N. Secretary-General: The Main Types and Causes of Discrimination, U.N. Pub. 49.XIV.3, paras. 6-7).

¹¹⁴ Case No. 7615 (Brazil), Inter-Am. Commission Res. No. 12/85 (March 5, 1985), *Annual Report of the Inter-American Commission on Human Rights, 1984-1985*, O.A.S. Doc. OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985), at 24, 31.

¹¹⁵ *Id.* at 29-31.

¹¹⁶ This same interpretation of the content and reach of the norm of cultural integrity and article 27 in relation to indigenous peoples was reiterated by the Inter-American Commission in its 1997 human rights report on Ecuador, a report that included an analysis of the situation of indigenous peoples in the Amazon region who had experienced environmental damage as a result of oil development. See Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador*, O.A.S. Doc. OEA/Ser.L/V/II.96, doc 10, rev. 1, Chapter IX (April 24 1997).

The *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,¹¹⁷ before the Inter-American Court of Human Rights was the first case by a modern international tribunal to result in a legally binding decision affirming indigenous peoples' rights over land and resources. The Inter-American Court affirmed that developments in international law required indigenous traditional land tenure to be included under the American Convention's property rights guarantee. The Court held that the concept of property articulated in the American Convention on Human Rights¹¹⁸ includes the communal property of indigenous peoples, even if that property is not held under a deed of title or is not otherwise specifically recognized by the state. In the absence of such specific government recognition, Nicaraguan authorities had treated the untitled traditional indigenous lands—or substantial parts of them—as state lands, as they had done in granting concessions for logging in the Awas Tingni area.¹¹⁹ The Court concluded, especially in light of articles 1 and 2 of the Convention, which require affirmative state measures to protect rights recognized by the Convention and domestic law, that such negligence on the part of the state violated the right to property of article 21.¹²⁰

The Court emphasized that the rights articulated in international human rights instruments have “autonomous meaning for which reason they cannot be made equivalent to the meaning given to them in domestic law.”¹²¹ The Court emphasized that:

¹¹⁷ Awas Tingni case, *supra*, p. 395.

¹¹⁸ See American Convention on Human Rights, Nov. 22, 1969, OAS Treaty Ser. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978), art. 21, “Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.... No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.” The Court declared “Article 21 of the American Convention recognises the right to private property.... ‘Property’ can be defined as those material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value.” Awas Tingni case, *supra*, paras. 143-44.

¹¹⁹ For relevant background see Jorge Jenkins Molieri, *El desafío indígena en Nicaragua: El Caso de los Miskitos* 33-114 (1986) (a history on the Atlantic Coast region); Theodore Macdonald, “The Moral Economy of the Miskito Indians: Local Roots of a Geopolitical Conflict,” in Remo Guidieri *et al.*, ed. *Ethnicities and Nations: Processes of Interethnic Relations in Latin America, Southeast Asia, and the Pacific* 114-22 (1988); S. James Anaya, “The Awas Tingni Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers, and Government Neglect in Nicaragua,” 9 *St. Thomas Law Review* 157 (1996); S. James Anaya and Claudio Grossman, “The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples,” *Arizona Journal of International & Comparative Law*, Vol. 19 (2002), pp. 1-15.

¹²⁰ Awas Tingni case, *supra*, paras. 142-55.

¹²¹ *Id.* para. 146. The Inter-American Commission on Human Rights had pressed this point in prosecuting the case before the Court, invoking in its written submissions the jurisprudence of the European Court of Human Rights regarding the analogous property rights provision of the European Convention on Human Rights, and referring to developments elsewhere in international law and institutions specifically concerning indigenous peoples' rights over lands and natural resources. See Final Written Arguments of the Inter-American Commission on Human Rights before the Inter-American Court of Human Rights in the Case of the Mayagna (Sumo) Indigenous Community of Awas Tingni Against the Republic of Nicaragua, August 10, 2001, published in *Arizona Journal of International & Comparative Law*, Vol. 19 (2002), p. 367, at paras. 62-66.

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 centred 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.¹²²

Accordingly, the Court determined that protection of property rights necessarily includes demarcation and specific recognition, such as by title, of indigenous peoples' lands in circumstances where those rights are not otherwise secure.

Significantly, the Inter-American Court of Human Rights found indigenous customary land tenure patterns to be the basis of property rights that are protected by international human rights law. According to the Court,

Indigenous peoples' customary law must be especially taken into account ... As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.¹²³

The Court also asserted that the demarcation and titling of indigenous lands should be done "in accordance with their customary law, values, customs and mores."¹²⁴ The Court thus recognised both the validity of indigenous customary law in general and its particular role in defining the content of a collective right to property. In another case, *Aloeboetoe v. Suriname*, the Inter-American Court considered Saramaka customary law on family relations and succession when determining the compensation due as reparation for the massacre of Saramaka villagers and in identifying the beneficiaries of that compensation.¹²⁵

In two subsequent decisions, the Inter-American Commission on Human Rights followed the precedent and interpretive methodology of the *Awes Tingni* decision in addressing indigenous land claims under the American Declaration of the Rights and Duties of Man.¹²⁶ In the *Dann* case, the Commission noted the inadequacy of the historical rationale

¹²² *Id.* para. 149.

¹²³ *Id.* para. 151.

¹²⁴ *Id.* para. 164.

¹²⁵ *Aloeboetoe et al v. Suriname. Case (Reparations), Inter-Am. Ct. H.R., September 10, 1993, (Ser. C) No. 15, paras. 55-63 (1993).* According to the Inter-American Court, to calculate the compensation it had to "take Saramaka custom into account. That custom will be the basis for the interpretation of those terms, to the degree that it does not contradict the American Convention." *Id.* at para. 62.

¹²⁶ *Dann case, supra, and Maya Indigenous Communities case, supra.*

for the presumed taking of Western Shoshone land—the need to encourage settlement and agricultural development—and also cited the failure to apply to the Western Shoshone the same just compensation standard ordinarily applied for the taking of property under domestic law.¹²⁷

In applying and interpreting the cited provisions of the American declaration in the *Dann* case, the Commission was explicit in its reliance on developments and trends in the international legal system regarding the rights of indigenous peoples.¹²⁸ The Commission summarised what it considers the pertinent “general international legal principles” that are *now* applicable both within and outside of the Inter-American system:

- the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;
- the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and
- where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.¹²⁹

C. International Declarations and Policy Statements

In addition to the international instruments and bodies described above, further affirmation of the consensus concerning the norms applicable to indigenous peoples can also be discerned through the practice and rhetoric of states and other international actors. The emerging pattern is one in which declarations and agreements address the interaction of their subject matter with indigenous peoples through explicit reference. Acceptance of indigenous rights is evident in Chapter 26 of Agenda 21 adopted by the U.N. Conference on Environment and Development,¹³⁰ the UNESCO Declaration on Cultural Cooperation, the World Bank's Operational Directive 4.20 for Bank-funded projects affecting

¹²⁷ See *Dann* case, *supra*, paras. 144-45.

¹²⁸ See *id.* paras. 124-28. The Commission noted “a review of pertinent treaties, legislation and jurisprudence reveals the development over more than 80 years of particular human rights norms and principles applicable to the circumstances and treatment of indigenous peoples.” *Id.* at para. 125.

¹²⁹ *Id.* para. 130 (footnotes omitted).

¹³⁰ Chapter 26 recognises indigenous peoples' "historical relationship with *their* lands," Agenda 21, U.N. Conference on Environment and Development, Rio de Janeiro, June 13, 1992, U.N. Doc. A/CONF.151/26 (vols. 1, 2, &3), Annex 2 (1992), para. 26.1 (emphasis added), and prescribes a number of measures to protect and strengthen that relationship, *id.* paras. 26.1, 26.3, 26.4.

indigenous peoples,¹³¹ and the concluding documents of the 1993 World Conference on Human Rights and the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, among other instruments.

In 1966, UNESCO issued a Declaration of the Principles of International Cultural Cooperation that proclaimed the dignity and value of each culture, the variety and diversity of which in aggregate “form part of the common heritage belonging to all mankind.”¹³² More recently, UNESCO adopted a Universal Declaration on Cultural Diversity, in which it specifically included indigenous cultures within this understanding, and linked their protection to safeguarding other fundamental human rights.¹³³

Agenda 21, the program document adopted by the UN Conference on Environment and Development in Rio de Janeiro in 1992, includes a chapter concerning the role of indigenous peoples in sustainable development practices. The document affirms the need for domestic legal regimes protecting indigenous peoples’ rights to resource use and management,¹³⁴ intellectual property,¹³⁵ consultation and culturally appropriate development according to their own values and priorities,¹³⁶ and participation of indigenous peoples in the broader national polity.¹³⁷

Similarly, the 1993 World Conference on Human Rights specifically called on states to “ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them ... States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization.”¹³⁸ In like manner, the Durban World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance expressed concern that

in some States political and legal structures or institutions, some of which were inherited and persist today, do not correspond to the multi-ethnic, pluricultural and plurilingual characteristics of the population and, in

¹³¹ *World Bank Operational Manual*, Operational Directive 4.20: “Indigenous Peoples,” para. 15(c) (1991) (establishing recognition of customary or traditional indigenous land tenure systems as a premise of bank-assisted projects). This Operational Directive is currently in the process of review. The World Bank policy on indigenous peoples is addressed *infra* note 174.

¹³² Declaration of the Principles of International Cultural Cooperation, proclaimed by the general conference of the United Nations Educational, Scientific and Cultural Organization at its 14th session, Nov. 4, 1966, art. 1, reprinted in U.N. Compilation of Instruments, *supra*, Vol. 1, pt. 2, at p. 591.

¹³³ Universal Declaration on Cultural Diversity, proclaimed by the General Conference of the UNESCO at its 31st session, Nov. 2, 2000, art. 4: “The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples.”

¹³⁴ See Agenda 21, *supra*, paras. 26.3(a)(iv), 26.4.

¹³⁵ See *id.* para. 26.4(b).

¹³⁶ See *id.* para. 26.3(b), 26.5(a), 26.6(a).

¹³⁷ See *id.* para. 26.4(b), 26.3(b)&(c).

¹³⁸ Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights, July 12 1993, U.N. Doc. A/CONF.157/23, para. 20.

many cases, constitute an important factor of discrimination in the exclusion of indigenous peoples.¹³⁹

The final documents of the Durban conference went on to explicitly support the normative principles contained in the UN draft declaration¹⁴⁰ and affirm the rights of indigenous peoples to ownership of their lands and resources,¹⁴¹ to cultural survival,¹⁴² and to participation in state decisions affecting them.¹⁴³ The Conference urged states to honour international legal norms by “adopting ... in concert with them, constitutional, administrative, legislative, judicial and all necessary measures to promote, protect and ensure the enjoyment by indigenous peoples of their rights”¹⁴⁴

Explicit recognition of international norms concerning indigenous peoples is not limited to state actors. The World Bank, itself a subject of international law within its realm of competency,¹⁴⁵ includes in its Operational Directive 4.20 “informed participation” by indigenous peoples and “direct consultation” with them among the “central activities” that must be undertaken in connection with any Bank-funded project that may affect the interests of these peoples.¹⁴⁶ Bank projects affecting indigenous peoples must include

¹³⁹ Durban Declaration, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia*

and Related Intolerance (Durban, South Africa, Aug. 31 – Sept. 8, 2002), U.N. Doc. A/CONF.189/12, para. 22. It is important to note that, from the perspective of indigenous peoples’ representatives who participated in the Vienna and Durban conferences, the final resolutions failed to provide sufficient recognition of indigenous peoples’ rights. Indigenous representatives’ dissatisfaction was most notable at the Durban conference. See *Press Release: Protest of Indigenous Peoples must be taken seriously: World Conference must withdraw discriminating articles from final resolution*, issued by the Society for Threatened Peoples on Sept. 4, 2001. Nevertheless, whatever its weaknesses the Durban Declaration, follows the practice of including provisions that reinforce the normative tendencies reflected in Convention No. 169 and the UN and OAS draft declarations.

¹⁴⁰ See Durban dec., *supra*, para. 42.

¹⁴¹ See *id.* para. 43.

¹⁴² See *id.* para 41.

¹⁴³ See *id.* para. 40, Durban Programm of Action, para. 22.

¹⁴⁴ Durban Programme of Action, para. 15(a). See also *id.* para. 19 (requesting states examine their constitutions, laws and administrative frameworks for consistency with international norms concerning indigenous peoples).

¹⁴⁵ See Daniel Bradlow, “The World Bank, the IMF and Human Rights,” *Transnational Law & Contemporary Problems*, No. 6, 1996, p. 63 (the World Bank is a subject of international law because it has rights and obligations that are determined by international law).

¹⁴⁶ See World Bank, Operational Directive O.D. 4.20 – Indigenous Peoples (September, 2001), at para. 8, (currently under review). The emphasis on the requirement of participation and consent by indigenous peoples and other particularly vulnerable social groups is especially obvious in the World Bank’s recent policy pronouncements. The new Operational Policy of the Bank regarding natural habitats requires consultation with “affected groups” including especially indigenous peoples, before and after conducting environmental impact studies. World Bank, *Operational Policy 4.04., Natural Habitats* (June, 2001), at paras. 15, 17. In regard to the construction of dams, the official position of the Bank is to require “free and significant consultation with indigenous groups directly affected”. “World Bank Position with respect to the World Commission on Dams” (December, 2001), quoted in World Bank, *Summary of Consultations with External Stakeholders regarding the World Bank Draft Indigenous Peoples Policy (Draft OP/BP 4.10)* (April 18, 2002), Annex C, at 12. A similar policy has been adopted with respect to involuntary resettlement resulting from the Bank’s development projects, which pays special attention to the

measures to protect their rights, including where appropriate measures for “establishing legal recognition of the customary or traditional land tenure systems of indigenous peoples.”¹⁴⁷

D. Draft Instruments on the Rights of Indigenous Peoples

As can be surmised by the discussion thus far, there is a large body of international developments concerning indigenous peoples. In addition to the above, prominent among these are the ongoing efforts within the United Nations and the Organization of American States to develop declarations on the rights of indigenous peoples for adoption by the principal organs of these institutions. While neither of these declarations has been finalized and discussion continues concerning specific wording, the drafting process has contributed to the crystallization of consensus among participating states and indigenous peoples concerning the broad contours of the norms applicable to indigenous peoples.

To be sure, controversy persists about much of the wording in the existing drafts of the declarations, with states typically holding that parts of the drafts go too far and would make for unworkable or unjustified state obligations. Nonetheless, an examination of the discussions among states and others around the drafts reveals a core of consensus about indigenous rights which is in some measure reflected in the drafts.¹⁴⁸ Moreover, having

participation of indigenous peoples and accords priority to their preferences in resettlement strategies. World Bank, *Operational Policy O.P. 4.12., Involuntary resettlement* (December, 2001), paras. 7-11.

In practice, however, the Bank’s actions have not always been faithful to these principles. A study by the Bank itself carried out in 1992 made clear that more than a third of the Bank’s projects affecting indigenous communities had not taken into account Operational Directive 4.10 on indigenous peoples, including that part of the directive mandating consultation with affected communities. See John Swartz and Jorge Uquillas: *Aplicación de la Política del Banco sobre Poblaciones Indígenas (OD 4.20) en América Latina (1992-1997)*, Washington DC, World Bank, Regional Office for Latin America and the Caribbean, 1999, p. 2. A later, independent study, based on an evaluation of seven specific Bank projects, concluded that the affected indigenous communities perceived the consultation as “often” superficial and “normally limited to brief visits to the field” that were ineffective because they “contradicted the gradual and consensual collective decision-making processes common in indigenous cultures”; Thomas Griffiths and Marcus Colchester: “Report of a workshop on «Indigenous Peoples, Forests and the World Bank: Policies and Practice» (Washington, May 9-10, 2002),” Program for Forest Peoples, Centre for Information on Multilateral Development Banks, 2000, p. 32. But despite these significant shortcomings, the study also noted that the existence of the World Bank directive “has been important to promote changes in the practice of some countries and to mitigate the adverse effects of development plans on indigenous peoples”. *Id.* at 3.

¹⁴⁷ Operational Directive 4.20, *Id.* para. 15(c).

¹⁴⁸ See summaries of government comments delivered at the 1993 and 1994 sessions of the U.N. sub-commission working group, which appear, respectively, in *Report of the Working Group on Indigenous Populations on Its Eleventh Session*, U.N. Doc. E/CN.4/Sub.2.1993/29 (1993), and *Report of the Working Group on Indigenous Populations on Its Twelfth Session*, U.N. Doc. E/CN.4/Sub.2/1994/30. Written comments on the proposed declaration appear verbatim or are summarized in *Analytical Compilation of Observations and Comments Received Pursuant to Sub-Commission Resolution 1988/18*, U.N. Doc. E/CN.4/Sub.2/1989/33/Add.1-3 (1989); *Analytical Commentary on the Draft Principles Contained in the First Revised Text of the Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/AC.4/1991/1 & Add. 1-3 (1990); *Revised Working Paper Submitted by the Chairperson/Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1991/36 (1991). See also *Report of the working group established in accordance with Commission on Human Rights Resolution 1995/32*, U.N. Doc. E/CN.4/2000/84 (Dec. 6, 1999) (Oct.18-29, 1999 session); *Report of the working group established in accordance with Human Rights Commission resolution 1995/32*, U.N. Doc. E.CN.4/2001/95; *Report of the*

been developed by authorized international agencies and through years of deliberation and consultation with states as well as indigenous peoples, the drafts stand in their own right as authoritative statements of the rights of indigenous peoples.

The draft of a United Nations Declaration on the Rights of Indigenous Peoples¹⁴⁹ was produced and adopted in 1993 by the UN's five-member Working Group on Indigenous Populations, which is part of the Sub-Commission on Promotion and Protection of Human Rights. Representatives of indigenous peoples from around the world actively participated in the years of deliberation by the Working Group that began in the early 1980s and that led to its draft of a declaration on indigenous rights. The draft declaration is now before the Sub-Commission's parent inter-governmental body, the UN Commission on Human Rights, which in 1995 established its own working group to consider the draft.¹⁵⁰

Having been authorized in 1989 by the OAS General Assembly to develop a "juridical instrument" regarding indigenous groups, the OAS Inter-American Commission on Human Rights adopted in 1996 a Proposed American Declaration on the Rights of Indigenous Peoples.¹⁵¹ The Proposed American Declaration is now being considered by a specially created working group of the Political and Juridical Committee of the OAS Permanent Council, and indigenous peoples' representatives have participated actively, alongside state representatives, in that working group.

That the UN and OAS draft texts represent an international consensus in broad terms is reflected in the fact that the two documents are very similar in terms of scope of coverage and in the nature of the rights affirmed. Like the ILO's Convention No. 169 on Indigenous and Tribal Peoples, both draft texts embrace a philosophy that, in contrast to earlier dominant thinking, values the integrity of indigenous communities and their cultures; and the texts identify indigenous groups and individuals as special subjects of concern for the states in which they live and for the international community at large. Further, like the ILO Convention, the draft UN and OAS texts presuppose that indigenous peoples will exist as parts of the states that have been constructed around

working group established in accordance with Human Rights Commission resolution 1995/32, U.N. Doc. E.CN.4/2002/98; Report of the working group established in accordance with Human Rights Commission resolution 1995/32, U.N. Doc. E.CN.4/2003/92 & Add.1; Report of the working group established in accordance with Human Rights Commission resolution 1995/32, U.N. Doc. E.CN.4/2004/81 & Add.1.

¹⁴⁹Draft United Nations Declaration on the Rights of Indigenous Peoples, as agreed upon by the members of the U.N. Working Group on Indigenous Populations at its eleventh session, Geneva, July 1993; adopted by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities by its resolution 1994/45, August 26 1994, U.N. Doc. E/CN.4/1995/2/, E/CN.4/Sub.2/1994/56, at 105 (1994) [hereinafter "Draft UN Declaration"].

¹⁵⁰The Commission on Human Rights recently extended the mandate of this working group for an additional year. See Human Rights Commission, Human Rights Resolution 2005/50 (April 20, 2005) U.N. Doc. E/CN.4/RES/2005/50.

¹⁵¹Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-Am. Comm. on Human Rights Feb. 1997, in: 1997 Inter-Am. Com. H.R. Annual Report, OEA/Ser.L/V/III.95.doc.7, rev. 1997, pp. 654-676 (proposal by the Inter-Am. Comm. H.R.). This proposed text was a revision of an earlier draft, which the Inter-American Commission had published in September of 1995. See OEA/Ser.L/V/II.90, Doc. 9 rev. 1 (1995) [hereinafter "Proposed American Declaration"].

them, but with robust group rights, including rights relating to land and natural resources, culture, and autonomy of decision-making authority. Indicating continued movement forward in the international norms as applied to indigenous peoples, both draft texts are more sweeping than ILO Convention No. 169 in their articulation of such rights; the UN text is the most far reaching, going so far as to articulate “a right of self-determination” for all indigenous peoples.¹⁵² The draft U.N. Declaration on the Rights of Indigenous Peoples states:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.¹⁵³

The Proposed American Declaration on the Rights of Indigenous Peoples recognises “the right to autonomy or self-government” in similar terms.¹⁵⁴

The draft U.N. Declaration on the Rights of Indigenous Peoples affirms the overwhelmingly accepted view that “[i]ndigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making which may affect their rights,”¹⁵⁵ a view affirmed in similar terms in the proposed American declaration, incorporating minimum requirements of consultation that approximate or exceed the mandates of Convention No. 169.¹⁵⁶ It is evident that there is a broad acceptance of minimum

¹⁵² See Draft UN Declaration, *supra*, art. 3.

¹⁵³ *Id.* art. 33.

¹⁵⁴ See Proposed American Declaration, *supra*, art. XV(1).

¹⁵⁵ Draft UN Declaration, *supra*, art. 19.

¹⁵⁶ Among the relevant provisions of the Draft UN Declaration, *supra*, are the following: art.19 (“Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures”); art. 20 (“Indigenous peoples have the right to participate fully ... in devising legislative or administrative measures that may affect them [and] States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures”); art. 30 (“Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources”); Article 37 (“States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration”). The Proposed American Declaration, *supra*, includes the following relevant provisions, among others: art. XIII (“Indigenous peoples are entitled to information on the environment, including information that might ensure their effective participation in actions and policies that might affect their environment”); art. XV (“Indigenous populations have the right to participate without discrimination, if they so decide, in all decision-making, at all levels, with regard to matters that might affect their rights, lives and destiny”); art. XVII (“The States shall promote the inclusion, in their national organizational structures, of institutions and traditional practices of indigenous peoples”); and art. XXI (“Unless exceptional circumstances so warrant in the public interest, the states shall take necessary measures to ensure that decisions regarding any plan, program or proposal affecting the rights or living conditions of indigenous people are not made without the free and informed consent and participation of those peoples”). Canada, Chile, Costa Rica, and various

requirements of consultation among states and others participating in the discussions on drafts.¹⁵⁷

The Draft U.N. Declaration on the Rights of Indigenous Peoples states that indigenous peoples are entitled “to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development.”¹⁵⁸ In addition, the Proposed American Declaration on the Rights of Indigenous Peoples affirms that “[I]ndigenous Peoples shall be entitled to obtain, on a non-discriminatory basis, appropriate means for their own development according to their preferences and values.”¹⁵⁹

Significantly, the Inter-American Commission on Human Rights declared in a decision concerning a complaint concerning the Western Shoshone people of the United States that the “basic principles reflected in many of the provisions” of the Proposed American Declaration on the Rights of Indigenous Peoples, “reflect general international legal principles developing out of and applicable inside and outside of the inter-American system and to this extent are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples.”¹⁶⁰

indigenous peoples' organisations have stressed the importance of this right in commenting on the proposal for an inter-American instrument on indigenous rights. *See Report on First Round of Consultations on Inter-American Instrument, supra*, at 282-83.

¹⁵⁷ *See, e.g.* Comments by the Delegation of Canada on Articles VII through XVIII and on the issue of self-determination in the Proposed American Declaration on Indigenous Rights (March 14, 2002), O.A.S. Doc. OEA/Ser.K/XVI, GT/DADIN/doc.69/02 (“Canada supports the principle that indigenous individuals have the right to participate in the general political processes of the state in which they live, without discrimination, consistent with international standards”); Comments of the Delegation of Guyana (March 15, 2002), O.A.S. Doc. OEA/Ser.K/XVI, GT/DADIN-73/02 (March 26, 2002) (“I wish to reiterate Guyana’s support for, and commitment to both informing and consulting with indigenous communities on environmental and all other issues related to the affairs of Guyana”); Proposal of the Delegation of the United States (March 13, 2002), O.A.S. Doc. OEA/Ser.K/XVI GT/DADIN/doc.66/02 rev. 1 (“Where a national policy, regulation, decision, legislative comments or legislation will have substantial or direct effects for indigenous peoples, States should consult with indigenous peoples prior to the taking of such actions, where practicable and permitted by law”). *See also Report of the working group established in accordance with Commission on Human Rights resolution 1995/32*, U.N. Doc. E/CN.4/1997/102 (December 10, 1996) (summarising government comments on the draft U.N. declaration): comments by delegation of Mexico, *id.* at para. 44 (stating that indigenous peoples “have the right to participate in economic, cultural, social and political development”); comments by delegation of Canada, *id.* at para. 199 (referencing articles 18 and 19 of the draft U.N. declaration and supporting indigenous peoples’ “participation in State decisions which directly affected certain areas of particular concern to indigenous peoples”); comments by the delegation of Argentina concerning articles 19 and 20 of the U.N. draft declaration, *id.*, at para. 205 (supporting the participation of indigenous peoples in decision-making processes, and citing to the relevant provisions of the Argentinean constitution in this regard); proposal of the delegation of Brazil on article 20 of the U.N. draft declaration, *id.* at para 214 (“States shall consult the peoples concerned, whose informed opinion shall be expressed freely, before implementing and adopting those measures”); comments by the U.S. delegation on article 19, *id.* at para. 221 (supporting the right of indigenous peoples to participate effectively at the local and national levels “particularly with respect to decisions directly affecting them”).

¹⁵⁸ Draft UN Declaration, *supra*, art.38.

¹⁵⁹ Proposed American Declaration, *supra*, art. XXI(1).

¹⁶⁰ Dann case, *supra*, at para. 129.

III

OVERVIEW OF DOMESTIC STATE PRACTICE CONCERNING INDIGENOUS PEOPLES

As just discussed, international instruments and multilateral discussions among states and others confirm a regime of collective rights of indigenous peoples. The actual behaviour of states in domestic settings generally lags behind the international developments. Nonetheless, within the last two decades states worldwide have adopted legal reforms concerning indigenous peoples, and these reforms generally confirm the relevant international norms. States' domestic legal practice encompasses a variety of strategies through a range of legal, political and administrative tools. The strategies and tools appropriate for any given country at any given time will depend upon factors such as the situation, aspirations, and organizational capacity of the indigenous peoples concerned; the historical context; and the institutional capacity of the state. Thus far, state practice has tended to fall along a spectrum of legal and political ordering within the model of a multicultural state, ranging from a narrow focus on land rights at one end to comprehensive political, administrative, and economic arrangements at the other.

At one end of the spectrum are countries beginning to protect indigenous peoples' rights, usually by focusing on protecting indigenous lands through domestic property reform. Demarcation and protection of a physical sphere of control provides a space within which indigenous peoples are for the most part free to define and develop their relationship with that land and with each other. While property is the focus, because of the collective and territorial nature of indigenous land rights, this approach necessarily incorporates at least a modicum of political and jurisdictional reform. Recognizing collective indigenous property entails legal recognition of indigenous groups as such, and therefore of their internal governance structures. It also necessarily involves recognition of jurisdiction for that governance, at minimum over land tenure. Thus while the focus is on property, it is unavoidably a political reordering. Examples toward this end of the spectrum include developments in Chile, Panama, Australia, and the Philippines, described below.

At the other end of the spectrum are countries that are pursuing more robust protection of indigenous human rights through the wholesale incorporation of indigenous territory and self-government within the formal political structure of the state. Recognition of indigenous land and resource rights is a necessary part of this approach, but it goes beyond the limited beginnings of accommodation to seek more comprehensive arrangements of autonomy and integration within the state. Thus, reforms encompass a variable range of issues in addition to land rights, such as civil and criminal jurisdiction, economic development, taxation, and political structures. Because of the greater complexity and comprehensiveness of this approach, negotiations leading to measures that may involve constitutional reform are often the tools of choice. Canada, Colombia, Denmark and Nicaragua tend toward this end of the spectrum.

As with all international law, implementation of governing norms in the domestic arena can involve action by any or all of the legislative, judicial, or executive branches of the state. Because modern states were historically constructed around indigenous peoples

without their adequate participation, legal recognition of indigenous rights involves a process of “belated state building”¹⁶¹ in which constitutional change, legislative reforms or other tools of legal restructuring involving judicial or executive action are employed. Given the international norm affirming indigenous self-determination and participation in all things affecting them, domestic legal reforms concerning indigenous peoples now as a rule are made in consultation or through negotiations with the indigenous peoples and will lack legitimacy if undertaken without such consultations or negotiations.

A. Non-African Countries

The following are examples of domestic legal reforms that are representative of the kinds of reforms taking place concerning indigenous peoples in the Americas and certain other regions of the World.

1. Chile

Chile is an example toward the more limited end of the spectrum of indigenous rights protection, using legislation and focusing primarily on land issues. In 1993 Chile enacted Law No. 19253 concerning “indigenous protection, promotion and development”,¹⁶² which recognizes indigenous communities’ rights over lands they occupy or possess. Indigenous customary law determines individual or family rights within indigenous community lands,¹⁶³ which cannot be transferred, obstructed, taxed, or acquired by prescription except within communities or members of the same ethnic group.¹⁶⁴ Indigenous peoples also have the right to engage in collective activities in culturally and spiritually significant areas beyond those over which they have full ownership. Furthermore, indigenous communities with an interest in these culturally significant areas can request a transfer of real estate title to these areas.¹⁶⁵

Chile has also attempted to address the development rights of indigenous peoples within their borders. A National Indigenous Development Corporation has been established to promote, coordinate and execute state policies of integrated social, economic and cultural development of indigenous peoples and communities.¹⁶⁶ A Fund for Indigenous Land and Waters, administered by the Corporation, grants subsidies for land acquisition and finances solutions to land problems.¹⁶⁷ An Indigenous Development Fund finances

¹⁶¹ See Erica-Irene “Some Considerations on the Right of Indigenous Peoples to Self-Determination,” 3 *Transn’l L. & Contemp. Probs.* 1, 9 (1993).

¹⁶² Ley No. 19253 (1993) in which norms are established concerning indigenous protection, investment and development, and the National Indigenous Development Corporation is established (“por la que se establecen normas sobre protección, fomento y desarrollo de los indígenas, y se crea la Corporación Nacional de Desarrollo Indígena”), *Diario Oficial* (Chile), October 5, 1993, No. 34683, pp. 2-8.

¹⁶³ *Id.* art. 18.

¹⁶⁴ *Id.* arts. 12, 13.

¹⁶⁵ *Id.* art.19.

¹⁶⁶ *Id.* art. 39. The Corporation is also responsible for promoting indigenous languages, culture and bilingual education; to legally represent communities in cases of land conflicts, if so requested, and in some cases arbitrate and mediate disputes; and maintain a registry of indigenous communities, organization and indigenous lands.

¹⁶⁷ *Id.* art. 20.

special programs for indigenous development.¹⁶⁸ The Law also establishes Indigenous Development Areas, through which the Ministry of Planning and Cooperation can establish areas where the administrative State agencies work to benefit harmonious development of indigenous peoples and their communities.¹⁶⁹ In affirmation of the duty to consult, Law No. 19253 provides for indigenous participation in State decision-making processes that affect their rights and in the administration of protected wilderness areas.¹⁷⁰

2. Colombia

Colombia is a good example of a more comprehensive approach to integrating indigenous peoples into the state structure in a manner consistent with international law. The 1991 Constitution of Colombia provides indigenous peoples with distinct constitutional status. Indigenous peoples have the right to self-government according to their customs and traditions within their lands, including the administration of justice.¹⁷¹ Indigenous authorities “exercise their jurisdictional functions within their territorial jurisdiction in accordance with their own laws and procedures provided these are not contrary to the Constitution and the laws of the Republic.”¹⁷² Indigenous territories are governed by councils that “formed and regulated according to the customs of their communities” and exercise such functions as:

- 1) Supervise the application of the legal regulations concerning the uses of lands and settlement of their territories;
- 2) Design the policies, plans, and programs of economic and social development within their territory...;
- 3) Promote public investments in their territories and supervise their appropriate implementation;
- 4) Collect and distribute their funds;
- 5) Supervise the conservation of natural resources;
- 6) Coordinate the programs and projects promoted by the different communities in their territory;
- 7) Cooperate with to maintain public order within their territory...
- 8) Represent the territories before the national government and the other entities within which they are integrated...¹⁷³

Cultural, social, and economic integrity is protected generally by article 330 of the Constitution. Indigenous languages and dialects are official in their respective territories and the education provided in indigenous communities is bilingual.¹⁷⁴ Colombia provides

¹⁶⁸ *Id.* art. 23.

¹⁶⁹ *Id.* art. 26.

¹⁷⁰ *Id.* arts. 34, 35.

¹⁷¹ Constitución Política (Colombia), arts. 330, 246. English translation available at http://confinder.richmond.edu/columbia_const2.html.

¹⁷² *Id.* art. 246.

¹⁷³ *Id.* art. 330.

¹⁷⁴ *Id.* art. 10.

for the possibility of members of indigenous peoples whose traditional territories cross state boundaries to be considered Colombian citizens.¹⁷⁵

The Constitutional Court of Colombia has recognized territory as a necessary condition for cultural integrity, and indigenous peoples' land rights are determined in light of ensuring that integrity.¹⁷⁶ The constitution recognizes indigenous peoples' lands, and guarantees their inalienable and imprescriptible nature.¹⁷⁷ The Constitutional Court has held that recognition of indigenous land imposes an affirmative obligation on the State to demarcate and protect the lands of particular indigenous communities. "The fundamental right of ethnic groups to collective property implicitly contains, given the constitutional protection of the principle of ethnic and cultural diversity, a right to the creation of reserves under the control of the indigenous communities."¹⁷⁸

Indigenous peoples are also guaranteed the right to be consulted regarding natural resource development or exploitation in their territories.¹⁷⁹ The Constitutional Court has determined that the consultation must be broad and meaningful. It must include full disclosure of the proposed activities on the land and of the possible consequences of that activity. The communities must also have ample opportunity to discuss the plans among their members and to provide a meaningful response.¹⁸⁰ The state must take measures to mitigate any detrimental effects brought to their attention by the community during the consultation period. Exploitation of natural resources in indigenous peoples' territories may not be carried out in a way that derogates from the cultural, social, and economic integrity of the indigenous communities.¹⁸¹

In addition to these protections for indigenous peoples' autonomy, Colombia also ensures their participation in the national political community. Indigenous peoples form a special constituency for the election of central government representatives.¹⁸² Some of these representatives are required to have had occupied a traditional post of authority in their respective communities or to have been leaders of an indigenous organization.¹⁸³ Colombia also recognizes indigenous peoples' customary law as official public law.¹⁸⁴

¹⁷⁵ *Id.* art. 96(2)(b) ("The following hold Colombian citizenship: 2.b. Members of the indigenous peoples who share border areas, with application of the principle of reciprocity according to public treaties.")

¹⁷⁶ *See* Constitutional Court of Colombia Judgment No. T-188 (1993) (Case of Crispín Laoza) "The right to collective property ... is essential for the cultures and spiritual values of aboriginal peoples ... the special relationship indigenous communities have with the land they occupy [stands out] not only because it is their principle means of subsistence, but because it is an integral element of the cosmology and religions of aboriginal peoples. ... Without this right, the rights to culture and autonomy are merely formal."

¹⁷⁷ *See* Constitución Política (Colombia), *supra*, art. 63.

¹⁷⁸ Judgment T-188 (1993), *supra*.

¹⁷⁹ *See* Constitución Política (Colombia), *supra*, art. 330.

¹⁸⁰ *See* Constitutional Court of Colombia, Judgment SU-039 (1997) (Case of Comunidad U'wa).

¹⁸¹ *See* Constitución Política (Colombia), *supra*, art. 330.

¹⁸² *Id.* art. 171, 176.

¹⁸³ *Id.* art. 171. The article further states that the leadership of an indigenous organization is to be recognized by means of a certificate from such an organization and authenticated by the government Ministry.

¹⁸⁴ *See Id.* art. 246; Donna Lee Van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America*, Pittsburgh: University of Pittsburgh Press, 2000, at 265, stating such

The need for effective judicial proceedings to protect indigenous peoples' rights to culture and land have also been recognized in Colombia. Two legal procedures and remedies exist for the vindication of fundamental rights (*tutela*), and collectively shared interests (*acción popular*). Although a *tutela* action is generally only available for individual rights, indigenous communities have been permitted to bring *tutela* actions to protect their land and cultural rights despite the collective nature of those rights, because of their fundamental nature.

3. Nicaragua

Nicaragua is another example of a comprehensive constitutional re-ordering of the state to accommodate indigenous peoples' rights through constitutional reform, followed somewhat tardily by legislation providing for the demarcation of indigenous lands. The 1987 amendments to the Nicaraguan Constitution and the Autonomy Statute for the Atlantic Coastal Regions of Nicaragua were an effort to address indigenous peoples' aspirations for autonomy. Article 5 of the Constitution recognizes indigenous peoples' existence and their rights to the maintenance and development of their identity and culture, their own forms of social organization and to their communal forms of land ownership.¹⁸⁵ The Constitutional recognition of indigenous land tenure includes "the use and enjoyment of the waters and forests on their communal lands."¹⁸⁶ The Nicaraguan Atlantic Coastal Communities are also guaranteed the "free election of their authorities and representatives."¹⁸⁷

The Autonomy Statute states that the "Regions inhabited by the communities of the Atlantic Coast enjoy – within the unity of the Nicaraguan State – the Rule of Autonomy which ensures them the effective exercise of their historical and other rights, as states in the Political Constitution."¹⁸⁸ The Law divides the Atlantic Region into two Autonomous regions that are further divided into municipalities according to community traditions, to the extent possible.¹⁸⁹ The Autonomous Regions have powers that include the preparation and implementation of national development programs consistent with the interests of the region's indigenous communities; administration of health, education, culture, transportation and community services in coordination with their respective national agencies; promotion of their own economic, social and cultural projects; imposition of regional taxes; and promotion of the rational use of communal natural resources.¹⁹⁰ Communal land ownership rights are recognized through "the rational use of mineral,

recognition of customary law as official public law is characteristic of Latin American "multicultural" constitutions.

¹⁸⁵ Constitución Política (Nicaragua) (1995).

¹⁸⁶ *Id.* art. 89.

¹⁸⁷ *Id.* art. 180.

¹⁸⁸ Autonomy Statute for the Regions of the Atlantic Coast of Nicaragua (Law No. 28), (*Estatuto de la Autonomía de las Regiones de la Costa Atlántica de Nicaragua, Ley No. 28, Gaceta No. 238 30/10/87,*) art. 4.

¹⁸⁹ *Id.* arts. 6,7. Art. 7 further states that the "administrative subdivision of the municipalities shall be established and organized by the corresponding Regional Councils, in accordance with their traditions."

¹⁹⁰ *Id.* art. 8.

forest, fishing, and other natural resources of the Autonomous Regions, and said use should benefit the inhabitants equitably, by means of agreements between the Regional Government and the Central Government.”¹⁹¹ In practice however, and in the absence of effective protections for indigenous lands and resources, the Committee for the Elimination of Racial Discrimination expressed concern about a lack of effective consultation with the regional authorities, leading in turn to “insufficient participation of the indigenous groups in decisions affecting their land and the allocation of the natural resources of their land, their cultures and their traditions.”¹⁹²

The Autonomy Statute states that communal property consists of “the land, waters and forests that have traditionally belonged to the communities of the Atlantic Coast” and said lands are “indissoluble; they cannot be donated, sold, leased nor taxed, and are inextinguishable.”¹⁹³ However, despite constitutional recognition and these provisions, Nicaragua for years had no procedure for indigenous peoples to actually register and obtain a deed to their ancestral lands.¹⁹⁴ This situation gave rise to the international human rights case of *Awás Tingni*, which has been described at length above.¹⁹⁵ In response to the decision in the *Awás Tingni* case, in 2003 Nicaragua adopted a land demarcation law, Law 445 concerning the Communal Property Regime of the Indigenous Peoples and Ethnic Communities of the Autonomous Regions and the Bocay, Coco, Indio and Maíz Rivers.¹⁹⁶ Of note, this law also addresses the land rights of “ethnic communities,” primarily Afro-Caribbean groups that share a common ethnicity, culture, values and traditions that are closely linked to their own forms of land tenancy and natural resources.

Law 445 implements indigenous land occupation, usufructory and natural resource use rights previously mentioned in the Autonomy Statute and Constitution.¹⁹⁷ It recognizes the legal personality of indigenous communities. To assure indigenous peoples’ participation in the titling process, the administrative bodies responsible for titling communal lands are made up of elected representatives of the various ethnic groups inhabiting the region, as well as representatives from all levels of government.¹⁹⁸ The five-stage demarcation and titling process includes a formal study of historical, demographic and ethnographic information concerning the community’s land tenure system and land use patterns, and a conflict resolution procedure if communities’ territories overlap or conflicts have arisen over land use.¹⁹⁹ The Law determines the

¹⁹¹ *Id.* art. 9.

¹⁹² *Concluding observations of the Committee on the Elimination of All Forms of Racial Discrimination: Nicaragua*. 22/09/95, A/50/18, paras. 499-541, para. 536.

¹⁹³ Constitución Política (Nicaragua) *supra*, art. 36.

¹⁹⁴ This situation may parallel that of Tanzania, which in 1999 enacted two land laws that recognize collective customary ownership of land (subject to the underlying title of the State), yet has not created administrative procedures for titling that land. *See* ACHPR Working Group report, *supra*, pp. 16-17.

¹⁹⁵ *See* notes 117-125, *supra*, and accompanying text.

¹⁹⁶ Ley No. 445, Del Régimen De Propiedad Comunal De Los Pueblos Indígenas Y Comunidades Étnicas De Las Regiones Autónomas De La Costa Atlántica De Nicaragua Y De Los Ríos Bocay, Coco, Indio Y Maíz, Gaceta No. 16, 23/01/2003.

¹⁹⁷ *Id.* art. 29-31.

¹⁹⁸ *Id.* arts. 40-42.

¹⁹⁹ *Id.* arts. 45-59.

priority of indigenous property rights over third party interests. Indigenous property rights prevail over third party titles, except those granted and confirmed through possession prior to the 1987 reforms. Where third party property rights prevail, the land cannot be sold except to the indigenous people in whose territory it lies.²⁰⁰ After titling, third parties with inferior property rights, residing in or using communal lands, must leave with appropriate compensation from the state, or make rental arrangements with the communities to remain.²⁰¹

Administrative remedies are available under Nicaraguan law to any citizen or communal authority who considers his rights to have been violated in the demarcation and titling process. If this administrative route is unsuccessful, an *amparo* action is available in the courts because of the constitutional nature of indigenous land rights.²⁰² In the *Awasi Tingni* case, the inability of the legal system to respond adequately to *amparo* actions made for a failure to uphold international standards of human rights protection, and this failure has still not yet been remedied.

Nicaragua's experience demonstrates the insufficiency of merely having laws on the books protecting indigenous peoples. To meet international human rights standards, those laws must translate into tangible, effective protection of those rights in daily life.

4. Philippines

The Philippines is another example of the comprehensive reform model carried out by constitutional and legislative reform. The Constitution of the Philippines recognizes "indigenous cultural communities" and rights to "ancestral lands" and "ancestral domain." Article 12, Section 5 provides:

The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being.

The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.²⁰³

The Indigenous Peoples Rights Act (IPRA) of 1997 was enacted by the Philippines to implement this Constitutional recognition.²⁰⁴ The law addresses the norm of consultation by providing that indigenous peoples "shall have a decisive role in all the activities

²⁰⁰ *Id.* art. 35-37.

²⁰¹ *Id.* art. 38.

²⁰² *Id.* art. 60-61.

²⁰³ See Constitution of the Philippines, art.12, sec. 5.

²⁰⁴ S. James Anaya and Robert A. Williams, "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System", 14 *Harv. Hum. Rts. J.* 33 (2001), 73.

pertinent” to delineation of their ancestral domains.²⁰⁵ It provides for indigenous participation in national governance through a seven-member National Commission on Indigenous Cultural Communities/ Indigenous Peoples (NCIP), made up of indigenous representatives. The NCIP is “responsible for the formulation and implementation of policies, plans and programs to promote and protect the rights and well-being of the [Indigenous Peoples] and the recognition of their ancestral domain as well as their rights thereto,”²⁰⁶ and is empowered to review existing laws and policies on indigenous rights and propose new laws and policies; formulate and implement programs and policies for indigenous economic, social and cultural development; provide legal assistance to indigenous peoples; and issue “certificates of ancestral domain title”.²⁰⁷

Section 52 of the NCIP sets out the process and procedure for the identification and delineation of indigenous lands, which includes: a petition for delineation; delineation proper (with indigenous participation); proof of ancestral domain through testimony of elders, written accounts of culture and political structure of the communities, anthropological data, etc.; formal mapping by the Ancestral Domains Office; public notice; transfer of areas managed by other government agencies within ancestral domains to the indigenous community; and finally, issuance of formal title, in the form of “ancestral domain certificates.”²⁰⁸ Customary law is recognized as authoritative in disputes involving indigenous rights, between indigenous and non-indigenous claimants and also competing indigenous claims, with an appeal available to the NCIP.²⁰⁹ The NCIP has the power to “take appropriate legal action for the cancellation of officially documented titles which were acquired illegally.”²¹⁰

Accommodation of indigenous peoples within the state is not limited to the property regime, however. Their autonomy and participation in the political structures of the state are also ensured. Autonomy is addressed by recognition of indigenous peoples’ self-governing bodies’ authority over land tenure,²¹¹ the administration of justice, immigration,²¹² and resource development,²¹³ within their lands, and education in their own language²¹⁴. There are also provisions permitting indigenous self-governing institutions in towns and cities,²¹⁵ and imposing a duty on the state to ensure indigenous self-government institutions are adequately resourced.²¹⁶ Furthermore, indigenous peoples are provided “mandatory representation in policy-making bodies and other local

²⁰⁵ Indigenous Peoples’ Rights Act of 1997 (Republic Act No. 8371), Sec. 51 [hereinafter IPRA].

²⁰⁶ *Id.*, Sec. 38. *See also* sec. 40 (All 7 NCIP Commissioners are to be indigenous peoples representing each region of the Philippines).

²⁰⁷ *Id.* Secs. 44 & 46.

²⁰⁸ *Id.* Sec. 52.

²⁰⁹ *Id.* Secs. 62, 66.

²¹⁰ *Id.* Sec. 64. The NCIP can promulgate its own rules and regulations for the hearings it presides on, issue subpoenas and summon parties, Sec. 69.

²¹¹ *Id.* Sec. 7(h)

²¹² *Id.* Sec. 7(e)

²¹³ *Id.* Sec. 7(b) and 7(f).

²¹⁴ *Id.* Sec. 30.

²¹⁵ *Id.* Sec. 18.

²¹⁶ *Id.* Sec.20.

legislative councils” to ensure their participation in the broader political structures of the Philippines.²¹⁷

5. Australia

Australia’s approach began with court-mandated changes to the domestic property rights regime, at the narrow end of the spectrum, and is slowly moving toward greater structural accommodation, using the tools of judicial reform followed by legislative and executive action. Australia recognized indigenous land rights through a judicial decision in 1992 explicitly applying international law regarding indigenous peoples’ rights and international principles against racial discrimination. The case of *Mabo v. Queensland [2]* abolished the common law doctrine of *terra nullius* (empty lands) that had denied the existence of Australian Aboriginal peoples and their title to their lands.²¹⁸ The Australian High Court recognized the existence of aboriginal or “native” title derived from historical use or occupancy by aboriginal peoples according to their traditional laws and customs.²¹⁹

After the Australian High Court’s decision in *Mabo*, the Australian government passed the *Native Title Act* in 1993 to recognize and protect native title and to establish mechanisms and standards in dealing with native title claims.²²⁰ The Act recognized native title as the Aboriginal peoples’ and Torres Strait Islanders’ rights and interests in the lands they possess under their traditional laws and customs; and that through those lands and customs, they have a connection, recognized in Australia’s common law, with the lands and waters.²²¹ “Native title” in Australia includes both exclusive ownership rights over traditional lands and usufructory rights to use lands, which may not amount to full ownership.

To further implement the statutory and judicial reforms regarding indigenous rights in Australia, the Act also established the National Native Title Act Tribunal. While aboriginal peoples must first bring a native title or compensation claim to the Australian Federal Court, the Court can then refer the matter to the Native Title Tribunal for mediation. The Tribunal contacts all peoples and organizations whose interests are affected by the claimants’ application. This tribunal is an arbitral body, not officially a court that determines the existence of native title, but it has mediated and helped make agreements between indigenous and non-indigenous parties about native title claims and development projects such as mining. These agreements settle who holds native title or how to share resources, often leading to Indigenous Land Use Agreements that

²¹⁷ *Id.* Sec. 16.

²¹⁸ *Mabo v. Queensland [2]* (1992) 175 C.L.R. 1. para. 2 “international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A ... doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards ... to entrench a discriminatory rule which ... denies [indigenous people] the right to occupy their traditional lands.”

²¹⁹ *Id.* p. 58, 61; see also Anaya and Williams, *supra*, p. 69.

²²⁰ *Id.* pp. 70, 71.

²²¹ *Id.*

accommodate indigenous, non-indigenous or commercial interests.²²² Agreements achieved through the Tribunal are affirmed by the Federal Court and become binding.

Although recognition of aboriginal rights began with property, Australia is moving to broaden protection of indigenous rights in other ways. Steps toward recognition of aboriginal cultural values are being made in the incorporation of indigenous elders in criminal sentencing of aboriginal offenders.²²³ Furthermore, negotiated agreements with indigenous peoples is becoming increasingly important in a broader range of issues, including land and resources access and management, cultural heritage, housing, health, education, intellectual property, and research.²²⁴

6. Canada

Like Australia, Canada is a country that began its recognition of indigenous peoples' rights through judicial recognition of aboriginal title in 1973. This was followed in 1982 by broader constitutional recognition of "aboriginal and treaty rights",²²⁵ and today, negotiated comprehensive agreements are the dominant format for protecting those rights. Aboriginal rights extend beyond ownership of traditional territories to protect cultural practices²²⁶ and self-government.²²⁷ Judicial decisions have also confirmed the state duty to consult indigenous peoples when decisions that could impact their rights, particularly land rights, are being contemplated,²²⁸ and the existence of a fiduciary duty on government in the management and sale of surrendered lands.²²⁹

Although there has been significant litigation concerning the nature and scope of indigenous rights, Canada has chosen negotiations with indigenous peoples as the

²²² See Federal Court of Australia website <http://www.fedcourt.gov.au/>; National Native Title Tribunal, Australian government website <http://www.nntt.gov.au/>.

²²³ See Harris, M. "From Australian Courts and Aboriginal Courts in Australia – Bridging the Gap", *Current Issues in Criminal Justice* (16) 1(2004); Marchetti, E & Daly K (2004) "Indigenous Courts and Justice Practices in Australia", *Trends and Issues in Criminal Justice No 277*, AIC, Canberra.

²²⁴ For a database of the agreements reached with indigenous peoples not only in Australia but Canada and New Zealand, see the Agreements, Treaties and Negotiated Settlements Project, at <http://www.atns.net.au/browse.htm>.

²²⁵ See Constitution Act, 1982, pt. II. (Rights of the Aboriginal Peoples of Canada) sec. 35(1).

²²⁶ See *R. v. Van der Peet*, (1996) 137 D.L.R. (411) 289. The test developed by the Canadian Supreme Court to establish an aboriginal cultural right requires proof that the "activity [is] an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming that right" but includes a temporal element requiring continuity of the practice with pre-European contact times. This "freezing" of indigenous cultural practices in a certain historical era is not consistent with the right to culture and cultural development protected under international law.

²²⁷ See Minister of Public Works and Government (Canada), *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, (Ottawa 1995).

²²⁸ See *Delgamuukw v. British Columbia* [1997] 3 SCR 1010 (extent of duty to consult indigenous peoples concerning decisions affecting their rights varies in content depending on effect of proposed state action and nature of aboriginal right, at upper end of the range requires full consent of the indigenous nation); *Haida Nation v. British Columbia (Minister of Forests)*, 245 D.L.R.4th 33 (2004) (duty to consult exists where aboriginal rights are claimed but not yet proven or recognized)

²²⁹ See Anaya and Williams, *supra*, p. 65 and accompanying notes.

primary method of concretising their rights. Indigenous peoples in Canada have negotiated several comprehensive regional agreements with the federal and provincial governments that address issues of land rights, self-governance, issues of wildlife harvesting and use, co-management of parks, waters and other natural resources, economic development, compensation for past land takings and other wrongs, and relations with non-indigenous people and local governments.²³⁰ Indigenous peoples have negotiated power-sharing in resource management with the government and other stakeholders and in some cases develop a whole regional governance regime.²³¹

Over fifteen comprehensive land settlement agreements have been negotiated and signed in Canada. The James Bay and Northern Quebec Agreements came as a response to proposed dam construction on indigenous lands, and provided for different classes of land rights; hunting and fishing rights, and the organization of indigenous peoples as corporations that were given funding and title to extensive land areas.²³² The Nisga'a Agreement of 1998, provided for the Nisga'a peoples' title over 1900 square kilometres of land and compensation for surrendered ancestral lands.²³³ The Nisga'a Agreement also addressed issues of self-government; joint management of parks, wildlife and fisheries; taxation; self-sufficiency; and the repatriation of important Nisga'a ceremonial and traditional items.²³⁴ The Nunavut Agreement created a separate self-governed territory for the Inuit covering 350,000 square kilometres of land. The government is territorially rather than ethnically defined, however indigenous Inuit form the vast majority of the population and for geographical and climactic reasons that is unlikely to change in the future. The Nunavut agreement included jurisdictional issues; financial compensation for historic wrongs; hunting rights; resource royalties; and land and environmental management rights.²³⁵ These agreements are considered modern treaties and as such are incorporated into the Canadian constitution.

Negotiation of a land settlement agreement under the federal Comprehensive Claims Policy follows a procedure in which an indigenous group asserting ownership of an area prepares a Statement of Claim with supporting evidence, which is then accepted or rejected by the Office of Native Claims depending on such factors as the claimants' existence as an organized society and their traditional and continuing use and occupancy of an area.²³⁶ A Framework Agreement marking the timetables and procedures for the negotiations is developed so that the next step results in an Agreement in Principle between government officials and indigenous authorities. A more comprehensive Final

²³⁰ See Donald Nicholls, *Canada: Comprehensive Land Claims Policy, Modern Day Agreements and a Royal Commission*, (2004) University of Arizona – Indigenous Peoples Law and Policy Program Materials, pp. 3-10.

²³¹ See Donna Craig, "Recognising Indigenous Rights through Co-management Regimes", *New Zealand Journal of Environmental Law* Vol. 6 2002, at 209, 213, 253, 254.

²³² See Nicholls, *supra*, pp. 5-6; Anaya and Williams, *supra*, p. 66.

²³³ See Anaya and Williams, *Id.*

²³⁴ See Nicholls *supra*, p. 6.

²³⁵ *Comprehensive Claims (Modern Treaties) In Canada* (March 1996). Information sheet produced by the Communications Branch, Department of Indian Affairs and Northern Development, in Indian and Northern Affairs (Canada) website http://www.ainc-inac.gc.ca/pr/info/trty_e.html.

²³⁶ *Id.* at 5; *Id.*; Nicholls *supra*, at 5

Agreement ratified by both parties is followed by an agreed implementation plan. The final step is the Canadian government implementing the Agreement through federal legislation.²³⁷

7. Denmark (Greenland Home Rule Act)

Denmark presents another example of a comprehensive approach to indigenous rights protections, through negotiated agreement between the indigenous Inuit of Greenland and the Danish government. The result was legislatively implemented through the Greenland Home Rule Act of 1978, which declared Greenland a “distinct community within the kingdom of Denmark.”²³⁸ Under this Act, the Greenland government is comprised of a popularly elected assembly (Landsting) and an executive body (Landsstyre).²³⁹ The Landsting’s functions are territorially defined, yet because 80% of Greenland is inhabited by the Inuit people, this essentially creates a *de facto* indigenous autonomous region.²⁴⁰

The Greenland government has responsibility and jurisdiction over such areas as: local government, taxation, social welfare, education and the environment.²⁴¹ The norms enacted by the government regarding these areas are binding on all inhabitants of Greenland. Greenlandic lay judges administer indigenous law in local magistrates’ courts, providing culturally appropriate administration of justice in Greenland because these judges are from and understand indigenous local communities, their culture and ways of life.²⁴² The Greenland government has also acted independently at the international level on certain issues, such as bilateral agreements regarding fishing or whaling with Canada, Norway, Russia and Iceland.²⁴³

With regards to natural resources, the Home Rule Act states that the “resident population of Greenland has fundamental rights in respect of Greenland’s natural resources.”²⁴⁴ This right applies to underground resources as well.²⁴⁵ Due to its complete jurisdiction over environmental matters, the Greenland government has actively promoted natural resource and wildlife management, and sustainable development, as well as enacting pertinent legislation such as the Environmental Protection Act of 1988.²⁴⁶ Indigenous ecological knowledge has been valued by the government in its research of environmental and natural resource management research and strategies.²⁴⁷

²³⁷ *Id.*; Nicholls, *supra*, p. 5.

²³⁸ Act. No. 577 of 29 November 1978 (Denmark), Greenland Home Rule Act, sec. 1(1) came into force 1 May 1979.

²³⁹ *Id.* sec. 1(2).

²⁴⁰ See Donna Craig and Steven Freeland, *Indigenous Governance by the Inuit of Greenland and the Sami of Scandinavia* (1998). Available at <http://www.austlii.edu.au/>.

²⁴¹ See *id.*

²⁴² *Id.* citing Bentzon AW, “Law and Legislation in Greenland During the Transition from Colonial Status to Home Rule Status (1945-1980)”, (1986) 1 *Law & Anthropology* 199, 230-31.

²⁴³ See Craig and Freeland, *supra*.

²⁴⁴ Greenland Home Rule Act, *supra*, sec. 8(1).

²⁴⁵ See Craig and Freeland, *supra*.

²⁴⁶ *Id.*

²⁴⁷ *Id.* citing Nuttall M, “Greenland: Emergence of an Inuit Homeland” in Minority Rights Group (Ed) *Polar Peoples - Self-Determination & Development*, 1994 Minority Right Publications London 1, 25.

8. Panama

Panama is an example toward the narrower end of the spectrum, with protection of land rights achieved primarily through administrative or executive means, later supported by constitutional reform. In the 1920's, the Kuna people of Panama managed to obtain control over a large contiguous territory through agreements with the government.²⁴⁸ This led to the creation of the Kuna reserve or *comarca* in 1930. The *comarca* system became the accepted norm for other indigenous groups and in 1972 the Constitution required the establishment of *comarcas* for all indigenous groups. Currently, *comarcas* cover over one fifth of Panamanian territory; yet a remaining problem is the recognition of claims of indigenous peoples outside *comarcas*, for which legislation implementing the constitutional provisions is still needed.²⁴⁹

The Kuna developed their own internal charters that were legally recognized and have enabled the Kuna to retain a large degree of autonomy over internal governance, administration and land tenure arrangements.²⁵⁰

The Kuna *comarca* became the site of probably the first natural protected area managed solely by an indigenous people. During the 1980's a collaborative effort between the Kuna and national and international conservationists began. Kuna people were trained in various areas of environmental conservation, monitoring and as park guides. The project received funding and donations from international agencies which went directly to and was managed by the Kuna.²⁵¹ The project enabled the Kuna to effectively demarcate their lands and negotiate with colonists encroaching on them.²⁵²

Although the original design of this collaborative project eventually ran into many problems and ceased to exist, the experience provided the Kuna with long-lasting benefits. The Kuna were able to blend both their traditional and outside views on ecology and advance conservation while diminishing particular political and ecological threats to their lands. The project gave rise to a variety of Kuna non-governmental organizations addressing the many issues affecting their lands. The Kuna have continued the further demarcation of their lands and have incorporated natural resource concerns (such as establishing marine and terrestrial protected areas and actively advocating Kuna rights to sub-surface minerals) into their internal *comarca* legislation.²⁵³

Furthermore, the Kuna took the initiative in dealing with Western scientists attempting to conduct research on them and their lands, and have negotiated cooperative agreements to

²⁴⁸ Roger Plant and Soren Hvalkof, *Land Titling and Indigenous Peoples*, Inter-American Development Bank Report, Washington D.C. (2001), p. 14.

²⁴⁹ *Id.* at 31, 36.

²⁵⁰ *Id.*

²⁵¹ Mac Chapin, *Defending Kuna Yala: PEMASKY, the Study Project for the Management of the Wildlands of Kuna Yala, Panama*, Biodiversity Support Program, U.S. Agency for International Development, at 16-20. Available at <http://www.worldwildlife.org/bsp/publications/>.

²⁵² *Id.* at 28, 39.

²⁵³ *Id.* at 41, 42..

their advantage with scientists or in cases blocked scientific research altogether.²⁵⁴ This has been useful in protecting the Kuna from usurpation of their intellectual property and traditional knowledge.

The accounts of these countries provide only a sampling of state practice. There are many other such developments in other countries. For example, Mexico,²⁵⁵ Ecuador,²⁵⁶ Brazil,²⁵⁷ and Bolivia²⁵⁸ now have constitutional recognition and protection of indigenous rights, including communal land rights. Russia included recognition of indigenous rights in its 1993 constitution,²⁵⁹ and has passed legislation under which indigenous land use rights are protected.²⁶⁰ Malaysia has passed legislation protecting indigenous customary land use,²⁶¹ and has also recognized indigenous property rights through its common law system.²⁶² The Nordic countries of Finland, Sweden and Norway have protected indigenous land use, and have established indigenous governance institutions with a formal role in the national political structure. Norway, which has ratified ILO Convention No. 169, also facilitates the passing of information directly from the indigenous peoples of that country to the International Labour Organization, without the intervention of a labour union, thus increasing indigenous access to international human rights mechanisms. In short, around the world states are responding to the international norms concerning indigenous peoples by adjusting their internal legal regimes to accommodate indigenous peoples' rights.

B. African Countries

Many African countries, faced with the task of nation-building after decolonization, have been slow to turn away from assimilationist policies, and reluctant to acknowledge the existence of indigenous peoples in their territories, in a context where virtually all of the population is native to the African continent.²⁶³ However, after decades of ethnic strife

²⁵⁴ *Id.* at 43.

²⁵⁵ See Constitución Política (Mexico), art. 27, section VII. Mexico has also passed legislation protecting indigenous lands. See Ley Agraria, art. 106 (1992); Ley Forestal, art. 19, (1992).

²⁵⁶ See Constitución Política (Ecuador), Title III, arts. 84, 224. Ecuador has also passed legislation recognizing indigenous traditional land rights. See Codificación de la Ley de Desarrollo Agrario, art. 38, 43.

²⁵⁷ See Constituicao tit. VIII (Brazil) (1988). Brazilian Courts have held stat action that reduces or alienates indigenous lands to be unconstitutional. See Roberto Barroso, "The Saga of Indigenous Peoples in Brazil: Constitution, Law and Policies, 7 *St. Thomas L. Rev.* 645 (1995).

²⁵⁸ See Constitución Política (Bolivia), art. 171. Several laws also specifically protect indigenous peoples' land rights, and ILO Convention No. 169 is also incorporated into domestic law. See Anaya and Williams, *supra*, p. 59.

²⁵⁹ See Constitution of the Russian Federation, (Dec. 12, 1993), art. 69 (guaranteeing the "rights of small indigenous peoples in accordance with the generally accepted principles and standards of international law and international treaties of the Russian Federation")

²⁶⁰ See "On Territories of Traditional Nature Use of the Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation" (2000) (came into force May 11, 2001) and "On Guarantees of the Rights of Indigenous Numerically Small Peoples of the Russian Federation" (1999), both available in Russian at <http://www.minelres.lv/NationalLegislation/Russia/russia.htm>

²⁶¹ See Aboriginal Peoples Act (134 of 1954, 1974) (Malaysia).

²⁶² See *Adong vin Kuwau v. Johor*, 1 *Malayan L.J.* 418-36 (1997).

²⁶³ See ACHPR Working Group report, *supra*, p. 46.

often born of frustration from exclusion in the name of national unity, many African countries are turning toward a more multicultural model, and in so doing are also becoming more open to understanding the particular issues of those groups that self-identify as “indigenous”. Still, steps to protect the Pygmy peoples of the Great Lakes basin are in their infancy or non-existent. The following overview of developments in select countries in francophone and non-francophone African countries provides an understanding of existing trends and a glimpse of ongoing difficulties in advancing legal reforms beneficial to indigenous peoples.

Non-Francophone Countries

1. South Africa

Among African countries, South Africa has been lauded by the African Commission’s Working Group for its positive developments in the recognition of indigenous rights as part of its multicultural approach to state ordering.²⁶⁴ The South African Constitution recognizes religious, cultural and linguistic communities and mentions the need to protect, promote and create conditions for the development and use of the Khoi, San and Nama indigenous languages.²⁶⁵ Section 9 of the Constitution prohibits unfair discrimination by the state or by persons and provides for affirmative action in favour of persons or groups that have been historically discriminated against.²⁶⁶ As an example, the South African government uses affirmative action to favour employing the Khoesan in national conservation parks as trackers or in other positions that utilize Khoesan specialized skills.²⁶⁷ Furthermore, “[t]he Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system.”²⁶⁸ In 1988, the Law of Evidence Amendment Act provided for the first time that all the courts of the land were authorised to take judicial notice of indigenous law.²⁶⁹

²⁶⁴ See ACHPR Working Group report, *supra*, p. 24, 33-34, 36-38.

²⁶⁵ See Constitution of the Republic of South Africa (Act No. 108 of 1996), Sec. 6(2), 6(3), 6(5)(a)(ii). Sec. 6(5)(a)(ii) states that the promotion of indigenous and other ethnic languages will be undertaken by a Pan South African Language Board.

²⁶⁶ *Id.* Sec. 9(2), 9(3):

3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

²⁶⁷ See ACHPR Working Group report, *supra*, p. 37.

²⁶⁸ *Alexkor Ltd. v. Richtersveld Community and others*, South African Constitutional Court, Case No. CCT19/03 (Oct. 14, 2003), para. 51. [hereinafter “*Alexkor v. Richtersveld Community*”]

²⁶⁹ The “Law of Evidence Amendment Act 45 of 1988, provides in s.1:

‘Judicial notice of law of foreign state and of indigenous law.—

- (1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

In 1994, the newly established democratic government in South Africa enacted the Restitution of Land Rights Act 22 of 1994, which established a Commission on Restitution of Land Rights responsible for investigating and processing land claims.²⁷⁰ The Constitution provides for restitution for any racially discriminatory dispossession of land after June 19, 1913.²⁷¹ Various Khoesan communities have benefited from this restitution program,²⁷² and in a landmark 2004 case the Constitutional Court recognized indigenous title to land arising from indigenous law, which “must now be seen as an integral part of our law”²⁷³ and not through the lens of the common law. It affirmed that the dispossession of such “invariably took place in a racially discriminatory manner”²⁷⁴ because they involved a failure to recognize indigenous property rights.²⁷⁵ Because in that case “[t]he undisputed evidence shows a history of prospecting in minerals by the Community and conduct that is consistent only with ownership of the minerals being vested in the Community,”²⁷⁶ and therefore ordered restitution not only of their traditional lands, but also the significant subsoil mineral rights.²⁷⁷

The South African Constitution recognizes the “institution, status and role” of traditional leaders and provides for their role at the local levels on issues affecting their communities.²⁷⁸ Another example of the recognition of traditional leadership is a project

(2) The provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned

(4) For the purposes of this section “indigenous law” means the law or custom as applied by the Black tribes in the Republic. [Sub-s (4) amended by s. 4 of Act 18 of 1996].’

Alexkor v. Richtersveld Community, *supra*, para. 52 note 50.

²⁷⁰ No. 22 of 1994: Restitution of Land Rights Act, 25 November 1994, No. 2011. Secs. 4, 6, 12.

²⁷¹ *Id.* Sec. 25(6), 25(7):

6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

7. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of parliament, either to restitution of that property or to equitable redress.

²⁷² See ACHPR Working Groups report, *supra*, pp. 24, 44.

²⁷³ *Alexkor v. Richtersveld Community*, *supra*, para. 51.

²⁷⁴ *Id.* para. 34.

²⁷⁵ See *id.* paras. 95 – 96.

²⁷⁶ *Alexkor v. Richtersveld Community*, *supra*, para. 60.

²⁷⁷ In *Alexkor*, the Communities had been removed from their lands because of the discovery of diamond deposits under them, of which significant mining was still occurring at the time of the judgment. *Id.*

²⁷⁸ Constitution of the Republic of South Africa, *supra*, Sec. 211, 212.

211. Recognition:

1. The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

2. A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

3. The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

212. Role of traditional leaders:

by the Department of Provincial and Local Government to research Khoesan government structures in order to promote their interaction with local provincial governments.²⁷⁹

The Constitution establishes a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, composed of representatives of the main cultural, linguistic and religious communities and who must also reflect the country's gender composition,²⁸⁰ whose objectives include the promotion of respect for indigenous peoples' rights; peace, tolerance and national unity among all ethnic groups; and "to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa."²⁸¹ This Commission has the power to "monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities."²⁸²

2. Ethiopia

Ethiopia has shifted from being a centralist governmental system with an assimilationist and mono-cultural character to a dramatic multiculturalism called by some observers "ethnic federalism".²⁸³ The Federal Constitution does not specifically address the rights and interests of indigenous peoples as such. However, the stated ideals of the current governmental and legal structure with its recognition of the political and cultural rights of all ethnic groups are, at least in theory, equally applicable to indigenous peoples.²⁸⁴

The 1995 Constitution of Ethiopia vests all sovereign power in the "Nations, Nationalities and Peoples of Ethiopia" and states that the Constitution "is an expression

1. National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

2. To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law

- a. national or provincial legislation may provide for the establishment of houses of traditional leaders; and
- b. national legislation may establish a council of a traditional leaders.

²⁷⁹ See ACHPR Working Group report, *supra*, p. 39.

²⁸⁰ *Id.* Sec. 186.

²⁸¹ Constitution of the Republic of South Africa, *supra*, Sec. 185.

²⁸² Constitution of the Republic of South Africa, *supra*, Sec. 185(2). Similarly, the South African Constitution also created a South African Human Rights Commission. This particular Commission is in charge of promoting respect for human rights and monitoring and assessing the observance of human rights in the country. It has the power to "investigate and to report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research and ; to educate." *Id.* Sec. 184.

²⁸³ See Tsegaye Regassa, *State Constitutions in Federal Ethiopia: A Preliminary Observation*, (A Summary for the Bellagio Conference, March 22-27, 2004) at 1.

²⁸⁴ Unfortunately, the constitutional provisions have not prevented violence and repression against indigenous peoples in Ethiopia, including the Anuak of Gambella, who have experienced massive state violence against them after oil was discovered in their lands. *see e.g.* Survival International <http://www.google.com/search?q=cache:R45Xc70B5-QJ:www.survival-international.org/anuak.htm+Anuak&hl=en>

of their sovereignty.”²⁸⁵ The “Nations, Nationalities and Peoples of Ethiopia” have the unconditional right to self-determination and even the right to secession.²⁸⁶ Every ethnic group, therefore, has the constitutional right to a “full measure of government that includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in State and Federal governments.”²⁸⁷

As a result of this recognition of self-determination, Ethiopia is currently made up of nine member “ethnic” states named after a predominant ethnic group.²⁸⁸ However, these state themselves are not entirely homogenous - for example, the SNNPR has around 56 ethnic groups.²⁸⁹ Each distinct ethnic group within the nine states still has the right to establish its own state.²⁹⁰ Within Ethiopia’s federal structure, member states also have their respective legislative, executive and judicial powers as well as their own constitutions.²⁹¹ One shortcoming of the system is its imposition of standardized governing structures that may not conform with the traditional forms of decision-making of an ethnic group.²⁹²

One commentator stated that individual member state constitutions and policies have the potential to address inter-ethnic competitions and tensions more specifically than in the federal constitution.²⁹³ Some states have accommodated or helped create special districts

²⁸⁵ Constitution of the Federal Democratic Republic of Ethiopia (1995) article 8. [hereinafter “Constitution of Ethiopia”] The Constitution defines Nations, Nationalities and Peoples as “a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.” *Id.* art. 39(10).

²⁸⁶ *Id.* art. 39(1). Secession, if desired, comes into effect when a demand for secession is approved by a two-thirds majority of Legislative Council members of that particular ethnic group. Within 3 years of receiving a council’s decision for secession, the Federal Government must hold a referendum which must be supported by majority vote. If approved, the Federal Government would transfer its power to the particular Nation, Nationality or People wishing to secede, *Id.* art. 39(4)-(8). The right to secession from the Ethiopian State created much controversy and concern over the unity of the Ethiopian state. However, the drafters of the 1995 Constitution viewed secession not as a threat to the Ethiopian state, but as a guarantee for democracy, human rights and inclusion. See Abate Nikodimos Alemayehu, *Ethnic Federalism in Ethiopia: Challenges and Opportunities*, Masters thesis submitted to the Faculty of Law, University of Lund (Fall 2004), at 58. Alemayehu cites the unpublished Minutes of the Constitutional Assembly. Nov. 1994, Minutes No.20 of Hidar 12 and 13 of 1987EC. It is also evident that the procedure for secession make it politically and practically difficult, so that fragmentation of the Ethiopian state is unlikely. See *Id.* at 61-62.

²⁸⁷ Constitution of Ethiopia *supra*, art. 39(3).

²⁸⁸ According to Article 46 of the Constitution, states are to be “delimited on the basis of the settlement patterns, language, identity and consent of the peoples concerned”. The nine member states recognized thus far are: Tigray; Afar; Amhara; Oromia; Somaliya; Benshangul/Gumuz; the Southern Nations, Nationalities and Peoples (SNNPR); Gambela and Harari, *Id.* art. 47.

²⁸⁹ See Regassa, *supra* note 31, at 5.

²⁹⁰ Constitution of the Federal Democratic Republic of Ethiopia, *supra*, art. 47(9)(a).

²⁹¹ *Id.* art. 50.

²⁹² See Jon Abbink, “Ethnicity and Constitutionalism in Contemporary Ethiopia”, 41 *J.A.L.* 159, esp. p. 162: “Under the ethnic self-rule ideology of the new regional organization, a so-called Surma Council has been installed ... [which] tends to bypass the traditional arena of political decision-making located in ... surma assemblies and public debates because they are seen as irrelevant to the programme which the state wants to be implemented.”

²⁹³ See Regassa, *supra* note 31, at 10.

of local self-governments for distinct ethnic groups.²⁹⁴ Therefore, legal and political avenues exist for recognition of indigenous peoples' rights and forms of government.

Even within the new federal structure in Ethiopia, inter-ethnic tensions of the past are still present, which presents problems to peoples in Ethiopia that would be considered as indigenous in the international legal sense. The pastoralist groups in Ethiopia have been identified by the African Commission on Human and Peoples' Rights as indigenous peoples suffering human rights violations.²⁹⁵ Pastoralists have made some major gains in recent years with the establishment in 2002 of the Pastoral Standing Commission within the Federal Parliament – such practice has extended to some individual states that formed their own pastoral commissions.²⁹⁶ The Pastoral Standing Commission is led by the head of a pastoral organization and “is expected to contribute a lot to advance the cause of pastoralists at the level of policy formulation and legislation.”²⁹⁷ Therefore, there has been a recent shift in policy by the Federal Government in recognizing pastoral communities although it still has to formally recognize pastoralism as a viable form of development.²⁹⁸

While the Federal Constitution vests ownership of rural and urban lands and of natural resources in the state and in the peoples of Ethiopia,²⁹⁹ pastoralists have the right “to free land for grazing and cultivation as well as the right not to be displaced from their own lands.”³⁰⁰ In a possible conflict with that recognition, the Constitution also provides Ethiopian peasants with the right to “obtain land without payment and the protection against eviction from their possession.”³⁰¹

The Constitution provides that each “Nation, Nationality and People,” not just member states, has the right to at least one representative in the House of the Federation, a parliamentary body created in the Constitution – thus this is one avenue for providing indigenous political representation within the federal government.³⁰²

Using ethnicity to determine the composition of the federal state can be seen as a means to address past disparities of power among Ethiopia's diverse and marginalized ethnic groups. It was hoped by various political leaders and political groups that “ethnic empowerment” and “ethnic federalism” could strengthen cultures, languages and ethnic

²⁹⁴ See *id.* and Alemayehu, *supra*, at 56.

²⁹⁵ See ACHPR Working Groups report, *supra*, p. 10. There are 29 different pastoral groups in Ethiopia representing 12 per cent (5 million) of the population. They live in harsh arid and semi-arid environments. The major pastoralist groups include the Somalis, Afars, Borena, Keruyu and Nuer, *id.* Pastoralist groups have suffered evictions from their ancestral lands and much of their pastoral lands have been passed on to commercial farmers or turned into game parks and wildlife reserves, *id.* at 17, 23.

²⁹⁶ See *id.* at 38.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ Constitution of Ethiopia, art. 40(3). It also states that land is “a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange.” *Id.*

³⁰⁰ *Id.* art. 40(5).

³⁰¹ *Id.* art. 40(4).

³⁰² Constitution of the Federal Democratic Republic of Ethiopia, *supra* note 32, at art. 61(2). In addition, “each Nation, Nationality and People shall be represented by one additional representative for each one million of its population.” *Id.*

pride, as well as reverse past governmental “hegemonic” practices that created further conflict and internal wars.³⁰³ The current shifts in law and policy towards pastoralist groups, although not having completely changed past attitudes, does indicate a change within Ethiopia that is capable of respecting indigenous peoples rights more consistently with the current international norms.

Francophone countries

3. Burundi

Burundi has taken a first step toward protecting indigenous rights through its new ethnically-based constitutional structure. Article 1 of the Constitution, overwhelmingly passed in a referendum on February 28, 2005, proclaims the country’s religious and ethnic diversity,³⁰⁴ and article 53 guarantees equal access to culture.³⁰⁵ The Constitution allocates participation in the state apparatus along ethnic and gender lines. Article 164 provides that “the national Assembly is composed of at least 100 deputies of whom 60% are Hutu and 40% are Tutsi, and at least 30% are women ... plus three deputies from the Twa ethnicity.”³⁰⁶ Similarly, article 180 provides three Senate seats to the Twa. Article 208 provides also that the judiciary is to reflect the regional, ethnic and gender composition of society, and the ethnic composition of the executive,³⁰⁷ bureaucracy,³⁰⁸ police and armed forces³⁰⁹ leave open the possibility of Twa participation.³¹⁰ These arrangements do not fit easily onto the spectrum of indigenous rights protection, primarily because the constitutional strategy is more directed at ethnic group rights generally than indigenous rights *per se*. The first elections under this arrangement are due to be held in August, 2005, and it remains to be seen whether these provisions for participation will result in further protections for the Twa people, who otherwise do not enjoy specific measure of protection for their lands or culture.

³⁰³ See Abate Nikodimos Alemayehu, *Ethnic Federalism in Ethiopia: Challenges and Opportunities*, Masters thesis submitted to the Faculty of Law, University of Lund (Fall 2004), at 49-50.

³⁰⁴ See “Projet De La Nouvelle Constitution Post-Transition De La Republique Du Burundi” (September 17, 2004) approved by national referendum February 28, 2005. Available at <http://www.burundiembassy-usa.org/projet%20de%20constitution%20en%20français.pdf>,

³⁰⁵ However, art. 68 places a duty on individuals to ‘preserve and reinforce Burundian cultural values’, which could be interpreted as an assimilationist requirement.

³⁰⁶ *Id.* Art. 1 (“Le Burundi est une République indépendante, souveraine, laïque, démocratique, unie et respectant sa diversité ethnique et religieuse.”). Article 13 also enshrines the non-discrimination norm, and article 19 incorporate the human rights affirmed in international instruments including the African Charter. Property is protected under article 36.

³⁰⁷ *Id.* art. 124 (providing that vice-presidents shall be from “different ethnicities and different political parties”) and art. 129 (providing that the cabinet is open to all ethnicities and will be made up of no more than 60% Hutu and no more than 40% Tutsi).

³⁰⁸ *Id.* art. 143 (providing that public administration shall reflect ethnic, regional and gender composition, with no more than 60% Hutu and no more than 40% Tutsi)

³⁰⁹ *Id.* art. 257 (providing that no more than 50% of the armed forces and police will be of any single ethnicity)

³¹⁰ *Id.*

4. Cameroon

The Constitution of Cameroon in its preamble specifically recognizes the rights of indigenous peoples and expresses pride in the country's linguistic and cultural diversity, while referencing the fundamental freedoms in the principal international human rights documents such as UN Charter and African Charter on Human and Peoples' Rights.³¹¹ Through this recognition, Cameroon confirms the normative strength of the international norms concerning indigenous peoples. This recognition is not instantiated in the articles of the Constitution, however, except tangentially through provisions mandating the state to "endeavour to protect and promote national languages" and the inclusion of locally elected "traditional rulers" within Regional Councils established in the Constitution should hold some relevance for indigenous cultural and political rights in Cameroon.³¹²

Cameroon's Forestry Law of 1994³¹³ with its provisions for including "local communities" in forest management could have been relevant to the recognition of Pygmy peoples' rights, at least in terms of forest management, but falls short of benefiting Pygmy peoples. Cameroon was among the first of Central African States to approach issues of forestry and land tenure by offering local communities to take out forest management agreements on lands that remain State-owned.³¹⁴ The Law, in principle, recognizes the distinct livelihoods of local communities, yet it has a bias towards encouraging market-driven activities such as timber production.³¹⁵

The Forestry Law provides for village communities to obtain community forests which consist of a piece of State land of a set size – 5,000 hectares – free from any forest exploitation license, that is granted by the state to a village community as a management concession,³¹⁶ rather than allocating community forests based on customary use patterns. In this and other aspects, the particular needs and circumstances of Pygmy peoples in Cameroon are not given attention in the law. The Forestry law requires formal legalization of a community's representative institution before the community can obtain a community forest. Due to their marginalization within Cameroonian society and educational systems, many Pygmy communities cannot meet these requirements. The application for a community forest itself must include management plans and maps,

³¹¹ See Constitution of the Republic of Cameroon, Law No. 96-06 of 18 January 1996 to amend the Constitution of 2 June 1972.

³¹² See *Id.* arts. 1(3) and 57.

³¹³ Forestry Law, *Loi Portant Regime des Forêts, de la Faune et de la Pêche* (1994).

³¹⁴ See David Brown, Michael B. Vabi and Robert Nkwinkwa, *Community Forestry as Entry Point for Governance Reforms in the Forestry Sector in the Central African Sub-region: The Case of the Republic of Cameroon*, Paper prepared for the XII World Forestry Congress held in Quebec City, Canada, September 2003, p. 3.

³¹⁵ *Id.* p. 7.

³¹⁶ See Samuel Nguiffo, *Forestry law and the marginalisation of pygmy populations*, in *Forest Management Transparency, Governance and the Law: Case studies from the Congo Basin*, Prepared for the Ministerial Conference on Africa Forest Law Enforcement and Governance (AFLEG), Oct. 13-16, 2003, p. 8. Nguiffo notes that the "State retains ownership of the land, but entrusts the management of the forestry resources to the village community concerned for 25 years, on a renewable basis."

which represent substantial financial and technical difficulties to be overcome by Pygmy populations.³¹⁷

Because a community forest can only be designated where a community shows customary land rights, many Pygmies who have been resettled near Bantu-inhabited forest areas are excluded because they are not on ancestral lands. As mentioned, the requirement for a community forest not to exceed 5,000 hectares does not take into account Pygmy hunting and gathering practices which extend over larger surface areas.³¹⁸

Furthermore, where Pygmies can show customary land rights, many times it is at a “Permanent Forest” where the designation as a community forest would not be allowed.³¹⁹ On the contrary, Pygmy populations in permanent forests are restricted from hunting³²⁰ and collecting non-protected forestry products for sale, which are a very important customary source of income.³²¹

Another problem with Cameroon’s Forestry Law is that it provides for the temporary or permanent suspension of user rights by the Ministries in charge of forestry, wildlife and fisheries if there are public utility reasons. There must be prior consultation with the people affected, but in practice, government officials have unilaterally decided to suspend Pygmy user rights, as was the case with the establishment of the Campo National Park.³²² The Cameroonian government’s actual practices and the Forestry Law’s shortcomings in terms of effective enforcement as well as its non-recognition of distinct Pygmy community structures and economic subsistence activities might actually prove detrimental to long term economic and cultural survival of Pygmy peoples in Cameroon.³²³

5. Democratic Republic of Congo (DRC)

The DRC has begun to legislatively acknowledge rights of indigenous communities with respect to forestry resources with the 2002 Forestry Code (Law No. 011/20002).³²⁴ The Forestry Code does not depart from the concept of State ownership of forests but it codifies and provides for regulation of the rights of use, ownership, possession and consultation.

³¹⁷ *Id.* p. 8.

³¹⁸ *Id.* p. 9.

³¹⁹ *Id.*

³²⁰ See Forestry Law, *supra*, arts. 26(1), 30(2), 36 and 38(2).

³²¹ See Nguiffo, *supra*, p. 9.

³²² See *id.* pp. 9-10 and Forestry Law, *supra*, art. 8(2) stating:

Les Ministres chargés des forêts, de la faune et de la pêche peuvent, pour cause d'utilité publique et en concertation avec les populations concernées, suspendre temporairement ou à titre définitif l'exercice du droit d'usage lorsque la nécessité s'impose.

Cette suspension obéit aux règles générales de l'expropriation pour cause d'utilité publique.

³²³ See Nguiffo, *supra*, p. 11.

³²⁴ Forestry Code (Law No. 011/20002), *Loi 011/2002 Du 29 Août 2002 Portant Code Forestier*.

This law defines “local community” as “a people traditionally organised on the basis of custom and united by clan or family solidarity relations, which is the basis for its internal cohesion...” and recognizes that local communities have an attachment to a specific territory.³²⁵ Local communities have ownership rights over the trees within a village or immediate surroundings and can transfer these trees to a third party.³²⁶ People living within or near a forest estate have user rights deriving from local customs and traditions as long as these do not violate the law.³²⁷ These people have individual and collective rights to exploit forest resources for domestic use except agriculture.³²⁸ Furthermore, local communities’ may request and obtain, in the form of a Presidential Decree, a “forest concession title” to part or all of a protected forest area they have traditionally possessed. The terms of these concessions are defined by the President,³²⁹ who must engage in consultations with the public and neighbouring communities prior to classifying a forest.³³⁰

³²⁵ *Id.* art. 1(17). English translation provided in Bienvenu Ngoy Isikimo, *Implementation of the Congolese Forestry Code: The case of provisions relating to local communities*, in *Forest Management Transparency, Governance and the Law: Case studies from the Congo Basin*, Prepared for the Ministerial Conference on Africa Forest Law Enforcement and Governance (AFLEG), Oct. 13-16, 2003, at 52. The original text states:

1(17). *communauté locale*: une population traditionnellement organisée sur le base de la coutume et unie par des liens de solidarité clanique ou parentale qui fondent sa cohésion interne. Elle est caractérisée, en outre, par son attachement à un terroir déterminé.

³²⁶ *Id.* art. 9:

Les arbres situés dans un village ou son environnement immédiat ou dans un champ collectif ou individuel sont la propriété collective du village ou celle de la personne à laquelle revient le champ. Ils peuvent faire l’objet d’une cession en faveur des tiers.

³²⁷ *Id.* art. 36:

Les droits d’usage forestiers des populations vivant à l’intérieur ou à proximité du domaine forestier sont ceux résultant de coutumes et traditions locales pour autant que ceux-ci ne soient pas contraires aux lois et à l’ordre public. Ils permettent le prélèvement des ressources forestières par ces populations, en vue de satisfaire leurs besoins domestiques, individuels ou communautaires.

³²⁸ *See* Isikimo *supra*, p.52, referring to Article 44 of the Forestry Code excluding farming from user rights: Les populations riveraines d’une concession forestière continuent à exercer leurs droits d’usage traditionnels sur la concession dans la mesure de ce qui est compatible avec l’exploitation forestière à l’exclusion de l’agriculture.

³²⁹ *Id.* art. 22:

Une communauté locale peut, à sa demande, obtenir à titre de concessions forestière une partie ou la totalité des forêts protégées parmi les forêts régulièrement posédées en vertu de la coutume.

Les modalités d’attribution des concessions aux communautés locales sont déterminées par un décret du Président de la République. L’attribution est à titre gratuit.

³³⁰ *Id.* art. 15, 29. Article 15 states :

Dans chaque province, les forêts sont classées suivant la procédure fixée par du Président de la République.

Le classement s’effectue par arrêté du ministre après avis conforme du conseil consultatif provincial des forêts concernées, fondé sur la consultation, préalable de la population riveraine. Toutefois, la création des réserves naturelles intégrales, des parcs nationaux et des secteurs sauvegardés relèvent de la compétence du Président de la République.

Art. 29 : Il est créé un conseil consultatif national des forêts et des conseils consultatifs provinciaux des forêts dont l’organisation, le fonctionnement et la composition sont fixés respectivement par décret du Président de la République et par arrêté du ministre.

Unfortunately, in practice, rather than providing protection for indigenous land tenure patterns, the law facilitates logging as an economic strategy. Small-scale and industrial logging companies often first obtain authorization from the state government, and then may engage in informal consultations with local communities.³³¹

While DRC's Forestry Code represents a first step in the recognition of local communities with regards to forest use and management, it does not go far enough to meet international legal norms concerning indigenous property, cultural, and participatory rights.³³²

6. Rwanda

Rwanda is an example of a state that has yet to conform its practice to international norms. In Rwanda, a protective legal framework for indigenous peoples, specifically the Batwa, is non-existent. Up to one-third of Rwanda's Batwa population were killed during the genocide of 1994.³³³ The Batwa people of Rwanda have been historically dispossessed of their ancestral lands, and current agrarian policies continue to exacerbate this process today. Rwanda has no specific protective legislation concerning the Batwa people, who continue to suffer pervasive social discrimination.³³⁴

There are some potential protections in Rwanda's 2003 Constitution that could be harnessed to protect indigenous peoples' rights. The Constitution enshrines the equality norm, prohibiting discrimination by both the state³³⁵ and private citizens.³³⁶ Article 29 recognizes the right to individually or collectively owned property.³³⁷ The Constitution provides for punishment of the "propagation of ethnic, regional, racial or any other forms of division,"³³⁸ the meaning of which is unclear, as such a provision could be used to promote or undermine a multicultural vision of the state. A National Unity and Reconciliation Commission exists to, among other goals, denounce actions and manifestations of discrimination and xenophobia.³³⁹

³³¹ See Isikimo *supra*, p. 52-53.

³³² See NGO Statement from CENADEP/ CNONGD, 12 Feb. 2004, to DRC government, World Bank and FAO, *Regarding the future of the forests in the Democratic Republic of Congo and the people living within these forests*, at 2-3. This Statement also points out that the Forestry Code falls short of complying with DRC's international treaty obligations such as the Convention on Biological Diversity Article 8(j).

³³³ Benon Mugarura and Anicet Ndemeye, *Batwa Land Rights in Rwanda*, Minority Rights Group International Micro Study, p.2.

³³⁴ *Id.* p.3-4.

³³⁵ Constitution of the Republic of Rwanda, 19 June 2003, art. 16.

³³⁶ *Id.* art. 46.

³³⁷ *Id.* art. 29: "Every person has a right to private property, whether personal or owned in association with others. Private property, whether individually or collectively owned is inviolable..."

³³⁸ *Id.* art. 29.

³³⁹ *Id.* art. 178: "The National Unity and Reconciliation Commission is an independent national institution. Its Responsibilities include ... denouncing and fighting against acts, writings and utterances which are intended to promote any kind of discrimination, intolerance or xenophobia." However, the commission is also responsible for eliminating any form of division between ethnic groups, which in practice could run counter to the recognition and tolerance of cultural difference required by international standards.

The Constitution provides for eight representatives of “historically marginalized communities”, nominated by the President, to sit in the Senate.³⁴⁰ However, the government has refused to recognize the Batwa as falling within this category.³⁴¹ Furthermore, members of the Senate are required to be “highly skilled in the fields of science, law, economics, politics, sociology, culture or be persons who have held senior positions in the public or private sectors.”³⁴² These requirements may actually limit possibilities for Batwa representation due to their social marginalization.³⁴³

A National Commission for Human Rights has been created, responsible for education and mobilization of the population on human rights issues; examining human rights violations committed by State officials, organizations and individuals; filing complaints with the competent courts regarding those human rights abuses; and preparing annual and other reports about the human rights situation of Rwanda.³⁴⁴ Whether the Commission will be a positive force for the protection of Batwa rights remains to be seen.

During the negotiations for the 2003 Rwandan constitution, Batwa organizations called for constitutional recognition, increased representation of Batwa in national administrative levels, their inclusion in land distribution, support for Batwa education and recognition that they need particular attention as a disadvantaged group.³⁴⁵ They have also brought attention to the rights and needs of Batwa people evicted from national parks and forests.³⁴⁶ While their objectives were not achieved in the 2003 Constitution, Batwa organizations have begun to be legally recognized by the government and they have promoted Batwa rights and mobilizing politically.

V

NORMS OF CUSTOMARY INTERNATIONAL LAW CONCERNING INDIGENOUS PEOPLES.

It is evident from the above that indigenous peoples have achieved a substantial level of attention within the international arena and in domestic settings across the globe, and with this transnational attention has come a substantial movement toward a convergence of opinion on the existence and content of relevant norms. International human rights treaties to which Congo is a party, as interpreted by relevant international bodies, establish binding obligations with regard to indigenous peoples. While expressing treaty-based obligations, the interpretation and application of human rights treaties in favor of indigenous peoples contribute to the body of developments toward a uniform consensus about the content of these norms. The multiple relevant developments of the last two decades also include the discussions over the draft UN and OAS declarations on

³⁴⁰ *Id.* art. 82(2).

³⁴¹ See Mugarura and Ndemeye, *supra*, p.2.

³⁴² Constitution of the Republic of Rwanda, *supra*, art. 83.

³⁴³ See Dorothy Jackson, *Twa Women, Twa Rights in the Great Lakes Region of Africa*, Minority Rights Group International (2003), p. 28.

³⁴⁴ Constitution of the Republic of Rwanda, *supra*, art. 177.

³⁴⁵ *The Indigenous World 2002/2003*. IWGIA, Copenhagen 2003 cited in African Commission of Human and Peoples' Rights, *supra* note 3 at 37.

³⁴⁶ See *id.* at 44-45.

indigenous rights. Despite persistent gaps in positions over these drafts, the multilateral discussions that have proceeded in relation to them over several years have helped to generate a discernible consensus on core principles of indigenous peoples' rights, which is evident in provisions of several already adopted instruments, including ILO Convention No 169.

Norms concerning indigenous peoples that are grounded in human rights precepts and generally accepted by the international community provide motivation for states to take initiatives to bring about conditions that are in conformity with the norms. Over the last several years, numerous states have enacted constitutional provisions or laws that more or less reflect the developing international consensus about indigenous peoples' rights. The international developments and interpretations of existing international instruments described above are not only impetus for domestic legal reforms, they also are reinforced by these reforms inasmuch the reforms are leading to an increasingly well defined and consistent pattern of domestic legal practice that favors the survival of indigenous communities and cultures.

All this is not to say that the level of consensus on indigenous peoples' rights is entirely satisfactory or that there is a sufficient commitment by authoritative actors to implementing that consensus. But it is important to take stock of this consensus and to note that, as it develops and further coalesces on the content of indigenous peoples' rights, so too do expectations that the rights will be upheld, regardless of any formal act of assent to articulated norms. Thus, this developing consensus is not just a political phenomenon with potential *future* legal consequences, but rather it also represents emerging customary international law with present legal implications. This effectively is the conclusion of the Inter-American Commission on Human Rights in declaring the existence of "general international legal principles" that have developed in recent years to uphold the rights of indigenous peoples.³⁴⁷

The interrelation between international and domestic legal developments concerning indigenous peoples can be seen especially in the now regular practice of states to report to international bodies on their respective domestic laws and initiatives. Much, if not most, of this reporting occurs apart from any specific treaty obligation. The government practice of reporting on domestic developments has been a regular feature of annual meetings of the United Nations Working Group on Indigenous Populations and of meetings of the working group's parent bodies, including the UN Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights. The oral and written statements of governments reporting domestic laws and initiatives to international bodies are indicative of customary international norms in two respects. First, the accounts of state conduct provide evidence of behavioral trends by which the contours of underlying standards can be discerned or confirmed, notwithstanding the difficulties in agreement on normative language for inclusion in written texts. Secondly, because the reports are made to international audiences concerned with promoting indigenous peoples' rights, they provide strong indication of subjectivities of obligation and expectation attendant upon the discernable standards. Evident in the government

³⁴⁷ Dann case, *supra*, paras.129, 130.

statements is the implied acceptance and the pull toward compliance of certain normative precepts grounded in general human rights principles.

Of course, a great deal remains to be done to see domestic constitutional provisions and laws fully implemented, just as for many indigenous peoples the emerging international customary norms remain an ideal rather than a reality. Nonetheless, the international customary norms are tools by which indigenous peoples may appeal to authoritative actors in both domestic and international settings and hold states responsible for acts or omissions that are adverse to their interests.

The specific content of a new generation of international customary norms concerning indigenous peoples is still evolving and remains somewhat ambiguous. Yet the norms' core elements increasingly are confirmed and reflected in the extensive multilateral dialogue and decision processes focused on indigenous peoples and their rights. These core elements can be summarized as follows:

1. Equality. The principle of human equality and its converse, non-discrimination, are at the core of the contemporary international human rights regime. At its most basic, the non-discrimination norm prohibits the denial of rights and state services, or the provision of lower quality services, to indigenous peoples. It is not sufficient that laws or regulations are not on their face discriminatory, that is, that there is no overt discrimination in the law itself. Substantive equality requires that application of the law does not result in *de facto* discrimination against a group because of their language, culture, race, or other grounds. The non-discrimination norm has special implications for indigenous groups, which, practically as a matter of definition, have been treated adversely on the basis of their cultural differences. It is now clearly no longer acceptable for states to incorporate institutions or tolerate practices that perpetuate an inferior status or condition for indigenous individuals or groups, or their cultural attributes. This affirmation of equality, coupled with self-determination, underlies the requirements of respect for indigenous culture, land tenure systems and the property rights arising from them; and the need to ensure indigenous peoples an adequate voice in state governance and decision-making.

2. Self-determination. Although several states have resisted express usage of the term self-determination in association with indigenous peoples, it is possible to look beyond the rhetorical sensitivities to a widely shared consensus of opinion. That consensus is in the view that indigenous peoples are entitled to continue as distinct groups and, as such, to be in control of their own destinies under conditions of equality. This principle has implications for any decision that may affect the interests of an indigenous group, and it bears generally upon the contours of related norms.

2. Cultural Integrity. There is today little controversy that indigenous peoples are entitled to maintain and freely develop their distinct cultural identities, within the framework of generally accepted, otherwise applicable human rights principles. Culture is generally understood to include kinship patterns, language, religion, ritual, art and philosophy; additionally, it increasingly is held to encompass land use patterns and other

institutions that may extend into political and economic spheres. Further, governments increasingly are held, and hold themselves to, affirmative duties in this regard.

3. Lands and Resources. In general, indigenous peoples are acknowledged to be entitled to ownership of, or substantial control over and access to, the lands and natural resources that traditionally have supported their respective economies and cultural practices. Where indigenous peoples have been dispossessed of their ancestral lands or lost access to natural resources through coercion or fraud, the norm is for governments to have procedures permitting the indigenous groups concerned to recover lands or access to resources needed for their subsistence and cultural practices, and in appropriate circumstances to receive compensation.

4. Social Welfare and Development. In light of historical phenomena that have left indigenous peoples among the poorest of the poor, it is generally accepted that special attention is due indigenous peoples in regard to their health, housing, education and employment. At a minimum, governments are to take measures to eliminate discriminatory treatment or other impediments that deprive members of indigenous groups of social welfare services enjoyed by the dominant sectors of the population.

5. Self-government. Self-government is the political dimension of ongoing self-determination. The essential elements of a *sui generis* self-government norm developing in the context of indigenous peoples are grounded in the juncture of widely accepted precepts of cultural integrity and democracy, including precepts of local governance. The norm upholds local governmental or administrative autonomy for indigenous communities in accordance with their historical or continuing political and cultural patterns, while at the same time upholding their effective participation in all decisions affecting them that are left to the larger institutions of government. Participation in this sense includes the requirement of prior consultation with indigenous peoples in regard to any decision that may affect their interests.

VI CONCLUSION

This report has provided a synthesis of the broad contours of the international human rights regime as it concerns indigenous peoples and thus the Republic of Congo-Brazzaville's responsibilities under international law, in the context of the current initiative to develop legislative protection for the Congolese Baka ("pygmy") peoples. It has reviewed the relevant provisions of treaties and other international instruments, interpretive decisions by United Nations institutions and other international bodies, and customary international norms as discerned from the international and domestic practice of state and other actors engaged in multilateral discussions about the rights of indigenous peoples. Norms of customary international law are important because they establish obligations for states in addition to their treaty-based obligations.

The broad contours of the human rights regime applied to indigenous peoples include the following areas of interrelated norms: equality; self-determination; cultural integrity; land and resource rights; social welfare and development rights; and self-government, including rights of autonomous governance and participation in the larger political order. Indigenous people are not to be discriminated against in the provision of state services or treated as inferior in rights because of their cultural or physical attributes; rather, while being regarded as equal in status and dignity as all others, their cultures, including customary economic, social and political modalities of living, are to be respected and protected, as is their access to and ownership of their traditional lands and resources. Furthermore, indigenous peoples are to be incorporated into the polity of the nation on the basis of ensured adequate avenues for autonomous self-governance and for collective participation in all relevant decision-making, including but not limited to prior, informed, culturally appropriate consultations whenever state decisions affecting their interests are made. Finally, indigenous peoples' own aspirations and priorities for economic, social and cultural development are to be respected and supported.