6 Indigenous land rights

Introduction

It was not until the latter part of the twentieth century that efforts were made to seriously consider land claims of indigenous peoples and to work towards their resolution. During the 1996 Commission Drafting Group, a representative of the indigenous communities of the Pacific expressed the general position of indigenous peoples:

First of all, it must be legally accepted that we are the first settlers, first dwellers or proprietors of our land. Second, we are a collective group who were imposed upon by uninvited external forces who disrupted the normal march of our history.¹

For some indigenous communities, land rights are the central claim in their struggle for more protection. Largely, this is because of their special relationship with the land on which they live, a relationship confirmed by the UN Human Rights Committee,² the UN Special Rapporteur on Indigenous Issues³ and ILO Convention No. 169.⁴ As indigenous peoples have explained:

The land is the basis for the creation stories, for religion, spirituality, art and culture. It is also the basis for relationships between people and with earlier and future generations. The loss of land, or damage to land, can cause immense hardship to indigenous people.⁵

Land was indigenous peoples’ sacred mother, life giver and the source of their survival, and therefore [land rights] were the heart and soul of the draft.⁶

Land rights often have ramifications for the physical survival of the group. These communities are amongst the poorest in the world and control over their lands alleviates many of the financial problems they face and, consequently, contributes to the elimination of social
problems. Burger believes that ‘unless indigenous peoples can reassert their right to control their own development and future and win back sufficient lands and resources, there can be no real progress in their standards of living’.7 The importance of recognising indigenous land rights also underlies claims for equality and non-discrimination. Many states have taken measures that provide lesser protection to indigenous land rights than to the rest of the population. The UN Committee on the Elimination of All Forms of Racial Discrimination has repeatedly highlighted such cases.

Unfortunately, the differences between indigenous and national land systems and the negative financial consequences indigenous land rights can have for states and transnational corporations have resulted in their strong opposition to such recognition. This chapter explores the main issues relevant to indigenous land claims and identifies the existing contours of international law on the matter. International bodies have been very reluctant to establish clear standards on property rights, therefore such rights enjoy rather vague and general protection. Both ILO Conventions include specific and strong protection for indigenous land rights, as demonstrated in the analysis earlier in this book. The ILO monitoring bodies have confirmed and even broadened such protection, also seen earlier. In order to complete the picture this chapter looks at the position of the other United Nations bodies and states’ domestic practice. It attempts to highlight trends concerning indigenous land rights. Domestic practice contributes to the interpretation of international law norms. An analysis of that practice is therefore helpful.

**Legal basis for indigenous land claims**

It is widely argued that land rights form part of indigenous peoples’ right to self-determination.8 Certainly, they themselves pursue their land rights on the basis of their right to self-determination. Although there is no consensus, of all the various aspects maximalists integrate into the right of self-determination in addition to the internal and external ones, the economic aspect is the most accepted. Whether it is attached to the right of self-determination per se9 or is perceived as part of internal self-determination,10 economic self-determination appears essential to indigenous peoples as the main legal basis for: permanent sovereignty over their lands; the exercise of their traditional activities and indigenous practices for sustainable development; the enjoyment
of the natural resources of the lands they live in; and the sharing of the benefits of such resources.\textsuperscript{11}

There is quite a solid legal basis for accepting an economic side to the right of self-determination. The main justification is offered in Article 1 of the International Covenants. Paragraph 1 establishes the right of peoples to develop their own economic status, while paragraph 2 reads:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Also, Article 47 of the International Covenant on Civil and Political Rights (ICCPR) and Article 25 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) include a common statement which reads:

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilise freely their natural wealth and resources.

However, even though important economic rights are proclaimed in the above articles, no explicit link is established in the text between these economic aspects and the right to self-determination. Neither does General Assembly Resolution 1803 (XVII) of 14 December 1962 on Permanent Sovereignty over Natural Resources, that refers to ‘the right of peoples and nations to permanent sovereignty over their natural resources’,\textsuperscript{12} make such a link. Moreover, in \textit{Nauru v. Australia},\textsuperscript{13} Nauru argued that the exploitation of certain phosphate lands in Nauru constituted a violation, among others, of the international standards generally recognised as applicable to the implementation of the \textit{principle} of self-determination and of the obligation ‘to respect the right of the Nauruan people to permanent sovereignty over their natural wealth and resources’. In other words, the Human Rights Committee linked the issues in question with the \textit{principle} of self-determination rather than the \textit{right} to self-determination. Consequently, it can be argued that claims related to natural wealth resources and in general to economic development do not fall within the right to self-determination, but within the right to development. It can be further argued that Common Article 1.2 of the International Covenants does not refer to an economic aspect of the right to self-determination, but simply to the right of development; so do Articles 47 of ICCPR and Article 25 of ICESCR.
The right of development was first proclaimed in the (1986) Declaration on the Right to Development as ‘an alienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised’. Its establishment as a human right faced strong opposition by some states; it took seven years until a consensus on the right of development as a human right was reached in 1993 at the UN World Conference on Human Rights. The Vienna Declaration and Programme of Action reaffirmed the right as a ‘universal and inalienable right and an integral part of fundamental human rights’.

Unfortunately, the text of the Declaration on the Right to Development is quite blurred about the contours of the right to self-determination and those of the right to development. In the Preamble, development is defined as:

a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

Following this definition, any claims on control, benefits and participation to natural wealth and resources, such as land, would fall within the right to development. However, Article 1.2. reads:

The human right to development also implies the full realisation of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Thus, Article 1.2 suggests that claims relating to natural wealth and resources fall within the scope of the right to self-determination. The confusion about the scope of the right to development and the right to self-determination does not stop here. Although several states rightly link Article 1 of both International Covenants with economic development and natural resources, they are not unanimous as to whether this is part of the right to self-determination or the right to development. For example, in its report to the Human Rights Committee, Peru stated on Article 1 that self-determination gives the state the right to decide on its political and economic regime; but the Philippines pronounced Article 1 of both International Covenants as ‘the right to
self-determination and free disposal of natural wealth and resources’, implying the existence of two separate rights. Indigenous representatives have also used the right to self-determination and the right to development interchangeably as a basis for claims concerning ownership of their lands or resources. Following from the analysis earlier on the meaning of the right of self-determination, a clear distinction between the right to self-determination, restricted to political power, and the right to development, encompassing economic claims, could prove helpful.

Admittedly, there are valid objections to the position described above; the first one relates to the language of the texts. Article 1.1 of the International Covenants proclaims that self-determination is the right of peoples ‘to pursue their political, economic, social and cultural development’ (emphasis added). Yet, as argued earlier, the emphasis of the text must be on the pursuance rather than the actual development. The pursuance takes place through political means (right to self-determination), whereas the development per se belongs to the economic, social etc. spheres (right to development). Otherwise, if the language of Article 1 is taken literally, then the right to self-determination covers all aspects of development, in which case the right of peoples to development becomes completely void. Still, a sceptic would insist that the position of paragraph 1.2 in the middle of an article on self-determination is another reminder that this paragraph refers to an aspect of the right to self-determination. However, it has not been denied that the right to self-determination and the right to development are very closely related, even though, following my position, they do have distinct scopes. The sceptic would also put forward the endorsement of the economic aspect to the right of self-determination by UN bodies. For example, in its General Comment 12, the Human Rights Committee maintained that paragraph 2 of Article 1 ‘affirms a particular aspect of the economic content of the right to self-determination’. Again, it can be argued that the opinions of the Human Rights Committee are not binding; nevertheless, they do have weight as interpretations by the authorised monitoring bodies of particular treaties.

Even if problems with the existing instruments are resolved, a more fundamental objection has been raised. Knopp warns that a rejection of economic self-determination disregards important feminist and Third World critiques on the interdependence of political and economic self-determination. The ‘liberal’ revolutions in Eastern Europe, and their focus on internal political self-determination, and the parallel disappearance of the communist bloc removed from the international
agenda the idea of economic independence of populations of states, an essential element for real democracy. Chinkin and Wright have criticised the focus on political self-determination arguing that ‘food, shelter, clean water, a healthy environment, and a stable existence must be the first priorities in how we define or “determine” the self in both individuals and groups’. Does the rejection of economic self-determination take away the legal basis of such claims? I think not. Just as with cultural claims, claims for food, shelter, clean water, a stable environment, economic independence and control are not diminished by my position; on the contrary, they are strengthened because they find a more appropriate direct basis. The right to development, the right to a clean environment and the right to food are all third generation rights that are linked to the principle of self-determination, as all rights are, but have still been recognised for their own value in the international human rights system. These rights better accommodate such claims.

Still, one can counter-argue that all the above-mentioned human rights present important weaknesses and therefore cannot be used as fruitful bases for claims. Their meaning is still contested; their beneficiaries are vague; and so are their duty bearers. In particular, the right to development has very similar weaknesses to the right to self-determination. Minimalists view the right to development as an economic right, whereas maximalists give it an economic, social, political and cultural dimension. Its beneficiaries are also not clear, especially those aspects related to natural resources and even more so to sub-surface resources; and its duty bearers are very elusive, especially since states are eager to focus on ‘international assistance and co-operation’, rather than on their individual responsibilities. Consequently, by transferring economic claims from the scope of self-determination to the scope of the right to development are we just transferring the problem instead of solving it? I think not. Contrary to self-determination, claims for economic development and benefit sharing are at the heart of the right to development. Essentially, the validity of the claims is strengthened; it is their basis that changes. In other words, the right to development provides a solid basis for such claims, and such claims present the perfect opportunity for the advancement of the right to development.

In any case, indigenous peoples have not yet been recognised as beneficiaries, neither of the right to self-determination, nor the right to development in international law. In addition, land rights per se have not been the focus of international human rights. For indigenous peoples, most helpful are undoubtedly ILO Conventions No. 107 and...
No. 169. Unfortunately, few states are parties to these two instruments. Nevertheless, the Conventions have acted as an important political tool for the development of indigenous rights. Property rights are notably absent from both the International Covenants. Other universal instruments only protect the individual right to property; consequently, they are not helpful to indigenous claims.

The United Nations bodies have sidestepped the difficulties that self-determination and development pose and have covered the legal gap in the protection of land rights by applying general human rights, especially provisions on the prohibition of discrimination, minorities’ right to their culture and the right to property. Indeed, although not addressing directly collective land rights, the UN’s ICCPR and ICESCR and the UN International Convention for the Elimination of All Forms of Racial Discrimination contain important provisions relevant to indigenous land rights. For example, the Human Rights Committee has repeatedly been using Article 27 of the ICCPR to deal with violations of indigenous land rights.27 The Committee on the Elimination of All Forms of Racial Discrimination (CERD) has also encouraged states to ‘recognise and protect the right of indigenous peoples to own, develop, control and use their communal lands, territories and resources; the Committee has urged states where indigenous have been deprived of their lands and territories without their free and informed consent, to take steps to return these lands and territories.28 States are also bound by the standards set in the UN Declaration on Minorities. Apart from human rights instruments, protection to indigenous land rights is also provided by instruments on environment and development, especially the Convention on Biological Diversity, the Rio Declaration and Agenda 21.

**Important issues related to indigenous land claims**

*Collective ownership*

**Doctrine of terra nullius**

The doctrine of *terra nullius*, a legal construction used by states in the past to legitimize colonisation and dispossess indigenous peoples from their lands has now been rejected both at the national and the international level. *Terra nullius* was allowed by international law, as affirmed by the decision of the Permanent Court of Justice in the (1933) *Eastern Greenland* case.29 In 1975, the International Court of Justice ruled in the *Western Sahara* case30 that the doctrine of *terra nullius* had been
erroneously and invalidly applied, because indigenous tribes inhabited the territory at the time of arrival of new settlers. More recently, in Mabo v. Queensland (No. 2) the Australian High Court discussed the legal and other effects of the doctrine of terra nullius. The case concerned a claim by members of the Meriam people to rights in land in the Murray islands in the Torres Strait, off the Queensland coast. The Australian High Court held by a majority that when the Imperial Crown acquired sovereignty in 1879 over the islands, the land rights of indigenous peoples survived the change of sovereignty and were not extinguished. The Court also rejected the view that the Aboriginal peoples were so low in the scale of social organisation that they did not possess rights and interests in land. The Mabo decision has had a tremendous impact on the Australian society and has been a landmark case for the recognition of indigenous rights all over the world.

Non-recognition of ownership

Currently, some states do not recognise ownership to any individual or group within the state. In Vietnam, for example, the 1988 Land Law established that land is the property of the entire people and is subject to exclusive administration by the state. A leasehold system has been in operation since 1986 and indigenous individuals, as all other citizens, can inherit, transfer, sell, rent or sublet lands. In such cases, where indigenous peoples are not discriminated against by other sections of the populations, although their rights are restricted, international law is of limited help. An instrument that could be of particular use is the Universal Declaration on Human Rights, which establishes the right of everyone ‘to own property alone as well as in association with others’ and the right not to be arbitrarily deprived of one’s property. The provision recognises the right to property in both its individual and its collective form. Unfortunately, the protection of Article 17 is qualified, as it protects only from arbitrary deprivation of property. This is, according to Lucas, deprivation without any reasonable cause or justification imposed by the mere exercise of power, without giving those affected the right to be heard and to have their interests considered. Most deprivations of indigenous lands, including non-respect of past treaties between indigenous nations and settlers and the application of terra nullius, fall within this category. However, the term ‘arbitrarily’ does not include a guarantee against taxation, naturalisation or the seizure of land. This is a weakness of the Declaration, however more serious is its lack of any of route redress.
Indigenous peoples could also use the (1948) Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). The Convention includes in the definition of genocide the deliberate infliction on a group of ‘conditions of life calculated to bring about its physical destruction in whole or in part’. Prohibition of indigenous land ownership severely harms the demographic and social situation of these communities and raises fears for their survival. Yet, the Convention sets as an intrinsic element of genocide the ‘intent to destroy’; it would be very difficult to prove that restrictions of indigenous land rights actually aim at the destruction of indigenous groups. As mentioned earlier, the draft Declaration establishes the ‘aim or effect’ rather than the intent to destroy indigenous communities as the main criterion in defining genocide.38

Strong legal ammunition for indigenous peoples is provided by ILO Convention No. 107. Article 11 recognises the right to ownership, ‘collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy’. Even stronger is ILO Convention No. 169. Article 14 recognizes ‘the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy’.39 Article 13 of the Convention provides for respect for the ‘special importance . . . of [indigenous peoples’] relationship with the lands and territories . . . and in particular the collective aspects of this relationship’. The article encapsulates a powerful argument on indigenous land ownership: ownership of their lands must be established irrespective of the land rights of other persons in the state, because of this special bond between indigenous peoples and their lands. Non-establishment of land ownership would violate indigenous cultural rights.

Recognition of individual ownership

Article 13 of ILO Convention No. 169 does not just require ownership, but collective ownership. This could prove very useful for indigenous peoples in states where only individual ownership is allowed. In Thailand, for example, individual ownership is protected and indigenous peoples cannot always acquire even this title because of legal restrictions and lack of citizenship. Population increase, expansion of commercial farming, plantations and migration of lowland Thais into the northern provinces have made problems related to indigenous land acute.40 Lack of collective ownership dilutes the control indigenous communities have over their lands. As the ILO noted in a 1998
representation,\(^{41}\) when lands held collectively by indigenous and tribal peoples are divided and assigned to individuals, the exercise of indigenous rights tends to be weakened and, in general, they ultimately lose all or most of their lands.\(^{42}\)

Non-establishment of collective indigenous ownership also contravenes Article 27 of the ICCPR and the right of minorities to exercise their cultures. On numerous occasions, the Human Rights Committee has included indigenous land rights in the right to a culture.\(^{44}\) Its jurisprudence provides important support for indigenous land rights. However, in 2000, the Committee qualified its protection of indigenous land rights: in *Diergaardt et al. v. Namibia* the Committee suggested that a long link between the land and indigenous peoples is not adequate; the special link has to be ‘the result of a relationship that would have given rise to a distinctive culture’.\(^{44}\) The Inter-American Court on Human Rights has recently joined the United Nations in supporting collective indigenous rights. In *Awas Tingni*,\(^{45}\) the Court ruled in favour of collective indigenous rights. In its judgment, the Court found that the right of property includes the collective property of indigenous peoples, even if this property has not been formally recognised by domestic law.\(^{46}\)

**Native title**

In common law countries, recognition of collective land rights often takes place through the legal construction of native title. Native (or aboriginal) title is essentially ‘the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes’.\(^{47}\) Exclusive use and occupancy of land from time immemorial gives rise to native title, a title that is good against all but the Sovereign. In Australia, the *Mabo (No. 2)* case ruled that Aboriginal peoples and Torres Strait islanders who live in a traditional society may possess native title to land that has not been alienated or appropriated by the Crown for its own use.\(^{48}\) The Canadian Supreme Court also affirmed in *Delgamuukw v. The Queen* (1997)\(^{49}\) that native title is a legal interest in the land itself and can compete with other types of proprietary interest.\(^{50}\) The form of the title depends on the type of traditional conduct of the Aboriginal group claiming it: an indigenous group that has been living on a certain territory ever since that group first occupied it has the right to continue to live on it. An indigenous group that has been using an area to hunt has the right to continue to do so, but cannot claim full ownership of this specific area. Native title can exist in specific lands, where it has not been extinguished by an act of government, in vacant or unallocated...
Crown land, in forests, beaches, national parks, public reserves, in some types of pastoral leases, in land held by government agencies and land held in trust for Aboriginal communities and any other public or Crown lands. Native title may also exist in inland or offshore waters, such as oceans, seas, lakes, rivers and other waters that are not privately owned. Lokan highlights the positive aspects of the native title:

By defining native title rights primarily at the level of the community, native title doctrine reinforces the community’s identity. At a practical level, it further provides an incentive for the community to remain cohesive, since members who leave the community may lose their ability to enjoy the rights and benefits that are associated with membership. This is a marked departure from the individual basis of common law property rights in most other contexts.

Still, there are some important limitations to the right: native title cannot prevail over other individuals’ valid rights, including ownership of a property in the land, a pastoral lease or a mining license; neither does it prevail in areas where individuals enjoy exclusive possession of the land, freehold ownership – essentially, most houses in cities and towns and most farms – and residential, commercial and certain other types of leases. Also native title does not prevail over legislation and does not prevail in cases where the public has the right to access places such as parks, recreation reserves and beaches; it is not recognised where there are schools, hospitals and roads.

Moreover, states have the power to ‘extinguish’ land rights and titles of indigenous peoples without their consent. National legal systems have developed a set of guidelines about when and under which circumstances extinguishment can occur. In Sparrow, the Court held that legislation that restricts native rights is allowed, so long as the restriction is justified and pursues an objective which is ‘compelling and substantial’, constitutional and ‘absolutely necessary to accomplish the required limitation’. According to the Court, while the conservation and management of fisheries constitutes a valid objective, ‘public interest’ is so vague that it does not provide meaningful guidance and so broad that it is unattainable as a test for justifying limitations on constitutional rights. However, Delgamuukw expanded the legislative objectives that allow indigenous title to be infringed; according to the Court they included:

…the development of agriculture, forestry, mining and hydro-electric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support these aims.
Such a long list of grounds for restriction of indigenous land rights falls below the international standards, which insist that limitations on human rights must be interpreted and applied restrictively. The United Nations Committee on Human Rights has identified the extinguishment of indigenous land rights as a violation of indigenous rights. In its 1999 report, the Committee recommended to Canada that ‘the practice of extinguishing inherent aboriginal rights be abandoned, as it is incompatible with Article 1 of the Covenant’. In 2006, the same Committee noted that alternative policies to extinguishment of indigenous rights also amount to violation of indigenous rights. Another way that certain states use to limit indigenous land rights is the doctrine of plenary power, namely the unlimited power of states to control or regulate the use of indigenous lands, without regard to constitutional limits on governmental power, which would otherwise be applicable. In 2006, the Human Rights Committee asked the United States whether such a principle set forth in US practice complies with Articles 1 and 27 of the ICCPR. In this manner, the Committee clearly indicated its dissatisfaction with the application of such doctrine.

Indeed, the whole concept of native title raises issues of discrimination against indigenous peoples. If the title is inferior to other land rights recognised for the rest of the population, the state has to justify the difference of treatment on the basis of necessity and for legitimate purposes. Article 5 of the International Convention for the Elimination of All Forms of Racial Discrimination clearly establishes non-discrimination concerning ‘the right to own property alone as well as in association with others’; the Convention prohibits discrimination both in law and in fact. In its Advisory Opinion on Minority Schools in Albania, the International Court of Justice noted that ‘equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations’. UN Special Rapporteur Daes has also stressed that the concept of native title ‘is itself discriminatory in that it provides only defective, vulnerable and inferior legal status for indigenous land and resource ownership’.

CERD has repeatedly raised issues of discrimination in the relevant Australian legislation. After the Mabo decision, the (1993) Native Title Act attempted to find the balance between indigenous land rights and third party interests. After consultations with indigenous leaders, the act allowed validation of prior land dealings, a discriminatory measure for indigenous peoples, but provided two measures for indigenous
recovery of their land rights: the freehold standard, which required native title to be treated in the same way as freehold title; and the right to negotiate about certain land use in the future. Unfortunately, both the freehold standard and the right to negotiate were restricted in the (1998) Native Title Amendment Act. Also, the 1998 Act expanded the extinguishment of native title to privately owned land (including family homes or freehold farms), residential, commercial and certain other leases and in areas where the government has built roads or other public works.69 CERD has been highly critical of the 1998 Act and has issued no less than three decisions condemning it.70 According to the committee, the Australian native title is a discriminatory legal arrangement, since other land rights are better protected against interference and forced alienation.71 All is not bleak though: other states have recently expanded their protection of native title; for example, recent Malaysian case law has confirmed that native title prevails over other interests.72

Problems of proof

Problems of proof of indigenous ownership often occur in disputes over indigenous land rights. The passage of time can also increase the differences of view between indigenous peoples and states. The problem of the Sámi land rights in Finland has been ongoing for a while. After initiating several studies, the state insists that lands claimed by Saami are public lands belonging to the state. Finland has recently stated:

From a legal perspective, it would be inappropriate to have the question of the titles of the Sámi to the land resolved by means of instituting court proceedings. The outcome of the proceedings could involve uncertainties relating e.g. to questions of evidence. Instead, adequate historical research based on archives could provide a sound basis for political decision-making.73

Indeed, courts often face problems in judging on the existence of a legal title. Differences in values between indigenous and non-indigenous peoples lead to a chasm between indigenous land systems and current national policies. Problems arise in transforming the link between the people and the land into a legal right. Most legal systems require a registered title to prove ownership of land. It is often assumed that land not formally registered belongs to the state; such assumptions have widely affected indigenous land rights in Latin America.74 Indigenous have to demonstrate possession and intent, usually established by acts showing a sufficient assertion of physical dominion over the land,
ranging from construction of fences, cultivation of crops or grazing of animals, in general acts that demonstrate substantial maintenance or connection between them and the land. However, indigenous communities do not generally use their lands for such activities. Thus, the existing standards presuppose value-based judgments about the ‘efficient use’ of the land and other conditions to which indigenous peoples can prove vulnerable: the legal title can be refused to indigenous communities on the ground that they have not invested sufficient labour or derived sufficient production to show assertion of physical dominion.75

Fortunately, the Court noted in Mabo (No. 2) that the nature and incidents of native title must be ascertained as a matter of fact by reference to the laws and customs of the indigenous inhabitants who possess that title.76 This means that possession must be considered according to indigenous interpretations. National courts in other parts of the world have also reached similar conclusions. In the United States, it was held that the legal question concerning occupancy of the land would be solved ‘in accordance with the way of life, customs and usages of [the indigenous people] who are its users and occupiers’.77 In Canada, the majority found in Delgamuukw that occupancy sufficient to support aboriginal title should be based on both ‘the physical occupation of the land in question’ and ‘the pattern of land holdings in Aboriginal law’.78 In establishing occupation, the court will take into consideration the group size, manner of life, the material resources that are utilised by technology and the character of the land claimed.79 Many Latin American states have designed measures that take into account indigenous customary norms in administrative and legal proceedings dealing with land rights.80

Moreover, in Delgamuukw the Court asked for exclusive occupancy. Proof of exclusion of others from the land would be useful, including through war, own laws (such as trespass laws), and recognition of the boundaries of indigenous land by neighboring groups. A joint title between two nations has also been confirmed as possible.81 In Delgamuukw, the Court further accepted the use of indigenous oral histories as proof of historical facts and ruled that ‘this kind of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents’. This constitutes an important victory for indigenous peoples.82

National courts have also asked for continued occupation of the land prior to the assertion of the occupants. Delgamuukw ruled that
occupation includes physical presence on the land and must be proved to the confines of the territories. This ruling fails to address the problem of indigenous peoples that have been removed from their traditional areas. If the Dulgamuukw ruling prevails and physical occupation is necessary to prove native title, groups that have been removed would lose their claims even for compensation. This would be quite unfair, especially since they may still be very close to the territory that was taken away from them. The situation in Australia is similar. Although Toohey J questioned the criterion of current physical presence in Mabo (No. 2), Australian courts have been demanding high levels of proof of continuous occupation, to the extent that many Australian aborigines cannot obtain legal title.

All these conditions in national laws and courts should always be in accordance with standards of international law. For example, Article 13 of ILO Convention No. 169 does not require continuous actual presence in the territory in question. CERD has highlighted the situation and asked Australia to acknowledge the customs and traditions of indigenous peoples in this respect. More generally, conditions of exclusivity and continuity must not discriminate against indigenous peoples, either directly or indirectly either in law or in practice; such are the requirements of the Convention against Racial Discrimination.

Indeed, there is a growing trend to adapt the rules of evidence and requirements of proof to indigenous perceptions. This suggests that the courts are attempting to take into account the cultural identity of indigenous communities and beginning to show some willingness to consider indigenous perceptions of land ownership and occupation.

Demarcation, a formal process to formally identify locations and boundaries of indigenous lands and to physically mark such boundaries on the ground, can be very helpful in issues of proof. In 1988, the Preparatory Meeting of Indigenous Organisations noted the importance of demarcation:

In most instances, the territories of indigenous peoples are not clearly identified or demarcated within the national legal system of States. This situation perpetuates uncertainty and facilitates States governments and other third parties to infringe upon the territorial rights of indigenous peoples.

Demarcation is encouraged by international law. Article 14 (2) of ILO Convention No. 169 urges governments to ‘take steps as necessary to identify the lands which the peoples concerned traditionally occupy’. The importance of demarcation has been noted repeatedly by
the Inter-American Commission on Human Rights in its 1997 Report on Brazil\textsuperscript{86} and the Inter-American Court of Human Rights in the \textit{Awas Tingni v. Nicaragua}\textsuperscript{87} and most recently, the \textit{Moiwana Village} case, where the Court ordered Suriname to delimitate and demarcate the traditional territories of an indigenous group.\textsuperscript{88} Recently, CERD has also commented on Venezuela’s efforts to demarcate indigenous lands, as in the promulgation of the Indigenous Peoples Habitat and Lands, Demarcation and Protection Act.\textsuperscript{89} The Human Rights Committee has recently commented on the slow pace of demarcation of indigenous lands in Brazil as well as the forced evictions of indigenous populations from their land and the lack of legal remedies to reverse these evictions and compensate the victimised populations for the loss of their residence and subsistence.\textsuperscript{90} Also, the draft Declaration urges states to take measures to identify indigenous lands (Article 27).

Non-implementation of strong legislation

Finally, some States recognise collective ownership, through native title or otherwise, but do not follow up these proclamations with a strong system of implementation. In 1997, the Philippines introduced the Indigenous Peoples Rights Act drafted on the basis of ILO Convention No. 169. The Act provides indigenous peoples with a wide range of rights over ancestral domains and ancestral rights, including ownership over their lands and resources. The Act has been a major breakthrough for the protection of indigenous peoples, but the government has not allocated funds for its implementation and has even adopted subsequent policies that have contradicted it.\textsuperscript{91} A similar fate has met the 2001 Cambodian Land Law; in the spirit of ILO Convention No. 169, Article 26 of the law proclaims that ownership of indigenous lands is recognised by the state as collective ownership; this right includes all components of individual ownership. Although the law is very important, it has not been implemented yet. Similar weaknesses in the implementation of the relevant legislation exist in the Russian Federation.\textsuperscript{92} In 2004, the Committee on Economic, Social and Cultural Rights blamed the lack of implementation of strong communal indigenous land rights in Ecuador for its negative effects on indigenous health and the equilibrium of the ecosystem.\textsuperscript{93}

\textbf{Rights of consultation and participation}

The right of indigenous peoples to negotiate and participate in decision making is of paramount importance, as it is linked to fundamental
principles of law, such as democracy, constitutionalism and the rule of law, and the protection of sub-national groups. Rights of consultation and participation touch upon the internal aspect of the right to self-determination and go beyond mere voting, as the right of every citizen to take part in the conduct of public affairs must be realised on a basis of equality and in circumstances in which persons ‘are able to develop and express their identities as members of different communities within larger societies’. Although groups do not have an unconditional right to choose the modalities of their participation in the conduct of the public affairs, the Human Rights Committee has emphasized in its General Comment 23(50) the importance of effective participation of members of minorities in decisions that affect them, as has the UN Minority Declaration. The Human Rights Committee has noted that ‘indigenous populations should have the opportunity to participate in decision-making in matters that concern them’ and has positively commented on examples of devolution concerning indigenous communities. Lack of participation is a violation of Article 5(c) of the International Convention against All Forms of Racial Discrimination. In its General Recommendation XXIII (1997), CERD stressed the importance of ensuring that ‘members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent’. The Committee called on states to ‘recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources’. Standards of participation and consultation and comments by international bodies on this matter are also applicable to decisions related to land rights.

Earlier, we saw how the CEACR of the ILO has focused on issues of indigenous participation and consultation related to land rights. The United Nations bodies have also repeatedly highlighted such issues. Recently, CERD indicated that mere participation of indigenous peoples is not adequate. In the Concluding Observations on the 2005 Nigeria Report, CERD criticised states for lack of meaningful consultation with indigenous peoples about the effects of oil production activities in their areas. This was the essence of the CERD concerns about the Australian Native Title Amendment Act 1998. The Committee had warned against the restriction of the right of indigenous title holders to negotiate non-indigenous land uses and in particular the level of negotiations between the government and indigenous communities before
the adoption of the Act. The Australian government replied that further negotiations with indigenous peoples were not deemed appropriate for reasons of parity in the treatment of indigenous and pastoralists. The government also noted that indigenous peoples have the same participatory rights as the rest of the population. The reply of the government ignores the obligation of the state to take positive measures to ensure that discrimination against racial groups does not occur in law and in practice. CERD issued a further decision, Decision 2 (55), reaffirming its earlier decision. In its Concluding Observations on Australia’s report, the Committee reiterated in 2000:

its recommendation that the States party ensure effective participation by indigenous communities in decisions affecting their land rights, as required under article 5(c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of ensuring the ‘informed consent’ of indigenous peoples.

The view of CERD is in agreement with ILO Convention No. 169 and its requirement that governments consult indigenous populations ‘through appropriate procedures and in particular through their representative institutions’ for matters that affect them; Convention No. 169 also recognises the right of indigenous peoples to decide their own priorities and to exercise control over their development ‘as far as possible’. The draft Declaration also includes indigenous rights of participation and consultation with particular reference to land rights. The Inter-American system has also stressed the importance of consultation with and participation of indigenous people in land issues that affect them in the Awas Tingni case. In 1998, the Inter-American Commission of Human Rights found that Nicaragua had violated Awas Tingni rights to property by granting a concession to a company to carry out road construction work and logging exploitation without the consent of the Awas Tingni community. Subsequent failure by the government to resolve the situation led to a 2001 decision of the Inter-American Court of Human Rights that confirmed the violation of land rights, including the right of the Awas Tingni indigenous peoples to participation and consultation. Other international bodies that have spoken in favour of indigenous participation in land rights include the 1992 United Nations Conference on Environment and Development (UNCED); the European Community; and several international agencies working in sectors such as hydropower, forestry and conservation.
Do international standards go so far as to require that indigenous peoples consent in matters related to the lands they live in? A 2005 legal commentary notes that ‘the principle of free, prior informed consent is acknowledged in several international human rights law instruments’ and argues that such a right ‘is grounded in and is a function of indigenous peoples’ inherent and prior rights to freely determine their political status, freely pursue their economic, social and cultural development and freely dispose of their natural wealth and resources – a complex of inextricably related and interdependent rights encapsulated in the right to self-determination, to their lands, territories and resources’. Indeed, Article 7 of the ILO Convention No. 169 recognises indigenous peoples’ right ‘to decide their own priorities for the process of development’ and ‘to exercise control, to the extent possible, over their own economic, social and cultural development’. The ‘to the extent possible’ weakens the provision. The Convention clearly requires consent of indigenous peoples for relocation (Article 16). Both the United Nations draft Declaration on the rights of indigenous peoples and the Inter-American Declaration on Indigenous Rights go further and ask for prior and informed consent before relocation and development projects. United Nations bodies have also gradually started referring to the requirement of consent, rather than consultation. In its General Recommendation CERD called upon states to ensure that ‘no decisions directly relating to their rights and interests are taken without their informed consent’. The Committee on Economic, Social and Cultural Rights has also recently asked for the consent of indigenous peoples in matters of resource exploitation. In 2005, the Inter-American Court on Human Rights also asked for the consent of indigenous peoples in demarcating their territories. Although other international bodies have acknowledged the need for prior informed consent by indigenous peoples and several such national laws have been adopted in the Philippines, New Zealand and Colombia, it may be too far-reaching to suggest that prior and informed consent is required in all matters affecting indigenous land rights. Such consent, however, gradually seems to emerge in relation to development projects directly affecting indigenous peoples and is already a standard – albeit with exceptions – concerning the relocation of indigenous peoples.

Even if current standards fall short of requiring indigenous consent in all matters that relate to their land rights, mere consultation is not adequate. Consultation not in good faith or without intending to address the concerns of the indigenous community falls below the
existing standards. The duty to consult entails more than mere information sharing, but can take several forms, including discussions or meetings with local leaders and individuals or with local organisations or communities, establishment of local advisory boards, indigenous membership on protected area management boards, informed involvement in development of management plans, active participation in development of management plans or local authorisation of protected area establishment, management plans, policies, and regulations. It may also include: exchanges of information and opinions related to specific proposals; development and negotiation of consultation protocols; site visits to explain the nature of the proposals; and the undertaking of traditional use studies. Effective consultations will involve entire communities rather than special groups within the indigenous group. National policies concerning formal consultation institutions and procedures for indigenous participation have to show flexibility and willingness to adjust to local cultural and political conditions.

Rights of use, management and resources

Claims of indigenous peoples for the use and management of the lands they live in have a similar legal basis to indigenous land ownership. The Human Rights Committee has proclaimed that violation of the indigenous right to engage in traditional economic activities amounts to a violation of their right to enjoy their culture. While the regulation of economic activity is normally a matter for state, the Committee has repeated that if the activity in question is ‘an essential element in the culture of an ethnic community’, there is a violation of Article 27 of the ICCPR. The Committee has also suggested that when it comes to traditional activities, equal rights to indigenous and non-indigenous persons may have adverse consequences for the traditional activities of the former; the traditional rights of indigenous peoples must have priority. This was affirmed in the Committee’s criticism in their 2005 comments on Thailand’s (1992) Master Plan on Community Development, Environment and Narcotic Crop Control in Highland Areas and its negative impact on indigenous peoples’ livelihood and way of life. This demonstrates how reluctant the Committee is to accept restrictions on indigenous traditional activities, even for a legitimate reason. In 2000, the Committee had noted that:

in many areas native title rights and interests remain unresolved [and] in order to secure the rights of its indigenous population under article 27 . . .
necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands . . . [S]ecuring continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, [are rights] that must be protected under article 27 . . . 127

The Committee has also demonstrated interest in the Sámi traditional means of subsistence in Finland – in particular reindeer breeding – and has asked whether the divisions of lands in private and public endanger their traditional culture, way of life, and hence their identity.128 The UN Committee on Economic, Social and Cultural Rights has also urged Norway to ensure that the Finnmark Act gives due regard to the rights of the Sámi people to participate in the management and control of natural resources in the county of Finnmark.129

Article 14(1) of ILO Convention No. 169 follows the same line as the Human Rights Committee. It urges states to take measures to safeguard indigenous rights to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular reference is made to the situation of nomadic peoples and shifting cultivators. The draft Declaration includes even wider protection of indigenous rights to pursue traditional activities.130

The ways in which traditional economic activities are exercised do not have to remain old-fashioned; the Human Rights Committee has clarified that within the scope of Article 27, traditional economic developments can be adapted to modern developments. McGoldrick has reflected on the omission of the Committee to refer to the margin of appreciation of the states concerning Article 27; he has noted that ‘any reference to the doctrine of ‘margin of appreciation’ in the Committee’s jurisprudence remains conspicuous by its absence’.131 In the Selbu case,132 the Norwegian Supreme Court held that when considering whether the conditions for establishing a right to reindeer herding in a particular area based on immemorial usage are met, one has to take into account the special conditions for Sámi reindeer herding, including the nomadic lifestyle and the lack of visible signs of activity due to their traditional way of life. Prior to this judgment it had been difficult for people engaged in reindeer herding to obtain rights in cases where there was competing use of the land in question. The Selbu case is considered to be a milestone and will be an important source of law in similar cases.133

Contrary to Norwegian jurisprudence, Canadian jurisprudence is more cautious. Although Canadian courts have recognised the indigenous
right to use land for traditional activities, 134 Van der Peet established that the activity in question must satisfy the ‘distinctive culture test’, i.e. be integral to the pre-contact indigenous culture of the indigenous community. 135 Lokan maintains that the test attempts to find the dividing line between matters of such significance to indigenous peoples that they should be within the zone of privilege where laws of general application do not intrude, and those matters where the normal sovereignty of the States is undiluted. 136

Eisenberg has rightly criticised the test. 137 Apart from its ethnocentric focus, 138 the distinctive culture test sets the pole higher than international law standards: no international body requires such a strong link between the indigenous culture during the time before the settlers arrived and today, and no instrument has established the time of contact with the newcomers as a landmark for indigenous rights. In Diergaardt, the Human Rights Committee asked for proof that the link between indigenous and their land was ‘the result of a relationship that would have given rise to a distinctive culture’; 139 this test does not go as far as the ‘distinctive culture test’.

Unfortunately, neglect of international standards on the protection of indigenous traditional activities is not uncommon. Indigenous peoples often face severe restrictions in exercising their traditional activities, especially if the lands they live in have rich natural resources. 140 States repeatedly use the argument of economic development and alleged necessity to restrict indigenous rights. For example, in 2002, in his reply to human rights concerns of the Human Rights Committee the representative of Vietnam said that:

The human rights obligations under the Covenant were universal, but they existed alongside the collective right to self-determination and the right to determine a country’s process of development. 141

The question whether indigenous peoples can claim rights over the natural resources of the lands they live in is not a resolved issue in international law. The draft Declaration on Indigenous Rights recognises the right of indigenous peoples to their lands, territories and resources (Article 26.1) and their right to ‘own, use, develop, and control the resources that they possess’ (Article 26.2). It also expects indigenous consent for the ‘development, utilisation or exploitation of their resources’ (Article 32). The use of natural resources continues to be one of the most controversial issues in international law, mainly because of the
pivotal economic repercussions.\textsuperscript{142} Common Article 1(2) of both the International Covenants recognises the right of \textit{peoples} to freely dispose of their natural wealth and resources’ and not to ‘be deprived of [their] own means of subsistence’, while Article 47 of the ICCPR gives \textit{peoples} the right ‘to enjoy and utilise fully and freely their natural wealth and resources’. As international law does not clarify who ‘a people’ is, there is disagreement between indigenous peoples and states on whether indigenous are the beneficiaries of these articles. The Human Rights Committee has indicated that indigenous peoples fall within the scope of Articles 1(2) and 47: in its comments on reports on Canada, Mexico and Australia, the Committee has dealt with the right to natural resources of indigenous peoples calling upon their right to self-determination, as enshrined in Article 1 of the International Covenants.\textsuperscript{143} Traditionally though, in cases concerning the negative effects of multinational companies on indigenous rights, the Committee has sidestepped the controversial issue of indigenous rights to natural resources and has used the ‘safer’ right to traditional activities and the right of minorities to a culture. In \textit{Ominayak v. Canada},\textsuperscript{144} the Committee found that a Canadian Government lease over Indian land that was to be used for commercial timber activities would violate Article 27 because it would destroy the traditional life of the Lubicon Lake Band. Although no violation was found in \textit{Länsman v. Finland},\textsuperscript{145} the Committee warned that any future mining activities on a large scale ‘may constitute a violation of the authors’ right under Article 27, in particular of their right to enjoy their culture’. Making a shift, in \textit{Hopu v. France}\textsuperscript{146} the Committee used the right to family and privacy, as they could not use Article 27 of the ICCPR;\textsuperscript{147} the Committee held that a construction of a hotel located on indigenous ancestral grounds would violate the right to family and privacy, because it would destroy the owners’ traditional burial grounds, which can play an important role in a person’s identity.\textsuperscript{148}

ILO Convention No. 107 is not very clear on the matter of natural resources; however, ILO Convention No. 169 is as helpful as it is realistic on the matter. Article 15 of ILO Convention No. 169 recognises that governments often retain some of the natural resources for their own exclusive ownership, but provides indigenous peoples with rights ‘to the natural resources pertaining to their lands. These rights include the right of these peoples to participate in the use, management and conservation of these resources’. Paragraph 2 notes that even when states own mineral resources, consultations before permitting exploitation or even exploration must take place. Thus, whilst recognising the
principle of state sovereignty over resources, the provision also notes the need for prior consultation with indigenous peoples. In a 1999 case against Bolivia, the ILO Governing Body held that states must undertake to ensure that the indigenous communities concerned are consulted promptly and adequately on the extent and implications of exploration and exploitation activities, whether these are mining, petroleum or forestry activities.\textsuperscript{149}

The ILO Governing Body has suggested that environmental, cultural, social and spiritual impact studies, conducted jointly with indigenous peoples,\textsuperscript{150} and appropriate consultations with indigenous peoples should take place before any exploration and exploitation of natural resources in areas traditionally occupied by them.\textsuperscript{151} The Committee of Experts of the ILO has also commented in several of its observations on projects that had negative impacts on indigenous peoples.\textsuperscript{152} The approach of the ILO Convention is in line with the United Nations Declaration on Development. Article 2 (3) of the Declaration establishes states’ right and duty to formulate development policies aiming at the development of the whole population and all individuals ‘on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom’. The Commission on Human Rights has in its Resolution 2000/5 reaffirmed the importance of the right to development for individuals and peoples alike. A number of international monetary organisations have recently been paying attention to the effects of their policies on indigenous rights. After years of criticism, the World Bank adopted Operational Directive 4.20, designed to condition Bank projects to ensure borrower government adherence to indigenous standards.\textsuperscript{153} In 1998, the Asian Development Bank also adopted a similar policy on indigenous peoples.\textsuperscript{154}

Even though indigenous rights currently form part of the debate on development projects, such projects continue to take place without consideration of their effect on indigenous peoples. Contrary to pronouncements by states, such projects also often have catastrophic effects on the whole population of states, putting in question the ‘wider good’ on which they are justified. Colchester et al. note:

contrary to the expectations of those who have favoured land markets as an engine for ‘development’, there is widespread evidence that land and resource mobilisation has actually increased poverty, landlessness and environmental damage in indigenous areas.\textsuperscript{155}
Nevertheless, environmental degradation is still used by states to curtail indigenous rights, rather than development projects. For example, the practice of indigenous shifting cultivation is seen as unacceptable as being environmentally destructive; therefore, indigenous peoples are pushed to engage in fixed cultivation.\textsuperscript{156} The representatives of Vietnam stated in CERD Committee in August 2001:

Unfortunately the mountain peoples employed traditional cultivation methods and burned the forests, thereby causing major environmental disasters in the form of floods affecting millions of people living downstream along the Mekong river. The Government was therefore endeavouring to persuade ethnic groups to adopt a settled method of cultivation, even though the latter would require large-scale investment from the Government so as to ensure adequate water supplies for rice-growing.\textsuperscript{157}

Such forms of ‘persuasion’ go against the protection of ‘customary use of biological resources in accordance with traditional cultural practices’ in the Convention on Biological Diversity (Article 10(c)). The provision requires recognition of indigenous control over and use of natural resources within the context of respect for indigenous self-determination and self-government.\textsuperscript{158} Also, paragraph 22 of the 1992 Declaration on Environment and Development (Rio Declaration) maintains:

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

Human Rights bodies have specifically addressed the issue of environmental degradation in relation to indigenous peoples. In \textit{Lubicon Lake Band} and in \textit{Länsman}, the Human Rights Committee affirmed that the environment forms part of the traditional way of life and culture of indigenous peoples and must be protected as such. Spiliopoulou has concluded that even though the protection of the environment is not part of Article 27 of the ICCPR, ‘the application of Article 27 is highly relevant for the environmental protection of considerable areas in many countries’. Other bodies have also commented on the issue. The Committee on Social, Economic and Cultural Rights has noted that ‘the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem’.\textsuperscript{159} CERD has also expressed its deep concern ‘about the adverse
effects on the environment of ethnic communities through large-scale exploitation of natural resources in the Delta Region and other River States, in particular, the Ogoni areas’.160

Removal and relocation

In several states, indigenous peoples are removed from their territories.161 States’ justifications for forced relocations vary from economic reasons to environmental reasons, natural disasters or internal strife. In some cases, indigenous peoples are the victims of the interests of multinational corporations; they are often the ones that pay the price of economic progress made without their consent or even consultation with them.

Forced removals have tremendous consequences for the physical and cultural survival of indigenous groups and make them ‘internally displaced persons’. Internally displaced persons have been defined as:

Persons that have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country.162

There is no international instrument that explicitly protects against relocation.163 The right not to be internally displaced falls within the freedom of movement and the right to choose one’s residence, as guaranteed in Article 13 (1) of the Universal Declaration, Article 12 (1) of the ICCPR,164 Article VIII of the American Declaration, Article 22 (1) of the American Convention, Article 2 (1) of the Fourth Protocol to the European Convention and Article 12 (1) of the African Charter. Although movement and residence are subject to restrictions ‘which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized . . .’;165 such limitation clauses must be interpreted restrictively. It is doubtful whether the development of the economic life of states constitutes an adequate reason to cause such negative changes to a group’s life.

In the last decade, United Nations bodies have renewed their efforts to address internal displacement. The UN Security Council has ‘affirmed the right of refugees and displaced persons to return to their homes’.166 The Vienna Declaration and Programme of Action of the World Conference on Human Rights167 called upon States to give special attention and find lasting solutions to the problems of internally
displaced persons. In 1994, the Sub-Commission on Prevention of Discrimination and Protection of Minorities expressed its concern over the growing number of internally displaced persons and affirmed ‘the right of persons to remain in peace in their own homes, on their own lands and in their own countries’. Several regional initiatives in Latin America, Europe and Africa have also expressed similar concerns. In 1998, the UN Guiding Principles on Internal Displacement affirmed that every person has the right to be protected against arbitrary displacement from his place of habitual residence and referred to states’ obligations for the realisation of this human rights. Currently, United Nations monitoring bodies often refer to relocations of indigenous peoples. The Human Rights Committee has raised issues of compensation for the displacement of the Thule community in Greenland. Human Rights monitoring bodies have recently highlighted relocations of indigenous peoples in Colombia, Brazil and Venezuela. In the concluding observation on Laos, CERD elaborated on the obligations of states concerning relocations:

The Committee recommends that the State party ... study all possible alternatives with a view to avoiding displacement; that it ensure that the persons concerned are made fully aware of the reasons for and modalities of their displacement and of the measures taken for compensation and resettlement; that it endeavour to obtain the free and informed consent of the persons and groups concerned; and that it make remedies available to them ... The preparation of a legislative framework setting out the rights of the persons and groups concerned, together with information and consultation procedures, would be particularly useful.

In this respect, the Committee followed the standards set by ILO Convention No. 169. Article 12 of ILO Convention No. 107 prohibits ‘removal’, ‘except in accordance with national laws and regulations for reasons relating to national security or in the interest of national economic development or of the health of the said populations’. The variety and vagueness of exceptions and the lack of consultation requirement weakens the prohibition considerably; however, as seen earlier, the Committee of Experts has interpreted the provision in a way that corresponds more to corresponding Article 16 of ILO Convention No. 169. Article 16 allows relocation of indigenous peoples, but only as an exceptional measure. The decision whether the measure is necessary will probably be made by the state, however with the free and informed consent of the group in question. When the consent of indigenous peoples cannot be obtained, ‘such relocation shall take place only
following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide for the effective representation of the people concerned’. The Article prescribes that indigenous peoples should ‘where possible’ have the option of return, ‘as soon as the conditions for relocation have ceased to exist’ and, where return is not possible, a right to lands of ‘at least’ equal quality and legal status to the former lands, or to compensation in kind or in money.

Contrary to ILO Convention No. 169, the draft Declaration does not set any conditions for forced relocation of indigenous groups. This omission has been the subject of criticism. It has been suggested that the requirement of a public hearing with effective participation contained in Article 16(2) of ILO Convention No. 169 may be the best safeguard for the protection of indigenous land rights, because it ensures that removals will be subjected to a judicial process rather than executive decree. In this respect, the protection of Article 10 of the draft Declaration is viewed as weaker than that of Article 16 of Convention No. 169. However, it appears that Article 10 excludes any possible relocation without the consent of indigenous groups, whereas Convention No. 169 allows states to go ahead with it, even without indigenous consent. The importance of indigenous consent on the matter is also stressed by the repetition of the condition in Article 30 of the draft Declaration. A reference to an independent arbitration for issues of relocation has been suggested, yet this suggestion again allows the possibility of relocations, especially since the independence of any national tribunal can be questionable. Thus, the current language of the draft Declaration protects indigenous groups more than ILO Convention No. 169.

Restitution and compensation

Article 10 of the draft Declaration on the rights of indigenous peoples also refers to no relocation without compensation and, where possible, the option of the return of indigenous peoples to their original lands. The right to restitution is not well established in international law, even though compensation is. Several international bodies have focused generally on reparations for human rights violations. A United Nations study on reparations by Theo van Boven noted that ‘restitution shall be provided to violations of human rights. Restitution requires, inter alia, restoration of liberty, citizenship or residence, employment or property’. In the landmark Velasquez case, the Inter-American Court on
Human Rights held that ‘reparation of harm brought about by the violation of an international obligation consists in full restitution which includes the restoration of the prior situation’. Among other bodies, the Human Rights Committee has also repeatedly called for reparation for violations of human rights recognised in the Covenant.

ILO Convention No. 169 is quite cautious on the issue of restitution. Article 16(3) prescribes that ‘whenever possible’, indigenous peoples ‘shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist’. Although this is a positive step, the Convention avoids referring to the restitution of indigenous lands that have been taken away from them in the past. There is a view that this can be deduced from Article 16 in conjunction with Article 14(3) that requires ‘adequate procedures ... within the national system to resolve land claims’ by indigenous peoples. This provision does not establish any temporal restriction, thus it can be argued that it even refers to claims originating well in the past. Anaya suggests:

Article 14(3) is the response to the historical processes that have afflicted indigenous peoples, processes that have trampled on their cultural attachment to ancestral lands, disregarded or minimised their legitimate property interests, and left them without adequate means of subsistence. In the light of the acknowledged centrality of lands and resources to indigenous cultures and economies, the requirement to provide meaningful redress for indigenous land claims implies an obligation on the part of states to provide remedies that include for indigenous peoples the option of regaining lands and access to natural resources.

Yet, Article 14 does not fully support Anaya’s position. Restitution is considered with respect to relocation only, rather than dispossession. In other words, the Convention does not go so far as giving indigenous peoples who have lost their lands the right to restitution.

Can the general principle of restitution also apply to violations of indigenous land rights? Waldron questions indigenous justifications for restitution. He argues that the First Occupancy claim that justifies restitution on the basis of indigenous historical priority is ‘inherently objectionable’, as it incites chauvinistic feelings and is ‘historically precarious’, since it is not possible to prove which group was first on the land. The second basis for indigenous restitution, the Established Order Claim, justifies restitution claims on the basis of prior occupancy. However, Waldron argues, ‘while this principle condemns injustice at one particular point in time, it can equally work to vindicate established patterns of settlement that are founded upon that injustice’. In contrast, Falk is...
supportive of such indigenous claims. He has noted that claims for restitution of past injustices represent ‘a search for intergenerational equity’ and give rise to ‘a greater sense of time consciousness with respect to past and future, making such intergenerational concerns part of the subject matter of justice and hence of humane governance’.184 Ted Moses of the Grand Council of the Crees explains the indigenous position:

The function of article 27 is to reverse the process of dispossession. It does not send the non-indigenous occupiers back to their homelands, rather it establishes a process of restitution that leads to the removal of the taint upon the sovereignty of the States, and seeks to return wherever possible, ownership to the original owners. Where this is not possible, compensation with the consent of indigenous peoples is a defined resolution.

What is so controversial and unreasonable about that?185

Restitution in indigenous cases gives rise to conflicts with interests of third parties. The balancing between indigenous need to restitution and non-indigenous rights and recent history in these same lands drives states to close their ears to voices for restitution.186 The statement by the United States highlights the point:

We doubt . . . whether restitution is a viable means for resolving such issues in most States. For this reason, we believe that the Declaration should call on States to consider the possibility of negotiated settlements, including restitution, as appropriate.187

Canada also has pushed for the alternative of compensation:

While the article mentions the right of restitution or compensation in the form of lands and resources of equal quality, size and legal status, consideration might also be given to allowing for alternatives which provide for fair and just compensation.188

Indeed, compensation is considered a less complicated option. Theo van Boven has explicitly referred to the entitlement of indigenous peoples to compensation in cases of damage resulting from exploration and exploitation programmes pertaining to their lands, and in cases of their relocation.189 He has also noted the interaction of individual and collective aspects in indigenous rights and, consequently, a necessity for provisions ‘to entitle groups of victims or victimized communities to present collective claims for damages and to receive collective reparation accordingly’.190

Compensation is often examined by international and national judicial bodies when assessing the legitimacy of an interference with
property. Pursuant to the non-discriminatory principle, indigenous peoples should have at least the same right to compensation as the rest of the population when they lose their land rights. In General Recommendation XXIII (51), CERD recognised the right to just, fair and prompt compensation for violations of indigenous land rights. Leading cases in several states, including Australia, Canada and the USA, have affirmed the right of indigenous peoples to compensation when their land rights have been legally restricted. It must be noted that states’ arguments that shift the obligation for compensation to transnational organisations violating indigenous rights are not valid.

Although the Transnational Corporations’ Code of Conduct urges corporations to respect social and cultural objectives, values and traditions of the countries in which they operate and to respect the human rights and fundamental freedoms in the countries in which they operate, the prime responsibility for protection of human rights lies with states.

Concluding comments

The above analysis has demonstrated that although international human rights instruments do not include strong protection of indigenous land rights, interpretation of these instruments by their monitoring bodies has expanded their scope and has to a degree accommodated indigenous claims. Unfortunately, their role is restricted to interpretation rather than law-creation. Still, the contribution of such documents cannot be underestimated. Through the elaboration of existing routes, new avenues for the protection of indigenous lands are explored. Apart from international norms, national case law has also been helpful, even though at times falling short of international standards. National courts are still in the process of coming to terms in dealing with indigenous land rights; although on a few occasions they fall below international standards, they are usually useful in interpreting and elaborating international standards. The ILO Conventions are certainly helpful; Convention No. 169 in particular goes quite far in its protection of indigenous rights and sets out specific rules on important aspects of land rights, including ownership, use and management of indigenous lands. Although the draft Declaration offers a very extensive range of rights, it still does not cover all indigenous concerns related to land rights: it includes no provision for shared use of land or pastoral peoples similar to Article 14(1) of ILO Convention No. 169; no provision encouraging additional land to allow for future growth and development, similar to Article 19
of the Convention No. 169; and no obligation on states to assist indigenous peoples in developing their lands, similar to Article 19. Yet, the limited application of Convention No. 169 seriously restricts its possible impact on indigenous land rights. Thus, even though most indigenous claims seems to be in broad agreement with current international law standards, new instruments would help clarify and consolidate these standards.

Notes

2. Human Rights Committee, General Comment No. 23(50), UN Doc. CPR/C/21/Rev.1/Add.5, para. 7.
4. Article 15.
10. E. Spiry, ‘From “Self-Determination” to a Right to “Self-Development” for Indigenous Groups’ (1995) 38 German Yearbook of International Law 129–52 at 136; Spiry notes that ‘the label “internal self-determination” is biased, and should be abandoned in favour of more “neutral” and objective expressions, such as “self-government” or, if we include economic rights, … “self-development” or “self-preservation”’.

13. Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports (1993), 243. The parties reached settlement and the proceedings before the Court were discontinued.

14. The Declaration on the Right to Development was adopted by the General Assembly in its Resolution 41/128 of 4 December 1986.


16. Paragraph 2 of the Preamble.


20. Ibid.


29. Eastern Greenland case (1933), PCIJ Series A/B, no. 53, 46. In this case, the Court held that Denmark had sovereignty over all of Greenland and dismissed the claim of Norway that part of Greenland, the Eirik Raudes Land, was *terra nullius* when Norway issued a declaration of occupation in 1931. Irrespective of the outcome, the Court accepted and discussed the idea of *terra nullius*.

30. Western Sahara case, ICJ Reports (1975), 12.


34. CERD, Summary record of the first part of the 1481st meeting: China, Viet Nam. 30/08/2001, UN Doc. CERD/C/SR.1481, para. 11.

35. Article 17.


37. Ibid.


41. Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal People’s Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP), Submitted 1997, Documents: GB.270/16/4 and GB.273/14/4.


43. See Kitok *v.* Sweden, Ominayak *v.* Canada, L. Lånsman et al *v.* Finland, J. Lånsman et al *v.* Finland as well as General Comment No. 23 [50], para. 7.

44. In Diergaardt et al. *v.* Namibia (760/1997), UN Doc. Namibia 06/09/2000, CCR/ C/69/D/760/1996, para. 10.8, the Committee rejected a special link of the Rehoboth way of life to the lands covered by their claims, on the ground that although the link dated back 125 years, this link was not the result of a distinct culture.
53. Freehold estates extinguish native title rights because the rights that flow from freehold lands (including the right to exclusive possession) are inconsistent with native title based on traditions and customs. Where such inconsistency is apparent, native title rights are extinguished. See the judgment of Brennan J as well as Toohey J in Mabo, as explained in M. Mansell, ‘Australians and Aborigines and the Mabo decision: Just who needs whom the most?’ (1993) 15 Sydney Law Review 168–77 at 170.
55. Sparrow [1990] 1 S.C.R.
57. Ibid., 417–18.
58. Ibid., 412.
63. Human Rights Committee, List of issues to be taken up in connection with the consideration of the second and third periodic reports of the United

64. Article 5(c) and (d) (v) of the Convention.
65. Articles 1.1 and 2.1(a).
79. Ibid., 1099–101.
82. Ibid., para. 87. For the indigenous understanding and discussion of the Delgamuukw case, see Assembly of First Nations, Aboriginal Title and

83. See Mabo No. 2 case, per Toohey J, 146–7; also see Mansell, ‘Australians and Aborigines and the Mabo decision’, 171.


95. Articles 25, 26 and 27 of the ICCPR.


97. Human Rights Committee, General Comment No.23(50), UN Doc. CCPR/C/21/Rev.1/Add.5, 5.

98. Article 2(3) of the United Nations Declaration on the Rights of Members belonging to National or Ethnic, Religious and Linguistic Minorities. At the European level, it is


100. Norway, ibid., para. 89.


104. CERD 1998 Decision 1 (53) was adopted on 11 August 1998, UN Doc. A/53/18, para. IIIB1; CERD 1999 Decision 2(54) was adopted on 18 March 1999, UN Doc. A/54/18, para. 21(2), see UN Doc. CERD/C/54/Misc.40/Rev.2 (18 March 1999), 8; also CERD 1999 Decision 2 (55) was adopted on 16 August 1999, UN Doc. A/54/18, para. 23 (2).

105. See Australia’s Comments on Decision 2 (54) of 18 March 1999 pursuant to Article 9 (2) of the Convention, 3–4.

106. Ibid., 4.

107. CERD 1999 Decision 2 (55) was adopted on 16 August 1999, UN Doc. A/54/18, para. 23 (2).


110. Article 7.

111. See esp. Articles 26, 27, 29 and 32.


114. The European Community adopted a Resolution on Indigenous Peoples and Development which endorses the principle that initiatives on their lands should be subject to their agreement.


117. Ibid., p. 15.


120. ‘Legal Commentary on the Concept of Free, Prior and Informed Consent’.


122. Ibid., 174–5.


130. Articles 29, 31 and 32.


133. Ibid.

134. Lokan, ‘From Recognition to Reconciliation’, p. 94.


138. Ibid.


140. Xanthaki, ‘Land Rights of South-East Asian Indigenous Peoples’.


144. Ibid.

145. Ibid.

146. Ibid.

147. France has made a reservation to Article 27, thus no finding was possible on this ground.

148. UN Committee on Human Rights, Australia, n. 143 above, para. 11.

149. Report of the Committee set up to examine the representation alleging non-observance by Bolivia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Bolivian Central of Workers (COB), Submitted 1998 (Documents: GB.272/8/1 and GB.274/16/7), para. 38.

150. Ibid., paras. 39 and 44.

151. Ibid.


155. Ibid., 60.

157. CERD, Summary record of the first part of the 1481st meeting: China, Viet Nam. 30/08/2001, UN Doc. CERD/C/SR.1481, para. 11.

158. Convention on Biological Diversity, Traditional Knowledge and Biological Diversity, UNEP/CBD/TKBD/1/2, October 1997, 18.


164. The right to movement is also guaranteed in Article VIII of the American Declaration, Article 22 (1) of the American Convention, Article 2 (1) of the Fourth Protocol to the European Convention and Article 12 (1) of the African Charter.

165. Article 12 (3) of the ICCPR.


169. The San José Declaration, the Permanent Consultation on Internal Displacement in the Americas, the OSCE and the Organisation of African Unity have repeatedly expressed their concern about internally displaced persons.


176. Ibid.

177. See Article 8 of the Universal Declaration on Human Rights, Article 2(3) of the ICCPR, Article 6 of the Convention against All Forms of Racial Discrimination.


183. Ibid.


189. Ibid., para. 17.
190. Ibid., para. 14.


192. Paragraph 5, section 2 of CERD General Recommendation XXIII (51).


197. These omissions were identified by the ILO Secretariat, see Comments on the draft United Nations Declaration on the rights of indigenous peoples, Note by the International Labour Office, UN Doc. E/CN.4/1995/119, para. 26.