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Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine

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BEYOND INDIGENOUS PROPERTY RIGHTS: EXPLORING THE EMERGENCE OF A DISTINCTIVE CONNECTION DOCTRINE

ERIC DANNENMAIER*

Human rights law has begun to offer normative protection for what remains of indigenous lands. Yet territory now better defended from conquest and encroachment is increasingly threatened by their byproducts. Water scarcity, food security, waste deposition, climate change—in short, the multiple impacts of industrial development—pose a new territorial challenge to indigenous communities that will test the reach and capacity of the human rights regime.

This Article examines that challenge and argues that a solution may lie in emerging human rights doctrine recognizing indigenous peoples' land rights not as heirs to a European conception of property, but as peoples with a distinctive historical, cultural, and spiritual relationship to the land and environment. The Article does not purport to create this doctrine, but merely to name it and examine its contours. The author traces multiple sources of law that affirm indigenous property rights based on land-connectedness and proposes, for the sake of analysis, a "distinctive connection" doctrine. The article asks:

- 1. How has this doctrine been defined and applied in indigenous property claims based, in part, on cultural and spiritual land-relationships; and*
- 2. Can it be effectively deployed to protect against the "new" territorial encroachment: the impact on indigenous communities' environment?*

While a distinctive connection has been repeatedly advanced, its contours remain uncertain and it has not been fully deployed to address

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natural resource and ecological concerns of indigenous peoples. The author thus offers an analytic framework within which the connection might be further understood, emphasizing its relevance to the environment. The article looks at examples of recent indigenous environmental cases—an Inuit climate change claim, Western Shoshone concerns regarding mining practices and nuclear waste disposal on traditional lands, and remedial rights of Inuit communities affected by the Exxon Valdez oil spill—to suggest that a distinctive connection doctrine may offer a means of addressing environmental impacts bound up with indigenous communities’ relationship to the land and environment. The author argues this doctrine may thus give rise to a property right beyond title and trespass: one that protects the deeper ecological values of this distinctive connection.

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I. INTRODUCTION

This Article looks at the evolution of indigenous peoples' land rights under international human rights law and examines the claim—of instruments, tribunals, scholars, institutions, and indigenous advocates—that indigenous peoples have a unique or distinctive connection to the land with deep social, cultural, and spiritual meaning. The claim is not casual or incidental but rather integral to the increasing assertion and recognition of indigenous land rights at many levels.

The claim of uniqueness, which the author posits as an emerging “distinctive connection doctrine,” draws on social and cultural human rights principles, and has helped both to justify indigenous land rights and to shape the nature of those rights beyond traditional domestic title and tenure. While indigenous sovereignty is often seen as lost long ago, or at least highly eroded, the distinctive connection has allowed indigenous peoples to lay collective claim to possessory property rights in the absence of a sovereign prerogative.

The Article explores this emerging doctrine, examining the claim of uniqueness and asking what its legal significance has been in the evolution of indigenous land rights. The author goes further to ask whether the doctrine might be deployed more effectively where the unique attributes of indigenous peoples are particularly relevant to ecological concerns and environmental rights. This latter possibility is explored with reference to environmental litigation, where the cultural and spiritual concerns of indigenous peoples make them particularly vulnerable to environmental harms.

Part II provides background on the evolution of indigenous land rights in international law. It begins by discussing how the term “indigenous” has come to be constructed in international law and describing how indigenous property and sovereignty were eroded during the period of European colonial expansion. This Part then outlines the emergence of instruments that have allowed indigenous peoples to reclaim some of their lost property rights in the context of human rights law.

Part III explores these human rights instruments in much greater detail to better elucidate how the distinctive relationship has been described and asserted in legal and institutional contexts. This is a thick descriptive piece that offers some analytical insights, but is intended primarily to highlight the claim of a unique connection.

Part IV examines how the assertion of a distinctive relationship has affected the outcome of cases dealing with indigenous land and resource rights. This is also a descriptive piece focusing on cases that have

employed a distinctive connection doctrine, though without naming it as such and without fully examining its implications. Many tribunals assert the connection yet fall back on traditional property rights to provide relief not unique to indigenous concerns. While collective property claims have thus been advanced, tribunals often have not addressed (because they have not perceived a need) the deeper implications of rights associated with the spiritual and cultural connection of indigenous communities to the land and environment.

Part V considers the work that a distinctive connection seems to be doing in the instruments and cases discussed in Parts III and IV—offering an analytical framework within which the doctrine might be better understood. It also asks how the doctrinal recognition of this distinctive relationship might be more fully developed to protect the complex interests of indigenous communities relating to the environment. It looks at three recent cases where a distinctive connection may be especially relevant—an Inuit Circumpolar Conference claim concerning climate change, Western Shoshone concerns regarding mining practices and a nuclear waste repository on their traditional lands, and remedial rights of Inuit communities affected by the Exxon Valdez oil spill—to suggest that the distinctive connection doctrine may have particular relevance where concerns over environmental impact are bound up with a communities' historical, cultural, and spiritual relationship to the land and environment.

The author concludes that a distinctive connection doctrine, while already serving (though innominately) to solidify the still-tenuous collective property claims of indigenous peoples, could be deployed in service of rights beyond title and trespass. Peoples with a unique relationship to the land and natural environment—a relationship tied to culture and spiritual tradition as well as livelihood—should be able to call upon human rights protection to preserve that relationship; otherwise human rights guarantees of economic, social, and cultural protection have little meaning for these peoples. The result of this acknowledgement is not radical, but calls (as economic, social, and cultural claims do) on governments to work toward progressive realization of rights. This means at least beginning to focus on environmental impacts on indigenous communities and to give those affected standing to defend cultural and spiritual values. Finally, the author acknowledges, but leaves for future exploration, the implications the doctrine may have for communities similarly situated—with deeply rooted relationships to the land—but not similarly understood as indigenous.

II. THE EVOLVING UNDERSTANDING OF INDIGENOUS LAND RIGHTS

The rights of indigenous peoples in international law changed rapidly and substantially during the latter half of the twentieth century, and land claims were often at the forefront of these changes. Initially, from almost the moment that indigenous peoples were formally encountered by European states (a moment that, in itself, helps define the word “indigenous”),¹ legal norms were constructed to deny indigenous peoples essentially all sovereignty over the land and resources they traditionally occupied and used.² Indeed, ideas about indigenous sovereignty were often co-constructed with norms that denied legal personhood—even humanity—to indigenous peoples themselves; these constructs were in many ways mutually reinforcing. These ideas about indigenous land rights (and about indigenous peoples more generally) began to change dramatically following World War II, as the advent of international human rights law caused a reexamination of the concerns, status, and treatment of an estimated 200 million indigenous people.³

The most recent statement of international law regarding indigenous peoples, the September 2007 U.N. Declaration on Indigenous Rights, acknowledges that indigenous peoples have, among other rights: the “right to the full enjoyment, as a collective or as individuals, of all human rights

1. See discussion *infra* Part II.A.

2. I refer to a “formal encounter” meaning the encounter with Europeans making territorial claims. This includes, for example, Portuguese voyages along the African coast in the mid-fifteenth century; the voyage of Columbus to the Americas in 1492; and the voyage of Vasco de Gama around the coast of Africa to India in 1497–98. There is strong evidence that Europeans encountered the inhabitants of the Americas much earlier than Columbus. See generally CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS (Knopf 2005). There are also well documented European-Asian and European-African encounters many hundreds of years before, including commercial encounters along the Silk Road, and military encounters such as the Greco-Persian conflicts and Roman imperial projects in North Africa. It was the state-sponsored or state-related encounters in the fifteenth and sixteenth centuries, however, that defined more contemporary relations between European and non-European peoples and which were later reinforced in the newly emerging international law and the conception of sovereignty growing from the Westphalian Peace of the seventeenth century. See generally Robert H. Jackson, *The Evolution of International Society*, in THE GLOBALIZATION OF WORLD POLITICS 35 (John Baylis & Steve Smith eds., 2d ed. 2001).

3. This estimate is used by several institutions. See, e.g., Press Release, World Bank, Indigenous Culture Fundamental to Global Development: World Bank’s Development Trends and Indigenous Peoples’ Forum (Sept. 24, 2004) (on file with author); see also John A. Grim, *Indigenous Traditions and Ecology*, available at <http://fore.research.yale.edu/religion/indigenous/index.html> (last visited Sept. 15, 2008). The World Health Organization (WHO) has issued a report putting the number at more than 300 million. See World Health Org., *Report of the Director-General on Collaboration Within the United Nations System and with Other Intergovernmental Organizations*, ¶ 1, U.N. Doc. A51/22 (Mar. 17, 1998).

and fundamental freedoms”;⁴ the rights of “self-determination”⁵ and “autonomy or self-government . . . relating to . . . internal affairs”;⁶ and “the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”⁷ Yet despite its reach, this latest statement—indicative of indigenous land rights more generally—remains constrained by its own terms⁸ and contested by states with large and often dispossessed indigenous populations.⁹ To appreciate the scope of indigenous land rights under current international law, it is thus important to explore the history of sovereignty claims with respect to indigenous lands, and assess the legacy of this history in human rights instruments. It is also useful to begin with some discussion of the term “indigenous.”

A. What is Meant by “Indigenous”?

The question of who is indigenous and what communities are the subject of emerging international law relating to indigenous peoples is complex and sometimes contested. Professor James Anaya has provided one of the more concise understandings, explaining “the term *indigenous* refers broadly to the living descendants of preinvasion inhabitants of lands now dominated by others.”¹⁰ This brief reference elegantly highlights both the geographic connection of indigenous peoples to traditional lands and the fact that they are “engulfed” by a different, and dominant, culture.¹¹ It encompasses a broad group of diverse peoples that, he explains, “are *indigenous* because their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of

4. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 1, U.N. Doc. A/Res/61/295 (Sept. 13, 2007) [hereinafter 2007 U.N. Declaration].

5. *Id.* art. 3.

6. *Id.* art. 4.

7. *Id.* art. 26.

8. The text provides, for example, that “[n]othing in this Declaration may be . . . construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.” *Id.* art. 46.

9. See, e.g., Statements of the Representatives of the Governments of Australia, Brazil, Canada, Colombia, Mexico, New Zealand, Norway, Sweden, Russia, and the United States at the 107th Plenary Meeting of the General Assembly regarding the U.N. Declaration on the Rights of Indigenous Peoples, U.N. GAOR, 61st Sess., 107th plen. mtg. at 11–27, U.N. Doc. A/61/PV.107 (Sept. 13, 2007). The comments of Mexico following the approval of the declaration are indicative: “The provisions . . . relating to ownership, use, development and control of territories and resources shall not be understood in a way that would undermine or diminish the forms and procedures relating to land ownership and tenancy established in our constitution and laws relating to third-party acquired rights.” *Id.* at 23.

10. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3 (2d ed. 2004).

11. *Id.*

more powerful sectors of society living on the same lands or in close proximity.¹²

Before Professor Anaya had offered this succinct formulation, a more detailed definition was offered in the early 1980s by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities:¹³

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.

This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

- a) Occupation of ancestral lands, or at least of part of them;
- b) Common ancestry with the original occupants of these lands;
- c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
- d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);

12. *Id.*

13. The Cobo Study was written over several years and published as U.N. Doc E/CN.4/Sub.2/476/Add.1-4; U.N. Doc E/CN.4/Sub.2/476/2/Add.5; U.N. Doc E/CN.4/Sub.2/1982/2/Add.1-6; U.N. Doc E/CN.4/Sub.2/1982/2/Add.6; U.N. Doc E/CN.4/Sub.2/1983/21/Add.1-8; and U.N. Doc E/CN.4/Sub.2/1986/7 [hereinafter Cobo Study]. These parts are being scanned and added to the web site of the United Nations Permanent Forum on Indigenous Issues, and are (or will be) available at <http://www.un.org/esa/socdev/unpfii/en/spdaip.html> (last visited June 10, 2008).

e) Residence on certain parts of the country, or in certain regions of the world;

f) Other relevant factors.¹⁴

This 1986 definition is one of the most cited reference points for defining “indigenous,”¹⁵ and it shares Professor Anaya’s later emphasis on a connection to traditional lands and political subordination to a dominant society. While neither Cobo nor Anaya seek to define what particular connection to the land helps understand a people as indigenous, both stress historical continuity—this connection and its importance—as part of a core definition. The Cobo definition goes further in highlighting culture, generally or “in specific manifestations” such as “means of livelihood.”¹⁶ Indigenous peoples’ own claims about their relationship to the land make reference to spiritual and cultural concerns as well as economic (or livelihood) concerns¹⁷

In 1995, the U.N. Working Group on Indigenous People (WGIP) asked its chair, Erica-Irene Daes, to prepare “a note on the criteria for a definition” of the concept of “indigenous.”¹⁸ While the WGIP continued to look to Cobo’s definition, many expressed concern that the lack of a more formal, accepted definition was being used by governments to deny the recognition of indigenous groups.¹⁹ Daes complied and prepared a report, but backed away from offering a single comprehensive definition.²⁰ Instead, she offered:

14. Cobo Study, *supra* note 13, Part III, Conclusion, Proposals, and Recommendations, E/CN.4/Sub.2/1983, reprinted at U.N. Doc. E/CN.4/Sub.2/1986/7/Add. 4, ¶ 379-80.

15. This claim is made in a 2004 U.N. background paper on data collection relating to indigenous peoples. See U.N. Permanent Forum on Indigenous Issues, the Secretariat, *Background Paper: The Concept of Indigenous Peoples*, at 1, U.N. Doc. PFII/2004/WS.1/3 (Jan. 19–21, 2004); see also ANAYA, *supra* note 10, at 10 n.2.

16. See Cobo Study, *supra* note 13, Part III, Conclusion, Proposals, and Recommendations, reprinted at E/CN.4/Sub.2/1983, ¶ 380(c).

17. See discussion *infra* Part III.F.

18. U.N. Econ. & Soc. Council [ECOSOC], Sub. Comm. on Prevention of Discrimination & Prot. of Minorities, Working Group on Indigenous Populations, *Discrimination Against Indigenous Peoples*, ¶ 162, U.N. Doc. E/CN.4/Sub.2/1995/24 (Aug. 10, 1995) [hereinafter 1995 WGIP Report]. The request was later approved by the Commission on Human Rights. See ECOSOC, Sub. Comm. on Prevention of Discrimination & Prot. of Minorities, Working Group on Indigenous Populations, *Discrimination Against Indigenous Peoples*, E/CN.4/Sub.2/1996/21 (Aug. 16, 1996) [hereinafter 1996 WGIP Report].

19. 1995 WGIP Report, *supra* note 18, ¶ 38.

20. ECOSOC, Sub. Comm. on Prevention of Discrimination & Prot. of Minorities, Working Group on Indigenous Populations, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*, E/CN.4/Sub.2/AC.4/1996/2 (June 10, 1996) (prepared by Erica-Irene A. Daes) [hereinafter Daes Report].

[F]actors which modern international organizations and legal experts (including indigenous legal experts and members of the academic family), have considered relevant to the understanding of the concept of “indigenous” include:

- (a) Priority in time, with respect to the occupation and use of a specific territory;
- (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- (c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
- (d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.²¹

Daes emphasized that these “factors do not, and cannot, constitute an inclusive or comprehensive definition.”²² Instead she explained they “may be present, to a greater or lesser degree, in different regions and in different national and local contexts.”²³

In a recent comprehensive volume on *Indigenous Peoples and Human Rights*, Professor Patrick Thornberry offers an extended discussion of “who is indigenous.”²⁴ Professor Thornberry reflects on the approaches in international instruments and reports that the Cobo definition continues to function as a “vague gatekeeper” for the WGIP and institutions (such as the World Bank), as well as claims and definitions from indigenous communities and advocates.²⁵ Thornberry also recounts the competing claims advanced after the discovery of one of the oldest human skeletons found in North America, near Kennewick, Washington. Attempts to classify the skeleton morphologically (it did not appear “related to modern American Indians”) as well as efforts by local Umatilla indigenous people to repatriate the remains led to a battle between scientists and Umatilla

21. *Id.* ¶ 69.

22. *Id.* ¶ 70.

23. *Id.*

24. PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 33–60 (2002).

25. *Id.* at 33. This latter source is particularly important, as the theme of indigenous self-identification has been an important feature of the interpretation of indigenous rights. *See, e.g., infra* Part IV.A (discussing *Awais Tingni*) and Part V (discussing *Moiwana Village*). As Professor Thornberry notes in discussing the arrival of Boers and Rehoboth Basters at the WGIP in the 1990s, the reliance of self-identification is not without its challenges. THORNBERRY, *supra* note 24, at 60.

representatives and “a swamp of fossilized politics, racial myth and archaeological angst.”²⁶

Thornberry explains that “the Kennewick debates suggest four interwoven strands in ‘indigenous’.”²⁷ These are (1) “association with a particular place;” (2) “prior inhabitation;” (3) “a sense of original or first inhabitants,” and (4) “distinctive societies.”²⁸ For Thornberry, these strands, which he calls the “Kennewick senses of indigenous,” are important touchstones in understanding what is indigenous.²⁹ While he rejects the idea of a single, simple answer to the question of coherence in the category of indigenous peoples, he argues that all these Kennewick senses “are contained somewhere or other in the corpus of international law.”³⁰ He also identifies a “spectrum of factors” employed in instruments and by commentators, “the ensemble of which is taken to portray the subject of their concern.”³¹ These factors include: “precedent habitation; historical continuity; attachment to land; the communal sense and the community right (including those societies which do not have a strong conception of individual rights); a cultural gap between the dominant groups in a State and the indigenous, and the colonial context[; and,] . . . self-identification as indigenous peoples.”³²

Thornberry invited comparison of his factors to those proposed by Daes in her 1995 report,³³ and in many ways they are similar. But the factors differ, perhaps, in one key respect. While Daes referred to “the occupation and use of a specific territory,”³⁴ Thornberry separately identifies the importance of “precedent habitation, historical continuity,” and “attachment to land.”³⁵ In this sense, his factors reflect the claims of distinctive connection that became more prominent following the Daes Report. Indeed, in a subsequent working paper, Daes dealt specifically with “indigenous peoples and their relationship to land.”³⁶ Thornberry also

26. THORNBERRY, *supra* note 24, at 36 (quoting Tony Allen-Mills, *Ancient Bones Make White Mischief in U.S.*, THE SUNDAY TIMES, June 15, 1997, at 22) (internal quotations omitted).

27. *Id.* at 37.

28. *Id.* at 37–39 (emphasis omitted).

29. *Id.* at 51.

30. *Id.*

31. *Id.* at 55.

32. *Id.* (emphasis omitted).

33. *Id.* at 55 n.170.

34. WGIP Report, *supra* note 18, ¶ 69.

35. THORNBERRY, *supra* note 24, at 55.

36. ECOSOC, Sub-Comm. on the Promotion & Prot. of Human Rights, *Final Working Paper: Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous People and their Relationship to Land*, U.N. Doc. E/CN.4/Sub.2/2001/21 (June 11, 2001) (prepared by Erica-Irene A. Daes).

compared his factors to those offered by Benedict Kingsbury in a piece that addressed the challenges of indigenous peoples in Asia.³⁷ Kingsbury had divided his factors into “requirements” and “indicia” and included “affinity with . . . land” as a “[s]trong [i]ndicia” of indigenoussness.³⁸

This Article does not depend on any one approach to defining “indigenous,” relying instead on the insights recounted above of those who have studied the question from an international human rights law perspective. It is important to note, however, that a unique relationship with the land is inherent in most of these understandings of what is indigenous. It is also a critical feature of many public statements by indigenous peoples and advocates.³⁹ Thus, it should be seen not merely as a collateral feature of an indigenous lifestyle, but rather as a core element of indigenous identity.

B. Of Discovery, Conquest, and Consent

The treatment of indigenous peoples’ land rights—often the utter negation of those rights—was a defining feature of international law almost from the moment European powers first formally encountered the inhabitants of Africa, Asia, and the Americas. Even at a time when the body of law we now consider “international” was largely prenatal, the disregard of non-European land rights by European political powers was palpable.

The Papal Bull *Inter Caetera*, issued in 1493, is an early example.⁴⁰ Within a year of Columbus’ first voyage to the Western Hemisphere, the pope had taken special note of those “certain very remote islands and even mainlands that hitherto had not been discovered by others; wherein dwell very many peoples living in peace, and, as reported, going unclothed, and not eating flesh,”⁴¹ and proceeded to divide between the Kingdoms of Portugal and Spain all newly “discovered” territory occupied by these “many peoples.”⁴² This papal pronouncement regarded inhabitants in this territory as subjects for spiritual and moral conquest—issuing a

37. THORNBERRY, *supra* note 24, at 56.

38. Benedict Kingsbury, *The Applicability of the International Legal Concept of “Indigenous Peoples” in Asia*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* 336, 374 (Joanne R. Bauer & Daniel A. Bell eds., 1999).

39. See discussion *infra* Part III.F.

40. POPE ALEXANDER VI, *THE BULL INTER CAETERA* (May 4, 1493), translated in *EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648* 73, 75–78 (Frances Gardiner Davenport ed., trans., 1917).

41. *Id.* at 76.

42. *Id.* at 76–78.

“command” that the king and queen of Spain⁴³ “should appoint to the aforesaid mainlands and islands worthy, God-fearing, learned, skilled, and experienced men, in order to instruct the aforesaid inhabitants and residents in the Catholic faith and train them in good morals.”⁴⁴

The vigor with which the crown’s “worthy” men pursued the papal charge is a matter of record. Bartolomé de las Casas, an immigrant to Hispaniola (present-day Haiti and the Dominican Republic) in 1502 who later became a Dominican priest, reported at length on Spanish brutality toward their new “subjects” in the Caribbean and Central America, describing the extent to which the indigenous populations were dehumanized and dispossessed:

The Spaniards have shown not the slightest consideration for these people, treating them (and I speak from first-hand experience, having been there from the outset) not as brute animals—indeed I would to God they had done and had shown them the consideration they afford their animals—so much as piles of dung in the middle of the road.⁴⁵

Las Casas noted the extent to which indigenous lands were seized and populations removed in a manner consistent with this low esteem. He reported that Hispaniola’s population had been reduced from “some three million” to only about two hundred and that half a million were forcibly moved from the Bahamas to Hispaniola to “make up losses among the indigenous population of that island.”⁴⁶

The reports of Las Casas are a rare first-hand written account of the European encounter, but history has revealed that indigenous populations throughout the Americas, as well as Africa and Asia, were held in similar regard by colonial powers.⁴⁷ Indigenous lives, along with their interests in the land where they had lived, were disregarded and exploited. The nation-states that emerged from this colonial period and inherited the territories thus acquired were occasionally called upon to justify their inheritance in

43. More precisely, “the illustrious sovereigns, our very dear son in Christ, Ferdinand, king, and our very dear daughter in Christ, Isabella, queen of Castile, Leon, Aragon, Sicily, and Granada” (now, with the exception of Sicily, parts of Spain). *Id.* at 75.

44. *Id.* at 77.

45. BARTOLOMÉ DE LAS CASAS, A SHORT ACCOUNT OF THE DESTRUCTION OF THE INDIES 13 (Nigel Griffin ed., trans., 1992).

46. *Id.* at 11–12.

47. *See, e.g.*, EDMUND D. MOREL, KING LEOPOLD’S RULE IN AFRICA 103 (1904) (describing the Belgian conquest of the Congo: “[t]he carnival of massacre, of which the Congo Territories have been the scene for the last twelve years, must appal (sic) all those who have studied the facts. From 1890 onwards the records of the Congo State have been literally blood-soaked.”).

the face of claims about indigenous property rights. They employed either a doctrine of conquest or doctrine of discovery, which privileged a “discovering” European state over all other European states to claim sovereignty over new territories as though the land had been uninhabited at the time of European arrival.⁴⁸

This idea that the land in possession of indigenous peoples was like a blank slate was sometimes called *terra nullius*⁴⁹ or *vacuum domicilium*.⁵⁰ In Emmerich de Vattel’s eighteenth century treatise *The Law of Nations*, the failure of indigenous peoples to “settle and cultivate” the land was offered as a justification for “tak[ing] possession of some part of a vast country, in which there are none but erratic nations whose scanty population is incapable of occupying the whole.”⁵¹ Vattel recognized an “oblig[ation] . . . to cultivate the land” which was “imposed by nature on mankind.”⁵² He reasoned this would prevent a European power from claiming lands that it could not fully occupy and exploit,⁵³ arguing that this same principle should apply to indigenous populations whose:

[U]nsettled habitation in those immense regions cannot [sic] be accounted a true and legal possession; and the people of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies.⁵⁴

Not all political theorists held that indigenous title was without any effect, though the entire discourse about indigenous property rights among European and colonial scholars during the fifteenth through nineteenth centuries seemed to begin with a fundamental negation of indigenous civilization. Mark F. Lindley published a treatise in 1926 classifying colonial period views on the legal status of indigenous lands (termed the

48. See, e.g., FRANKE WILMER, *THE INDIGENOUS VOICE IN WORLD POLITICS: SINCE TIME IMMEMORIAL* (1993).

49. See, e.g., SVEN LUNDQVIST, *TERRA NULLIUS: A JOURNEY THROUGH NO ONE’S LAND* (Sarah Death trans., 2007).

50. See, e.g., PAUL GOLDSTEIN & BARTON H. THOMPSON, JR., *PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION* 4 (2005).

51. EMMERICH DE VATTEL, *THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 99–100 (Joseph Chitty ed., 1863) (1758).

52. *Id.* at 35.

53. *Id.*

54. *Id.* at 100.

land of “backward races”).⁵⁵ He grouped views into three categories: (I) those regarding indigenous title as good against more “civilized peoples,” (II) those regarding indigenous title to exist, but to be qualified, and (III) those believing indigenous rights are not of “such a nature” as to bar assumption of sovereignty by “more highly civilized peoples.”⁵⁶ Thus, for some, lawful acquisition of indigenous lands required conquest or treaty, and for others a claim of discovery could be made despite prior habitation.

For the latter group, Vattel’s natural law argument about the need to “make use of” the land seemed to resonate. “The earth,” he had reasoned, “belongs to mankind in general, and was designed to furnish them with subsistence.”⁵⁷ Indigenous peoples, by virtue of their limited cultivation and use had created a vacuum sufficient to forfeit any claim to sovereignty. Vattel’s reasoning is echoed, for example, in a landmark case from the early nineteenth century United States, *Johnson & Graham’s Lessee v. M’Intosh*,⁵⁸ where the U.S. Supreme Court faced competing property claims by one who held title acquired from the federal government and another who held title that traced to a direct private purchase from an indigenous tribe during the British colonial period. In rejecting the title of direct indigenous origin, the Court was forced to justify the extinguishment of indigenous land title by colonial occupation. The Court explained that “[i]n the establishment of these [colonial] relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired.”⁵⁹

The Court in *M’Intosh* sought to defend the loss of indigenous title by the nature of indigenous land use. While seeming to reject Vattel’s premise and protesting that it would not “enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits[,]”⁶⁰ the Court nevertheless reasoned:

The tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn

55. M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 11–19 (1926); *see also* JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 141 (1894); WILLIAM BLACKSTONE, 18 COMMENTARIES *26–27.

56. LINDLEY, *supra* note 55.

57. VATTEL, *supra* note 51, at 100.

58. 21 U.S. (8 Wheat.) 543, 574 (1823).

59. *Id.*

60. *Id.* at 588.

chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighborhood, and exposing themselves and their families to the perpetual hazard of being massacred.⁶¹

The *M'Intosh* Court appeared troubled by the "inevitable consequence" of its reasoning, but still seemed bound by the logic of these inherited colonial legal principles (and the fact that much of the United States was at the time either settled or being settled on the basis of these principles).⁶² "However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear," the Court seemed to lament, "if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned."⁶³

In a far more recent case, the Australian High Court challenged the vitality of the terra nullius doctrine, at once rejecting it and embracing its consequences. In a 1992 decision, *Mabo v. Queensland*,⁶⁴ the court explained:

When . . . the Crown acquired sovereignty recognized by the European family of nations under the enlarged notion of terra nullius, it was necessary for the common law to prescribe a doctrine relating to the law to be applied in such colonies, for sovereignty imports supreme internal legal authority The view was taken that, when sovereignty of a territory could be acquired under the enlarged notion of terra nullius, for the purposes of the municipal law that territory (though inhabited) could be treated as a "desert uninhabited" country [T]he indigenous inhabitants of a settled

61. *Id.* at 590.

62. *Id.*

63. *Id.* at 591.

64. *Mabo v. Queensland II* (1992) 175 C.L.R. 1.

colony had no recognized sovereign, else the territory could have been acquired only by conquest or cession.⁶⁵

The court linked the ability of European colonial powers to see indigenous lands as “vacant” to the comparative lack of social organization among indigenous communities: “As the indigenous inhabitants of a settled colony were regarded as ‘low in the scale of social organization’, they and their occupancy of colonial land were ignored in considering the title to land in a settled colony.”⁶⁶

The *Mabo* court found the terra nullius doctrine largely discredited, and held it could not be used to justify denial of indigenous land rights, yet the court stopped short of rejecting Australian sovereignty over the lands claimed under the doctrine.⁶⁷ In a separate opinion, two justices explained that “communal native title” had “qualified and reduced” the “Crown’s ownership” of the lands in dispute, but acknowledged that the Crown retained sovereignty and that native title could be extinguished by legislative or executive act.⁶⁸

While this seemingly inconsistent result can be criticized,⁶⁹ one can see the Australian High Court struggling with the same challenge that confronted the U.S. Supreme Court more than a century before, and resolving the challenge in a related way. While Australia’s court sitting in the twentieth century could draw on a new understanding of indigenous rights, it still found itself a creature of a sovereign that could not, as a practical matter, challenge its master’s sovereignty. The court admitted as much when it cautioned: “[R]ecognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.”⁷⁰

Professor Thornberry notes that the doctrine of terra nullius was rarely exercised per se in the acquisition of inhabited lands and the idea that indigenous lands were akin to uninhabited territory “remained something

65. *Id.* ¶ 36.

66. *Id.* ¶ 39. This idea was not limited to Australia and the Americas, but also justified colonial expropriations elsewhere, including in Africa. *See* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, at 39 (Oct. 16) (“‘Occupation’ being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid ‘occupation’ that the territory should be *terra nullius*—a territory belonging to no-one—at the time of the act alleged to constitute the ‘occupation’.”).

67. *See generally Mabo*, 175 C.L.R.

68. *Mabo*, opinion of Deane and Gaudron, JJ., 175 C.L.R. ¶ 76(2).

69. *See, e.g.*, Henry Reynolds, *After Mabo, What About Aboriginal Sovereignty?*, AUSTL. HUMAN. REV., Apr. 1996.

70. *Mabo*, 175 C.L.R. ¶ 43.

of an academic conceit.”⁷¹ He points out that in Africa, for example, land rights were more often subjects of “treaty races” where title “was generally based upon claims that it had been ceded by consent of African rulers, or, much less frequently, that it had been acquired by right of conquest.”⁷² This approach to acquisition, justified even by those theorists falling into Lindley’s category I (those who would recognize indigenous title as valid against “more civilized” peoples) remains difficult to defend in light of inequalities in power between the parties and very different cultural conceptions of land ownership and title.⁷³ Thus, while the idea of consent was employed, it was not an idea that could bear much scrutiny.

At bottom, whether through conquest, discovery, or consent, the results of what Thornberry calls “saltwater colonialism”⁷⁴ were the same. Indigenous peoples were either extinguished, removed, or subordinated to new political powers with very different identities and approaches to land and resource development.

C. *An Emerging Claim of Indigenous Land Rights*

Even as domestic jurists in cases such as *Mabo* struggled to revisit doctrines of conquest and discovery while preserving their state’s sovereign prerogative, the international human rights discourse brought new support to indigenous claims of right including land rights. International law began moving from what Professor Anaya has called “a complicity with the often brutal forces that wrested lands from indigenous peoples”⁷⁵ to embrace a normative construct with greater concern for individual and group rights. Instruments and institutions emerged that both “rehumanized” indigenous peoples and revisited claims about their sovereignty and land rights.

The International Labour Organization (ILO) took a major step in 1957 with approval of ILO Convention No. 107, which responded to studies and expert meetings on the vulnerability of indigenous workers and called for the “protection” and “progressive integration” of indigenous “into the life of their respective countries.”⁷⁶ ILO No. 107 focused on members of

71. THORNBERRY, *supra* note 24, at 74–76.

72. *Id.* at 75–76 (quoting Hedley Bull, *European States and African Political Commentaries*, in *THE EXPANSION OF INTERNATIONAL SOCIETY* 111 (Hedley Bull & Adam Watson eds., 1984)).

73. *See, e.g.*, RUSSELL SHORTO, *ISLAND AT THE CENTER OF THE WORLD* 79–90 (2004) (and citations therein); IAN BROWNIE, *TREATIES AND INDIGENOUS PEOPLES* (1992).

74. THORNBERRY, *supra* note 24, at 48.

75. ANAYA, *supra* note 10, at 49.

76. International Labour Organization, *Convention on Indigenous and Tribal Populations*, June

indigenous groups rather than groups themselves, and its emphasis on “progressive integration” seems at odds with a concern over cultural integrity.⁷⁷ It does, however, recognize the “right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy,” place limits on removal from “habitual territories,” and call for respect of customary land tenure systems.⁷⁸ Professor Anaya points out that the recognition of customary laws and collective ownership rights is “posited as transitory and hence overshadowed by a persistent deference and even preference for national programs of integration and noncoercive assimilation.”⁷⁹ He also notes that there was “no apparent participation on the part of indigenous peoples’ own designated representatives” in the process of formulating the convention.⁸⁰

ILO No. 107 has been followed by ILO No. 169, adopted in 1989, which moves away from ILO No. 107’s assimilationist approach. ILO No. 169 places greater emphasis on indigenous peoples and cultures, calling for “special measures” for “safeguarding the persons, institutions, property, labor, cultures and environment of the peoples concerned,”⁸¹ and makes clear that “[s]uch special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.”⁸² It also calls for states to respect the relationship indigenous peoples have with their “lands or territories” and to recognize “rights of ownership and possession” of traditionally occupied lands.⁸³

A number of other international and regional instruments, institutions, and tribunal decisions have emerged that similarly support claims to indigenous traditional lands and territories. This includes the creation of the WGIP; the appointment of Special Rapporteurs on Indigenous Rights; decisions of the U.N. Human Rights Committee (HRC) and Commission

26. 1957, ILO No. 107, art. 2(1), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C107> [hereinafter ILO No. 107].

77. *Id.*

78. *Id.* arts. 11, 12, 13.

79. ANAYA, *supra* note 10, at 55.

80. *Id.* at 54.

81. International Labour Organization, Convention on Indigenous and Tribal Peoples in Independent Countries, Sept. 5, 1991, ILO No. 169, art. 4(1), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169> [hereinafter ILO No. 169]. Although ILO No. 169 is considered a revision of ILO No. 107, and thus the prior convention is deemed outdated, there are eighteen countries that have ratified ILO No. 107 but not ILO No. 169. A total of nineteen countries have ratified ILO No. 169. See ILO Ratification Table, <http://www.ilo.org/ilolex/english/newratframeE.htm> (last visited Sept. 1, 2008).

82. ILO No. 169, *supra* note 81, art. 4(2).

83. *Id.* arts. 13, 14.

on the Elimination of Racial Discrimination (CERD); decisions of the Inter-American Commission on Human Rights and Inter-American Court of Human Rights; the formulation of World Bank Operational Policies; and most recently the adoption of the U.N. Declaration on the Rights of Indigenous Peoples.⁸⁴ They can collectively be seen as recognizing claims to land that were long denied in international law. As Professor Anaya notes, the activity that led to these and other measures “has involved, and substantially been driven by, indigenous peoples themselves.”⁸⁵ His premise, that international law, “once an instrument of colonialism, has developed and continues to develop, however grudgingly or imperfectly, to support indigenous peoples’ demands,”⁸⁶ is difficult to challenge. In the area of land rights, however, the imperfections remain somewhat glaring and also perhaps inevitable. There remains a dichotomy between title and sovereignty that is a legacy of earlier doctrines of conquest and discovery. Having once denied sovereignty, title, and often personhood to indigenous peoples, it is a difficult project to recognize collective indigenous title (which has implications for tenurial relationships and development decisions) while allowing a surrounding state to retain ultimate sovereignty. It is a conflict at the heart of decisions such as *M’Intosh* and *Mabo*, and one that remains difficult to reconcile. The recognition of the distinctive relationship indigenous peoples have to the land may be one key to such a reconciliation.

III. ASSERTING A DISTINCTIVE CONNECTION TO THE LAND

The emergence of indigenous peoples’ land rights in international law has been closely tied to the recognition that indigenous peoples have a distinctive social, cultural, and spiritual relationship with traditional lands and natural resources. This is evident in instruments such as the 2007 U.N. Declaration on Indigenous Rights, in institutional guidelines such as the World Bank’s operational policies, and in claims made by indigenous peoples and their advocates.

84. See discussion *infra* Part III. These measures are discussed in detail in the following two Parts of this Article, with a specific focus on terms that deal with indigenous land rights and the distinctive connection that indigenous peoples are understood to have with the land.

85. ANAYA, *supra* note 10, at 56.

86. *Id.* at 4.

A. *The U.N. Declaration on the Rights of Indigenous Peoples*

The most recent instrument to acknowledge this relationship is the 2007 U.N. Declaration on the Rights of Indigenous Peoples.⁸⁷ The declaration links colonization and dispossession to concerns over self-determination and cultural traditions in a way that obliquely, yet affirmatively, ties the loss of land to the loss of cultural rights. The preamble, for example, expresses concern over “colonization and dispossession of [indigenous] lands, territories and resources,” and claims that “control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions.”⁸⁸ One might argue that this claim is not unique to indigenous peoples: territorial control by any population will enable institutions, cultures, and traditions. But the language in context ties indigenous institutions, culture, and tradition to the land in a way that is unique. The “inherent rights of indigenous peoples” to their “lands, territories, and resources,” the preamble tells us, “derive from” indigenous “cultures, spiritual traditions, histories and philosophies.”⁸⁹ Thus land rights are not incidental to culture, but integral to identity.

This claim is qualitatively different from human rights doctrine relating to non-indigenous property rights, which are understood as a universal right untethered to the cultures, spiritual traditions, histories or philosophies of claimants. Here, though, the declaration explicitly embraces a “land-identity uniqueness” claim: “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”⁹⁰

The declaration further upholds the right to traditional medicines and health practices, “including the conservation of their vital medicinal plants, animals and minerals”;⁹¹ highlighting resources with cultural as well as medicinal value. Article 26 calls for “legal recognition and protection” of traditional “lands, territories and resources. . . . with due respect to the customs, traditions and land tenure systems of the

87. 2007 U.N. Declaration, *supra* note 4.

88. *Id.* pmb1.

89. *Id.*

90. *Id.* art. 25.

91. *Id.* art. 24.

indigenous peoples concerned,”⁹² thus addressing questions of traditional tenure that historically led to the dispossession of indigenous peoples.⁹³

The declaration also confirms specific environmental and conservation rights of indigenous peoples.⁹⁴ This includes full, prior, and informed participation in decisions relating to lands, territories, and resources, “particularly in connection with the development, utilization or exploitation of mineral, water or other resources,”⁹⁵ as well as prohibitions on hazardous material storage or disposal and military activities.⁹⁶ It also confirms the right of indigenous peoples “to determine and develop priorities and strategies for the development or use of their lands or territories and other resources,”⁹⁷ and requires effective mechanisms “to mitigate adverse environmental, economic, social, cultural or spiritual impact” of development and land use.⁹⁸ Thus, in addition to claiming that indigenous peoples have a distinctive connection to their lands, the declaration makes guarantees consistent with this connection and at many points directly implies that environmental impact may also imply cultural or spiritual impact.

B. The International Labour Organization

ILO No. 169 likewise recognizes the unique relationship of indigenous communities⁹⁹ to land, stating that “governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories . . . and in particular the collective aspects of this relationship.”¹⁰⁰ It also calls for special measures to safeguard “the persons, institutions, property, labour, cultures and

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

93. *See* discussion *supra* Part II.B.

94. *See, e.g.*, 2007 U.N. Declaration, *supra* note 4, arts. 29–32.

95. *Id.* art. 32.

96. *Id.* arts. 29, 30.

97. *Id.* art. 32.

98. *Id.*

99. Note the implicit definition of indigenous peoples in ILO No. 169, stating the convention applies to “[t]ribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.” ILO No. 169, *supra* note 81, art. 1(a). It also emphasizes, as have other efforts to define, “[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion.” *Id.* art. 1(2).

100. *Id.* art. 13.

environment” of indigenous peoples,¹⁰¹ including punishment for trespass.¹⁰²

The convention calls for the participation of indigenous peoples in deciding “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”¹⁰³ It also provides that development activities be preceded by assessment of “social, spiritual, cultural and environmental impact,”¹⁰⁴ and calls for mitigation “in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.”¹⁰⁵ Thus, as the 2007 U.N. Declaration, ILO No. 169 directly acknowledges a unique relationship to the land, and explicitly links “social, spiritual, cultural and environmental impacts.”¹⁰⁶

C. Regional Human Rights Instruments

The proposed American Declaration on the Rights of Indigenous Peoples¹⁰⁷ likewise recognizes “the respect for the environment accorded by the cultures of indigenous peoples of the Americas,” and “the special relationship between the indigenous peoples and the environment, lands, resources and territories on which they live”,¹⁰⁸ combining the idea of a unique connection to the land with a claim regarding indigenous peoples as environmental stewards. It also claims “in many indigenous cultures, traditional collective systems for control and use of land, territory, and resources, including bodies of water and coastal areas, are a necessary condition for their survival, social organization, development and their

101. *Id.* art. 4.

102. *Id.* art. 18. The convention provides: “Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.” *Id.*

103. ILO No. 169, *supra* note 81, art. 7(1). The ILO notes that committees established to examine representations brought against states under Article 24 of the ILO Constitution have repeatedly dealt with the Article 17 duty of consultation prior to the exploration or exploitation of natural resources on the lands they occupy or use. See International Labour Organization, *Standards and Supervision: Main Situations Concerning Indigenous and Tribal Peoples which ILO Supervision Has Dealt With* (on file with author), available at <http://www.ilo.org/public/french/indigenous/standard/super1.htm> (last visited Oct. 3, 2007).

104. ILO No. 169, *supra* note 81, art. 7(3).

105. *Id.* art. 7(4).

106. *Id.*

107. American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R., OEA/Ser.L/V/II.95, doc.6 (draft approved Feb. 26, 1997) [hereinafter American Declaration].

108. *Id.* pmb., ¶ 3; see also Report on the Situation of Human Rights in Ecuador, Inter-Am. C.H.R., OEA/Ser.L/V/II.96, doc. 10 rev. (Apr. 24, 1997).

individual and collective well-being”¹⁰⁹ It would require measures to protect “sacred sites”¹¹⁰ and affirm an indigenous “right to the protection of vital medicinal plants, animals, and minerals in their traditional territories.”¹¹¹

The proposed American Declaration features extensive provisions on the “right to environmental protection,”¹¹² including a claim that “indigenous peoples have the right to a safe and healthy environment, which is an essential condition for the enjoyment of the right to life and collective well-being.”¹¹³ This language suggests that indigenous environmental rights might be both civil and political (relating to life) and economic, social, and cultural rights (collective well-being). While these rights should be understood as universal and indivisible, they are often classified and addressed separately.¹¹⁴

The American Declaration would provide for early, informed, and active indigenous participation in environmental and land use matters affecting their lands,¹¹⁵ and require that states respond to and punish environmental harms affecting indigenous peoples.¹¹⁶ It also explicitly advances an indigenous “right to conserve, restore and protect their environment and the productive capacity of their lands, territories and resources.”¹¹⁷ This includes a “right to assistance from their states” and from international organizations “for purposes of environmental protection.”¹¹⁸ This language is interesting both in its implicit acknowledgement of state sovereignty over indigenous lands and in its approval of arrangements whereby indigenous peoples may receive direct international assistance from institutions such as World Bank and others that might otherwise require state permission before funding projects within national territories.

The American Declaration would protect “traditional forms of property ownership” linked explicitly with “cultural survival.”¹¹⁹ It also includes provisions comparable to the 2007 U.N. Declaration regarding alienability

109. American Declaration, *supra* note 107, pmb., ¶ 5.

110. *Id.* art. X, ¶ 3.

111. *Id.* art. XII, ¶ 2.

112. *Id.* art. XIII.

113. *Id.* art. XIII, ¶ 1.

114. HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 237–38 (2d ed. 2000).

115. American Declaration, *supra* note 107, art. XIII, ¶¶ 2, 4, 7.

116. *Id.* art. XIII, ¶ 6.

117. *Id.* art. XIII, ¶ 3.

118. *Id.* art. XIII, ¶ 5.

119. *Id.* art. XVIII.

of lands and property rights from indigenous to non-indigenous peoples, although the language differs in important respects. The American Declaration would “recognize the [land] titles of indigenous peoples . . . as permanent, exclusive, inalienable, imprescriptible and inalienable,”¹²⁰ and provides that “titles may be changed only by mutual consent between the state and the respective indigenous peoples.”¹²¹ In contrast, the 2007 U.N. Convention provides for consultation,¹²² but would not appear to require mutual consent. One might argue that the American Declaration thus represents a different view about underlying indigenous sovereignty, but both approaches still constrain an indigenous community wishing to act on its own, and in this regard both are freighted with ideas of state sovereignty (if not paternalism).

Whatever message the American Declaration may send regarding continuing state sovereignty over indigenous lands, it settles the question of usufructuary rights decidedly in favor of indigenous peoples who, it provides,

have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage, and conserve such resources, and with respect to traditional uses of their lands, interest in lands, and resources, such as subsistence.¹²³

Where the state retains subsurface rights (not uncommon in the Americas), the American Declaration would require prior participation in decisions about impact on the “interests” of indigenous peoples, and participation in the “benefits of such activities,” including compensation for any negative impact.¹²⁴ The proposed American Declaration also requires prior informed consent and compensation where expropriation is contemplated.¹²⁵ It would also require states to “take all measures . . . to avert, prevent and punish” trespass.¹²⁶

Regional human rights instruments in Africa and Europe do not address the concerns of indigenous peoples in the same manner as in the inter-

120. *Id.* art. XVIII, ¶ 3(i).

121. *Id.* art. XVIII, ¶ 3(ii). It is worth noting that the declaration would explicitly reserve the right of indigenous communities to make decisions about the allocation of ownership within the community “in accordance with their customs, traditions, uses and traditional practices.” *Id.* art. XVIII, ¶ 3(iii).

122. 2007 U.N. Declaration, *supra* note 4, art. 17, ¶ 2.

123. American Declaration, *supra* note 107, art. XVIII, ¶ 4.

124. *Id.* art. XVIII, ¶ 5.

125. *Id.* art. XVIII, ¶ 6.

126. *Id.* art. XVIII, ¶ 8.

American system.¹²⁷ Property rights provisions do not deal explicitly with indigenous lands, nor make an explicit link between indigenous peoples and their cultural or spiritual regard for the land. Some property rights provisions could be used to advance the concerns of indigenous communities, such as the Banjul Charter's declarations that "the right to property . . . may only be encroached upon in the interest of public need or in the general interest of the community,"¹²⁸ and that "all peoples shall freely dispose of their wealth and natural resources," a right to be "exercised in the exclusive interest of the people."¹²⁹ These provisions place the "community" or "people's" interest at the center of decisions about property in a way that might advance indigenous community interests without making explicit reference to indigenous status or a unique connection to the land. The Banjul Charter also declares that "[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity"¹³⁰ Again, this provision makes no reference to indigenous peoples or land connectedness. It could, however, provide a basis for advancing the kind of land rights indigenous communities seek, by explicitly tying economic with social and cultural development in a single phrase that also calls for due regard to identity.

Environmental provisions of the Banjul Charter likewise make no separate reference to indigenous peoples, but instead provide that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development."¹³¹ Coupled with the provisions just examined calling for the protection of economic and cultural rights, an argument could be constructed for the protection of traditional communities that might fit into a broader understanding of the term indigenous. The African Commission on Human and Peoples' Rights (ACHPR) used these provisions in tandem to protect the Ogoni people from the impact of oil drilling operations of the state oil company in consortium with Shell Petroleum Development Corporation. In *Social and Economic Rights*

127. This article deals only with inter-American, African, and European regional instruments because other regional instruments have not yet progressed beyond drafts and discussions, although the proposed Asian Human Rights Charter does include the section "Indigenous/Tribal/Peoples' Rights." See Asian Human Rights Commission, Asian Human Rights Charter, available at http://material.ahrchk.net/charter/mainfile.php/draft_charter/ (last visited July 5, 2007).

128. Organization of African Unity, Banjul Charter on Human and Peoples' Rights, art. 14, June 27, 1981, 21 I.L.M. 58 [hereinafter Banjul Charter]. The Banjul Charter is the core African Human Rights instrument, sometimes referred to as the African Charter rather than the Banjul Charter.

129. *Id.* art. 21.

130. *Id.* art. 22, ¶ 1.

131. *Id.* art. 24.

Action Center and the Center for Economic and Social Rights v. Nigeria (SERAC),¹³² the ACHPR cited the Banjul Charter's Article 24 environmental provisions and Article 21 provisions on wealth, natural resources, and economic exploitation (along with human health provisions) to find that Nigeria and Shell had violated the rights of the Ogoni.¹³³ The ACHPR rebuked the government's failure to engage the Ogoni people in development decisions affecting their lands. "In all their dealings with the Oil Consortiums," the ACHPR found, "the government did not involve the Ogoni Communities in the decisions that affected the development of Ogoniland."¹³⁴ The ACHPR placed the origins of the Banjul Charter's Article 21 provisions on wealth, natural resources, and economic exploitation in a context with strong parallels to the history of colonial encounters with indigenous peoples in other regions:

The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation.¹³⁵

Thus, despite the unique history and contemporary political structures that distinguish Africa, one can see in the region's provisions dealing with land and resource rights clear traces of the "saltwater colonialism" that Thornberry notes is common to the indigenous experience.¹³⁶ Missing is an explicit claim about an indigenous identity linked to the land in a spiritual or cultural sense, although the ACHPR's concern with preserving the African birthright and "alienation" from the land and its willingness to use the Banjul Charter's broader provisions on natural resources to protect the Ogoni people suggest at least an implicit acknowledgement of some special connectedness.

132. Soc. and Econ. Rights Action Ctr. & the Ctr. for Econ. & Soc. Rights v. Nigeria, Afr. Comm'n on Human & Peoples' Rights, Comm. No. 155/96 (2001).

133. *Id.* ¶ 58 (findings regarding Article 21 violations) and ¶ 54 (findings regarding Article 24 violations).

134. *Id.* ¶ 55.

135. *Id.* ¶ 56.

136. See THORNBERRY, *supra* note 24, at 48.

D. Other International Instruments

In 1992, government leaders from 172 countries met at the U.N. Conference on Environment and Development (UNCED)¹³⁷ and adopted an action plan addressing a range of environmental and natural resources challenges within a framework of sustainable and equitable development. That action plan, Agenda 21, recognized that “[i]ndigenous people and their communities have an historical relationship with their lands and are generally descendants of the original inhabitants of such lands.”¹³⁸ The term “lands” was “understood to include the environment of the areas which the people concerned traditionally occupy,”¹³⁹ and Agenda 21 acknowledged that indigenous peoples and their communities “have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment.”¹⁴⁰ Agenda 21 also stressed that the cultural and physical well-being of indigenous peoples are linked to the land and its development, providing:

In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.¹⁴¹

Agenda 21 called for protection of indigenous peoples from environmentally unsound activities as well as those “the indigenous people concerned consider to be socially and culturally inappropriate.”¹⁴² This provision acknowledges not only that activities affecting the environment may be particularly inappropriate from an indigenous perspective, but also that the determination of sociocultural appropriateness should be left to “the indigenous people concerned.” Such an approach is consistent with areas of law that protect spiritual and religious rights without imposing

137. See U.N. Conference on Environment and Development (1992), www.un.org/geninfo/bp/enviro.html (last visited Mar. 3, 2008). UNCED was held in Rio de Janeiro, Brazil and is sometimes referred to as the “Rio Conference.”

138. U.N. Dep’t of Int’l Econ. & Soc. Affairs, Div. of Sustainable Dev., *Agenda 21*, ¶ 26.1, available at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> [hereinafter *Agenda 21*].

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* ¶ 26.3(a)(ii).

outside definitions or interpretations on those who would exercise them. It admits both a respect for the indigenous-environment relationship and an unwillingness to constrain that relationship through a meaning imposed by dominant cultures or through some universal definition.

Agenda 21 also recognizes “that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities.”¹⁴³ This provision is important not only because it reasserts a concern with indigenous cultural and physical well-being tied to the environment,¹⁴⁴ but also because it employs the idea of dependence on ecosystems as well as resources. Ecosystem dependence is far deeper and more integral than a dependence on any one natural resource or feature because it contemplates dependence on the entire system, including biological, chemical, and physical elements, and their interaction with one another.¹⁴⁵ Participants in UNCED certainly understood the significance of this distinction, and if applied in its most appropriate and robust meaning, it would offer a measure of protection for claims to traditional lands which have unique ecosystems that cannot be seen as fungible. More important with respect to complex systemic environmental claims (such as climate change), a recognition that indigenous peoples’ rights include ecosystem integrity could be seen to protect elements of the natural environment (such as weather patterns and nutrient cycles) that may directly affect a subsistence resource (such as water or fish stocks) or at least influence the long term availability or health of that resource.

The UNCED conference also hosted the signing of the Convention on Biological Diversity (CBD),¹⁴⁶ which recognized “the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources.”¹⁴⁷ The CBD recognizes both a benefit to indigenous communities in the conservation of biological resources and also a benefit to the broader society in “sharing equitably

143. *Id.* ¶ 26.3(a)(iv).

144. The concern with physical well-being is common to both paragraphs 26.1 and 26.3.

145. An “ecosystem” is understood as a “[c]ommunity of organisms interacting with one another and with the chemical and physical factors making up their environment.” G. TYLER MILLER, JR., ENVIRONMENTAL SCIENCE: SUSTAINING THE EARTH A7 (1991). The chemical and physical factors include sunlight, rainfall, soil nutrients, climate, salinity, etc. See M. Lynne Corn, *Ecosystems, Biomes, and Watersheds: Definitions and Use*, Cong. Research Serv. Rep., 103d Cong. (July 14, 1993), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-70:1>.

146. Convention on Biological Diversity, June 5, 1992, 1993 U.N.T.S. 143 [hereinafter CBD].

147. *Id.* pmbl.

benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.”¹⁴⁸ In this sense, it offers an argument of instrumental value to non-indigenous communities not typically advanced in the context of indigenous rights. Those rights are often expressed in terms of their importance to indigenous peoples and the moral obligation of non-indigenous populations,¹⁴⁹ but the CBD was clear that social and economic advantages flow to non-indigenous societies, who enjoy the benefits of traditional knowledge and practices¹⁵⁰—recognizing, for example, the value of “indigenous and traditional knowledge” relating to biological diversity.¹⁵¹

E. Institutional Treatment—The World Bank’s Operational Policies

The World Bank developed an internal policy on “tribal peoples” in 1981, in response to protests over the impact of a bank-financed hydroelectric project in the Philippines’ Chico River Basin.¹⁵² The bank later issued a revised “indigenous peoples” policy in 1994, following criticism of the 1981 policy; yet despite progress, the updated approach was also criticized, and, in the late 1990s, the bank looked again at indigenous concerns.¹⁵³ This time the bank drew, in part, on the input of indigenous advocates. The result, Operational Policy (OP) 4.10, issued in 2005, was cautiously welcomed by indigenous advocates such as the Indian Law Resource Center (ILRC) as a “significant advance” over earlier bank efforts.¹⁵⁴ Despite concern over “serious shortcomings,” ILRC approved of prior informed consultation requirements in OP 4.10, and

148. *Id.*

149. *See, e.g.*, 2007 U.N. Declaration, *supra* note 4 art. 25 (speaking in terms of a “spiritual relationship” and “responsibilities to future generations”).

150. CBD, *supra* note 146, ¶ 8(j).

151. *Id.* ¶ 17(2).

152. Andrew Gray, *Development Policy, Development Protest: The World Bank, Indigenous Peoples, and NGOs*, in *THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS* 267, 269–70 (Jonathan A. Fox & L. David Brown eds., 1998); *see also* Kay Treakle, NACLA Report on the Americas, *The World Bank’s Indigenous Policy* (Apr. 18, 1996), available at <http://www.hartford-hwp.com/archives/25/022.html>; Indian L. Resource Ctr., *The World Bank’s Indigenous Peoples’ Policy: Successes and Setbacks* (Oct. 2005) (on file with author) [hereinafter ILRC White Paper].

153. On criticism of updated policy, *see* Gray, *supra* note 152; Treakle, *supra* note 152. On the review process, *see* Summary of Consultations with External Stakeholders regarding the World Bank Draft Indigenous Peoples Policy, World Bank White Paper, Apr. 18, 2002 (on file with author).

154. ILRC White Paper, *supra* note 152.

noted that “unlike the 1991 policy, OP 4.10 recognizes some of the special concerns raised by conservation areas and extractive industries.”¹⁵⁵

The new policy recognizes the distinctive connection of indigenous peoples to the land, providing:

The Bank recognizes that the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend. These distinct circumstances expose Indigenous Peoples to different types of risks and levels of impacts from development projects, including loss of identity, culture, and customary livelihoods, as well as exposure to disease.¹⁵⁶

OP 4.10 recognizes that “Indigenous Peoples are closely tied to land, forests, water, wildlife, and other natural resources, and therefore special considerations apply if the project affects such ties.”¹⁵⁷ In these cases, planning documents must “pay particular attention to” the “customary rights of the Indigenous Peoples, both individual and collective, pertaining to lands or territories that they traditionally owned, or customarily used or occupied, and where access to natural resources is vital to the sustainability of their cultures and livelihoods.”¹⁵⁸ Special considerations also include “the cultural and spiritual values that the Indigenous Peoples attribute to such lands and resources”¹⁵⁹ as well as “Indigenous Peoples’ natural resources management practices and the long-term sustainability of such practices.”¹⁶⁰

OP 4.10 also requires an action plan for legal recognition of traditional ownership, occupation, or usage for projects involving land titling and acquisition—calling for “full legal recognition of existing customary land tenure systems of Indigenous Peoples[,] or conversion of customary usage rights to communal and/or individual ownership rights.”¹⁶¹ If neither option is possible under domestic law, the plan should include “measures for legal recognition of perpetual or long-term renewable custodial or use rights.”¹⁶²

155. *Id.*

156. World Bank Operational Manual, Operational Policies: Indigenous Peoples, OP 4.10, ¶ 2 (2005).

157. *Id.* ¶ 16.

158. *Id.* ¶ 16(a).

159. *Id.* ¶ 16(c).

160. *Id.* ¶ 16(d).

161. *Id.* ¶ 17.

162. *Id.*

Where a bank project involves commercial development of natural resources on indigenous lands, OP 4.10 calls for “a free, prior, and informed consultation process,” which includes information on the “potential effects of such development on the Indigenous Peoples’ livelihoods, environments, and use of such resources.”¹⁶³ Project proponents must also provide information on “the potential effects of such development on Indigenous Peoples’ livelihoods, environments, and use of such resources,” where a project involves “the commercial development of Indigenous Peoples’ cultural resources and knowledge (for example, pharmacological or artistic).”¹⁶⁴

OP 4.10 recognizes that the “physical relocation of Indigenous Peoples is particularly complex and may have significant adverse impacts on their identity, culture, and customary livelihoods”¹⁶⁵ and thus discourages relocation except “in exceptional circumstances,” requiring borrowers “to explore alternative project designs to avoid physical relocation of Indigenous Peoples.”¹⁶⁶ Where relocation is unavoidable, OP 4.10 requires borrowers to seek “broad support for it from the affected Indigenous Peoples’ communities as part of the free, prior, and informed consultation process.”¹⁶⁷ It also requires a resettlement plan “compatible with the Indigenous Peoples’ cultural preferences, and includes a land-based resettlement strategy.”¹⁶⁸

While the World Bank has been widely criticized for the effect of its lending policies¹⁶⁹ (particularly those that affect the environment and the

163. *Id.* ¶ 18.

164. *Id.* ¶ 19.

165. *Id.* ¶ 20.

166. *Id.*

167. *Id.*

168. *Id.*

169. *See, e.g., FIFTY YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND* (Kevin Danaher ed., 1994). Two leading examples of organizations that work through networks formed in large part to monitor and challenge World Bank lending practices are the Bank Information Center (BIC), whose web site at www.bicusa.org includes press releases, white papers, and links documenting dozens of challenges to World Bank practices by dozens of organizations, and 50 Years is Enough, whose web site at www.50years.org includes a similar record of concern over World Bank Practices. *See, e.g., Radhika Sarin et al., Earthworks, Tarnished Gold: Mining and the Unmet Promise of Development* (Sept. 2006), available at <http://www.bicusa.org/en/Page.Publications.aspx> (last visited June 10, 2008); Bank Information Center et al., *How the World Bank’s Energy Framework Sells the Climate and Poor People Short*, (Sept. 2006), available at <http://www.bicusa.org/en/Page.Publications.aspx> (last visited June 10, 2008); Press Release, Gender Action, 50 Years Is Enough & CEE Bankwatch, IMF and World Bank Policies Promote Violence Against Women, (Mar. 7, 2007), available at <http://www.50years.org/cms/updates/story/381> (last visited June 10, 2008). World Bank has established an internal review mechanism, the World Bank Inspection Panel, which receives complaints about lending practices and allegations that the bank has failed to follow its own internal practices. The Inspection Panel’s web site, hosted at

rights of indigenous peoples¹⁷⁰), OP 4.10 can be seen as a positive step, at least in its formal recognition of the relationship between indigenous peoples and the environment—a relationship tied to indigenous identity and culture as well as economic livelihood. The Operational Policy followed the findings of a senior sociologist in the Bank’s Environment Department by more than a decade. These findings were published in 1993 as a World Bank discussion paper entitled *Indigenous Views of Land and the Environment*, which calls for attention to the unique connection of indigenous communities to the environment.¹⁷¹ OP 4.10 can be seen as an important, though belated, recognition of this connection. At least the bank is a step ahead of many other economic development institutions with a profound influence on public development policy that have not made this link.¹⁷² The Organization for Economic Co-operation and Development (OECD), for example, does not even mention indigenous peoples in its “Guidance” document on “Strategies for Sustainable Development.”¹⁷³

F. Indigenous Peoples’ Voices

The distinctive connection of indigenous peoples to the land has social, cultural, and spiritual dimensions that have not always translated well into law—even human rights law, despite its explicit regard for social and cultural concerns. This inevitable loss in translation found expression, in part, in the ignorance that characterized colonial era legal claims about

www.worldbank.org, documents multiple complaints by multiple different actors.

170. See, e.g., BRUCE RICH, MORTGAGING THE EARTH: THE WORLD BANK, ENVIRONMENTAL IMPOVERISHMENT, AND THE CRISIS OF DEVELOPMENT 283–93 (1994); Ian A. Bowles & Cyril F. Kormos, *Environmental Reform at the World Bank: The Role of the U.S. Congress*, 35 VA. J. INT’L L. 777, 786–88 (1995); Andrew Gray, *Development Policy-Development Protest: The World Bank, Indigenous Peoples and NGOs*, in THE STRUGGLE FOR ACCOUNTABILITY: SOCIAL MOVEMENTS, NGOS AND THE WORLD BANK (Jonathan Fox & L. David Brown eds., 1996); Bank Information Center, *Rebuked by Internal Investigation, World Bank Plans to do More in DRC Forest Sector, but Will it do Better?* (Jan. 16, 2008), available at <http://www.bicusa.org/en/Article.3645.aspx> (concerning the bank’s failure to take account of forest sector financing on forest Pygmies in the Democratic Republic of Congo). Compare David B. Hunter, *Civil Society Networks and the Development of Environmental Standards at International Financial Institutions*, 8 CHI. J. INT’L L. 437 (2008) (describing evolving and improving environmental standards at World Bank in response to criticism).

171. WORLD BANK, WORLD BANK DISCUSSION PAPER 188, INDIGENOUS VIEWS OF LAND AND THE ENVIRONMENT (Shelton Davis ed., 1993).

172. For a detailed discussion of OP 4.10 and the bank’s underlying obligations to recognize indigenous rights, see Fergus MacKay, *Universal Rights or a Universe Unto Itself? Indigenous Peoples’ Human Rights and the World Bank’s Draft Operational Policy 4.10 on Indigenous Peoples*, 17 AM. U. INT’L L. REV. 527 (2002).

173. Organisation for Economic Co-operation and Development, *Strategies for Sustainable Development: Guidance for Development Co-operation* (2001), available at <http://www.oecd.org/dataoecd/34/10/2669958.pdf>.

how indigenous peoples were using (or not using) the land.¹⁷⁴ Justifications based on ideas such as *terra nullius*, or the bias against cultures that failed to cultivate, so evident in opinions such as *M'Intosh*—even the willingness to morally and theoretically ratify treaties by which vast lands were “sold” by indigenous peoples to colonial powers—spring in part from sociocultural and spiritual differences that made indigenous perspectives on the land difficult for colonial cultures to understand (although one cannot discount the influence of avarice and acquisitiveness even where hints of cultural awareness were present).

Without yielding to the conceit that a full understanding of these cultural and spiritual differences in a universal legal framework is possible, and recognizing that modern expressions of indigenous beliefs, including beliefs about a distinctive connection to the land, are filtered through the legacy of colonial conquest and the exigencies of international legal discourse, it is nevertheless important to ask how the connection is described in indigenous terms by indigenous peoples. An effort has thus been made in preparing this Article to gather indigenous expressions of land, natural resource, and environmental connectedness through public sources (such as statements and publications of indigenous groups and advocates) and through academic literature (principally from anthropology and sociology).¹⁷⁵

The author collected more than fifty statements of indigenous groups or advocates, mostly available from public sources, which speak of and about indigenous connectedness to the land, resources, and environment.¹⁷⁶ Despite the caveats inherent in relying on such a collection—and recognizing that they are a very small publicly available sample of voices from a highly diverse groups of people numbering over 200 million—they affirm, in sum, the trend in legal instruments and institutions toward recognizing a distinctive connection. The land as sometimes described as an economic provider (a “pantry,” according to “the NI ‘aka’ pamux people”¹⁷⁷), which is understandable enough in western legal terms, and

174. See discussion *supra* Part II.B.

175. This methodology is highly constraining and in many ways problematic, but it is not presented as an empirical data set, or even a sampling of authentic or representative voices. Instead, it is a picture of the claims made publicly (or in some cases to interviewers) by indigenous peoples (individuals, groups, and organizations) and indigenous advocates. In the context of this Article, it is thought that the limitations and biases inherent in such an approach are outweighed by the advantage of seeing at least some of the claims made by indigenous peoples regarding the land in their own voices.

176. The author gratefully acknowledges research assistance in this endeavor from Mellisa Benitez-Cotera and Maria E. Brockmann Rojas.

177. Marcus Colchester, *Beyond “Participation”: Indigenous Peoples, Biological Diversity*

also as mother (the Huitchol;¹⁷⁸ the Wayuu;¹⁷⁹ the Cree¹⁸⁰), as sacred (the Suquamish;¹⁸¹ the Mapuche;¹⁸² the U'wa;¹⁸³ the Quechua¹⁸⁴), and as an object of adoration (the Sami).¹⁸⁵

The vast majority of statements collected—over ninety-five percent—refer to a value that can be characterized as “spiritual.” They refer to the spiritual value of some geographic feature (such as a mountain, lake, or stream) and the spiritual value of a specific species (such as a type of tree, bird, or fish). Examples include the Quechua in Bolivia, Ecuador and Peru (“Divinity . . . in nature is represented by the mountain,”)¹⁸⁶ and the Chobar and Lalitpur of Nepal (the “Gangaji has power . . . water and sand from this river is required while performing a weekly religious ritual [and] annual rites for the dead.”).¹⁸⁷ For the Maori of New Zealand, “the land is

Conservation and Protected Area Management, 47 UNASYLVA, No. 186 (1996) (quoting Ruby Dustan from Stein Valley, Alberta, Canada).

178. Guillermo De la Pena, *Social Citizenship, Ethnic Minority Demands, Human Rights and Neoliberal Paradoxes: A Case Study in Western Mexico*, in MULTICULTURALISM IN LATIN AMERICA: INDIGENOUS RIGHTS, DIVERSITY AND DEMOCRACY 129 (Rachel Sieder ed., 2002) (quoting Mauricio, a Huitchol Elder).

179. Bjorn Sletto, *Mapping the Gran Sabana*, AMERICAS MAGAZINE, NOV. 2005, at 6, 13 (quoting Noeli Pocaterra, President of the Commission for Indigenous People and Vice-President of the National Assembly).

180. Danny Beaton, *Healing and Protecting Our Sacred Mother Earth*, FIRST NATIONS DRUM, Summer 2002, available at <http://www.firstnationsdrum.com/Sum2002/CovHealingProtecting.htm> (quoting Annie Mouse).

181. The First Nations Environmental Network, <http://www.fnen.org/?q=node/35> (last visited Mar. 3, 2008) (quoting Chief Seattle); see also Henry A. Smith, *Chief Seattle's 1854 Oration*, SEATTLE SUNDAY STAR, Oct. 29, 1887, available at www.halcyon.com/arborhts/chiefsea.html; ALBERT FURTWANGLER, ANSWERING CHIEF SEATTLE 12–17 (1997). Seattle was of both Suquamish (paternal) and Duwamish (maternal) descent. *Id.* at 144. See also CARL WALDMAN, ATLAS OF THE NORTH AMERICAN INDIAN 157 (2000).

182. ANA MARIELLA BACIGALUPO, SHAMANS OF THE FOYE TREE; GENDER, POWER AND HEALING AMONG CHILEAN MAPUCHE 48–49 (2007).

183. Larry Mosqueda, *The Struggle of the Indigenous U'wa People against Oil Exploitation and for Life: Green Action in Columbia*, SYNTHESIS/REGENERATION, Winter 2002, available at <http://www.greens.org/s-r/27/27-26.html>; see also Lillian Aponte Miranda, *The Hybrid State—Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135, 136 (2007).

184. Shanna Langdon, *Peru's Yanacocha Gold Mine: The IFC's Midas Touch?*, CIEL, Sept. 2000, available at <http://www.ciel.org/Ifi/ifccaseperu.html>; see also GARCILASO DE LA VEGA, ROYAL COMMENTARIES OF THE INCAS AND GENERAL HISTORY OF PERU 32 (Harold Livermore, trans., 1966).

185. Elizabeth Ann Svec, *Metaphor and Metaphysics within Sami Culture*, <http://www.utexas.edu/courses/sami/dieda/anthro/meta.htm> (last visited Sept. 2, 2008); see also Emily Barclay, *The Sámi Traditional World View through Decline and Ascent*, <http://www.utexas.edu/courses/sami/dieda/anthro/worldview.htm> (last visited Mar. 3, 2008).

186. Evaristo Pfuture Consa, *La Cosmovisión Andina*, <http://www.quechuanetwork.org/sami.cfm?yanantin-yachay1&lang=s> (translation by author) (last visited Mar. 3, 2008).

187. Maili Karmacharya, *Everyone Placed the World's Burden on Gangaji: Gangaji Did Not Speak, Was Not Able to Say, "Don't"*, in WATER WISDOM: ORAL TESTIMONIES FROM NEPAL (Kunda Dixit & Dibya Subba eds., 2000).

the person, the person *is* the land.”¹⁸⁸ For the Kuna of Panama: “gold lives in [the heart]”;¹⁸⁹ the Gikuyu of Kenya: “trees, such as the mugumo, [are] sacred.”¹⁹⁰ The Zapotec of Meso-America see corn as part of the “fundamental autonomy,” and a legacy to their children,¹⁹¹ and for peoples of the Solomon Islands, “God lives on the trees [If you want to take medicine] you have to go and ask the tree first.”¹⁹²

The idea of living in harmony with nature is frequently expressed. The Caribbean Taino (who Las Casas reported bore the brunt of the initial Spanish conquest), the Guarani in South America (whose habitat has long preserved them from European influence) and the Ojibwas of the western United States were all among those associated with a desire for harmony.¹⁹³ Finally, the idea that natural elements (living or nonliving) themselves have spiritual qualities (roughly an animistic idea) was the most common of expressions. For the Wanniya-laeto of Sri Lanka, people coexist with the “creatures of the forest who share a complex moral universe of fellow visible and invisible beings in an environment where everything is alive.”¹⁹⁴ The Diné Navajo of the United States view mining coal as taking the “liver” of the earth.¹⁹⁵ For the Korekore of

188. TE AHUKARAMU CHARLES ROYAL, *INDIGENOUS WORLDVIEWS: A COMPARATIVE STUDY 27* (Te Wananga-o-Rawkawa 2002), available at <http://www.mkta.co.nz/assets/sabbaticalreport31.1.2002.pdf> (last visited Mar. 3, 2008).

189. Kuna Cacique, Statement at the Workshop on Modernization of Panama’s Mining Code (Oct. 2003) (notes on file with author).

190. Bosire Maragia, *The Indigenous Sustainability Paradox and the Quest for Sustainability in Post-Colonial Societies: Is Indigenous Knowledge All That is Needed?*, 18 *GEO. INT’L ENVTL. L. REV.* 197, 217 (2006).

191. Carmelo Ruiz Marrero, *Biodiversity in Danger: The Genetic Contamination of Mexican Maize*, AMERICAS PROGRAM: INTERHEMISPHERIC RESOURCE CENTER, June 2004, available at <http://www.americaspolicy.org/articles/2004/0406contam.html> (quoting Aldo Gonzales, Zapotec leader); see also John Ross, *Tales of Corn Wars: NAFTA Scientists Meet Representatives of Indigenous Groups Who Defend Their Corn*, NATIONAL CATHOLIC REPORTER, Apr. 16, 2004, available at <http://www.encyclopedia.com/printable.aspx?id=1G1:116076212>.

192. Ruth Lilongula, Statement, in *VOICES OF THE EARTH: CULTURAL AND SPIRITUAL VALUES OF BIODIVERSITY* (Darren Addison Posey ed., 2000), available at <http://www.unep.org/OurPlanet/imgversn/105/voices.html>.

193. With respect to the Taino, see Ivan F. Mendez-Bonilla, *Taino Art*, CUNY ONLINE NEWS, available at http://www.lehman.cuny.edu/vpadvance/artgallery/gallery/taino_treasures/mendez_essay_a.htm (last visited Mar. 3, 2008); with respect to the Guarani, see *Las Comunidades Guaranies Radicadas en la Provincia de Misiones*, available at http://www.cataratasdeliguazu.net/cultura_guarani.htm; with respect to the Ojibwa, see WUB-E-KE-NIEW, *WE HAVE THE RIGHT TO EXIST: A TRANSLATION OF ABORIGINAL INDIGENOUS THOUGHT 198–99* (1995), available at <http://fore.research.yale.edu/religion/indigenous/texts/index.html> (excerpt).

194. Wiveka Stegeborn, *Sri Lanka: Indigenous Peoples and Self-Determination—A Case Study of the Wanniya-laeto*, in *ASPIRING TO BE: THE TRIBAL/INDIGENOUS CONDITION* 316, 317 (B.K. Roy Burman & B.G. Verghese eds., 1998).

195. International Indian Treaty Council, Submission to Commission on Human Rights, 59th Sess. (Mar. 17–Apr. 25, 2003) (quoting Kee Watchman), available at <http://www.treatycouncil.org/>

Zimbabwe, “[b]efore we touch the land we go to the spirits. The spirits are linked to certain animals or trees.”¹⁹⁶

While there is no one way to classify the distinctive connection of indigenous people to the land and the environment, these examples provide a sense, at least, of the range of views. An indigenous “declaration” to the 2002 World Water Forum in Kyoto sought to summarize an indigenous position on water as a resource:

We . . . reaffirm our relationship to Mother Earth and responsibility to future generations to raise our voices in solidarity to speak for the protection of water. We were placed in a sacred manner on this earth, each in our own sacred and traditional lands and territories to care for all of creation and to care for water. . . . Our relationship with our lands, territories and water is the fundamental physical cultural and spiritual basis for our existence.¹⁹⁷

This declaration asserts a right of indigenous self-determination, including “the practice of our cultural and spiritual relationships with water, and the exercise of authority to govern, use, manage, regulate, recover, conserve, enhance and renew our water sources, without interference.”¹⁹⁸ It also reaffirms that the relationship encompasses both land and natural resources, and the environmental impact of human activity on both.

IV. APPLYING A DISTINCTIVE CONNECTION IN TRIBUNALS

While the distinctive connection claim asserted in human rights and environmental instruments has been echoed by tribunals, it is more often cited than applied in a way that one might call distinctive. Tribunals have acknowledged the unique connection between indigenous communities and the environment and admit that this connection gives rise to specific rights; however, an examination of cases suggests that they turn more often on the recognition of rights that do not rely on this connection.

section_21181212.htm.

196. Ralph Mogati, Statement, in VOICES OF THE EARTH, *supra* note 192.

197. Third World Water Forum, Kyoto, Japan, March 2003, *Indigenous Peoples Kyoto Water Declaration* ¶ 1, available at <http://www.indigenouswater.org/user/IPKyotoWaterDeclarationFINAL.pdf> (last visited Sept. 29, 2008).

198. *Id.* ¶ 11.

A. *Awas Tingni*

One of the most prominent assertions of indigenous environmental rights was a 2001 decision of the Inter-American Court of Human Rights in *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*.¹⁹⁹ The case involved Nicaragua's decision in 1996 to grant a thirty-year, 62,000-hectare timber concession to a subsidiary of a Korean company in an area overlapping Mayagna communal lands in one of the eastern autonomous regions of the country.²⁰⁰ The Mayagna community claimed that Nicaragua's failure to demarcate their communal lands and decision to grant the concession without the community's consent violated property rights guaranteed by Article 21 of the American Convention on Human Rights.²⁰¹ The court agreed, finding that the community's usufructuary property rights under the statute governing Nicaragua's Atlantic regions should have been respected despite the fact that communal lands had not been titled.²⁰²

In reaching its conclusion, the court detailed testimony about the Awas Tingni connection to the land. Anthropologist Theodore MacDonald testified:

The hills located in the territory of the Community are very important. The "spirits of the mountain," *jefes del monte*, which in Mayagna are called "*Asangpas Muigeni*", live in them, and it is they who control the animals throughout that region. . . . There is then a strong tie with the surroundings, with those sacred places, with the spirits that live within, and the brothers who are members of the Community. . . . To go hunting is, to a certain point, a spiritual act, and it has much to do with the territory with [sic] they utilize.²⁰³

Anthropologist and sociologist Rodolfo Stavenhagen²⁰⁴ testified more generally:

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

200. *Id.* ¶ 2, 6. The Autonomous Atlantic Region of the North (RAAN) and South (RAAS) comprise roughly the eastern third of the territory of Nicaragua along the Atlantic (eastern) side (though they are technically located on the Caribbean Sea) and are governed by special provisions of the Nicaraguan Constitution. *Id.* ¶ 12, 17.

201. *Id.* ¶ 25 (citing the American Convention on Human Rights).

202. *Id.* ¶ 153.

203. *Id.* ¶ 83(c) (emphasis added).

204. Dr. Stavenhagen is Professor of Anthropology at the Colegio de México. He served as the first U.N. Special Rapporteur on Human Rights and Indigenous Peoples. Rodolfo Stavenhagen,

[T]he relationship between indigenous peoples and the land is an essential tie which provides and maintains the cultural identity of those peoples. One must understand that the land is not a mere instrument of agricultural production, but part of a geographic and social, symbolic and religious space, with which the history and current dynamics of those peoples are linked.²⁰⁵

The court credited this testimony and acknowledged the connection between indigenous communities and the environment, finding that “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.”²⁰⁶

Yet the case was pleaded and fundamentally decided as a collective property rights claim—despite the spiritual significance of the land to the Mayagna community.²⁰⁷ The fundamental problem in *Awes Tingni* was the failure of the state to demarcate indigenous lands and the exploitation of this ambiguous status to grant concessions without consultation. Had title been granted (as the community had a right to expect under Nicaragua’s Constitution²⁰⁸), the control of their lands and exclusion of trespassers would have been an issue of basic property law. Even where the state retains residual resource rights, the exercise of an easement to access the resources (in this case, timber) is again a standard property law problem. The special connection of the Mayagna community to the land helped the court affirm a right of demarcation, and it emphasized the potential injuries to the community from unchecked logging activities, but the deeper implications of the *Awes Tingni*’s distinctive connection to the land and environment did not come into play. The potential injuries and trespass were corporeal; and while the fact of the *Awes Tingni* connection to the land helped give the community a basis to challenge the injuries, the unique nature of the connection was not critical to this result. Even the failure to consult can be seen to have violated rights and interests that are not unique to indigenous peoples and do not depend upon a special connection to the land.

Resumen Curricular, available at <http://www.colmex.mx/centros/ces/CV-Stavenhagen.htm> (last visited June 6, 2008).

205. *Awes Tingni*, 2001 Inter-Am. Ct. H.R. ¶ 83(d).

206. *Id.* ¶ 149.

207. See generally *Awes Tingni*, 2001 Inter-Am. Ct. H.R.

208. Constitution of Nicaragua, Arts. 89, 180; see also *Awes Tingni*, 2001 Inter-Am. Ct. H.R. ¶¶ 117–18.

B. Belize Maya

The Inter-American Commission on Human Rights faced the issue of development encroaching on traditional territories in a petition filed against the Belize government in 1998 by the ILRC and the Toledo Maya Cultural Council on behalf of the Mopan and Ke'kchi Maya of southern Belize (Belize Maya). The petition claimed the state had violated the American Declaration by granting logging and oil concessions to traditional Maya lands and "otherwise failing to adequately protect those lands."²⁰⁹ The state's failure to recognize and secure Maya territorial rights, it alleged, had "impacted negatively on the natural environment upon which the Maya people depend for subsistence, have jeopardized the Maya people and their culture, and threaten to cause further damage in the future."²¹⁰

The Belize Maya held land collectively according to a traditional tenure system which existed alongside "a system of 'reservations' established by the British colonial administration" that had continued following independence in 1981,²¹¹ though the petition claimed that "customary land tenure patterns of the Maya communities extend well beyond the reservation boundaries."²¹² Petitioners also asserted, and the Commission accepted, that petitioners were "descendants or relatives of Maya subgroups that have inhabited the territory at least as far back as the time of European exploration"²¹³

The Commission noted that "indigenous peoples enjoy a particular relationship with the lands and resources traditionally occupied and used by them . . . [as] integral components of [their] physical and cultural survival."²¹⁴ It also held that "for indigenous communities, relations to the land . . . [have] a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."²¹⁵

209. *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/11.122, doc. 5 rev. ¶ 2 (2004).

210. *Id.* ¶ 2.

211. *Id.* ¶ 25. Belize had been a British colony since the mid-nineteenth century. See P.A.B. THOMSON, *BELIZE A CONCISE HISTORY* (2004).

212. *Maya Indigenous Community*, 12.053 Inter-Am. C.H.R. ¶ 25.

213. *Id.* ¶ 92. The Commission found this claim of "long-standing ancestral connections" supported by "evidence from authorities who have studied the origins and history of the Maya-speaking people of the Toledo District" as well as admissions on the government's official website. *Id.* ¶¶ 92-93.

214. *Id.* ¶ 114.

215. *Id.*

The Commission quoted the Inter-American Court's holding in *Awás Tingni* regarding the "close ties of indigenous people with the land,"²¹⁶ emphasizing that indigenous property rights are not limited to "those property interests that are already recognized by states or that are defined by domestic law," but instead have "autonomous meaning in international human rights law."²¹⁷ This includes "that indigenous communal property that arises from and is grounded in indigenous custom and tradition" and requires "special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources."²¹⁸

The Commission concluded that the Mopan and Ke'kchi Maya people had "demonstrated a communal property right," and the state's failure to demarcate, title, and protect their territory violated Article XXIII of the American Declaration.²¹⁹ The logging and oil concessions had been granted without prior consultation²²⁰ and had "caused environmental damage."²²¹ The Commission concluded these failures not only violated Belize Maya property rights, but also amounted to racial discrimination²²² and thus violated Maya equal protection rights under Article II of the American Declaration.²²³ Again, as in *Awás Tingni*, the unique relationship to the land was important to the Commission and affirmed its conclusions that the Belize Maya's collective rights had been violated. But again, the decision extended only to claims of demarcation, title, and prior consultation—basic property rights available to nonindigenous peoples as well.

C. Yanomami

In late 1980, the Inter-American Commission on Human Rights considered a petition against Brazil alleging violations of Yanomami indigenous people's rights resulting from the construction of a highway through their traditional territory which had been built to facilitate access to mineral deposits discovered in the 1970s.²²⁴ The influx of "highway

216. *Id.* ¶ 116.

217. *Id.* ¶ 117.

218. *Id.*

219. *Id.* ¶ 135.

220. *Id.* ¶ 143.

221. *Id.* ¶¶ 147–48.

222. *Id.* ¶¶ 167–71.

223. *Id.* ¶ 171.

224. Yanomami Community v. Brazil, Case 7615, Inter-Am. C.H.R., Res. No. 12/85, Background ¶ 2(f) (1984–1985). The Commission noted that "[b]etween 10,000 and 12,000 Yanomami Indians live

construction workers, geologists, mining prospectors, and farm workers”²²⁵ was predictably negative for the Yanomami. “The massive penetration of outsiders,” the petition alleged, “had devastating physical and psychological consequences for the Indians; it has caused the break-up of their age-old social organization; it has introduced prostitution among the women, something that was unknown; and it has resulted in many deaths, caused by epidemics of influenza, tuberculosis, measles, venereal diseases, and others.”²²⁶

As a consequence, the Yanomami abandoned much of their territory and retreated further into the Amazon. The government responded with agricultural development projects and a proposed “Yanomami Indian Park” (which would have protected virtually all traditional lands).²²⁷ But the agricultural projects simply accelerated the loss of land and initiated a forced removal of Yanomami to agricultural communities where they could not practice their customs and traditions.²²⁸ The park project was halted by opposition from interests seeking to open the area to further development.²²⁹

The Commission took note of Brazilian constitutional and statutory guarantees of indigenous rights,²³⁰ and concluded that “the failure of the Government of Brazil to take timely and effective measures in behalf of the Yanomami Indians” resulted in the violation of their rights under the American Declaration of the Rights and Duties of Man.²³¹ While the state had retained subsurface mineral rights under the constitution,²³² access to minerals on indigenous lands was limited to “cases of great national interest, by federal public entities,” and had to be approved by the administrative agency established to protect indigenous interests, *Fundação Nacional do Índio* (FUNAI).²³³ The Commission found that

in the State of Amazonas and the Territory of Roraima, on the Brazilian border with Venezuela.” *Id.* Background ¶ 2(a).

225. *Id.* Considerations ¶ 10(a).

226. *Id.* Background ¶ 3(a).

227. *Id.* Background ¶ 2(j).

228. *Id.* Background ¶ 3(c).

229. *Id.* Background ¶ 3(f).

230. *See id.* Background ¶ 2(b) (citing CONSTITUIÇÃO FEDERAL [C.F.] amend. 1/69, art. 198); *id.* Background ¶ 2(c) (quoting *Estatuto do Índio*, No. 6000, de la de dezembro de 1973 (Braz.) art. 23).

231. *See id.* Resolves ¶ 1.

232. C.F. art. 168 (Braz.).

233. Indigenous peoples are considered “relatively incompetent” and thus under the “guardianship” of FUNAI under article 6 of the Brazilian Civil Code. FUNAI was created under the Ministry of Interior “for the defense, protection, and preservation of the interest and cultural heritage of the Indians and also to promote programs and projects related to their social and economic development.” *Yanomami*, 7615 Inter-Am. C.H.R. Background ¶ 2(e).

FUNAI had failed to exercise its fiduciary obligations.²³⁴ The Commission found violations of the right to life, liberty, and personal security; residence and movement; and preservation of health and well-being,²³⁵ finding the displacement had “all the negative consequences for their culture, traditions, and costumes.”²³⁶ The Commission did not, however, find a violation of Yanomami property rights, though it had been pleaded and it was clear that encroachment on traditional lands was at the heart of the injury to the Yanomami communities.²³⁷ The Commission also did not make specific reference to a distinctive connection to the land, but did note “that for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states.”²³⁸ The Commission also noted that the Organization of American States (OAS) had made “the preservation and strengthening of the cultural heritage” of ethnic groups and threats to their “cultural identity” a priority.²³⁹ Thus, while the 1982 decision did not specifically use the language that has since emerged regarding a distinctive connection—indeed, it did not rest its decision on property rights allegations—there is a sense that the unique cultural relationship of the Yanomami to their land is, in part, driving the Commission’s result. Yet the Commission did nothing to suggest that unique relationship created rights beyond those afforded by national law.

D. Lubicon Lake Band

In 1984, the U.N. Human Rights Committee received a communication from the Lubicon Lake Band (the Band), a Cree Indian band in Alberta, Canada, alleging that governmental decisions to allow development on their lands violated the Band’s right of self-determination for economic, social and cultural development, and the right not to be deprived of its own means of subsistence under the International Covenant on Civil and Political Rights (ICCPR).²⁴⁰ The Band is “a self-identified, relatively autonomous, socio-cultural and economic group” whose “members have

234. *Id.*

235. *Id.* Resolution ¶ 1.

236. *Id.* Considerations ¶ 2.

237. This may be because the Commission found that the government was already taking relevant steps to address property rights concerns through the Yanomami Park proposal. *Id.* Considerations ¶ 12.

238. *Id.* Considerations ¶ 8.

239. *Id.* Considerations ¶ 9.

240. *Lubicon Lake Band v. Canada*, U.N. Human Rights Committee [H.R.C.], Comm’n No. 167/1984, ¶ 1, U.N. Doc. A/45/40 (1990).

continuously inhabited, hunted, trapped and fished in a large area encompassing approximately 10,000 square kilometers in northern Alberta since time immemorial.”²⁴¹ It alleged that development activities threatened “the destruction of [its] environmental and economic base” and “would make it impossible for the Band to survive as a people for many more years.”²⁴² The Band’s “existence,” it asserted, was “seriously threatened by the oil and gas development that has been allowed to proceed unchecked on their traditional hunting grounds and in complete disregard for the human community inhabiting the area.”²⁴³ Though the Band’s initial communication concerned the environmental and cultural impact of oil and gas exploration, a later submission alleged Canada had leased “all but 25.4 square miles of the Band’s traditional lands for development, in conjunction with a pulp mill”²⁴⁴ The claim alleged Canada had violated the antidiscrimination provisions of ICCPR Article 2(1), failing to take into consideration “elements of a social, economic and property nature inherent in the Band’s indigenous community structure.”²⁴⁵

Although Canada claimed that domestic judicial remedies had not been exhausted, the Band contended that even a successful permanent injunction “would come too late” to “bring back the animals,” “restore the environment,” or undo destruction of Band members’ “traditional way of life” or damages to their “spiritual and cultural ties to the land.”²⁴⁶ Canada also initially objected that “the Lubicon Lake Band is not a people within the meaning of [A]rticle 1 of the Covenant,”²⁴⁷ and that the

241. *Id.* ¶ 2.2.

242. *Id.* ¶ 3.2.

243. *Id.* ¶ 12(a).

244. *Id.* ¶ 18.1

245. *Id.* ¶ 16.1. In addition to the Article 2 violations, the Band alleged violations of the Article 6 right to life, claiming the government’s actions had

created a situation which “led, indirectly if not directly, to the deaths of 21 persons and [is] threatening the lives of virtually every other member of the Lubicon community. Moreover, the ability of the community to [survive] is in serious doubt as the number of miscarriages and stillbirths has skyrocketed and the number of abnormal births . . . has gone from near zero to near 100 per cent.”

Id. ¶ 16.2 (alteration in original).

246. *Id.* ¶ 11.2.

247. *Id.* ¶ 6.1. The Lubicon Lake Band later complained that Canada had “fabricate[d]” a “Woodland Cree Band,” to assert a “competing claim to traditional Lubicon lands . . . in further violation of [A]rticles 1, 26 and 27 of the Covenant.” *Id.* ¶ 27.5. The Lubicon Lake Band alleged that the “Woodland Cree” was

a group of disparate individuals drawn together by Canada from a dozen different communities scattered across Alberta and British Columbia, who have no history as an organized aboriginal society and no relation as a group to the traditional territory of the

communication was made by an individual seeking to assert a collective right,²⁴⁸ but later conceded “that the Lubicon Lake Band has suffered a historical inequity and that they are entitled to a reserve and related entitlements.”²⁴⁹

The Human Rights Committee concluded that both “[h]istorical inequities . . . and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of [A]rticle 27 so long as they continue.”²⁵⁰ It found, however, that the government’s offer of a territorial reserve and other accommodations would, if accepted, enable the Band to “maintain its culture, control its way of life and achieve economic self-sufficiency,”²⁵¹ and that this was a sufficient remedy “within the meaning of [A]rticle 2 of the Covenant.”²⁵²

A separate opinion by Nisuke Ando conceded “[i]t is not impossible that a certain culture is closely linked to a particular way of life and that industrial exploration of natural resources may affect the Band’s traditional way of life, including hunting and fishing,” but objected to the idea that “the right to enjoy one’s own culture should not be understood to imply that the Band’s traditional way of life must be preserved intact at all costs.”²⁵³ Though Ando was concerned about the scope of cultural protection available, he obliquely articulated a connection between indigenous culture and the impact of development in a way that the Committee had not, by emphasizing the close link of certain cultures to a “particular way of life” connected to the environment. While the Committee found merely that the facts of the instant case manifested a violation of cultural rights,²⁵⁴ Ando’s challenge asks rather directly how one balances development interests within a dominant culture with the competing interests of indigenous peoples to defend their own way of life within that dominant culture.

Lubicon Lake Band [in an effort to] . . . undermine the traditional Lubicon society and to subvert Lubicon land rights.

Id. (alteration in original).

248. *Id.* ¶ 6.1. The government of Canada pointed out that the Lubicon Lake Band “comprises only one of 582 Indian bands in Canada and a small portion of a larger group of Cree Indians residing in northern Alberta. It is therefore the position of the Government of Canada that the Lubicon Lake Indians are not a ‘people.’” *Id.* ¶ 6.2.

249. *Id.* ¶ 24.1.

250. *Id.* ¶ 33.

251. *Id.* ¶ 24.1; *see also id.* ¶ 17.1.

252. *Id.* ¶ 24.1.

253. *Id.* app. I (original emphasis omitted).

254. In fact, the Committee seemed to be applying a fact-dependent test in assessing a possible Article 27 violation. *See id.* ¶ 13.4.

E. Ilmari Länsman

In 1992, Ilmari Länsman and other reindeer breeders of Sami ethnic origin, all members of the Muotkatunturi Herdsmen's Committee (Herdsmen), complained to the U.N. Human Rights Committee that a contract by Finland's Central Forestry Board to allow stone quarrying on the side of a mountain they considered sacred, and transportation of the stone directly through a "complex system of reindeer fences" and along a road through territory traditionally claimed by the Herdsmen, violated their rights under Article 27 of the ICCPR.²⁵⁵ While title to traditional Sami lands was disputed by Finland, there was no dispute that the activities would affect lands traditionally used by the Herdsmen. They asserted that the quarry site "is a sacred place of the old Sami religion,"²⁵⁶ and allowing quarrying and transporting, they alleged, would violate "their right to enjoy their own culture, which has traditionally been and remains essentially based on reindeer husbandry."²⁵⁷

Finland responded that national authorization had followed a locally-granted permit from the Angeli Municipal Board, and maintained that the Herdsmen and others in their community had been adequately consulted.²⁵⁸ The extent of environmental damage from the quarrying and transportation was also disputed.²⁵⁹ Finland conceded that "the concept of culture in the sense of [A]rticle 27 provides for a certain protection of the traditional means of livelihood for national minorities and can be deemed to cover livelihood and related conditions insofar as they are essential for the culture and necessary for its survival."²⁶⁰ It also acknowledged "the concept 'culture' in [A]rticle 27 covers reindeer herding as an 'essential component of the Sami culture'."²⁶¹ The state maintained, however, that planned quarrying activities would affect only a very limited part of the

255. *Länsman v. Finland*, U.N.H.R.C., Comm'n No. 511/1992, ¶ 2.3, U.N. Doc. CCPR/C/52/D/511/1992 (1994).

256. *Id.*

257. *Id.* ¶ 3.1. The Herdsmen also cited in support of their claim ILO No. 169 "concerning the rights of indigenous and tribal people in independent countries." *Id.* ¶ 3.2.

258. *Id.* ¶ 4.1. The state also raised procedural objections.

259. The Committee considered, for example, allegations that even "the marks and scars left by the provisional road allegedly will remain in the landscape for hundreds of years, because of extreme climatic conditions." *Id.* ¶ 5.3. The state countered that "possible harm to the environment remains minor;" and that "special attention was paid . . . to avoid disturbing reindeer husbandry . . ." *Id.* ¶ 7.7.

260. *Id.* ¶ 7.10.

261. *Id.* ¶ 7.3

land (about 2.5 acres) and thus would have “no significance on the bearing capacity of the pastures” of the Herdsmen.²⁶²

Finland argued that reindeer husbandry is protected under national law and that local officials paid “special attention” in granting their permit “to avoid disturbing reindeer husbandry in the area.”²⁶³ It also noted that the state’s contract, issued pursuant to the local permit, required environmental mitigation measures,²⁶⁴ and that the contract both assigned liability to the contractor for any significant environmental “or other” damage caused by quarrying activities and could be cancelled if “extraction of land resources has had unpredictable harmful environmental effects.”²⁶⁵ In addition to these protections, Finland asserted that the impact of the quarrying activities would not threaten “the survival and continued development of the cultural, religious and social identity” of the Sami, which is the central concern of Article 27.²⁶⁶ The Herdsmen, it argued, could “continue to practise reindeer husbandry and are not forced to abandon their lifestyle.”²⁶⁷

After weighing these competing claims, the Human Rights Committee found it undisputed that the Herdsmen are a minority under Article 27 with a right to enjoy their own culture,²⁶⁸ and that “reindeer husbandry is an essential element of their culture.”²⁶⁹ The Committee also found that the mountain “continues to have a spiritual significance relevant to [Sami] culture” and noted the Herdsmen’s concern “that the quality of slaughtered reindeer could be adversely affected by a disturbed environment.”²⁷⁰ The Committee nevertheless found no breach of Article 27 because it held that the impact of quarrying had been minimal and that the Herdsmen had been sufficiently consulted in the permitting and contracting processes conducted by local and national authorities.²⁷¹

262. *Id.* ¶ 7.6. The state suggested that the nature of the quarrying procedure would be only minimally disruptive and provided an opinion of the Environmental Office of the Lapland County Administrative Board that “only low pressure explosives are used to extract stone from the rock: ‘Extraction is carried out by means of sawing and wedging techniques . . . to keep the rock as whole as possible.’” *Id.* ¶ 7.7.

263. *Id.* ¶ 7.7

264. *Id.* ¶ 7.5.

265. *Id.* ¶ 7.3.

266. *Id.* ¶ 7.12.

267. *Id.* ¶ 7.13.

268. *Id.* ¶ 9.2.

269. *Id.*

270. *Id.* ¶ 9.3.

271. *Id.* ¶ 9.6.

Significantly, the Committee rejected Finland's claim of a "margin of appreciation"²⁷² where cultural rights are at issue under Article 27,²⁷³ relying instead on its findings that the scope of activity had been sufficiently disruptive to Sami culture and that the Herdsmen were afforded an opportunity to participate in the process.²⁷⁴ It nevertheless cautioned that future development must "be carried out in a way that the authors continue to benefit from reindeer husbandry" and noted that a significant expansion of mining activities in the Angeli area "may constitute a violation of the authors' rights under [A]rticle 27, in particular of their right to enjoy their own culture."²⁷⁵

Here, as in the Inter-American cases, we see the tribunal reciting claims of a special connection and still essentially falling back on traditional property claims—in this case, more in the nature of nuisance—and a right to prior consultation. The Committee had an opportunity to find that the unique nature of the Sami's relationship to the mountain and its herding practices called for special scrutiny or raised the prospect of a unique injury, but failed to do so.

V. A DISTINCTIVE CONNECTION DOCTRINE—BEYOND PROPERTY

It is perhaps ironic that the nature of indigenous peoples' relationship to the land—once used to deny sovereignty and to mask conquest as "discovery" in cases such as *M'Intosh*²⁷⁶—has, under the human rights regime, become a justification for protecting remaining descendants of the peoples dispossessed. The irony is compounded by the growing claim in recent anthropological literature that many indigenous peoples historically had far more complex relationships with the land as cultivators, engineers, and botanists than even sympathetic twentieth-century advocates may have imagined. The work of Professors William Balée, Darrell Posey, R. Brian Ferguson, and Leslie Sponsel, among others in the emerging field of historical ecology, challenges the idea of ecologically naïve or unsophisticated "pre-encounter" indigenous communities.²⁷⁷ What one

272. *Id.* ¶ 9.4.

273. *Id.*

274. *Id.* ¶ 9.5 (citing General Comment on Article 27 of the ICCPR (1994) ¶ 7); *id.* ¶ 9.6.

275. *Id.* ¶ 9.8.

276. *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823).

277. See generally *ADVANCES IN HISTORICAL ECOLOGY* (William Balée ed., 1998) and works produced therein: R. Brian Ferguson, *Whatever Happened to the Stone Age? Steel Tools and Yanomami Historical Ecology*, in *HISTORICAL ECOLOGY*, *supra*, at 287; Darrell A. Posey, *Diachronic Ecotones and Anthropogenic Landscapes in Amazonia: Contesting the Consciousness of Conservation*, in *HISTORICAL ECOLOGY*, *supra*, at 104; Leslie E. Sponsel, *The Historical Ecology of Thailand:*

legal scholar terms a tendency to “live lightly on the land,”²⁷⁸ is understood by these social science scholars who study past and present indigenous settlement and land use patterns as resulting from a complex interaction of culture, cosmology, and choice practiced for generations (as the *M’Intosh* Court might put it, “from time immemorial”²⁷⁹). While these scholars acknowledge ambiguities and do not claim to have a full understanding of the field, the evidence they have uncovered (often literally unearthed) certainly does not support a claim of *terra nullius* or *domicilium vacuum*.

But we are left with nation-states constructed on these ideas—or, as Professor Thornberry reminds us, constructed more often on assertions of right growing from conquest or from treaties written in the languages of those who harbored such ideas.²⁸⁰ The conceit of spiritual, moral, cultural, and technological superiority begat sovereign assertions—first in the countryside, and later the courtrooms—that lay at the foundation of many of the states which today frame and implement the international legal system. Yet that system seems willing to hand some measure of right back to the descendents of the dispossessed.²⁸¹

Some of the claims made in this process of what one might call “retrocession”—that indigenous peoples have a distinctive connection to the land—thus appear ironic in light of the historical context against which the legal protections of indigenous land rights are now being framed.²⁸² This argues for special attention to the claim of a distinctive connection

Increasing Thresholds of Human Environmental Impact from Prehistory to the Present, in HISTORICAL ECOLOGY, *supra*, at 376; see also RONALD NIEZEN, THE ORIGINS OF INDIGENISM: HUMAN RIGHTS AND THE POLITICS OF IDENTITY (2003).

278. Peter Manus, *Sovereignty, Self-Determination, and Environment-Based Cultures: The Emerging Voice of Indigenous Peoples in International Law*, 23 WIS. INT’L L.J. 553, 555 (2005). This thesis should not be confused with what some in the anthropological literature have criticized as a tendency to see indigenous peoples as “ecologically noble savages.” See, e.g., Allyn MacLean Stearman, *Revisiting the Myth of the Ecologically Noble Savage in Amazonia: Implications for Indigenous Land Rights*, 49 CULTURE & AGRICULTURE 2, 2–6 (1994).

279. *M’Intosh*, 21 U.S. at 30–33.

280. THORNBERRY, *supra* note 24.

281. See generally Adriana Fabra, *Indigenous Peoples, Environmental Degradation, and Human Rights: A Case Study*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 245 (Alan Boyle & Michael Anderson eds., 1996); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1996); Darlene M. Johnston, *Native Rights as Collective Rights: A Question of Group Self-Preservation*, in THE RIGHTS OF MINORITY CULTURES 179 (Will Kymlicka ed., 2006). This willingness, however, remains tenuous. Witness the objections of states which benefited from conquest and discovery doctrines to the terms of the 2007 U.N. Declaration, *supra* note 8.

282. The irony is that indigenous peoples’ unique relationship to the land was historically used to justify dispossession (see, for example, *M’Intosh*, 21 U.S. at 543 and *Mabo v. Queensland II* (1992) 175 C.L.R. 1 (Austl.)) and now it is being used to justify the recognition of land rights.

and particularly to a need to understand the connection in terms set out by indigenous peoples themselves, lest the international legal system find itself making yet another set of presumptions about distant or alien cultures that peoples and nation states come to regret in another 500 years. There is a danger of engaging in what anthropologists might call “essentializing” the relationship indigenous cultures have to the land for the sake of classifying and managing it doctrinally, and this danger should also be borne in mind.²⁸³

This is an argument for care in the further development and application of a distinctive connection doctrine, not an argument for rejecting it. The instruments and indigenous claims cited above affirm that there is something socially, culturally, and spiritually unique about how many indigenous communities understand and use their traditional lands. The acknowledgement of that relationship by institutions and tribunals has had a discernable impact on how tribunals decide indigenous land claims by providing a rationale for collective rights, for recognizing tenure where uses are not intensive or exploitive, and for giving indigenous communities a voice in development decision making.

The first important impact has been that the land connectedness of indigenous peoples has helped validate the assertion of collective property rights on behalf of indigenous communities. The ability to define boundaries, to live and make use of resources within those boundaries, and to exclude trespassers is a fundamental characteristic of property law. This

283. As used by anthropologists, the term has been defined as characterizing representations that “freez[e] and reify[] an identity in a way that hides the historical processes and politics within which it develops.” Jean E. Jackson & Kay B. Warren, *Indigenous Movements in Latin America, 1992–2004: Controversies, Ironies, New Directions*, 34 ANN. REV. ANTHROPOLOGY 549, 559 (2005). This presents problems for social scientists, because it can reduce intragroup diversity to idealized, homogenized images which confer political power (and thus, perhaps, legal rights) only so long as Indians’ political identities resonate with Western ideas and symbols. Beth A. Conklin & Laura R. Graham, *The Shifting Middle Ground: Amazonian Indians and Eco-Politics*, 97 AM. ANTHROPOLOGIST 4, 695, 706 (1995); see also J. Peter Brosius, *Analyses and Interventions: Anthropological Engagements with Environmentalism*, 40 CURRENT ANTHROPOLOGY 3 (1999). The danger of this phenomenon in law can be seen in the understanding of indigenous land relationships which helped justify the results in cases such as *M’Intosh*, 21 U.S. at 543, and *Mabo II*, 175 C.L.R. 1. Even where the essential characteristics are seen as positive and policy results are benign or constructive there remains a danger of viewing an authentic identity as limited or static. See, e.g., Alcida Rita Ramos, *Cutting Through State and Class: Sources and Strategies of Self-Representation in Latin America*, in INDIGENEOUS MOVEMENTS, SELF-REPRESENTATION, AND THE STATE IN LATIN AMERICA 251 (Kay B. Warren & Jean E. Jackson eds., 2002). Though a more positive understanding of indigenous land relationships is evident in the evolving recognition of a distinctive connection, this understanding should neither be used to negate the complex relationship of indigenous peoples with the land nor be constructed in a way that could limit, rather than confer, indigenous land and resource rights.

ability has been upheld for communities in cases such as *Awes Tingni*,²⁸⁴ *Yanomami*,²⁸⁵ and *Lubicon Lake Band*²⁸⁶ based at least in part on the tribunals' recognition of the special connection that these communities had to the land. Though not held in fee simple or under another title recognized in common law or civil law systems, the results were the same. Despite the lack of sovereignty, these communities were seen to have a property claim beyond the mere possessory rights once recognized in *M'Intosh*.²⁸⁷

The distinctive connection has also promoted respect for collective tenure in terms of a community's historical and cultural appropriate use. At one time, for example, theorists and courts would have rejected the idea that a group of 150 people living in a small collection of dwellings and hunting or gathering in an area covering 20,000 acres could claim any kind of right to the entire area. Even discounting ideas such as *terra nullius*, more persistent and time honored legal doctrines such as best use and adverse possession could undermine any such claim. Yet a respect for a distinctive indigenous connection provides a meaningful counterweight to these longstanding doctrines. Put simply, this is how the land is used by some indigenous peoples; the lack of fencing, grazing, cultivation, paper titles, or specific vigilance against trespass are deprived of legal consequence, or at least diminished in their effect. The Inter-American Commission held as much in *Belize Maya*.²⁸⁸ Respect for collective tenure, moreover, as an element of how an indigenous group owns or "holds" its land, minimizes intrusion into the community's decisions about resource use and allocation and assures a generational continuity that might otherwise be undermined.

Respect for a distinctive connection has also grounded the assertion of a right to participate in development decisions and in the benefits of development that occur on or influence indigenous lands. Even where indigenous communities lack an exclusive right to natural resources on the lands they have traditionally used, a respect for their unique relationship has provided a basis for requiring that they be consulted and participate meaningfully in development choices that may affect their interests. The

284. *Mayagna (Sumo) Awes Tingni, Community v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

285. *Yanomami Community v. Brazil*, Case 7615 Inter-Am. C.H.R., Res. No. 12/85 (1984-85).

286. *Lubicon Lake Band v. Canada*, U.N.H.R.C., Commc'n No. 167/1984, U.N. Doc. A/45/40 (1990).

287. *M'Intosh*, 21 U.S. at 543.

288. *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053 Inter-Am. C.H.R., Report No. 40/04, OEA/Ser. L/V/U.122, doc. 5 rev. 2 (2004).

result in *Awás Tingni*, for example, rested in large part on the fact that the government had failed to consult the community about an activity (logging) that would have an impact on the spiritual and cultural values it places on the land.²⁸⁹ Similarly, in *Ilmari Länsman*, though the U.N. Human Rights Committee rejected Sami Herdsmen opposition to quarrying activity on their traditional lands, it did so largely on the basis that community members *had been* consulted and the activity had been approved first at a local level in a town recognized as being largely of Sami origin.²⁹⁰ The Committee also noted that any further mining activity would require continuing consultation and would need to be carried out in a way that respected the Herdsmen's traditional reliance on reindeer husbandry.²⁹¹ The Committee expressed a similar concern in *Lubicon Lake Band* for resource development (in that case, oil and gas) to be conducted in a way that assured the ability of the Band to maintain its culture and way of life.²⁹²

While the recognition of a distinctive connection should not be seen as the lone basis for the result in any of these cases, it certainly gave weight to the tribunals' decisions and helped shape outcomes that responded to each indigenous community's unique circumstances and interests. These cases, and the range of instruments also discussed, can be seen as advancing a distinctive connection doctrine that has helped relate the nonphysical relationship of indigenous peoples to the land (with strong spiritual and cultural dimensions) to the very corporeal understandings of land rights as they have evolved through common law and civil law property regimes.

Yet the underlying foundations of the doctrine imply much more than a mere translation of these deeper cultural values to the language of Western property law. Claims of a distinctive connection—especially when viewed in the terms offered by indigenous peoples and their advocates—cannot be easily cabined within the constraints of property or even natural resources law.²⁹³ There is a dynamic aspect to indigenous land references that speaks more about ecological integrity than merely physical integrity. The manner

289. *Awás Tingni*, 2001 Inter-Am. Ct. H.R. No. 79.

290. *Länsman v. Finland*, U.N.H.R.C., Commc'n No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1952 (1994).

291. *Id.* ¶ 9.8.

292. *Lubicon Lake Band v. Canada*, U.N.H.R.C., Commc'n No. 167/1984, U.N. Doc. A/45/40 (1990).

293. This is not to say that traditional property and natural resources doctrine cannot address some indigenous concerns relating to land and the environment. But traditional doctrine has distinct and demonstrable limitations.

of land and natural resource (even landscape) dependence—its integration as a spiritual as well as physical provider—cannot count on doctrines of title and trespass alone for vindication. The references to harmony with nature so common in the indigenous expression of a land connectedness²⁹⁴ do not appear to be an artifact of popular Western discourse, but rather a dominant historical theme in indigenous land relationships.²⁹⁵

What does this say, then, about the distinctive connection doctrine? While it has served to substantiate collective indigenous land rights, tenurial relationships, and participatory rights, there are other legal theories and doctrines not reliant upon a unique relationship that can accomplish the same ends.²⁹⁶ More importantly, the distinctive connection is not by its terms limited to a physical claim. There is a sense that the doctrine, by bringing a focus to what is unique about indigenous land claims in the spiritual and cultural sense, could do more.

A. *Cultural and Spiritual Standing—Moiwana Village*

The Inter-American Court of Human Rights gave a hint at what a nonphysical land-related claim might look like in *Moiwana Village v. Suriname*.²⁹⁷ In that case, descendants of escaped African slaves who claimed a degree of autonomy over the lands their ancestors had occupied since the seventeenth and eighteenth centuries²⁹⁸ could not return to their village because the violent deaths of women, children and the elderly there during Suriname's civil war left them fearful and concerned over the spirits of the victims.²⁹⁹ Though not asking to be seen as indigenous, the

294. See discussion *supra* Part III.F.

295. See *supra* note 276.

296. Property rights are universally affirmed in human rights instruments, see e.g., Universal Declaration of Human Rights, art. 2, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), as are rights of participation, *id.* art. 27; the affirmation of collective rights does not depend on a cultural or spiritual tie to land. See, e.g., International Covenant on Civil and Political Rights, arts. 1–2, G.A. Res. 2200A, U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966) (the right of “all peoples” to self determination and to “freely dispose of their natural wealth and resources” is not limited to those with unique ties to the land).

297. 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005).

298. *Moiwana Village* was part of a larger community of the N'djuka Maroon peoples of Suriname. They are descendants of slaves who escaped to rainforest areas in the eastern part of Suriname's present national territory in the seventeenth and eighteenth centuries that had signed treaties with the state in 1760 and 1837 that established semi-autonomous regions with settled boundaries. *Id.* ¶ 86(1)-(4). “Although individual members of indigenous and tribal communities are considered natural persons by Suriname's Constitution, the State's legal framework does not recognize such communities as legal entities. . . . [N]ational legislation does not provide for collective property rights.” *Id.* ¶ 86(5).

299. *Id.* ¶ 86(43).

villagers have analogous claims to their own language, history, as well as cultural and religious traditions. The Court found that “a N’djuka community’s connection to its traditional land is of vital spiritual, cultural and material importance,”³⁰⁰ and credited expert testimony that, like indigenous communities, the N’djuka have an “all-encompassing relationship to their ancestral lands. They are inextricably tied to these lands.”³⁰¹ The court also recounted testimony that the N’djuka’s “inability to maintain their relationships with their ancestral lands and its sacred sites has deprived them of a fundamental aspect of their identity and sense of well being.”³⁰² The court concluded that the state’s failure to investigate the deaths in the village had perpetuated the dislocation of villagers,³⁰³ citing their testimony that “only when justice is accomplished in the case will they be able to appease the angry spirits of their deceased family members, purify their land, and return to permanent residence without apprehension of further hostilities.”³⁰⁴

The court ordered Suriname to investigate the villagers’ deaths; to recover their remains and facilitate proper burial; to “carry out a public ceremony” recognizing its responsibility; to issue an apology; and, to build a “memorial in a suitable public location.”³⁰⁵

In *Moiwana Village*, then, there is recognition of a unique relationship to ancestral lands substantiating rights and warranting relief that certainly exceeds the rights that might be recognized and relief that might be granted under common law and civil law property regimes. By extension, the injury to resources, species, and landscapes held sacred by indigenous peoples might be seen as similarly cognizable under a distinctive connection doctrine offering more culturally relevant protection to the land interests of indigenous peoples. Just as the N’djuka’s relationship to their land compelled the Inter-American Court to fashion relief appropriate to the nature of the relationship, the distinctive connection of indigenous peoples to their traditional lands should be protected where relevant, beyond rights of demarcation, title, and participation.

300. *Id.* ¶ 101.

301. *Id.* ¶ 132.

302. *Id.*

303. *Id.* ¶ 134.

304. *Id.* ¶ 86(43).

305. *Id.* ¶ 233.

B. Ecology as Culture

The application of a distinctive connection doctrine should include at a minimum some recognition that impacts on species or ecosystems important to indigenous peoples be measured (or at least comprehended) and minimized. The protection of biodiversity in this sense is not always limited to the policing of trespass on demarcated lands. It may include, for example, the protection of migratory species upon which indigenous peoples depend or the protection of habitat or landscapes central to indigenous culture or custom. It would certainly extend to activities with a transboundary impact, such as pollutant transport.³⁰⁶ It might also include giving indigenous communities standing to sue in cases where they are uniquely affected by a nuisance or another incident, the impact of which has cultural or spiritual implications.

C. Recent Cases in Point—Unheralded Cultural Claims

If environment (in its broadest sense, to include ecosystems, species, and landscapes) were fully appreciated as part of indigenous culture, then indigenous claims could be understood to extend beyond basic property rights such as title and excluding trespass. This would give indigenous communities standing to seek redress for environmental impacts that encroach upon cultural or spiritual interests without a physical trespass.³⁰⁷ For example, following the grounding of the Exxon Valdez off the coast of Alaska in 1989, Inuit communities were denied standing by the U.S. courts because the injury to their “subsistence way of life” was not deemed a compensable injury.³⁰⁸ The Ninth Circuit Court of Appeals found that “the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual and psychological benefits in pristine natural surroundings is shared by all Alaskans.”³⁰⁹ Application of a distinctive connection doctrine might have led to a different result. It would certainly oblige the court to address how Inuit traditions, and their

306. *See, e.g.*, Trail Smelter Arbitration (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (Perm. Ct. Arb. 1935).

307. This idea may sound relatively esoteric until one considers the example of regulatory takings jurisprudence in the U.S., which recognizes and compensates for the expropriation of economic, but non-physical property interests. *See, e.g.*, *Mugler v. Kansas*, 123 U.S. 623 (1887); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). While some might argue that economic interests differ from social and cultural concerns, international human rights law places the three in the same class.

308. *Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196, 1198 (9th Cir. 1996).

309. *Id.* (internal quotation marks omitted).

cultural and spiritual connection to the land, might be seen as distinct from the relationship of others.³¹⁰

A more recent case before the U.N. Committee for the Elimination of Racial Discrimination (CERD) also raises questions for which a distinctive connection doctrine could provide guidance. The case involves a longstanding dispute over the U.S. government's efforts to evict two Western Shoshone sisters, Carrie and Mary Dann, from rangeland that is part of a much larger area encompassing tens of millions of acres in western states which the Danns claimed their ancestors had used "from time immemorial."³¹¹ The United States asserted that aboriginal title to all Shoshone lands, including the disputed area, had long ago been "extinguished" through "gradual encroachment."³¹²

When the Inter-American Commission reviewed the case, it acknowledged, as it had before, "a particular connection between communities of indigenous peoples and the lands and resources that they have traditionally occupied and used,"³¹³ and found that the United States had failed to ensure the Danns' right to property "under conditions of equality."³¹⁴ The United States essentially ignored the Commission Report and acted instead to evict the Dann sisters from the disputed rangeland,³¹⁵ so they sought the intervention of the CERD.³¹⁶ In addition to addressing the Dann sisters' property rights claims, the CERD expressed specific concern over proposed surface mining near the Danns' ranch and a proposed nuclear waste repository approximately two hundred miles south of the ranch (on traditional Western Shoshone lands).³¹⁷ Though the United States responded to the CERD's concerns over the underlying property rights issues, it did not take up the questions about mining and

310. See also Günther Handl, *Indigenous Peoples' Subsistence Lifestyle as an Environmental Valuation Problem*, ENVIRONMENTAL DAMAGE IN INTERNATIONAL AND COMPARATIVE LAW: PROBLEMS OF DEFINITION AND VALUATION 85 (Michael Bowman & Alan Boyle eds., 2002).

311. *United States v. Dann*, 470 U.S. 39, 43 (1985).

312. *United States v. Dann*, 706 F.2d 919 (9th Cir. 1983), *rev'd on other grounds*, *Dann*, 470 U.S. 39.

313. *Mary and Carrie Dann v. United States*, Case 11,140, Inter-Am. C.H.R., Report No. 75/02 ¶ 125, 128 (2002) (citing *The Human Rights Situation of the Indigenous People in the Americas*, Inter-Am. C.H.R., OEA/Ser.L/V/II.108, doc. 62 21-25 (2000)).

314. *Dann*, 11.140 Inter-Am. C.H.R. No. 75/02 ¶ 172.

315. *Id.* ¶ 179; see also Amnesty Int'l USA, Report on Western Shoshone (2003), available at http://www.amnestyusa.org/justearth/indigenous_people/western_shoshone.html (last visited Aug. 31, 2007).

316. U.N. Comm. for the Elimination of Racial Discrimination [CERD], Early Warning and Urgent Action Procedure Decision 1(68), GE.06-41251 [hereinafter CERD Early Action Letter].

317. *Id.* ¶ 7(b).

nuclear waste.³¹⁸ These issues certainly raise broader environmental concerns that might affect the cultural and spiritual rights of the Dann sisters as well as other Western Shoshone, and it may be an area where a distinctive connection doctrine could be employed.

A distinctive connection doctrine might also provide a useful point of analysis in the more recent claim by the Circumpolar Inuit Conference regarding the impact of U.S. energy and climate policy on their ability to sustain, among other things, a traditional lifestyle. The case was filed in December 2005 with the Inter-American Commission on Human Rights, which decided the following year not to proceed with the matter.³¹⁹ The Commission issued no formal decision in the case, and expressed concern to the petitioners that it would be difficult to establish a causal link between U.S. greenhouse gas emissions and climate change as well as concern that the Commission has no jurisdiction over the many states contributing to the climate problem.³²⁰

While the Inuit petition alleges that U.S. climate policy may constitute a wide range of human rights violations, and makes reference to Inuit “close ties to the land and the environment,”³²¹ it does not develop the argument of a distinctive connection or address its implications for the impact of climate change on the Inuit. To the extent that the claim can be cast as a defense of Inuit cultural rights to property, shelter, and a broader range of economic, cultural, and spiritual interests, it may be easier to find that the United States has an obligation to work toward the progressive realization of Inuit rights through long-term policy decisions,³²² rather than finding that its contribution to greenhouse gases is distinguishable from a range of other factors and parties over whom the Commission has no jurisdiction. The nature of the Inuit relationship to land itself might give the petitioners’ standing to claim relief that others who are differently affected by climate change cannot seek. Certainly, their injury is distinct

318. U.S. DEP’T OF STATE, REPORT TO THE UN COMMITTEE FOR THE ELIMINATION OF RACIAL DISCRIMINATION, annex II (Aug. 31, 2007), available at http://www.state.gov/g/drl/rls/cerd_report/83406.htm.

319. Inuit Circumpolar Conference, Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005), available at http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf [hereinafter Inuit Petition]; June George, ICC Climate Change Petition Rejected, Nunatsiaq News (Dec. 15, 2006), available at http://www.nunatsiaq.com/archives/61215/news/nunavut/61215_02.html (last visited June 6, 2008).

320. Interview by author with participants in public hearing, March 2006.

321. Inuit Petition, *supra* note 319, at 72.

322. See, e.g., *South Africa v. Grootboom*, 2001(1) SA 46 (CC) (S. Afr.).

and disproportionate—not just because of *where* they live, but *how* they live. If their distinctive connection were clearly recognized as a cultural or spiritual right, the Commission might be persuaded, as the South African Constitutional Court in *Grootboom*, to find the state should work progressively toward a culturally-appropriate solution, regardless of myriad other factors that may be affecting the right.

These examples simply raise possible applications of a distinctive connection doctrine if it is seen as something more than merely a basis for sustaining core property rights. The language used by instruments, advocates, and tribunals would seem to provide a basis for these applications, if the connection is appreciated for what it is—a unique cultural and spiritual relationship to land and the environment.

VI. CONCLUSION

A distinctive connection doctrine can be plainly seen emerging from the human rights framework for the protection of indigenous peoples. It has helped justify the assertion of collective property rights by indigenous communities, led to greater respect for tenurial relationships common among indigenous communities, and secured a right to participate in decision making relating to indigenous lands. Yet the emergence of this doctrine both calls for caution and offers promise.

The caution is a concern that indigenous property and environmental rights may be seen to *depend on* the distinctive connection of indigenous peoples to the land rather than the assertion of basic and universal rights to which indigenous peoples are entitled regardless of their land connectedness. It is not necessarily harmful to recognize a distinctive connection while relying on traditional property and antidiscrimination doctrine, and it seems clear that the unique connection of indigenous peoples to land and the environment has helped secure those traditional rights which were historically denied. But the doctrines should not be conflated, and tribunals should clarify that indigenous land rights are fundamentally based on universal principles and universally applicable legal principles.

The promise is that the distinctive connection might be more effectively deployed where unique attributes of indigenous peoples are particularly relevant to address ecological harms and assert environmental rights. Where traditions and beliefs of indigenous communities make them particularly vulnerable to the environmental consequences of governmental policy and development, the doctrine might serve to overcome the hesitance of tribunals to consider indigenous assertions of

right and offer standing to indigenous communities to challenge injuries that affect their unique connection to the land, resources, and environment.³²³

Thus, while the distinctive connection doctrine has helped to advance indigenous rights of title, tenure, and participation, it may also offer a means of addressing environmental impacts bound up with indigenous communities' relationship to the land and environment. This would give rise to a property right beyond title and the exclusion of a trespasser—one that protects the deeper ecological values which appear to be inherent in this distinctive connection.

323. It may be fair to ask not only how this doctrine might give voice to unasserted indigenous environmental claims, but also what implications it may have for peoples and communities not seen as indigenous. While this article documents repeated assertions of a unique land connection on behalf of indigenous peoples (indeed, for many this has become a discourse about identity), it invites the question of whether a distinctive connection analysis could be made for other communities with deeply rooted relationships to the land or natural resources. This is not to diminish the understanding apparently reached by the international community—that indigenous peoples have such a relationship—but merely to ask whether this understanding might be extended to those who are demonstrably similarly situated. Certainly, the Inter-American Court of Human Rights did not hesitate to recognize the spiritual connection of inhabitants of Moiwana Village though they were descendants of escaped slaves and not earlier arrivals. Even the *Awes Tingni* court set aside allegations that the claimants in that case were relatively recent arrivals (hundreds rather than thousands of years) to the land they sought to defend. The question of a distinctive connection is one of substance, not label. While it is beyond the scope of this Article to explore this broader theme, it may well warrant future investigation.